

HOUSE BILL NO. 692

INTRODUCED BY B. MERCER

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO APPOINTMENT OF COUNSEL; PRECLUDING APPOINTMENT OF A PUBLIC DEFENDER FOR CERTAIN MISDEMEANORS FOR WHICH INCARCERATION IS NOT A POTENTIAL SENTENCE BECAUSE EITHER THE PROSECUTOR OR THE COURT HAS WAIVED IMPRISONMENT AS PART OF THE SENTENCE; PROVIDING EXCEPTIONS; AND AMENDING SECTIONS 46-8-101, 46-11-401, AND 47-1-104, MCA."

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

NEW SECTION. Section 1. Required notification from prosecution in certain misdemeanor -- written court order. (1) In the charging document or in a separate document filed within 5 business days of the filing of a charge for a misdemeanor that carries the potential for imprisonment, the prosecutor shall declare whether the prosecutor may seek incarceration as part of a defendant's sentence if a conviction is obtained. If neither the charging document nor the separate document is filed by the prosecutor with the court within 5 business days, the failure to file is considered as a waiver of the opportunity to seek incarceration as part of the sentence.

(2) When a prosecutor has declared the prosecutor will not seek incarceration as part of the defendant's sentence or has waived the opportunity to seek incarceration, the court shall enter a written order stating either that incarceration is ~~not a sentencing option~~ WILL NOT BE IMPOSED if the defendant is convicted or that incarceration is ~~a sentencing option~~ MAY BE IMPOSED if the defendant is convicted.

Section 2. Section 46-8-101, MCA, is amended to read:

"46-8-101. Right to counsel. (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel and must be asked if the aid of counsel is desired.

(2) Except as provided in subsection (3)(a), if the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor,

1 and incarceration is a sentencing option if the defendant is convicted, and the prosecutor did not waive
2 incarceration as provided in [section 1], the court shall order the office of state public defender, provided for in
3 2-15-1029, to assign counsel to represent the defendant without unnecessary delay pending a determination of
4 eligibility under the provisions of 47-1-111.

5 (3) (a) If the defendant desires assigned counsel because of financial inability to retain private
6 counsel and the offense charged is a misdemeanor, and incarceration is a sentencing option if the defendant is
7 convicted, and the prosecution did not waive incarceration as a sentencing option [section 1], during the initial
8 appearance the court may order that incarceration not be exercised as a sentencing option if the defendant is
9 convicted. If the court so orders, the court shall inform the defendant that the assistance of counsel at public
10 expense through the office of state public defender is not available and that time will be given to consult with an
11 attorney before a plea is entered. ~~If incarceration is waived as a sentencing option, a public defender may not~~
12 ~~be assigned.~~

13 (b) Notwithstanding the exceptions to appointments of counsel in this section, if a defendant
14 desires assigned counsel because of financial inability to retain private counsel and the offense charged is a
15 violation of 45-5-206, 45-6-301, or Title 61, chapter 8, part 10, the court shall order the office of state public
16 defender to assign counsel as required by subsection (2).

17 (c) If, subsequent to the appointment of counsel, the court orders that incarceration will not be
18 exercised as a sentencing option if the defendant is convicted, the court shall vacate the order appointing the
19 office of state public defender."

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21 **Section 3.** Section 46-11-401, MCA, is amended to read:

22 **"46-11-401. Form of charge.** (1) The charge must be in writing and in the name of the state or the
23 appropriate county or municipality and must specify the court in which the charge is filed. The charge must be a
24 plain, concise, and definite statement of the offense charged, including the name of the offense, whether the
25 offense is a misdemeanor or felony, ~~whether the prosecution will waive incarceration as a sentencing option for~~
26 ~~a misdemeanor charge that carries the potential for imprisonment,~~ the name of the person charged, and the
27 time and place of the offense as definitely as can be determined. The charge must state for each count the
28 official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is

alleged to have violated. AS PART OF THE CHARGE IN A MISDEMEANOR CASE, THE PROSECUTION MAY DECLARE
WHETHER IT WILL SEEK INCARCERATION IF THE DEFENDANT IS CONVICTED.

(2) If the charge is by information or indictment, it must include endorsed on the information or indictment the names of the witnesses for the prosecution, if known.

(3) If the charge is by complaint, it must be signed by a sworn peace officer, under oath by a person having knowledge of the facts, or by the prosecutor.

(4) If the charge is by information, it must be signed by the prosecutor. If the charge is by indictment, it must be signed by the lead juror of the grand jury.

(5) The court, on motion of the defendant, may strike surplusage from an indictment or information.

(6) A charge may not be dismissed because of a formal defect that does not tend to prejudice a substantial right of the defendant.

(7) AS PROVIDED IN [SECTION 1], IN MISDEMEANOR CASES, IF THE PROSECUTOR DID NOT INCLUDE A
DECLARATION IN THE CHARGING DOCUMENT OR MAKE A SEPARATE FILING IN THE COURT DOCKET REGARDING WHETHER
INCARCERATION WILL BE SOUGHT OR MAY BE SOUGHT IF A CONVICTION IS OBTAINED, THE DECLARATION MUST BE FILED
WITHIN 5 DAYS OF FILING THE CHARGING DOCUMENT in advance of the initial appearance by a defendant."

Section 4. Section 47-1-104, MCA, is amended to read:

"47-1-104. Statewide system -- structure and scope of services -- assignment of counsel at public expense. (1) There is a statewide public defender system, which is required to deliver public defender services in all courts in this state. The system is supervised by the director.

(2) The director shall approve a strategic plan for service delivery and divide the state into not more than 11 public defender regions. The director may establish a regional office to provide public defender services in each region, as provided in 47-1-215, establish a contracted services program to provide services in the region, or utilize other service delivery methods as appropriate and consistent with the purposes described in 47-1-102.

(3) When a court orders the assignment of a public defender, the appropriate office shall immediately assign a public defender qualified to provide the required services. The director shall establish protocols to ensure that the offices make appropriate assignments in a timely manner.

(4) A Except as provided in [section 1] and 46-8-101, a court may order assignment of a public defender under this chapter in the following cases:

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

(i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;

(ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;

(iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in 41-3-425;

(iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

(v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;

(vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

(vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116;

(ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and

(x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.

(b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows:

(i) as provided for in 41-3-425;

(ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;

- (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;
- (iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent for Abortion Act of 2013, as provided in 50-20-509;
- (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;
- (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;
- (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;
- (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and
- (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).
- (5) (a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.
- (b) A private attorney who is contracted with under the provisions of 47-1-121 to provide public defender services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the statewide public defender system and does not result in a conflict of interest."

NEW SECTION. Section 5. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 46, chapter 11, part 4, and the provisions of Title 46, chapter 11, part 4, apply to [section 1].

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