

FELONY ADULT CRIMINAL SENTENCING

Presented by

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I “A district court’s authority in sentencing a criminal defendant is defined and constrained by statute, and the court has no power to impose a sentence in the absence of specific statutory authority. Consequently, ‘[a] sentence not based on statutory authority is an illegal sentence.’” State v. Hicks, 2006 MT 71, ¶41; State v. Ruiz, 2005 MT 117, ¶ 8.

II Sentences § 46-18-201

A Probation

1 Deferred

2 Suspended

B Commitment to Department of Corrections

C Prison

D Other Types

1 Commitment to DPHHS

2 Commitment to Prerelease

3 Combinations

a Prison/Probation

b DOC Commit/Probation

c DPHHS Commit/Probation

III Deferred Sentence

A Deferred *imposition* of sentence; Dismissed upon successful completion

B How long can it be deferred? 46-18-201

1 6 years for a felony;

- 2 2 years for a misdemeanor
- C It IS A CONVICTION! State v. Rice (1996), 275 Mont. 81, 84, 910 P.2d 245, 246; Davis v. State, 2004 MT 112, ¶16 (Mont. 2004)
 - 1 Registration necessary **as long as** conviction not dismissed.
 - 2 DNA
- D Who is eligible for a deferred sentence?
 - 1 No previous conviction;
 - a Exception: 46-18-222
 - b Offender with a previously dismissed deferred? Only if he/she meets one of the exceptions in 46-18-222
 - 2 Is the conviction expunged after dismissal?
 - a Was only expunged pursuant to 46-18-204 between Oct. 1, 1987 and April 6, 1989.
 - b Absent explicit authorization from the legislature, a court has no power to expunge criminal records. State v. Chesley, 2004 MT 165, ¶15

IV Suspended Sentence; An amount of time the offender serves on probation

- A Offender is supervised on both deferred and suspended unless the judge otherwise orders (§ 46-18-201 (8))
- B Can be combined with prison, DOC, or DPHHS sentence
- C Can be suspended for maximum time allowed for crime
- D Mandatory minimums that cannot be deferred or suspended
 - 1 First 30 days on SIWC, Indecent exposure, Deviate sexual conduct or Incest;
 - 2 First 2 years can't be deferred on Mitigated deliberate homicide, Aggravated assault, Kidnapping, Aggravated kidnapping, Robbery, Sexual assault, SIWC (45-5-503 (2) & (3)), Aggravated promotion of prostitution, Criminal distribution of dangerous drugs (45-9-101 (2),

(3)&(5)(d)), Criminal possession of dangerous drugs (45-9-102(4)), and Criminal possession with intent to distribute dangerous drugs.

3 First 10 years of deliberate homicide

E Exceptions to Mandatory Minimums § 46-18-222

1 Less than 18;

2 Significantly impaired mental capacity;

3 Unusual and substantial duress;

4 Offender was accomplice & minor participant;

5 No serious bodily injury—unless weapon used in crime;

6 Felony sexual assault & treatment in community is better.

V Commitment to Department of Corrections (DOC Commit)

A Only one statutory reference: “commitment of an offender . . . to the department of corrections with a recommendation for placement in an appropriate correctional facility or program.” 46-18-201 (3) (d) (I)

B Concept of the DOC Commit

1 A judicial determination the offender is appropriate for a community placement

2 DOC will place wherever it deems appropriate

3 Quiz: Can a judge add a “no parole” provision to a commitment to DOC?

4 Quiz: How about a sentence that says, “5 years commitment to DOC for placement at Montana State Prison?”

C History of the DOC Commit:

1 April 28, 1993: DOC Commit new—could be any length;

2 October 1, 1997 to April 28, 1999: Commitment cannot exceed 5 years;

3 April 28, 1999 to PRESENT: All but first 5 years must be suspended;

- 4 Exception: offender charged as youth and convicted as adult (41-5-206); Any length is O.K. then up to max. for crime.

D What Is “An Appropriate Correctional Facility or Program”?

- 1 Currently:
 - a Prerelease center;
 - b Intensive supervision (ISP);
 - c Boot Camp (TSCTC or ICP);
 - d Connections Corrections;
 - e WATCh (East or West)
 - f Conditional Release
 - g Prison
- 2 Soon: Meth treatment facilities

E How does DOC determine where to place a DOC commit?

- 1 Risk and Needs Assessment;
- 2 MASC/BASC
- 3 Screening Committees
 - a Screening committees screen for all Prereleases, most ISP placements, Boot Camp, & WATCh.
 - b Screening committees composed of Law enforcement, Facility reps, DOC reps, and community reps.

F Where does DOC committed offender go and when?

- 1 Can be screened for placement before sentencing;
- 2 After sentencing, offender presumed to be in CUSTODY
 - a If not accepted for placement can go to MASC/BASC
 - b In rare instances will go immediately to prison.

VI Prison Sentence

- A Must be a specific number of years or months
- B Should be “to a state prison to be designated by the DOC”
- C Can suspend all or part of the sentence
 - 1 Suspended on a contingency?
 - a Only with specific statutory authority
 - b Current statutory authority:
 - (1) Initial incarceration sentence for felony DUI if offender completes treatment (§ 61-8-731);
 - (2) If offender completes boot camp (§ 53-30-402);
 - (3) If offender completes meth treatment (when treatment opens); (§ 45-9-102 (5) (b))
 - 2 Can judge suspend all but 90 days to be served in county jail?
- D Cannot send non-violent offender to prison unless judge makes a record of all the criteria in 46-18-225
 - 1 Non-violent offender definition in 46-18-104:
 - a Offender has not used or possessed and threatened to use a deadly weapon,
 - b Has not caused serious bodily injury or death,
 - c Crime is not felony sexual assault, SIWC, or Incest (of victim under 16 and offender is 3 or more years older, or if offender inflicted bodily injury)

VII Conditions and other sentence provisions

- A Conditions judge MAY impose
 - 1 P&P Standard Conditions. Judge and judgment does not need to recite the standard conditions. They are:

- a Residence—Supreme Court’s recent decision in Moody, 2006 MT 305
 - b Travel
 - c Employment
 - d Reporting
 - e Weapons
 - f Financial
 - g Search
 - h Laws and Conduct
- 2 Non-standard conditions
- a Other conditions judge may impose:
 - (1) Jail time up to 180 days
 - (2) Boot Camp
 - (3) Community Service
 - (4) Payment of costs or a fine
 - (5) No public office
 - (6) No association with felons
 - (7) Restriction on parole—ONLY if prison sentence is more than 1 year.
 - (8) Any other reasonable restriction or condition
 - (i) Any condition in this category **must** have a connection to underlying crime. State v. Ommundson, 1999 MT 16, ¶4
 - (ii) “No alcohol, no bars” is a non-standard condition and must have justification considering the underlying crime.

B Conditions judge **must** impose

- 1 Restitution
- 2 Weapons enhancement for use of a weapon
- 3 Life without parole
 - a if current offense is Deliberate homicide, Aggravated kidnapping, SIWC, Sexual abuse of children, or Ritual abuse of a minor; and,
 - b Offender has one of above-listed crimes in offense history.
 - c If current offense is Mitigated deliberate homicide, Aggravated assault, Kidnapping, Robbery, Aggravated promotion of prostitution; and,
 - d Offender has two of above-listed crimes or crimes in (a) in offense history.

VIII Restitution

- A If judge finds that a victim has sustained a pecuniary loss, the judge **must** impose payment of full restitution, whether any part of sentence is deferred or suspended—even with full prison sentence.
- B Can now plea bargain for reduced or dismissed charges in exchange for payment of restitution on reduced or dismissed charge. 46-18-243 (2) (a) (vi)
- C Duty to pay stays with the offender until full restitution is paid and is a condition of any probation or parole;
 - 1 Offender has a duty to pay restitution even after the offender's sentence is fully discharged;
 - 2 This has been the case since 1983 when § 46-18-247 (3) was enacted: "An order to pay restitution constitutes a judgment rendered in favor of the state. . . ."
- D Court **shall** order offender to pay cost of supervising restitution (10%) **unless** judge makes a finding the offender is not able to pay the supervision cost.

- E Payment is to DOC unless offender is in prison, then prison garnishes offender's prison account. Prison will garnish prisoner's account even for unpaid restitution on discharged sentences as stated in C 1 & 2 above.

IX Sentencing and Boot Camp (TSCTC or ICP)

A Judge may order at time of sentencing

- 1 If offender completes boot camp
- 2 Remainder of sentence is automatically suspended

B If judge does not include boot camp suspension in judgment

- 1 Offender can petition the court upon successful completion of boot camp.
- 2 Judge, of course, does not have to grant the petition.

X Mental disease or defect in sentencing 46-14-311 & 312

A If offender at the time of the commission of the offense

B Suffered from a mental disease or defect or development disability that rendered the offender

- 1 Unable to appreciate the criminality of the offender's behavior; or,
- 2 Unable to conform the offender's behavior to the requirements of law,

C The court **shall** sentence the offender to the custody of the director of DPHHS.

- 1 No mandatory minimums apply;
- 2 Sentence is for a term of years—cannot be more than maximum for the offense.

D The offender goes to the state hospital or Development Center in Boulder, but DPHHS director may transfer offender if DPHHS determines hospital is not appropriate;

- 1 Transfer must be to a "correctional, mental health, residential, or developmental disabilities facility"
- 2 Transfer 99% of time is to prison.

E Court can review the sentence on petition of DPHHS director or offender if one of the contingencies in 46-14-312 is met.

- 1 Offender meets one of the contingencies when director transfers offender;
- 2 Court can suspend remainder of sentence on review.

F Court cannot commit Defendant to DPHHS on revocation if DPHHS commit not imposed initially. State v. Boulton, 2006 MT 170, ¶¶17-18.

G Biggest mistake defense attorneys make in this area:

- 1 Don't ask psych evaluator to go beyond fitness to proceed and
- 2 Evaluate ability to conform conduct to requirements of law or to appreciate criminality of conduct.

XI Sentencing felony DUI offenders

A First time through WATCH

- 1 13 months to DOC followed by up to 5 years suspended (can be to DOC or a state prison)
- 2 If the offender successfully completes treatment
 - a Operated by or
 - b Approved by the DOC
- 3 The remainder of the 13 months is suspended (and added to the other suspended time)

B Already been to WATCH (whether completed or not):

- 1 13 months to 5 years to DOC
- 2 No mandatory suspended time—it can all be imposed;
- 3 If DOC sends offender to WATCH, remainder of sentence is NOT suspended.

XII Sentencing youth—41-5-206 and 41-5-208

A Under 41-5-206 (called “206”)—Youth transferred to adult court

- 1 Exactly like sentencing an adult **except**
- 2 No limit on amount of non-suspended DOC time.
- 3 DOC will evaluate and place offender in an appropriate adult or juvenile facility—except no offender under 16 in prison.
- 4 Youth sentenced under 206 is criminally convicted youth (§ 41-5-2503)
 - a Offender can have review hearing “any time before the youth reaches the age of 21.” (§ 41-5-2510 (1))
 - (1) **Except** for offender convicted of offense that carries potential life in prison, death or 100 year sentence;
 - (2) Hearing is to determine if offender has been “substantially rehabilitated.” (§ 41-5-2510 (4))
 - (i) If court determines youth has been substantially rehabilitated the court can “suspend all or part of the remaining portion of the sentence” (§ 41-5-2510 (5))
 - (ii) Or the court can “impose all or part of the remaining sentence” (*Id.*)
 - (iii) Or the court can impose a combination of (i) and (ii)
- B Under 41-5-208 (called “208 transfer”)—someone adjudicated in youth court is transferred at age 18 to adult court “for supervision”
 - 1 Adult P&P supervises youth under normal P&P conditions and any special conditions judge sets;
 - 2 P&P officers will do a report of violation (ROV) when offender violates conditions of probation;
 - a Judge can revoke offender’s “probation”
 - (1) Can sentence offender to prison until age 25
 - (2) Even if offender “adjudicated” only for committing misdemeanor offense in youth court

XIII Sentencing Sex Offenders

- A Judge **cannot** waive registration requirement (§ 46-18-201)

- B Judge must designate offender with a tier level designation (§ 46-23-509 (3) (b))

XIV Concurrent vs. Consecutive Sentence

- A Consecutive unless otherwise ordered; § 46-18-401 (4)
- B Last judge to sentence rules;
- C Judge may not make a sentence consecutive to one not yet imposed. State v. McGuire (McGuire II), Mont. 386, 388, 860 P.2d 148 (1993);
- D DOC will aggregate all consecutive prison time, then all consecutive probation time.
 - 1 **Exception:** When Defendant starts serving a probationary sentence, then is convicted of a felony offense, and prison sentence is imposed.
 - 2 **IF** not revoked on the original probationary sentence, it continues to run.

XV Credit for time served

- A Defendant should only receive credit for jail time served if sentence of imprisonment is imposed; § 46-18-403 (1)
 - 1 Deferred sentence is **not** a sentence of imprisonment and Defendant should not receive jail time credit when deferred sentence imposed.
 - a In re Gray, 163 Mont. 321, 322, 517 P.2d 351, 352 (1973);
Unpublished cases: Burns v. State, 2006 Mont. July 12, 2006;
State v. Meckler, 2006 MT 53N, 131 P.3d 572 (2006).
- B A defendant should receive credit for time he or she was incarcerated before sentencing only if the defendant is incarcerated on a bailable offense. If the defendant is also incarcerated because he/she is serving a prison sentence on another crime, the defendant is not entitled to credit for time served towards the new crime because the defendant is not eligible to post bail and get out of jail. State v. Kime, 2002 MT 38.
- C A defendant's sentence may be credited with the time he or she was incarcerated only if that incarceration was directly related to the offense for which the sentence is imposed. State v. Kime, 2002 MT 38, ¶16, *overruled in part on other grounds*, State v. Eaton, 2004 MT 283.

- D If the defendant is serving several concurrent suspended sentences from different jurisdictions and spends time in jail awaiting revocation on one, the defendant must receive the jail credit on all the concurrent sentences if they are revoked. State v. Tracy, 2005 MT 128, ¶¶28-29.
- E Court cannot give defendant credit towards an imprisonment sentence for time the defendant has already spent on that cause number in prison. Example Felony DUI sentence—court cannot give defendant credit on revocation for the time the offender spent in in-patient treatment as that is prison time.
- F Effect of credit for time served: Sentence starts running before sentencing—from when Defendant was jailed.
 - a Example: 3 year deferred sentence handed down on July 1, 2006 with 180 days credit for time served
 - (1) Without 180 days credit, sentence runs 3 years from July 1, 2006 and would expire on June 30, 2009.
 - (2) With credit for 180 days, the sentence actually began on January 1, 2006 and runs until January 1, 2009.

XVI Revocations

- A What time can court impose?
 - 1 On revocation of deferred, can impose up to the maximum allowable for the offense; i.e., 3 yr deferred for Burglary on revocation can sentence to 20 years.
 - 2 On revocation of suspended, can only impose time that was suspended **minus** credit for time served.
 - 3 Court cannot revoke
- B If crime committed after April 17, 2003, court can revoke a DOC commit and impose a MSP sentence. State v. Tracy, 2005 MT 128, ¶¶20.
- C On petition to revoke, even if court does not revoke probationary sentence, court can add, modify, or remove conditions. 46-18-203.

XVII How long will a defendant serve?

A Good time

- 1 Was abolished for anyone who committed a crime after January 31, 1997.
- 2 An offender is still eligible today for good time if he/she is serving a sentence of imprisonment and committed the offense before January 31, 1997.
 - a An offender who receives good time today receives day-for-day good time.
 - b As a result of the MacPheat (2000 MT 62) decision, offenders eligible to receive good time receive day-for-day good time on jail time for which the court awards credit.

B Parole

- 1 Parole eligibility depends on the statute in effect at the time of the commission of the offense for which defendant is imprisoned.
- 2 History of parole eligibility statutes:

	Time Sentence		Life Sentence
		Outer Limit	
Pre 1975	All Offenders----- $\frac{1}{4}$ minus good time	12 $\frac{1}{2}$ years	25 years minus good time
1975-1979	<u>Regular Offenders</u> ----- $\frac{1}{4}$ minus good time	<u>17 $\frac{1}{2}$ years</u>	30 years minus good time
	<u>Persistent Felony Offender</u> ----- $\frac{1}{3}$ minus good time	<u>17 $\frac{1}{2}$ years</u>	
	<u>First time offender</u> ----- $\frac{1}{4}$ minus good time	<u>12 $\frac{1}{2}$ years</u>	
1979-1995	<u>Dangerous Offender</u> ----- $\frac{1}{2}$ minus good time	<u>17 $\frac{1}{2}$ years</u>	30 years minus good time
	<u>Non-Dangerous Offender</u> ----- $\frac{1}{4}$ minus good time	<u>17 $\frac{1}{2}$ years</u>	
1995	$\frac{1}{4}$ of term	None	30 years

XVIII Judgments in general

A Read them!

- B You have 120 days to get them changed to conform to oral pronouncement (§ 46-18-116 (2))
- C After 120 days you will need a nunc pro tunc order to change the judgment.

XIX Numbers of DOC Placements available

1 Prerelease

- a Billings 157 Males, 65 Females
- b Great Falls 135 Males, 34 Females
- c Butte 116 Males, 55 Females
- d Missoula 90 Males, 20 Females
- e Helena 98 Males
- f Bozeman 30 Males

2 Other prerelease-based programs

- a Transitional Living 77 slots throughout Montana
- b Enhanced Supervision (ESP) 84 slots
- c Boot Camp Aftercare 30 beds, mainly in Great Falls

3 Intensive Supervision Program (ISP)

- a Billings 100
- b Great Falls 75
- c Butte 50
- d Missoula 100
- e Bozeman 50

4 WATCH Only for Initial incarceration of Felony DUIs

- a Warm Springs 100 (mostly males)

b Glendive 40 (mostly females)

5 Coming Soon

a Male Meth Treatment Lewistown 80

b Female Meth Treatment Boulder 40

---The End---