MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD,** on January 28, 1999 at 9:00 A.M., in Room 413 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 215, SB 257, 1/25/1999
Executive Action: None

HEARING ON SB 257

Sponsor: **SEN. DUANE GRIMES, SD 20, Clancy**

Proponents: **Judy Wang, Missoula Assistant City Attorney**
Mike McGrath, Lewis and Clark County Attorney
Rich Ochner, Missoula City Police Detective
Kirsten LaCroix, Missoula County Attorney's Office
John Connor, Attorney General's Office

Kathy Sewell, Administrator of Montana Coalition Against Domestic and Sexual Violence
Sharon Hoff, Montana Catholic Conference
Dennis Paxinos, Yellowstone County Attorney
Rebecca Moog, Montana Women's Lobby
Bob Anderson, Montana Sheriffs' and Peace Officers Association

Opponents: **Scott Crichton, American Civil Liberties Union**

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, Clancy, introduced SB 257, which deals with whether or not sexual gratification needs to be present in order for a sexual crime to be charged.

{Tape : 1; Side : A; Approx. Time Counter : 9.05}

Proponents' Testimony:

Judy Wang, Missoula Assistant City Attorney, stated that two years ago a legislative committee was asked to address a problem in Montana law caused by the fact that sexual assault, indecent exposure, and sexual intercourse without consent all require proof of sexual arousal or gratification on behalf of the victim or the perpetrator as an element of the crime. The problem is that sex crimes are really assaults on victims of a sexual nature but may not involve sex at all. These crimes are violent and about power, not passion.

An instance that addresses this issue is a situation where a number of years ago a husband was upset that his wife had been out late and as a result he proceeded to beat her. He kicked her and thrust his hand more than once into her vagina and then tried to also insert a deodorant can in her vagina. Peace officers in Missoula were concerned that she had been raped and filed the case as a rape. The county attorney determined that there was no evidence that she was sexually aroused or gratified and also there was no evidence that the perpetrator was sexually aroused or gratified. This was not a sexual intercourse without consent case. It was a misdemeanor case.

She also explained another case of indecent exposure where a man was driving around a major parking lot with his pants down. There were many children around. When her adult victim saw him, it was not clear that he had an erection. He was charged with indecent exposure but there is a difficult proof problem.

Another case involved a 17-year-old girl who on her first day at a new job had a 40-year-old boss who thought that as a part of her orientation program she should be exposed to seeing his genitals and also should be exposed to him fondling her breasts. She was not sexually aroused or gratified. At trial, he claimed that it was all a horrible mistake and he was not aroused or gratified. He was convicted, but getting the conviction was a major problem.

This bill adds language to address sexual intercourse without consent when sexual arousal or gratification cannot be proven but it can be proved that it was done to humiliate or degrade the victim or done to cause bodily injury to the victim. This is a change in Montana law which is needed to effectively prosecute people who are inflicting violent crimes on others. Part of the element of the crime should not be sexual gratification or arousal alone. If it is done to humiliate or degrade, that should be an element as well. Written testimony of **Ms. Wang**, **EXHIBIT(jus22a01)**.

Mike McGrath, Lewis and Clark County Attorney, remarked that a few years ago an elderly woman was brutally beaten and raped by a transient. In the course of this assault, which took place over a period of many hours, he inserted a number of things into her vagina. By the time of trial, she was not able to go to trial. She was placed in a nursing home in another state and her condition deteriorated to the point where she was not able to testify. At trial, they charged the transient with two offenses, aggravated assault for the beating and sexual intercourse without consent. They proceeded to trial with sexual intercourse without consent even though the victim could not testify because they had testimony from the medical personnel at the emergency room that they had found cigarette papers that had been inserted into her vagina. They convicted the man for the offense of aggravated assault but the jury acquitted the man on sexual intercourse without consent. In interviewing jurors after the trial, they were informed that the jurors did not feel that they could prove the statutory requirement of sexual gratification for either party.

Rich Ochner, Missoula City Police Detective, claimed that they have several cases where the man is impotent and has inflicted objects into children. There is no way to show sexual gratification. In years past, the rape statute did not cover coercion. The legislature saw this as a problem and added coercion which helped them to be able to hold people accountable and responsible for their actions.

In one of his cases, a six week old child was molested by her father. He said that he was under the influence of a muscle relaxer which caused him to be temporarily impotent. This man took responsibility because his child was involved, but a very zealous defense attorney may have been able to defeat the charge.

Another case involved a man in a fraternity who called a group of people to watch as he took a very intoxicated female and entered a beer bottle into her to the point where he caused a vaginal tear one inch in size. The medical examiner said this was equivalent to a woman giving childbirth. If the statute contained an element that showed degradation and humiliation, it would fit the crime.

In his interrogations or interviews, the offender often tells him that they made a mistake and they know it was humiliating and degrading and the act was not to please either person but just that an urge overcame this person.

Kirsten LaCroix, Missoula County Attorney's Office, related that this bill will fill a void that needs to be filled. Montana does not have common law crimes. Every crime has to be specified in statute. Sex offenders are not being charged due to the current law. She has had a case where a five month old infant's babysitter impaled the infant, without her diaper on, upon a blunt object which caused severe vaginal tearing. They are required under the statute to prove that this person committed the crime for sexual reasons. The woman was not charged.

Another case involved a young boy in the care of his foster father who in the course of several months, had his genitals repeatedly scrubbed to the point that his testicles were raw from being scrubbed with a scrub brush. Without a conviction, they are unable to get sex offender treatment for this person.

In a case that she prosecuted, a man who had four girls molested all the girls. They could prosecute for the molestation of one of these girls. She had to put all the children on the stand to testify against their parents. The defendant refused to acknowledge that there was a sexual problem and refused to get sexual offender treatment.

In approximately two-thirds of sex offender cases that come across her desk, she does not file charges because she knows that she cannot prove sexual gratification as required in the current statute.

John Connor, Attorney General's Office, conveyed that they have been struggling to figure out how to repair the statutes that talk about intent or purpose with respect to sex crimes. They

are trained to believe that a person commits a sex crime because that person is trying to gain power of some sort over the victim. This bill is a good step forward in terms of sound public policy. It simply focuses the attention of the fact finder on the true motivation of the offender.

Kathy Sewell, Administrator of Montana Coalition Against Domestic and Sexual Violence, remarked that she is a rape survivor. She was raped in California when she was quite young. If her rape had gone to court in Montana under this statute, it would not have been considered rape. The man entered her with a knife and damaged her to the point where she can no longer have children. Her four-year-old son viewed the attack. This man had no sexual gratification. Only about 25% of the rape victims in Montana report the rape to law enforcement. Woman know that they will have to prove sexual gratification and this is a very difficult place to put victims when they are already trying to figure out what they are going to do with their lives. Treatment for sexual offenders cannot be obtained if they are not convicted.

Sharon Hoff, Montana Catholic Conference, stated that they base their positions in the legislature on the dignity of the human person. Only having a definition of sexual gratification, flies in the face of the dignity of a person. The additional language of bodily injury, harassment, and degrading is critical to the statute.

Dennis Paxinos, Yellowstone County Attorney, maintained that the reason for sex offenses usually has nothing to do with sexual gratification. This is about power, control and revenge. This language will allow the state to present a case which will involve the sex offender getting treatment.

Rebecca Moog, Montana Women's Lobby, rose in support of SB 257.

Bob Anderson, Montana Sheriffs' and Peace Officers Association, rose in support of SB 257.

Additional written testimony in support of SB 257:

Robert M. McCarthy, Butte-Silver Bow County Attorney, EXHIBIT(jus22a02)
Aileen Miller, Deputy Hill County Attorney, EXHIBIT(jus22a03)
Joan Gonzales and Michael Grayson, County Attorney's Office, Anaconda-Deer Lodge County, EXHIBIT(jus22a04)
James A. Hubble, Attorney, EXHIBIT(jus22a05)
Gary Ryder, Treasure County Attorney, EXHIBIT(jus22a06)
Don Morman, Missoula Sheriff's Dept., EXHIBIT(jus22a07)
Lt. Edwin R. Brannin, Missoula Sheriff's Dept., EXHIBIT(jus22a08)

Ron J. Silvers, M.Ed.,LPC, Clinical Member MSOTA, EXHIBIT(jus22a09)
Jamie Sowre, YWCA Sexual Violence Services Coordinator, EXHIBIT(jus22a10)
Todd S. Whipple, Deputy Gallatin County Attorney, EXHIBIT(jus22a11)
CC Ibsen, Missoula County Deputy Sheriff, EXHIBIT(jus22a12)
Michelle T. Friend, Deputy Yellowstone County Attorney, EXHIBIT(jus22a13)
Jennifer Gibson, Rural Crime Victim Advocate, EXHIBIT(jus22a14)

{Tape : 1; Side : A; Approx. Time Counter : 9.30}

Opponents' Testimony:

Scott Crichton, American Civil Liberties Union, raised a concern regarding the vagueness of the language and its applicability. This bill applied outside of specifics could complicate issues for people. A shy guy in the locker room who is having towels snapped at him by aggressive macho dudes, could become an element in sexual harassment cases. He also saw it becoming a tool in divorce cases. He is especially concerned about the vagueness of language that speaks to harassing, degrading, or humiliating. He would not want the state to infer from this language that it is appropriate for them to start defining what type of sexual interactions between consenting adults is their business. Some people do engage in consensual sexual acts that could be defined as harassing, degrading, or humiliating. Some people find pleasure in that. He questioned whether this could be getting to some of the issues in the Driesen case or in the Griswold case. This in no way undermines the heartfelt and important testimony of defending women and children against sexual perpetration.

{Tape : 1; Side : A; Approx. Time Counter : 9.34}

Questions from Committee Members and Responses:

SEN. DOHERTY questioned why the indecent exposure language added the word "abuse". **Ms. Wang** explained that they reviewed language from 30 different states and adopted language from the District of Columbia. They did not leave "bodily injury" in the indecent exposure statute because they could not envision a factual scenario where indecent exposure would involve a person causing bodily injury to a victim. There could be the circumstance where they were causing abuse. Abuse is very difficult to define. Since the definition of bodily injury has been used under Montana law for many years, it is used specifically where it applies.

SEN. DOHERTY questioned whether an over zealous prosecutor could use this statute to infringe on private consensual activities. **Ms. Wang** stated they are not amending the core law and are not doing anything to change the part of the crime dealing with "without consent". Towel slapping in a locker room is not without consent sexual contact. With indecent exposure, a person who exposes himself is likely to cause affront or alarm. A locker room is where one would dress or undress.

Mr. Connor maintained that the changes are in specifically defined statutes. Working in the areas where legislation is put into effect, worst case scenarios are usually not encountered. The majority of complaints his office receives about county attorneys involve situations where someone is not happy with the fact that the county attorney has decided not to prosecute a case. The worst case scenario will not occur because both the city and county attorneys offices have far too much to do to focus on situations that do not constitute egregious criminal conduct.

SEN. HALLIGAN remarked that it is very important that the record be clear on the sexual response portion of this legislation. **Mr. Connor** explained that his understanding of the term is having to prove a potential physical response as opposed to a mental state on the part of the victim or the offender. Proving response includes actually visualizing a physical response as opposed to desire which is in the mind of the person involved.

SEN. HALLIGAN questioned whether the other proponents agreed with **Mr. Connor's** definition. The proponents agreed.

Mr. Connor further stated that the terms "humiliate, harass, degrade" are similar to terms found in other areas of the code. Stalking uses the terms "humiliate or intimidate". At trial, the jury is told that those terms have common understanding and common meaning and if there is a problem, they are defined by dictionary definitions.

SEN. HALLIGAN remarked that the word "intimidate" is not included in the wording "to humiliate, harass, or degrade". He questioned why the word "intimidate" was not used. **Mr. Connor** believed harassment could also involve intimidation.

Mr. Wang explained that the language they used from the District of Columbia statute did not use the word intimidate. She added that she believed the language covers intimidation factors. Also, these are alternative reasons.

CHAIRMAN GROSFIELD was concerned with the vagueness of the language allowing for applicability which was not intended by the legislation. An example would be a legislator who presented a bill that some people did not like. After the hearing, the legislator could be in a crowded elevator and inadvertently brush against a female's breast. Later, she decided to hire a lawyer. This statute could be waived in the face of an innocent person. He was concerned about this statute being misapplied. **Ms. Wang** responded that in any criminal case mental state needed to be proven. There would need to be proof that someone was acting knowingly and that they were aware of their conduct or that they acted purposely and had conscious object to engage in that conduct. In the above example, there would be no intent on the legislator's part to humiliate, harass, degrade, or embarrass the person in the elevator. There may be circumstances where something like that could evolve into an offense. When she works with sex offenders, there are times in a crowded area where men or women will repeatedly brush up against the genitals of another person.

Mr. Crichton commented about a situation where a young girl mooned some boys who were riding on a bus. This would be knowingly exposing yourself to shock or to alarm. Anyone who is designated a sexual offender has to register for life. He was concerned about a youthful offense. He could also see this applied in an argument in a divorce proceeding.

SEN. BARTLETT stated that the statute on incest used the term "sexual contact". She added that the Griesen? case affected the deviate sexual conduct but the definition of deviate sexual conduct includes the term "sexual contact". She asked for an analysis of how the changes in the definitions might come into play in relation to incest or deviate sexual conduct. **Ms. LaCroix** stated that the incest statute incorporates, in the substantive statute, the definition of sexual contact. They are not changing the core requirements of what the state needs to prove in the offense itself. Incest is a good example of an umbrella statute. If there is a family relationship, they can charge incest.

SEN. BARTLETT raised a concern about a teenager who could be angry with her father for grounding her and decide to go to a school counselor and say that her dad has been playing around with her. Using the language of sexual contact including touching through clothing, could she make a case against her father for incest when nothing of the kind really happened.

Ms. LaCroix stated that they deal with these questions all the time. The first question she asks herself is whether she

believes the person has been sexually violated. This statute will not change the things they look at when they assess credibility. They generally try to find corroborating evidence and expert opinions on whether or not this person is truthful.

{Tape : 1; Side : B; Approx. Time Counter : 9.55}

Closing by Sponsor:

SEN. GRIMES asked **Mr. Ochner** to address false or weak allegations. **Mr. Ochner** explained that his job is to be the objective fact finder. The first thing he reviews is the motivation for the person making the complaint. He needs to be convinced of the facts before he can even attempt to convince a prosecutor who needs to convince 12 people of the facts. If he is not convinced and there is no corroborating evidence, in most cases he will not even take the case to a prosecutor.

SEN. GRIMES remarked that every community is affected by these type of circumstances. It is very sad that this type of legislation is necessary, but it is also very important legislation.

HEARING ON SB 215

Sponsor: **SEN. SUE BARTLETT, SD 27, Helena and Unionville**

Proponents: **Mike McGrath, Lewis and Clark County Attorney**
Rich Ochner, Missoula City Police Detective
Kirsten LaCroix, Missoula County Attorney's Office
John Connor, Attorney General's Office
Dennis Paxinos, Yellowstone County Attorney

Opponents: **None**

Opening Statement by Sponsor:

SEN. SUE BARTLETT, SD 27, Helena and Unionville, introduced SB 215. The only substantive change is on line 15 which makes the maximum penalty for negligent homicide 20 years instead of 10 years. She believes that the sentence range for crime should reflect the severity of the crime and be comparable to the severity of other crimes that have the same kind of sentence range. A ten year penalty for someone convicted of negligent homicide does not meet that test. Negligent homicide is a crime that has the broadest set of fact circumstances under the law that could occur for someone to end up charged with this crime.

There are people who have been convicted of negligent homicide who have received suspended sentences. The facts of their particular case were sufficient to convince the judge that a suspended sentence was an appropriate punishment. There have been other circumstances where the judge did not feel that 10 years was an adequate penalty but that was the highest penalty available.

There was a case in Great Falls where an individual was convicted of aggravated assault. The crime included an individual shaking a child and causing permanent impairment to the child. The individual was convicted of aggravated assault and received a 15 year sentence. Recently an individual was convicted of negligent homicide for the death of his infant daughter from shaken baby syndrome. Sentence has not been passed in that case but the maximum he could receive would be 10 years.

{Tape : 1; Side : B; Approx. Time Counter : 10.03}

Proponents' Testimony:

Mike McGrath, County Attorney, explained that the state does not have a child homicide statute. They are finding a larger number of cases in this area in recent years. One of the reasons is the sophistication of medical technology available for arriving at the cause of these types of injuries. There have been cases where a care giver for an infant shakes the child so violently that it creates a number of tears in the brain and the child dies or is severely injured. The person who shakes a baby enough to cause a death needs to use an incredible force. The person is not shaking the child to cause its death. The person is shaking the child out of some inappropriate response to the child. Attempted or deliberate homicide doesn't fit the crime. Negligent homicide is usually charged. The definition of negligent homicide is a wanton and willful disregard of a particular result. There are some cases where documentation shows prior hematomas. In these case a 10 years sentence, where the person may only serve five years, is not an adequate sentence.

Another situation involved a man who now has 12 DUIs. When he had 7 DUIs, he was given a year in the county jail. He did not have any treatment while in jail. In less than 40 hours after he was released from jail, he was the driver of a vehicle that was involved in an accident and a 15-year-old girl was killed. This is a classic negligent homicide case in Montana. He had many opportunities to address his drinking and knew it was a dangerous situation to drive while intoxicated, but did it anyway. In this case, he was sentenced for 10 years and served his time. Since

his release he has had three or four DUIs. On the last DUI he was charged with criminal endangerment and sent back to prison.

Mr. McGrath further commented that in the fiscal note, exhibit 1, item #2 indicates that the average net sentence between 1994 and 1998 for negligent homicide is 8.6 years. He didn't believe this addressed actual incarcerations but that it also included suspended sentences.

Dennis Paxinos, Yellowstone County Attorney, rose in support of SB 215. In Montana, a third offense for indecent exposure carries 100 years in the Montana State Prison. If you shoot someone and are charged with aggravated assault, the sentence is up to 20 years. Assaulting a peace officer or a judicial officer carries a twenty year sentence. If you are convicted of a aggravated assault on a child, the sentence is 20 years. If you kill the child, but you didn't mean to do it, the sentence is up to 10 years.

A very difficult job for a prosecutor is explaining Montana's sentencing statutes to a victim. An individual who receives a 10 year sentence will be automatically eligible for parole in two and a half years. If they served time in jail awaiting the trial, credit will be given for that time. Trial judges routinely will offer "lesser included" from deliberate, to mitigated deliberate, to negligent homicide. Those offenses are being offered to juries. The difference of penalties between a deliberate homicide, which is 100 years in prison; mitigated deliberate homicide, which is 40 years; and negligent homicide, which is 10 years, is too broad a spectrum.

Kirsten LaCroix, Missoula County Attorney, reported that two years ago a 12 year old and a 8 year old were walking along Rattlesnake Drive in Missoula with their mother. Meanwhile, Robert Davis, who was on probation for drinking and driving and had been ordered not to drink, drive, or refuse a blood test, drove off the road while intoxicated and ripped mom right out of her children's hands and they both watched her die. The defendant sobered up and decided to cooperate the next day. Had Mr. Davis broke into their home and taken a television set, he would be facing 30 years - 10 for the theft and 20 for the burglary. If he had taken their parent's checkbook and forged their names for a $25 amount of groceries, he would have been facing 20 years for forgery. If he had failed to return rental property that he had borrowed, he would be looking at 10 years in prison. He took the life of the children's mother and his maximum penalty is up to 10 years.

The maximum penalties affect the prosecutors job at every stage of the process. It weighs heavily into negotiating. With a 10

year maximum, the most that will be served is two and a half years in prison with some of that chipped away due to jail time. This limits the defendant's risk and makes them more willing to want to go to trial. In the case mentioned above, it also affected the restitution. The family of the victim was homeless. The funeral expenses were monumental to them. Even though the individual received a ten year sentence, they do not have a cushion of time that they can put a suspended sentence on him afterwards in order to enforce that he pay back the family's restitution of medical bills and funeral expenses. We can never bring the loved one back, but we can give the victim's family a small slice of justice.

Rich Ochner, Missoula City Police Detective, reported that in 1984 a man came to Missoula and told his friends that he was going to steal a car and, if stopped by the police, was going to kill the police officer. He proceeded to steal a car and some gas and was pulled over by Deputy Al Kimery?. The man rolled down his window, stuck his gun out the window, shot, and killed Deputy Al Kimery. This offense went to trial on the charge of deliberate homicide and, in the alternative, negligent homicide. The jury hung on deliberate homicide and almost convicted on negligent homicide. This case was retried and the man was later convicted of deliberate homicide. Deputy Al Kimery left a wife and two children. They were told that, if convicted, the worst the offender would serve was 10 years in prison. At the time, a persistent or dangerous offender would only serve five years. Sometimes justice needs to come in the way of sentencing. When negligent homicide is charged, they need to prove gross negligence, which is very difficult to accomplish.

John Connor, Attorney General's Office, explained that the **Montana County Attorney's Association** had brought this bill to **SEN. BARTLETT** envisioning a concept that would allow for a shaken baby situation to include a negligent homicide that resulted in the death of a child. **SEN. BARTLETT** suggested changing one word which involved changing "10" years to "20" years. This accomplished their intent.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. JABS questioned the different homicide charges in current law. **Mr. McGrath** clarified that there are three homicide charges in Montana which include deliberate, mitigated deliberate, and negligent. The maximum for mitigated deliberate homicide is forty years and the maximum for deliberate homicide is 100 years or, in some cases, the death penalty would apply.

SEN. JABS further questioned whether negligent homicide was charged as a lesser offense when mitigated homicide could not be proven even though the prosecutor may believe that it was mitigated homicide. **Mr. McGrath** explained that mitigated homicide is homicide that is committed under substantial duress. The old classic example of mitigated homicide would be a spouse coming home and finding the other spouse having sex with another person and killed one or both of the parties. It isn't very often that a charge is lessened from mitigated deliberate homicide to negligent homicide. With the shaken baby example, the offender may have been under duress but he still wasn't trying to kill the baby and simply acted grossly negligent.

SEN. GRIMES remarked that he found the inconsistencies in the law very frustrating. He asked for a list of the different penalties and fines in the criminal code. **Mr. Connor** responded that it would take a little time to pull a list together. There is no consistent thread when individual statutes are amended. He offered to work on such a list.

Closing by Sponsor:

SEN. BARTLETT explained that she had material that could either substitute for the information **Mr. Connor** was asked to prepare or be the starting point for it. Serving on the Sentencing Commission provoked her interest and understanding of sentencing structure in Montana. A list of different crimes was developed by maximum and minimum penalties. This would not include fines. It is inadequate because the sentencing statutes have become very convoluted. For example, negligent arson carries a 10 year maximum while arson carries a 20 year maximum. She does not know enough about the individual crimes to be able to understand the differences. She suggested that **Mr. Connor** provide a brief summary that would help the Committee understand each of the individual crimes.

Montana has an indeterminate sentencing system which provides a range of years available to a prosecutor and a judge to determine, on a specific case basis, an appropriate sentence. The prosecutor and defense attorneys come in with their recommendations, but the judge makes the final decision. Because the facts in different negligent homicide cases can vary so dramatically, it seems to be most appropriate to give judges a decent sentence range to work under. In the case of negligent homicide, she believes that 0 to 10 years in adequate and that 0 to 20 years would be more appropriate.

ADJOURNMENT

Adjournment: 10:37 A.M.

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SEN. LORENTS GROSFIELD, Chairman

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JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus22aad)