

MINUTES  
**SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Friday, March 13, 2020

**TIME:** 1:00 P.M.

**PLACE:** Room WW54

**MEMBERS PRESENT:** Chairman Lakey, Vice Chairman Lee, Senators Lodge, Anthon, Thayn, Cheatham, Burgoyne, Nye

**ABSENT/ EXCUSED:** Senator Grow

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Lakey** called the Senate Judiciary and Rules Committee (Committee) to order at 1:00 p.m.

**GUBERNATORIAL REAPPOINTMENT VOTE:** **Senator Thayn** moved to send the Gubernatorial reappointment of Paula Garay to the Sex Offender Management Board to the floor with recommendation that she be confirmed by the Senate. **Senator Cheatham** seconded the motion. The motion carried by **voice vote**.

**GUBERNATORIAL APPOINTMENT HEARING:** Arnold Carlos Ponce, having been appointed to the Sex Offender Management Board (Board), was introduced to the Committee. **Mr. Ponce** stated that he was a domestic abuse victim advocate and also serves as an Elmore County domestic abuse victim coordinator and sexual assault coordinator. He indicated that he was interested in learning what types of programs are being developed to help sex offenders.

**DISCUSSION:** **Chairman Lakey** questioned Mr. Ponce about his involvement in the area of mental health. **Mr. Ponce** explained that he had experience in the mental health area in his past employment.

**PASSED THE GAVEL:** Chairman Lakey passed the gavel to Vice Chairman Lee.

**H 469** **Chairman Lakey** introduced **H 469** and stated that Paul Jagosh, Idaho Fraternal Order of Police, was unable to attend but was very supportive of this legislation. **Chairman Lakey** explained that this legislation is an adjustment to the mandatory drug trafficking statutes and explained the relevance of heroin quantities involved. Because of the increasing problem of fentanyl usage in Idaho, it has also been added to the legislation. Input from the Governor's Office and the U.S. Attorney's Office was provided in that decision. The changes proposed in this legislation will help provide that the trafficking statutes are applied to those involved in drug distribution and sales rather than those solely engaged in personal use. The sentencing timeframes for heroin are being reduced to more closely correspond to other controlled substances in the statute.

**TESTIMONY:** **Tom Arkoosh**, representing the Idaho Association of Criminal Defense Lawyers, spoke against **H 469**. He indicated that they were not against raising the heroin limit and agree that there must be something done about fentanyl usage. **Mr. Arkoosh** proposed sending this bill to the amending order. He indicated that there were two conditions he felt must be met, including striking all minimums allowing unified sentencing which would include a fixed and a non-fixed portion to a sentence, and allowing judicial discretion in sentencing while considering the nature of the defendant (see Attachment 1).

**Holly Koole Rebholtz**, representing the Idaho Prosecuting Attorneys Association, stated that they were supporting this bill. She mentioned hearing numerous stories of individuals who were users but were tried as traffickers. After considerable discussion with the stakeholders involved it was determined that the amount of the bottom tier should be moved up from two grams to five grams and the years on the second and third tiers should be brought down.

**Elisa Massoth**, attorney from Payette, testified in opposition to this legislation. She elaborated on the various aspects of community protection and indicated that this statute and the changes being proposed do not keep communities safer. She feels that adding fentanyl to the statute would open doors for a felony possession to be turned into a felony possession with the intent to deliver. Idaho's drug trafficking statute places all the power in the hands of the prosecution. This statute removes the ability of capable judges to impose a fair sentence.

**Caley Larkey**, representing herself, shared her story of drug usage, path to addiction, and eventual incarceration for being in the wrong place at the wrong time. She explained that mandatory minimums take away the control from judges and put it into the hands of the prosecution. She has seen first-hand that "one size fits all" mandatory minimums do not work and she stated that there needs to be true reform where they are concerned.

**Scott McKay**, representing himself, stated that he was opposed to this legislation. He indicated that there were many judges in Idaho who were against mandatory minimums. He believed that the "one size fits all" approach is inconsistent with nearly every other crime in Idaho. **Mr. McKay** strongly supported judges being able to consider the circumstances of their cases and sentence accordingly.

**Marshall** and **Shanna Wolfe**, representing themselves, said that they oppose this legislation. They shared a personal experience with their son's incarceration. They believe that judges should be able to have input in the sentencing process.

**Joe Miller**, representing Idaho Association of Criminal Defense Lawyers, testified in opposition to **H 469**. He stated that it was the position of his organization that the decision-making sentences should be in the hands of the judges. His experience has shown him that mandatory minimum sentences are not good deterrents for drug users or dealers. In his opinion, education would be much more effective. He commented that he believes a common consensus among judges is that they would prefer to get rid of mandatory minimums.

**Vice Chairman Lee** reminded Mr. Miller that the legislation being discussed was not regarding a change to mandatory minimums.

Kathy Griesmyer, representing the ACLU of Idaho, submitted written testimony in opposition to **H 469** (see Attachment 2).

**DISCUSSION:**

**Senator Burgoyne** stated that he was making a Rule 39(H) disclosure because several years ago, he was counsel to a law firm in which Mr. Miller was a partner. He stated that there is a need to discuss mandatory minimums because that was essentially what this bill was proposing.

**Chairman Lakey** concluded by explaining that this bill adjusts the quantities of heroin up to take them out of the personal use category. This legislation makes adjustments and allows personal users to be removed from the realm of drug trafficking.

**Senator Burgoyne** stated that he could accept making an adjustment to change the amount of heroin that triggers a mandatory minimum sentence. His concern is that he does not think mandatory minimums are just, but he would be willing to accept some mandatory minimums within the existing law to reach a compromise. His recommendation was to send the bill to the 14th Order of Business for possible amendment.

**MOTION:** **Senator Anthon** moved to send **H 469** to the floor with a **do pass** recommendation. **Senator Cheatham** seconded the motion.

**ROLL CALL VOTE:** **Vice Chairman Lee** called for a roll call vote. **Chairman Lakey** and **Senators Anthon, Cheatham, and Nye** voted aye. **Vice Chairman Lee** and **Senators Lodge, Thayn, and Burgoyne** voted nay. The motion failed.

**MOTION:** **Senator Burgoyne** moved to send **H 469** to the 14th Order of Business for possible amendment. The motion was seconded. The motion carried by **voice vote**, with **Chairman Lakey** requesting he be recorded as voting nay.

**PASSED THE GAVEL:** Vice Chairman Lee passed the gavel back to Chairman Lakey.

**H 582** **Ken McClure**, representing Idaho Liability Reform Coalition, stated that this bill is in response to a Supreme Court decision noting that there was not a clear definition either in Idaho statute or in jury instructions for "willful or reckless misconduct." **Mr. McClure** explained there is a continuum beginning with negligence and ending with intentional conduct. The Supreme Court found that recklessness is more than ordinary negligence and it is more than gross negligence. In some cases, negligence can be found to be recklessness. There is a cap on non-economic damages and an exception for injuries for reckless misconduct. There appears to be a misinterpretation on what the conduct was that was subject to the cap on the non-economic damages.

**MOTION:** **Senator Anthon** moved to send **H 582** to the floor with a **do pass** recommendation. **Senator Lodge** seconded the motion. The motion passed by **voice vote**, with **Senator Burgoyne** requesting to be recorded as voting nay. He said he viewed "willful or reckless misconduct" as two separate things and this legislation combines it into one.

**H 617** **Senator Chuck Winder**, District 20, stated that **H 617** revises Idaho Code in regard to administrative rules. It brings Idaho statutes into compliance with the Idaho Constitution. The words "Concurrent Resolution" were chosen to replace "statute" as otherwise provided by joint rules and were not subject to veto from the Governor. This leaves a way for a joint rule to deal with things like how to partition the rules. This would make it possible for them to be placed into several separate resolutions. This would allow people more flexibility in voting. **Senator Winder** indicated that **H 617** provides a way to deal with administrative rules and move forward as the two legislative bodies work together.

**DISCUSSION:** In response to Senator Burgoyne, **Senator Winder** discussed joint rules, the flexibility allowed by the concurrent resolution, and the added protection of requiring action from both bodies. He elaborated that a non-fee rule requires a 50 to 24 vote. In order to reject a non-fee rule, both bodies would have to reject it. **Senator Burgoyne** wondered whether there is any language which suggests that the degree of consensus between the two bodies would change as a result of this new language.

**TESTIMONY:** **Russ Hendricks**, representing the Idaho Farm Bureau, testified that his members support **H 617**. He indicated that this cleanup bill would bring conformity with what is in the Idaho Constitution.

**MOTION:** **Senator Nye** moved to send **H 617** to the floor with a **do pass** recommendation. **Senator Thayn** seconded the motion. The motion carried by **voice vote**.

**H 616** **Brian Whitlock**, President of the Idaho Hospital Association, presented **H 616**. **Mr. Whitlock** began by detailing what a health care directive registry is and what it is used for. Idaho's Health Care Registry is housed in the Secretary of State's Office. This legislation would move it and all existing records to the Department of Health and Welfare. The information on the registry would be available 24 hours a day, 7 days a week. Such information needs to be HIPPA compliant and on a HIPPA compliant platform ensuring one central accessible registry for all legal advance care documents. Being able to easily create and upload these documents will increase the number of people using it, and providers should be able to easily retrieve the information during an emergency (see Attachment 3).

**DISCUSSION:** **Senator Burgoyne** had several questions concerning HIPPA compliance. **Mr. Whitlock** assured him that the platform created would meet the necessary requirements to be compliant under federal regulations.

**Senator Anthon** expressed concern about the mechanics and reach of the registry. **Mr. Whitlock** explained that there will be a standardized form for obtaining advance care directives. If one chooses not to participate in the clearing house, there is nothing that would preclude someone from not having their advance directive recognized by a hospital. If a person can still communicate and changes his or her mind at the hospital, the decision at the hospital will override the advance directive. This legislation provides a database to access to find out the wishes of an incapacitated person.

**MOTION:** **Vice Chairman Lee** moved to send **H 616** to the floor with a **do pass** recommendation. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**ADJOURNED:** There being no further business at this time, **Chairman Lakey** adjourned the meeting at 2:30 p.m.

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Senator Lakey  
Chair

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Sharon Pennington  
Secretary