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SENATE JUDICIARY
EXHIBIT NO. 18
DATE 3/17/09
BILL NO. HB228

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Sheriffs & Peace Officers Association

March 17, 2009

To: Chairman Perry and Members of Senate Judiciary Committee.
Fr: Jim Smith
Re: House Bill 228. Testimony in Opposition.

I was asked by some members of the House Judiciary Committee to prepare a little history and background on the concealed weapon & gun legislation introduced over the last several years. I did some research on that subject, which I believe might also be of interest to the members of the Senate Judiciary Committee.
One note of caution: my personal involvement with the issue goes back to 1997. The LAWS only goes back to 1999. I understand from testimony of the proponents of HB 228 that concealed weapon legislation was first introduced in Montana in 1989.

1997. HB 429. Intro'd by Rep. Wells. Effectively eliminated the Concealed Weapon Permit requirement by greatly expanding the number of individual exempted from the requirement to obtain a concealed weapon permit. HB 429 was tabled in House Judiciary.

1997-1999. 'Consensus Group' works on revisions to CCWs. Information attached.

1999. SB 186. Intro'd by Sen. Wells. Revisions to CCW Law. Identified 'prohibited places' (basically included banks, bars and public buildings).
1999. HB 459. Intro'd by Rep. Bob Clark. CCW Reciprocity Agreement with other states.
Both of these 1999 bills passed and were signed into law.

2001. HB 202. Intro'd by Rep. Davies. CCW & public employees. Tabled in House Judiciary Committee.
2001. SB 18. Intro'd by Sen. O'Neill. Drivers App. Firearm purchase check. Missed Transmittal.

2003. SB 184. Intro'd by Rep. Butcher. Lifetime CCW permits. Tabled in House FWP Committee.

2005. HB 693. Intro'd by Rep. Wells. Citizen Right to Self Defense. Died On House Floor.

2007. HB 340. Intro'd by Rep. Wells. Citizen Right to Self Defense. Tabled in Senate Judiciary.

Copies of these bills have been given to Pam Schindler, Senate Judiciary Secretary.

I think the lesson here is that the agreements reached between 1997 and 1999, which resulted in SB 186 and HB 459 being introduced and passed in the 1999 Session have stood the test of time fairly well. Subsequent legislatures have resisted all attempts to amend the current law.

Montana Code Annotated - 2007

45-3-101. Definitions. (1) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

(2) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

45-3-102. Use of force in defense of person. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

45-3-103. Use of force in defense of occupied structure. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

Montana Code Annotated - 2007

45-3-104. Use of force in defense of other property. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

Montana Code Annotated - 2007

45-3-105. Use of force by aggressor. The justification described in 45-3-102 through 45-3-104 is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force but the assailant continues or resumes the use of force.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

45-3-106. Use of force to prevent escape. (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

Montana Code Annotated - 2007

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45-3-108. Use of force in resisting arrest. A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

History: En. by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, .

45-8-321. Permit to carry concealed weapon. (1) A county sheriff shall, within 60 days after the filing of an application, issue a permit to carry a concealed weapon to the applicant. The permit is valid for 4 years from the date of issuance. An applicant must be a United States citizen who is 18 years of age or older and who holds a valid Montana driver's license or other form of identification issued by the state that has a picture of the person identified. An applicant must have been a resident of the state for at least 6 months. Except as provided in subsection (2), this privilege may not be denied an applicant unless the applicant:

(a) is ineligible under Montana or federal law to own, possess, or receive a firearm;

(b) has been charged and is awaiting judgment in any state of a state or federal crime that is punishable by incarceration for 1 year or more;

(c) has been convicted in any state or federal court of a crime punishable by more than 1 year of incarceration or, regardless of the sentence that may be imposed, a crime that includes as an element of the crime an act, attempted act, or threat of intentional homicide, violence, bodily or serious bodily harm, unlawful restraint, sexual abuse, or sexual intercourse or contact without consent;

(d) has been convicted under 45-8-327 or 45-8-328, unless the applicant has been pardoned or 5 years have elapsed since the date of the conviction;

(e) has a warrant of any state or the federal government out for the applicant's arrest;

(f) has been adjudicated in a criminal or civil proceeding in any state or federal court to be an unlawful user of an intoxicating substance and is under a court order of imprisonment or other incarceration, probation, suspended or deferred imposition of sentence, treatment or education, or other conditions of release or is otherwise under state supervision;

(g) has been adjudicated in a criminal or civil proceeding in any state or federal court to be mentally ill, mentally defective, or mentally disabled and is still subject to a disposition order of that court; or

(h) was dishonorably discharged from the United States armed forces.

(2) The sheriff may deny an applicant a permit to carry a concealed weapon if the sheriff has reasonable cause to believe that the applicant is mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community to the extent that the applicant should not be allowed to carry a concealed weapon. At the time an application is denied, the sheriff shall, unless the applicant is the subject of an active criminal investigation, give the applicant a written statement of the reasonable cause upon which the denial is based.

(3) An applicant for a permit under this section must, as a condition to issuance of the permit, be required by the sheriff to demonstrate familiarity with a firearm by:

(a) completion of a hunter education or safety course approved or conducted by the department of fish, wildlife, and parks or a similar agency of another state;

(b) completion of a firearms safety or training course approved or conducted by the department of fish, wildlife, and parks, a similar agency of another state, a national firearms association, a law enforcement agency, an institution of higher education, or an organization that uses instructors certified by a national firearms association;

(c) completion of a law enforcement firearms safety or training course offered to or required of public or private law enforcement personnel and conducted or approved by a law enforcement agency;

(d) possession of a license from another state to carry a firearm, concealed or otherwise, that is granted

by that state upon completion of a course described in subsections (3)(a) through (3)(c); or

(e) evidence that the applicant, during military service, was found to be qualified to operate firearms, including handguns.

(4) A photocopy of a certificate of completion of a course described in subsection (3), an affidavit from the entity or instructor that conducted the course attesting to completion of the course, or a copy of any other document that attests to completion of the course and can be verified through contact with the entity or instructor that conducted the course creates a presumption that the applicant has completed a course described in subsection (3).

(5) If the sheriff and applicant agree, the requirement in subsection (3) of demonstrating familiarity with a firearm may be satisfied by the applicant's passing, to the satisfaction of the sheriff or of any person or entity to which the sheriff delegates authority to give the test, a physical test in which the applicant demonstrates the applicant's familiarity with a firearm.

History: En. Sec. 1, Ch. 759, L. 1991; amd. Sec. 1, Ch. 408, L. 1995; amd. Sec. 3, Ch. 581, L. 1999.

Montana Code Annotated - 2007

45-8-323. Denial of renewal -- revocation of permit. A permit to carry a concealed weapon may be revoked or its renewal denied by the sheriff of the county in which the permittee resides if circumstances arise that would require the sheriff to refuse to grant the permittee an original license.

History: En. Sec. 3, Ch. 759, L. 1991.

45-8-328. Carrying concealed weapon in prohibited place -- penalty. (1) A person commits the offense of carrying a concealed weapon in a prohibited place if the person purposely or knowingly carries a concealed weapon in:

(a) portions of a building used for state or local government offices and related areas in the building that have been restricted;

(b) a bank, credit union, savings and loan institution, or similar institution during the institution's normal business hours. It is not an offense under this section to carry a concealed weapon while:

(i) using an institution's drive-up window, automatic teller machine, or unstaffed night depository; or

(ii) at or near a branch office of an institution in a mall, grocery store, or other place unless the person is inside the enclosure used for the institution's financial services or is using the institution's financial services.

(c) a room in which alcoholic beverages are sold, dispensed, and consumed under a license issued under Title 16 for the sale of alcoholic beverages for consumption on the premises.

(2) It is not a defense that the person had a valid permit to carry a concealed weapon. A person convicted of the offense shall be imprisoned in the county jail for a term not to exceed 6 months or fined an amount not to exceed $500, or both.

History: En. Sec. 8, Ch. 759, L. 1991; amd. Sec. 1, Ch. 572, L. 1999.

45-8-329. Concealed weapon permits from other states recognized -- advisory council. (1) A concealed weapon permit from another state is valid in this state if:

(a) the person issued the permit has the permit in the person's immediate possession;

(b) the person bearing the permit is also in possession of an official photo identification of the person, whether on the permit or on other identification; and

(c) the state that issued the permit requires a criminal records background check of permit applicants prior to issuance of a permit.

(2) The attorney general shall develop and maintain a list of states from which permits are recognized under this section for the use by law enforcement agencies in this state.

(3) A determination or declaration of a Montana government entity, official, or employee is not necessary to the existence and exercise of the privilege granted by this section.

(4) The governor shall establish a council, composed of interested persons, including law enforcement personnel and gun owners, to advise the governor on and pursue concealed weapon permit issues.

History: En. Sec. 3, Ch. 408, L. 1995; amd. Sec. 2, Ch. 476, L. 1999.

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HB 228 –the 'Rearming the Felons' bill
TALKING POINTS

1. HB 228 is amateurishly drafted, which leads to numerous technical problems.

   a. The shift in the burden of proof (Section 1 (5)) occurs in a "purpose" section not a substantive section. An explicitly contradictory statute exists in the current code (Section 45-3-115), yet is not even mentioned.

   b. The introduction of three new and undefined mental states (recklessly, deliberately and intentionally) in the brandishing section. The Montana criminal code uses and defines only three mental states: purposely, knowingly, or negligently.

   c. All the existing law of Justifiable Use of Force, § 45-3-101 *et seq.* remains on the books. Nothing has been repealed. Which statutes control? These very real technical problems exist because there was no substantive review by the Legislative Counsel to address these conflicting statutory construction issues. Since all the current law regarding justifiable use of force apparently remains in effect along with HB 228. Which law governs? No one knows, but we do know there are numerous conflicts with current laws and this law. The sponsor's stated purpose is to "clarify" the law. HB 228 accomplishes the opposite, and runs counter to our existing laws regarding justifiable use of force and the carrying concealed weapons statutes.

2. The citizens of Montana are receptive to "Castle Doctrine" legislation. HB 228 is not "Castle Doctrine" legislation. It is a major overhaul of well-settled self-defense law and concealed weapons statutes. HB 228 does not protect law-abiding citizens. It only creates loopholes for criminals and will have serious unintended consequences.

3. HB 228's real impact will be felt in law enforcement's response to domestic violence cases. Domestic violence is where we most often see violence in the home. In 2008, Yellowstone County alone had 67 felony domestic violence cases (prosecuting defendants with a minimum of 134 prior domestic violence convictions). It is already difficult enough for law enforcement to respond to domestic violence situations. The legislature has previously recognized the problems inherent in domestic violence, and has made it a priority to stop this societal epidemic. Accordingly, it has amended and expanded § 45-5-206 every session from 1991 through 2005. For example, in 2005, the legislature recognized by statute that these cases may involve mutual combat, and now requires an officer to make a determination and arrest the "predominant aggressor" (§ 46-6-311(1)(b)). HB 228 will set domestic violence enforcement back ages and undermine all the hard work of these 8 consecutive legislative sessions and arguably allows a partner or family member to choose deadly force as his lawful response to a mere verbal threat of bodily injury, or a slap in the face. Serial domestic abusers will use HB 228 to justify their crimes against their partners.

4. We are aware of no counterpart in any State in the country for the "brandishing a firearm" section of HB 228 (Section 3). It does not clarify Montana law; it muddles it. For example, under HB 228, if an individual in a crowded theater asked a rude patron to quit talking on his cell phone during the movie, and the rude person responded with a threat of bodily injury ("Shut up or I'll punch you in the nose!"), the first individual could then draw his concealed weapon, point it in the air, and say, "I have a gun and I will not be intimidated any more!" While the amateurish drafting of HB 228 forbids discharging a firearm in

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the direction of another person, it suggests by implication that a person could crank off a round into the ceiling for emphasis. Under HB 228, no crime is committed. He did not point the weapon at anyone; he only displayed it for defensive purposes because he felt "threatened" with bodily injury. HB 228 also condones without consequence the firing of the weapon in the air for defensive purposes. Montana's current law uses objective standards—how would a reasonable person respond—in such situations. HB 228 avoids the reasonable person standard and now adds to Montana's criminal code the subjective standard—the individual's claimed perceived fear—whether reasonable or not.

5. The amendments to the concealed weapons sections gut the permitting process. Since anyone acting under HB 228 can carry concealed without a permit or any screening procedure whatsoever, for all intents and purposes, the permitting process is gone. Perhaps this is why the sponsors are also repealing Section 45-8-317, the list of exceptions currently applied to the law. After all, with no need for permits or screening, there is no need for any exception. Thus, convicted violent/sexual offenders will no longer be screened or prohibited from carrying concealed weapons. The plain language of HB 228 Section 11(1)(2) allows such convicted felons to carry concealed weapons, so long as the convicted felon was not using the weapon to commit another crime. Under current law, when a law enforcement officer stops someone for a traffic violation and a pat-down for officer safety reveals a convicted felon is carrying a concealed weapon (it does not have to be a firearm), that is a felony.

Under HB 228, there will be no felony arrest sanctions available to law enforcement, because the officer cannot know whether the felon was carrying the concealed weapon to "commit a crime." The officer must wait until the felon has actually committed the crime with his hidden weapon and only then can he be charged with a misdemeanor. Unfortunately, there must first be another victim before this misdemeanor can be charged. Authorizing convicted felons to covertly arm themselves without consequence presents an extremely dangerous situation for law enforcement and the general public.

6. More troubling is the next scenario. Once violent criminals realize HB 228 not only encourages but gives them permission to brandish their weapons at each other without any criminal consequence, the public's safety will be shattered. Further, once weapons are "displayed," HB 228 then arguably allows the other party to defend themselves anywhere and anytime they are lawfully located (parks, malls, intersections) with deadly force. HB 228 neither recognizes nor gives law enforcement the ability to arrest mutually-agreed combatants, even if they mutually agreed to illegal activity. Other states provide no such safe harbor.

7. HB 228 pretends to "solve" a problem that does not exist. Proponents of HB 228 and its supporters have failed to identify or name any specific case or any specific incident where someone was harmed because HB 228 was not the law. The proponents fear that prosecutors and law enforcement are running amok depriving ordinary citizen of their Second Amendment rights. Some would have you believe that innocent Montanans who have lawfully used firearms to protect themselves are being arrested and prosecuted across this state. Yet, not a single case has been presented for consideration. But if such a case really did happen, somewhere, sometime in this century or last, we all should be talking about it. The fact that we are not speaks highly of our citizens and our law enforcement. HB 228 is a clumsy solution in search of a nonexistent problem.

8. Attached are the relevant sections of the Montana Codes Annotated (MCA) on the justifiable use of force and carrying concealed weapons.