

SENATE BILL NO. 68  
INTRODUCED BY CROMLEY  
BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A ~~PRIOR CONVICTION~~ CIRCUMSTANCE OR FACT USED TO ENHANCE A PENALTY OR AN AGGRAVATING CIRCUMSTANCE USED TO IMPOSE A DEATH PENALTY MUST BE PLEADED ~~OR~~ AND ADMITTED ~~AND~~ OR MUST BE FOUND BY THE TRIER OF FACT BEYOND A REASONABLE DOUBT; AND AMENDING SECTIONS 46-1-401, 46-18-302, 46-18-305, AND 46-18-310, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 46-1-401, MCA, is amended to read:

**"46-1-401. ~~Incarceration penalty~~ Penalty enhancement -- pleading, proof, and mental state requirements.** (1) A court may not impose ~~an incarceration~~ a penalty enhancement specified in Title 45, Title 46, or any other provision of law unless:

(a) the enhancing act, omission, or fact was charged in the information, complaint, or indictment, with a reference to the statute or statutes containing the enhancing act, omission, or fact and the penalty for the enhancing act, omission, or fact;

(b) if the case was tried before a jury, the jury unanimously found in a separate finding that the enhancing act, omission, or fact occurred beyond a reasonable doubt; ~~and~~

(c) if the case was tried to the court without a jury, the court finds beyond a reasonable doubt that the enhancing act, omission, or fact occurred; and

(d) a defendant who knowingly and voluntarily pleaded guilty to an offense also admitted to the enhancing act, omission, or fact.

(2) The enhancement issue may be submitted to a jury on a form separate from the verdict form or may be separately stated on the verdict form. The jury must be instructed that it is to reach a verdict on the offense charged in the information, complaint, or indictment before the jury can consider whether the enhancing act, omission, or fact occurred.

(3) An enhancing act, omission, or fact is an act, omission, or fact, whether stated in the statute defining the charged offense or stated in another statute, that is not included in the statutory definition of the elements of

the charged offense and that allows or requires a sentencing court to add to, as provided by statute, ~~an incarceration period~~ a penalty provided by statute for the charged offense or to impose the death penalty instead of a statutory incarceration period provided by statute for the charged offense. ~~The EXCEPT FOR AN AGGRAVATING CIRCUMSTANCE DESCRIBED AS PROVIDED IN SUBSECTION (4),~~ the aggravating circumstances contained in 46-18-303 are enhancing acts, omissions, or facts.

~~(4)~~(4) Use of the fact of one or more prior convictions for the same type of offense or for one or more other types of offenses to enhance the ~~incarceration~~ penalty for a charged offense is ~~not~~ NOT subject to the requirements of this section."

**Section 2.** Section 46-18-302, MCA, is amended to read:

**"46-18-302. Evidence that may be received.** ~~In~~ (1) (a) Subject to subsection (1)(b), in the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to:

- (i) the nature and circumstances of the crime;
- (ii) the defendant's character, background, history, and mental and physical condition;
- (iii) the harm caused to the victim and the victim's family as a result of the offense; and
- (iv) any other facts in aggravation or mitigation of the penalty.

(b) Evidence of an aggravating circumstance may not be admitted or considered unless the defendant pleaded guilty to the offense and admitted the aggravating circumstance or the trier of fact found beyond a reasonable doubt that the aggravating circumstance existed.

(2) Any evidence that the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to aggravating or mitigating circumstances must be considered without reintroducing it at the sentencing proceeding. The state and the defendant or the defendant's counsel must be permitted to present argument for or against sentence of death."

**Section 3.** Section 46-18-305, MCA, is amended to read:

**"46-18-305. Effect of aggravating and mitigating circumstances.** In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if ~~it finds one or more of the aggravating circumstances~~ the trier of fact found beyond a reasonable doubt, or the defendant

pleaded guilty to the offense and admitted to, one or more aggravating circumstances and the court finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 46-18-303 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense."

**Section 4.** Section 46-18-310, MCA, is amended to read:

**"46-18-310. Supreme court's determination as to the sentence.** (1) The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(b) whether the evidence supports the trier of fact's finding of the existence or nonexistence of the aggravating circumstances enumerated in 46-18-303 and the sentencing judge's finding of the existence or nonexistence of the ~~aggravating~~ or mitigating circumstances enumerated in ~~46-18-303~~ and 46-18-304; and

(c) whether the sentence of death is excessive or disproportionate to the penalty imposed in other cases in which a sentencing hearing was held pursuant to 46-18-301, whether the sentence imposed was death or a sentence other than death, considering both the crime and the defendant. The court shall include in its decision a reference to those other cases it took into consideration.

(2) The supreme court shall uphold the sentencing court's findings of fact issued pursuant to 46-18-306 unless those findings are clearly erroneous. The supreme court may not substitute its judgment for that of the sentencing court in:

(a) assessing the credibility of witnesses;

(b) drawing inferences from testimonial, physical, documentary, or other evidence; or

(c) resolving conflicts in the evidence presented at the sentencing hearing or considered by the sentencing court."

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