

# OFFICE OF STATE PUBLIC DEFENDER



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## STATE OF MONTANA

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May 11, 2006

EXHIBIT 2

Chairman John Parker  
Law and Justice Interim Committee  
State Capitol  
Helena, Montana 59620

Dear Chairman Parker

This letter identifies legislative proposals for the Office of the State Public Defender. These proposals are as follows:

1. Reintroduction of LC 1343. An Act providing that a statement by a person during custodial questioning is presumed to be inadmissible in evidence unless it is electronically recorded; providing grounds for rebuttal of the presumption; and requiring preservation of the recording. Please refer to the attached copy of LC 1343 for more detail.
2. An amendment to 53-20-125(3) to ensure that a respondent with a developmental disability who is subject to an involuntary commitment proceeding is not required to request counsel prior to appointment. Delete: "At the request of the respondent, the respondents parents or guardian or the responsible person."
3. An amendment to 72-5-315(1) to ensure that appointed counsel does not have the dual and contradictory roles of guardian ad litem and attorney. Delete: "The official or assigned counsel has the powers and duties of guardian ad litem."

If you have any question, please call me at 406-496-6082. We appreciate any assistance that the Committee can provide in these matters.

Sincerely,

A handwritten signature in cursive script that reads "Randi Hood".

Randi Hood  
Chief Public Defender

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A STATEMENT BY A PERSON DURING CUSTODIAL QUESTIONING IS PRESUMED TO BE INADMISSIBLE IN EVIDENCE UNLESS IT IS ELECTRONICALLY RECORDED; PROVIDING GROUNDS FOR REBUTTAL OF THE PRESUMPTION; AND REQUIRING PRESERVATION OF THE RECORDING."

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

**NEW SECTION. Section 1. Recording of custodial questioning of person arrested for felony -- admissibility.** (1) As used in this section, the following definitions apply:

(a) "Custodial questioning" means the questioning in this state by a state or local government law enforcement officer of a person who is in custody and is questioned concerning a felony. The questioning must be conducted in a law enforcement office or vehicle, courthouse, correctional facility, community correctional center, detention facility, health care facility, or any other place where adequate electronic recording equipment can be made readily available, whether or not the equipment is in fact available.

(b) "Electronic recording" means a complete and authentic recording created by motion picture, videotape, audiotape, or digital media.

(2) An oral, written, or sign language statement of a person made during custodial questioning is rebuttably presumed to be inadmissible in evidence in a criminal proceeding unless:

(a) the custodial questioning is electronically recorded in its entirety;

(b) at the start of the custodial questioning and electronic recording, the person was given the requisite Miranda warning and knowingly, intelligently, and voluntarily waived the rights in the warning;

(c) the electronic recording equipment was capable of making an accurate recording, the equipment operator was competent, and the electronic recording has not been altered;

(d) each electronically recorded voice that is material to the custodial questioning is identified; and

(e) at least 20 days before the beginning of any trial or hearing in which it is contemplated that the electronic recording will be introduced in evidence, the defense attorney, or the defendant if the defendant does not have a defense attorney, is provided with a true, complete, and accurate copy of the electronic recording.

(3) The presumption of inadmissibility of the statement may be overcome by clear and convincing evidence that the statement was voluntary and reliable and that the law enforcement officer or officers conducting the custodial questioning had good cause for not electronically recording the custodial questioning. Good cause includes but is not limited to:

(a) the custodial questioning was conducted in a place where electronic recording equipment could not be made readily available;

(b) the person questioned refused to have the custodial questioning electronically recorded and the refusal itself was electronically recorded; or

(c) equipment failure resulted in the inability to electronically record the custodial questioning in its entirety.

(4) The electronic recording must be preserved until:

(a) the statute of limitations has run out for any offense for which the person might be charged;

(b) for any offense for which the person could be and was charged, the person was found not guilty; or

(c) for any offense for which the person could be and was charged, the person was convicted and all time for appeal, postconviction relief, and habeas corpus relief has passed and the conviction has become final.

(5) This section does not apply to a statement made in a judicial hearing or trial or before a grand jury or spontaneously made during or after the commission of an offense and not made in response to custodial questioning.

**NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46 apply to [section 1].

- END -

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**53-20-125. (Effective July 1, 2006). Outcome of screening -- recommendation for commitment to residential facility -- hearing.** (1) A person may be committed to a residential facility only if the person:

(a) is 18 years of age or older; and

(b) is determined to be seriously developmentally disabled and in need of commitment to a residential facility by the residential screening team, as provided in [53-20-133](#), and by a court, as provided in [53-20-129](#) or in this section.

(2) If as a result of the screening required by [53-20-133](#) the residential facility screening team concludes that the respondent who has been evaluated is seriously developmentally disabled and recommends that the respondent be committed to a residential facility for treatment and habilitation on an extended basis, the team shall file its written recommendation and report with the court. The report must include the factual basis for the recommendation and must describe any tests or evaluation devices that have been employed in evaluating the respondent.

(3) ~~At the request of the respondent, the respondent's parents or guardian, or the responsible person, the court shall order the office of state public defender, provided for in [47-1-201](#), to assign counsel for the respondent. If the parents are indigent and if the parents request it or if a guardian is indigent and requests it, the court shall order the office of state public defender to assign counsel for the parents or guardian pending a determination of indigence pursuant to [47-1-111](#).~~

(4) Notice of the determination of the residential facility screening team must be mailed or delivered to:

(a) the respondent;

(b) the respondent's parents, guardian, or next of kin, if known;

(c) the responsible person;

(d) the respondent's advocate, if any;

(e) the county attorney;

(f) the residential facility;

(g) the attorney for the respondent, if any; and

(h) the attorney for the parents or guardian, if any.

(5) The respondent, the respondent's parents or guardian, the responsible person, the respondent's advocate, if any, or the attorney for any party may request that a hearing be held on the recommendation of the residential facility screening team.

(6) Notice of the hearing must be mailed or delivered to each of the parties listed in subsection (5).

(7) The hearing must be held before the court without jury. The rules of civil procedure apply.

(8) If the court finds that the respondent is seriously developmentally disabled and in need of commitment to a residential facility, it shall order the respondent committed to a residential facility for an extended course of treatment and habilitation. If the court finds that the respondent has a developmental disability but is not seriously developmentally disabled, it shall dismiss the petition and refer the respondent to the department of public health and human services to be considered for placement in community-based services according to [53-20-209](#). If the court finds

that the respondent does not have a developmental disability or is not in need of developmental disability services, it shall dismiss the petition.

(9) If none of the parties notified of the recommendation request a hearing, the court may issue an order for the commitment of the respondent to the residential facility for an extended period of treatment and habilitation or the court may initiate its own inquiry as to whether the order should be granted.

(10) The court may refuse to authorize commitment of a respondent to a residential facility for an extended period of treatment and habilitation if commitment is not in the best interests of the respondent.

(11) An order for commitment must be accompanied by findings of fact.

(12) A court order entered in a proceeding under this part must be provided to the residential facility screening team.

**History:** En. 38-1208 by Sec. 8, Ch. 468, L. 1975; amd. Sec. 7, Ch. 37, L. 1977; amd. Sec. 2, Ch. 568, L. 1977; R.C.M. 1947, 38-1208(1) thru (4); amd. Sec. 3, Ch. 417, L. 1987; amd. Sec. 10, Ch. 381, L. 1991; amd. Sec. 11, Ch. 255, L. 1995; amd. Sec. 470, Ch. 546, L. 1995; amd. Sec. 56, Ch. 449, L. 2005.

*Provided by Montana Legislative Services*

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**72-5-315. (Effective July 1, 2006). Procedure for court appointment of guardian -- hearing -- examination -- interview -- procedural rights.** (1) The incapacitated person or any person interested in the incapacitated person's welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender, provided for in 47-1-201, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the person in the proceeding. ~~The official or assigned counsel has the powers and duties of a guardian ad litem.~~

(3) The person alleged to be incapacitated must be examined by a physician appointed by the court who shall submit a report in writing to the court and must be interviewed by a visitor sent by the court. Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of the incapacity. The visitor shall also interview the person who appears to have caused the petition to be filed and the person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made and submit the visitor's report in writing to the court. Whenever possible without undue delay or expense beyond the ability to pay of the alleged incapacitated person, the court, in formulating the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in the person's affairs.

(4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it.

**History:** En. 91A-5-303 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 222, L. 1977; amd. Sec. 2, Ch. 514, L. 1977; R.C.M. 1947, 91A-5-303; amd. Sec. 8, Ch. 344, L. 1981; amd. Sec. 65, Ch. 449, L. 2005.