



## Law and Justice Interim Committee

### 61st Montana Legislature

#### SENATE MEMBERS

JOHN ESP  
GREG HINKLE  
LARRY JENT  
CAROL JUNEAU  
LYNDA MOSS  
JIM SHOCKLEY

#### HOUSE MEMBERS

SHANNON AUGARE--Chair  
RON STOKER--Vice Chair  
BOB EBINGER  
DAVID HOWARD  
MIKE MENAHAN  
KEN PETERSON

#### COMMITTEE STAFF

SHERI HEFFELFINGER, Research Analyst  
VALENCIA LANE, Staff Attorney  
DAWN FIELD, Secretary

# MINUTES

September 9, 2010

Room 152, Capitol Building  
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

#### **COMMITTEE MEMBERS PRESENT**

REP. SHANNON AUGARE, Chair - via teleconference  
REP. RON STOKER, Vice Chair

SEN. JOHN ESP  
SEN. GREG HINKLE  
SEN. LARRY JENT  
SEN. CAROL JUNEAU  
SEN. LYNDA MOSS  
SEN. JIM SHOCKLEY

REP. MIKE MENAHAN  
REP. KEN PETERSON

#### **COMMITTEE MEMBERS EXCUSED**

REP. BOB EBINGER  
REP. DAVID HOWARD

#### **STAFF PRESENT**

SHERI HEFFELFINGER, Research Analyst  
VALENCIA LANE, Staff Attorney  
FONG HOM, Secretary

## **AGENDA & VISITORS' LIST**

Agenda, Attachment #1.  
Visitors' list, Attachment #2.

## **COMMITTEE ACTION**

The Law and Justice Interim Committee:

- approved the June 29 and 30, 2010, meeting minutes, as written;
- approved Department of Justice proposed legislation for drafting;
- approved Department of Corrections proposed legislation for drafting;
- approved Judicial Branch proposed legislation for drafting;
- approved amendments to LCdna3; and
- approved LCdna3 as a committee bill.

## **CALL TO ORDER, ROLL CALL, WELCOME, APPROVAL OF MINUTES**

00:00:01 REP. STOKER called the meeting to order at 8:05 a.m. and welcomed all to the meeting. The Secretary took the roll, REP. EBINGER and REP. HOWARD were excused and REP. AUGARE was in attendance via polycom phone (ATTACHMENT 3). **REP. PETERSON moved to approve the June 29-30, 2010, meeting minutes, as written. The motion passed on unanimous vote.**

## **RULE REVIEW REPORT**

00:06:28 **Valencia Lane, Staff Attorney, Legislative Services Division (LSD),** discussed a rule review report regarding gambling licenses (**Exhibit 1**).

## **UPDATE OF THE LEGISLATIVE FISCAL DIVISION REFERENCE BOOK**

00:07:44 **Pat Gervais, Legislative Fiscal Analyst, Legislative Fiscal Division (LFD),** discussed the background for the creation of the reference book subcommittees and updated the Law and Justice Interim Committee (LJIC) on the work and recommendations of the reference book subcommittees.

## **AGENCY PROPOSED LEGISLATION**

00:14:30 Ms. Heffelfinger discussed the purpose of reviewing agency proposed legislation.

### **Department of Justice**

00:18:09 **Ali Bovingdon, Assistant Attorney General, Department of Justice (DOJ),** presented the DOJ's proposed legislation (**Exhibit 2**).

### **Questions**

00:47:35 SEN. ESP asked if the Department of Justice is proposing to drop certain programs in order to fund other programs. Ms. Bovingdon said that decision has not been made but the Department intends to fund as many programs as possible.

00:49:02 SEN. ESP asked about the costs of the 24/7 sobriety pilot program. Ms. Bovingdon said that there are no expenditures to date. She noted that the Secure Continuous Remote Alcohol Monitoring (SCRAM) units have been borrowed and the vendors are willing to provide the software at no cost. She said that the real cost is to the sheriffs because of diverting staff time to monitoring duties.

00:50:10 SEN. ESP asked what the consequence of a positive test result will be. Ms. Bovingdon said the offender will be immediately placed back in jail and that a judge would decide how long he would remain there.

00:50:54 SEN. ESP commented regarding the proposal to increase the penalty for consumer protection crimes and on the difficulty on defining one victim as more vulnerable than another.

00:52:02 REP. STOKER asked Ms. Bovingdon to comment on the housekeeping bill for the Motor Vehicle Division. Ms. Bovingdon said that changes at the federal level prompted the request and that Brenda Nordlund could provide more details.

00:52:45 REP. MENAHAN asked about the prescription drug registry and whether the DOJ's proposal will include investigative powers. Ms. Bovingdon said the bill draft will include investigative subpoena powers.

00:54:01 REP. MENAHAN and Ms. Bovingdon discussed the Department's withdrawal of the bill draft proposal to amend involuntary mental health commitment records.

00:55:48 REP. MENAHAN asked what the Department's rationale is for the proposal to allow admission of prior crimes in sex offense crimes against children. Ms. Bovingdon said there were concerns that it was too far-reaching and the current proposal is an attempt to create a narrower bill to address those concerns.

00:57:32 REP. PETERSON discussed the LFD reference book subcommittee meeting held the previous day and his concerns regarding the 5 percent spending reduction. He asked how the DOJ plans to fund the drug registry program. Ms. Bovingdon said grant money will be used for the start up costs of the registry and then it will be funded by license fees.

00:59:42 REP. PETERSON asked if all participants in the 24/7 sobriety test project will have SCRAM units. Ms. Bovingdon said that only the hard core offenders will have SCRAM units and that the primary testing mechanism will be the preliminary breath test (PBT). REP. PETERSON asked several additional questions regarding how testing will be administered.

01:05:53 SEN. SHOCKLEY asked about the expense of PBT testing and whether the state purchased the devices and then sold them to the counties at cost, if that would eliminate the need for a fiscal note. Ms. Bovingdon said it would and explained further. She said that rather than purchasing SCRAM units, it is possible that counties may work directly with the vendors through a master contract with approved vendors.

01:10:23 SEN. SHOCKLEY and Ms. Bovingdon discussed the implications of federal rule 404(b) as it pertains to the DOJ's proposal to allow admission of prior crimes in sex offense cases.

- 01:12:59 SEN. JUNEAU asked if in-house service facilities and doctors, on or off reservation, will be allowed access to the prescription drug registry database. Ms. Bovingdon thought they would be but said she would confirm that.
- 01:14:12 SEN. JUNEAU asked if counties will be required to participate in the 24/7 sobriety program. Ms. Bovingdon said that each county will have to have a program but that the sheriff can opt out and designate a private entity or facility to operate the program. SEN. JUNEAU said she supports the legislation but is concerned about staff costs, particularly for small counties.
- 01:17:09 SEN. JENT asked if the Department considered an offender levy for the per capita costs of the 24/7 sobriety program. Ms. Bovingdon said it has not. SEN. JENT said that because the program has such potential, he would like to investigate innovative ways to fund it and that having offenders pay for part of their treatment would ease the burden on counties.
- 01:18:42 SEN. MOSS asked, when constructing fiscal notes, if the DOJ has an internal method with which to assign costs to personnel. Ms. Bovingdon said it does and explained how the cost of the 24/7 sobriety program, for example, would be accommodated within the Department.
- 01:20:29 SEN. JUNEAU asked if the South Dakota 24/7 sobriety program has reduced incarceration costs in the corrections system. Ms. Bovingdon said she has only anecdotal information but yes, that the South Dakota program staff think there is a correlation between the program and the decline in incarcerations.
- 01:21:21 REP. PETERSON asked if the prerelease center charges fees to do the breath tests. Ms. Bovingdon said that the offender is charged two dollars per blow. One dollar goes to the PBT vendor and \$1 goes to the center for conducting the test. She said that she anticipates that this procedure would continue, should the pilot project be adopted formally.
- 01:23:19 REP. PETERSON asked if the proposed enhanced penalty (increased fine) for consumer protection violations would apply in individual consumer cases. Ms. Bovingdon said it would apply only to cases brought by the Attorney General.
- 01:25:00 REP. STOKER asked if vehicles are impounded upon a positive breath test. Ms. Bovingdon said that if the offender has driven to the breath test with a suspended license, the offender will be prosecuted for that offense and that she wasn't sure what would happen to the vehicle.
- 01:25:41 SEN. ESP discussed his concerns about continued funding of the 24/7 project and cautioned the DOJ against making low-ball cost estimates, considering the budget situation facing the state.
- 01:28:08 REP. MENAHAN asked if, for the purposes of the pilot project, SCRAM units from one vendor were used for consistency, and whether, if the program is officially adopted, it was correct that a single vendor system would not necessarily be used; and whether the defendant would likely be responsible for

finding and paying for his own unit. Ms. Bovingdon said yes but said that software concerns would have to be worked out with the agencies doing the monitoring and testing.

01:30:30 REP. MENAHAN said a concern of his is that if an offender is drinking, that the information be transmitted to a law enforcement agency as soon as possible. He asked if rulemaking authority is anticipated to establish criteria and procedures to implement the standards. Ms. Bovingdon said yes, that the bill proposal included rulemaking authority to deal with those issues.

01:32:02 REP. PETERSON asked if a certain number of SCRAM units would be available for offenders who are unable to pay. Ms. Bovingdon said that while costs are a concern, it would be up to the offender to figure out how to make things work because the main goal of the program is public safety and keeping drunk drivers off the road.

01:34:17 SEN. JENT asked to segregate Proposal 4 -- allow admission of prior sexual offenses in cases involving sex crimes against children. REP. PETERSON asked to segregate Proposal 6 -- require fingerprinting for certain misdemeanors, and Proposal 12 -- housekeeping bill for Motor Vehicle Division. SEN. JUNEAU reminded the LJIC that the process is meant simply as an administrative tool to allow the DOJ to proceed with the bill drafting process and is not intended to address the content of a proposal.

01:37:25 REP. STOKER recessed the committee for a short break.

**BREAK**

02:00:37 The meeting reconvened at 10:06 a.m.

### **Statutory Report: Racial Profiling, 44-2-117, MCA - Col. Mike Tooley**

02:01:03 **Col. Mike Tooley, Montana Highway Patrol (MHP)**, discussed a statutory report on racial profiling with attachments (44-2-117, MCA, DOJ's written policy on racial profiling, and a 2010 year-to-date traffic stop report (**Exhibit 3**).

### **Committee Questions**

02:09:04 SEN. JUNEAU asked if all of the county and municipal law enforcement agencies have policies in place. Col. Tooley said that 54 of 56 counties and about the same number of municipalities have policies in place.

02:10:05 SEN. JUNEAU asked if the traffic stops report and the statutory report are available online or if the reports are provided to tribal governments. Col. Tooley said that the traffic report is available online but the statutory report is not and could be provided to anyone.

02:11:06 SEN. JUNEAU asked what assistance, if any, is needed in order to get better data on traffic stops. Col. Tooley said the lack of a uniform information gathering system is a hindrance and that it would be helpful if all law enforcement agencies used the same system and procedures for gathering data.

02:16:11 SEN. JENT withdrew his request to segregate Proposal 4.

- 02:16:42 **Sen. Juneau moved to approve the Department of Justice's proposed legislation for drafting, with Proposals 6 and 12 segregated. The motion passed on a 11-1 voice vote. SEN. ESP voted no. REP. AUGARE and EBINGER (Juneau), and REP. HOWARD (Peterson) voted yes by proxy.**
- 02:19:50 **SEN. MOSS moved to approve Proposal 6 -- require fingerprints for certain misdemeanors.** REP. PETERSON said he opposed the proposal because it violates constitutional rights. REP. MENAHAN supported the proposal and explained why it would be useful. SEN. SHOCKLEY supported the proposal. SEN. ESP opposed the proposal.
- 02:25:18 **The motion passed on a 7-5 roll call vote. SEN. ESP, SEN. HINKLE, REP. PETERSON, REP. STOKER, and REP. HOWARD (Peterson proxy) voted no (Attachment 4).**
- 02:25:25 **SEN. MOSS moved to approve Proposal 12 – amend campaign finance contribution laws.** REP. PETERSON opposed the proposal. REP. MENAHAN supported the proposal. **The motion passed on a 7-5 roll call vote. SEN. ESP, SEN. HINKLE, REP. PETERSON, REP. STOKER, and REP. HOWARD (Peterson proxy) voted no (Attachment 5).**

#### **Update on status of committee's request for audit of the Motor Vehicle Division and MERLIN**

- 02:30:17 **Kent Rice, Auditor Manager, Legislative Audit Division (LAD),** reported that the LJIC's audit request has been added to LAD's schedule and that the audit process will likely begin in October 2010. He briefly described the audit process and noted that he would communicate regularly with Ms. Heffelfinger.

#### **Committee Questions**

- 02:31:22 SEN. ESP asked if the auditors will consider the public testimony and information gathered by the LJIC as part of the audit process. Mr. Kent said yes, and that LAD also will talk with agency personnel for this report. SEN. ESP asked that the county treasurers be involved in the initial phase of identifying areas of concern.

#### **Public Comment**

- 02:33:27 **Dexter Levandoski, Compliance Monitoring Systems,** commented on the use of SCRAM bracelets. He noted that an exit survey done by his company revealed that offenders pay an average of \$10.60 per day for alcohol and that a SCRAM unit averages about \$12 per day; so the units are affordable for most offenders.
- 02:36:41 REP. STOKER asked how fees are regulated and collected. Mr. Levandoski said the offender pays his company directly and that the company is reimbursed by the courts. He said the fees can be adjusted in certain situations.
- 02:38:05 REP. PETERSON asked for a description of the monitoring system. Mr. Levandoski explained how a SCRAM bracelet operates.

02:42:24 **Rhonda Wiggers, Montana County Treasurers Association**, said that the DOJ has been working diligently to correct the MERLIN issues, most of which have been resolved. She said that accounting problems are still occurring and that the financial statements aren't balancing, but that the DOJ has committed to working with them until the issue is resolved.

**LUNCH BREAK** – REP. STOKER recessed the LJIC for a lunch break.

05:24:55 REP. STOKER reconvened the meeting at 1:30 p.m.

#### **INTRODUCTION OF NEW LEGAL DIRECTOR -**

05:25:31 **Lee Heiman, acting Code Commissioner, LSD**, introduced Rob Stutz as the new director of LSD's Legal Services.

#### **LEGISLATIVE FISCAL DIVISION REFERENCE BOOK UPDATE**

05:27:53 Pat Gervais discussed a one-page report: "*The Three Budget Building Blocks*" (**Exhibit 4**) explaining the terminology and overview of the budget process. Ms. Gervais then discussed the LFD's reference book subcommittee on the Department of Corrections budget and five percent reduction plan.

#### **DEPARTMENT OF CORRECTIONS AND BOARD OF PARDONS AND PAROLE**

##### **Proposed legislation**

05:35:43 **Diana Koch, Chief General Counsel, Department of Corrections (DOC)**, discussed the DOC's legislative proposals (**Exhibit 5**).

##### **Committee Questions**

05:42:52 REP. PETERSON asked, regarding proposal 3 -- set a standard rate for county per diem by rule, if that amounts to setting a mandate for county governments. Ms. Koch said it is not set a rate per se, but a method of calculation. She explained further. REP. PETERSON said regardless of the method, the detention facility ought to have input in the rules. Ms. Koch agreed and said that the DOC is working with local governments and the Montana Association of Counties to come to agreement so that the bill would be unnecessary.

05:46:54 SEN. JUNEAU asked, regarding proposal 2 -- amend Board of Pardons and Parole statutes, if the Board would continue to have a Native American board member. Ms. Koch said yes.

05:47:44 REP. PETERSON asked about the changes made to medical parole statute in the 2009 session and how the changes are working . **Craig Thomas, Chair, Board of Pardons and Parole**, said that changes are working well and that no additional changes are needed. Mr. Thomas said that a written report from the Board on medical paroles was provided to the LJIC members (**Exhibit 5a**).

##### **Public Comment**

05:49:49 **Jlm Smith, Montana Sheriff's and Peace Officers' Association (MSPOA)**, said that the MSPOA is willing to work with the DOC to make proposal 3 (county jail per diem rates) unnecessary. He commented further.

05:52:35 **REP. PETERSON moved to approve the DOC's legislative proposals, 1 through 3, for drafting.** REP. PETERSON expressed his concerns about rule making and the potential impact on private facilities and local governments. Mr. Smith and REP. STOKER discussed the issue of city governments paying jail costs when housing a prisoner in a county jail.

05:56:50 **REP. PETERSON's motion passed unanimously by voice vote.** REP. STOKER recessed the Committee until 3:00 p.m.

**BREAK**

06:56:47 The meeting reconvened at 3:02 p.m.

**JUDICIAL BRANCH**

**Budget and Report on Reference Book Subcommittee - Pat Gervais**

06:57:53 Ms. Gervais gave an update on the LFD's reference book subcommittee on the Judicial Branch budget and five percent reduction plan.

**Committee Questions**

06:58:25 SEN. JENT asked who pays for pre-trial services in counties. Ms. Gervais said she would have to check the statutes. SEN. JENT asked who pays for the court administrator positions. Ms. Gervais said that the counties pay.

**Judicial Branch Proposed Legislation**

07:00:25 **Lois Menzies, Court Administrator, Judicial Branch,** discussed two legislative proposals (**Exhibit 6**).

**Committee Questions**

07:03:48 SEN. JUNEAU said, regarding the proposal to eliminate annual evaluation of selected out-of-state placements for juveniles, that it is important that someone be monitoring these programs. Ms. Menzies agreed that is a concern. She explained that reviews done by the Cost Containment Review Panel will continue and are an indicator of whether a program is working. She said that once the economic downturn subsides, she hopes to reinstate the Juvenile Delinquency Intervention Program (JDIP) evaluation.

07:08:03 SEN. SHOCKLEY asked how much money is being spent out-of-state. Ms. Menzies said that she does not have a number but that the number of out-of-state placements has decreased over the past several years. She explained that because multiple funding streams are used to pay for the placements, it would be difficult to calculate a total amount.

07:10:48 SEN. JENT asked who pays for pre-trial services for adult defendants awaiting trial. Ms. Menzies said she did not know but would find out.

07:12:53 SEN. SHOCKLEY said that out-of-state placements are very expensive and that the \$25,000 is actually a very small amount to monitor the much larger amounts spend for the out-of-state treatment programs.

07:16:01 Ms. Menzies added that the Judicial Branch is trying to increase "wrap-around" services in order to keep more Montana youth in-state.

07:19:05 Ms. Menzies said that as part of the voluntary reductions, the Branch will request legislative approval to revert \$343,000 to the general fund from its information technology (IT) capital projects account.

## **Judicial Branch Statutory Reports**

### **Information Technology Status Report**

07:20:50 Ms. Menzies discussed the Judicial Branch Information Technology status report **(Exhibit 7)**.

### **Report on Annual License Tax on Attorneys**

07:23:26 Ms. Menzies discussed the report on annual license tax on attorneys **(At 8)**.

### **Report on Juveniles on Probation in Montana**

07:29:24 Ms. Menzies referred the LJIC to a report on juveniles on probation in Montana **(Exhibit 9)**.

### **Public comment**

There was no public comment.

07:25:10 **REP. PETERSON moved to accept the Judicial Branch's proposed legislation for drafting. The motion passed unanimously on a voice vote.**

## **SJR 29 - PRESERVATION OF BIOLOGICAL EVIDENCE**

07:26:41 SEN. MOSS reported on the Aug. 3 DNA Subcommittee conference call meeting and said that the Subcommittee agreed to move the revised bill draft forward for consideration by the full Committee. She thanked SEN. SHOCKLEY for his work on the bill.

07:27:20 SEN. SHOCKLEY reviewed the provisions of LCdna3 **(Exhibit 10)**.

### **Committee discussion and questions**

07:35:33 The LJIC members discussed at length a number of concerns regarding LCdna3, including certain portions of language that may need to be revised or clarified, as well as existing statutory language regarding preservation of biological evidence.

### **Public Comment**

07:55:12 **Mark Murphy, Montana Association of County Attorneys**, discussed several concerns about LCdna3, saying that an internal conflict would be created if the language is adopted into law. He discussed his opinion that this is "a solution in search of a problem" and the potential for unanticipated consequences.

08:06:52 **David Carter, Yellowstone County Attorney's Office**, concurred with Mr. Murphy's comments, including the removal of subsection (iii) on page 2 of LCdna3. He said that the bill, as drafted, makes sense with respect to certain provisions but that he does have concerns.

- 08:10:29 **Harold Blattie, Executive Director, Montana Association of Counties (MACo)**, read from the annotations to 46-21-111, MCA, and discussed MACo's concerns about LCdna3 and the lack of a definition for "law enforcement agency". He said that unreasonable burdens would be placed on county governments in order to comply with the language of LCdna3.
- 08:14:03 **Jessie McQuillan, Executive Director, Montana Innocence Project**, discussed several of her organization's objections regarding LCdna3. She thanked the Subcommittee for its work and said that LCdna3 is a solid compromise and should be supported.
- 08:22:18 REP. STOKER asked how Montana treats preservation of evidence or denial to test as a constitutional right. Mr. Murphy said his opinion is that all DNA evidence should be tested at the outset of every case and that a defendant's rights would be most preserved if the testing is done early. REP. STOKER discussed concerns about the bill's language stating that the right to preservation of biological evidence may not be waived.
- 08:25:26 SEN. SHOCKLEY said he thought that the counties' fear is exaggerated and explained why. He agreed that the proposal could be fine-tuned and suggested that lines 23 and 24 (subsection (iii) on page 2) be removed.
- 08:28:14 **SEN. SHOCKLEY moved to approve LCdna3 as a LJIC committee bill.**
- 08:28:38 **REP. PETERSON moved to amend LCdna3 and asked that the language in subsection (i) on page 3 (lines 6 - 10) be changed and asked staff to explain the language changes.** Ms. Heffelfinger said:
- on line 8, after the words "convicted person", insert "unless the convicted person is deceased";
  - on lines line 8 and 9, insert "makes a reasonable attempt to notify" before "the attorney of record for the convicted person": and
  - insert "notifies" in front of "the Montana chief public defender" on line 10. She suggested that the motion allow staff to work on the technical aspects in order to make sure the language is correct. Ms. Heffelfinger said that language on page 4, line 12 - notification of a convicted person- would also have to be changed to match the language in subsection (2)(a)(i).
- 08:31:48 **The motion to amend LCdna3 passed on a unanimous voice vote. REP. AUGARE (Juneau), REP. EBINGER (Juneau), and REP. HOWARD (Peterson) voted yes by proxy.**
- 08:33:26 **Sen. Esp moved to amend LCdna3 by removing subsection (iii) - lines 23 and 24 on page 2. The motion passed on a unanimous voice vote. REP. AUGARE (Juneau), REP. EBINGER (Juneau), and REP. HOWARD (Peterson) voted yes by proxy.**

08:34:30 **SEN. MOSS moved to approve LCdna3, as amended, as a LJIC committee bill.**

08:35:08 SEN. ESP said that he would not support the bill because of the cost and burdens it will create for local and state agencies.

08:36:45 SEN. JENT said he would support the bill because it will take care of certain ambiguities in the law.

08:37:33 **The motion passed on a 9-3 roll call vote. SEN. ESP, SEN. PETERSON, and REP. HOWARD (Peterson proxy) voted no (Attachment 6).**

08:39:22 Ms. Heffelfinger briefly reviewed the next day's meeting agenda.

**RECESS**

08:39:45 REP. STOKER recessed the meeting at 4:45 p.m., to reconvene at 9 a.m. on Sept 10, 2010.

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