MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 29, 2003 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

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 & Date Posted: HB 84, 1/24/2003; HB 149, 1/24/2003
HB 15, 1/24/2003;
Executive Action: None

HEARING ON HB 84

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **John Connor, Attorney General's Office**
Jim Smith, Montana County Attorneys Association

Opponents: **None**

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 84. He explained the original intent of the bill was to eliminate the offense of mitigated deliberate homicide and to recognize the concept of mitigation is a sentencing concern. In all other areas of the criminal code, mitigation is a concept that is presented to the judge after the finding of guilt. After the enabling language, the entire bill was stricken and rewritten. We currently have three homicide offenses: deliberate homicide, mitigated deliberate homicide, and negligent homicide. Deliberate homicide and mitigated deliberate homicide result when an actor purposely or knowingly causes the death of another human being. Negligent homicide occurs when the actor negligently causes the death of another human being. Purpose, knowledge, and negligence are defined in the criminal code. Mitigated deliberate homicide has an additional element. This element is the actor was acting under the influence of extreme emotional stress. The current mitigated deliberate homicide statute provides that mitigation is an affirmative defense. It is illogical to create an affirmative defense in the statute that creates an offense. This blurs the line of duty of responsibility for both the prosecution and the defense. In any criminal case, the state has the burden of proving all elements of the offense beyond a reasonable doubt. The defense, when it raises an affirmative defense, has the burden of injecting an affirmative defense into a case and then proving by a preponderance of evidence that the defense exists.

He presented an example of a case wherein a person was charged with deliberate homicide and the jury acquitted the person of deliberate homicide. The verdict form does not state the element that is missing, but if the state does not prove all elements of a crime the defendant is acquitted. Either purpose or knowledge or causation of the death was missing according to the jury. The jury convicted that person of mitigated deliberate homicide. That is illogical. If purpose or knowledge or causation was missing, it would also be missing in mitigated deliberate homicide too. Those elements didn't change. Judges and juries have a difficult time implementing the legislative policy

underlying our homicide statutes. In the House Judiciary Committee, testimony was given by the defense bar that in the case of homicide most states have varying degrees of homicide to include premeditated murder, voluntary manslaughter, involuntary manslaughter, etc. In the 1970s, Montana adopted the model penal code version of homicide. The issue was brought up in House Judiciary that defendants were being deprived of their due process or their ability to argue their actions were mitigated at the adjudication stage rather than the disposition stage.

The amended bill allows for the retention of the middle tier offense in the homicide scheme. It allows for the retention of mitigated deliberate homicide as a separate offense. It does not relegate the concern to the sentencing phase so a jury, rather than the judge, will still decide the question. It does not preclude a defendant from showing evidence as to mitigation. Should a jury convict of deliberate homicide under this proposed scheme, the judge will still be allowed to entertain evidence as to mitigating factors before the time of imposition of sentence. This proceeding respects the defendant's rights and gives the defendant two opportunities to argue mitigation. The first opportunity will be to argue mitigation and present evidence on mitigation as to the nature of the offense and the question of guilt or innocence. The second opportunity would be at sentencing to argue mitigating evidence to show a lesser sentence would be appropriate.

Proponents' Testimony:

John Connor, Attorney General's Office, rose in support of HB 84. He stated that the genesis for this bill came from the fact that the people who practice criminal law have been experiencing problems with the mitigated and deliberate matters since 1987. They had two alternative ways to approach resolution of the problem. They selected the approach in the introduced bill but the House Judiciary Committee did not think this was appropriate. The alternative route in this bill is fine. Either approach will correct the problem. Prior to 1987, the law stated that neither side has the responsibility of proving mitigation but that either side could raise mitigation and, if there were evidence of mitigation in the record, the court would instruct the jury that it was a lesser included offense to deliberate homicide and the jury could make the decision. This law was stated in State v. Gratzer, a 1984 case from Silver Bow County. In Gratzer, the court pointed out that mitigated deliberate homicide is not an affirmative offense. The Montana County Attorneys Association decided to clarify the Gratzer decision by proposing to the legislature that mitigated deliberate homicide can be an affirmative defense. It is both an offense and a defense. The defendant can maintain that he did not raise mitigated deliberate

homicide as an affirmative defense but this was not necessary because it is an offense as well. The defendant will then ask for a lesser included offense on the jury instruction. In other cases, the defense will come forward with the burden of proof and argue they have this affirmative defense available to them. Because the law also allows the state lesser included offense instructions, he has done so but the defense has objected because mitigated deliberate homicide is only an affirmative defense. The judge has a problem with jury instructions and the verdict forms are confusing. This bill would go back to the way things were before 1987 and incorporate some language from the Gratzer decision to make it clear that neither side has the burden of presenting the evidence but either side may raise it. If there was evidence in the record of mitigation, the court would decide whether or not to give an instruction on it. If the defense wanted to go for acquittal and did not present any evidence of mitigation, the jury would not be instructed on it.

He tried a case in Miles City wherein a woman killed her baby. The baby was born in the bathroom and she smashed the baby's head against the tub, wrapped the baby in a towel, put it in a bag with some kitty litter and placed it in the basement. Six months later, law enforcement found the baby. The defense was that the child was stillborn and therefore, there could not be a homicide. The jury decided otherwise due to the medical evidence about the damage to the skull of the child. In that case, the defense presented evidence of mitigation. There was evidence of mitigation in the record in the form of extreme mental or emotional stress for which there is reasonable explanation or excuse. **Mr. Connor** told the judge that since there was evidence of mitigation in the record, the court would need to instruct on mitigation. The defense did not want that. They wanted the jury to feel sorry for the defendant but did not want to risk a conviction for mitigation. The defense wanted to use deliberate homicide and then hope for an acquittal. The judge decided the state was entitled to a mitigation instruction so it was allowed.

Jim Smith, Montana County Attorneys Association, rose in support of HB 84 as amended.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL noted that on page 2, line 6, the language stated that neither party has a burden of proof as to mitigating circumstances. He questioned whether there was a definition of mitigating circumstances. **REP. NEWMAN** explained that mitigated

deliberate homicide is defined in statute as extreme mental or emotional stress for which there is a reasonable explanation or excuse. He admitted that the term "mitigating circumstances" is quite broad. This could include unusual emotional stress, medical treatment, or physiological problems that don't rise to a level of an excuse under the law. If a person suffers from a mental disease or defect which precludes them from acting knowingly, they are exonerated from criminal liability. There may be a mental condition that does not rise to that level. The state can still present that information to a trier of fact.

SEN. MIKE WHEAT remarked that on page 2 the language stated that mitigated deliberate homicide is a lesser included defense of deliberate homicide. In the statute under deliberate homicide, the language describes a different circumstance when a homicide is committed. He questioned why mitigated deliberate homicide should not also be a lesser included offense in 45-5-102(1)(b). **REP. NEWMAN** stated that this section is the felony murder rule. This comes from the common law doctrine and recognizes that if the actor is engaged in the commission of a forcible felony, such as a robbery or a kidnap, and a death is the result of that forcible felony, the felony murder rule would apply and then the actor is liable for homicide as well. Those circumstances are distinct from the question of whether the actor purposely or knowingly caused the death of another person. Evidence of mitigation in that instance would relate solely to sentencing and not to the determination of guilt or innocence.

SEN. WHEAT commented that there is an issue in regard to whether or not the district judge will include a lesser included offense jury instruction. Under the proposed language, would a deliberate homicide charge contain a lesser included offense as a jury instruction if the defendant gave any evidence of mitigation. **REP. NEWMAN** affirmed that the intent of the language change would state that mitigated deliberate homicide is a lesser included offense of deliberate homicide. If either the state or the defense offered evidence of mitigation during the trial phase, that instruction would be warranted. He had a case involving a murder at a local pawn store. The defendant stabbed, bludgeoned, and hacked his victim 25 times with five different weapons. There were blocks of injury in five different locations on the victim's body. The facts of this case would hold that this was deliberate homicide in its purest form. A report came back from the state crime lab stating that the ten wounds on the back were inflicted after the victim had died. They were convinced that there was no question of mitigation. During the trial, the defense offered evidence concerning the defendant's family relationship and the reason why he was in the pawn store on that date. He had pawned hunting rifles that belonged to his

father-in-law and did not have the money to get them back. His father-in-law had been out of state and was returning within a week. The defendant was having marital troubles. The evidence was offered to show that due to this stress, he was not thinking in a rational manner. He was evaluated by several mental health professionals who all concluded he had the ability to act with knowledge and purpose. The defense brought the evidence forward not to show that he couldn't act with purpose or knowledge but to show that it was not a premeditated situation. In respect to jury instructions, the state offered mitigated deliberate homicide instructions based on the defense evidence. The defense attorney concurred that the issue should be given to the jury. The defendant told the judge it was his right to say all or nothing. He wanted to be guilty of deliberate homicide or acquitted. The judge made sure that the defendant was making a voluntary and rational choice. The judge ruled that he would not give the lesser included offense instructions. The jury convicted the defendant. With the changes being proposed in this bill, it would be clear to the judge that while neither party has to present evidence along those lines, if the evidence is injected, the judge should instruct the jury as to the high tier offense and the middle tier offense in the homicide scheme.

{Tape: 1; Side: B}

The House Judiciary Committee did not like the idea that mitigation was only reserved for a judge's determination after conviction.

CHAIRMAN DUANE GRIMES stated that he was intrigued by the original proposal. He questioned whether there was a concern that more defendants would inadvertently be acquitted because there would no longer be a middle tier and the mitigation circumstances would have been eliminated. **REP. NEWMAN** stated that originally he did not have that concern. The elements of both deliberate homicide and mitigated deliberate homicide still involve either purpose or knowledge and the unlawful causation of another's death. That would not change. He believes that it is logical to place mitigation in the sentencing concept rather than in the adjudication phase. This was not shared by the House Judiciary Committee or the House as a whole. They were comfortable with the idea of having a middle tier offense because they believed that it would be more consistent with homicide laws nationwide. He added the House amendments were acceptable to him.

CHAIRMAN GRIMES inquired what the practical effect would be for the jury to have the option of using mitigation in respect to the sentencing phase. **REP. NEWMAN** claimed that approximately 40

percent of the homicide offenders in the state are convicted of mitigated deliberate homicide as opposed to deliberate homicide. The net effect would be that those offenders are being sentenced in the two to forty year range rather than the ten to one hundred year range.

CHAIRMAN GRIMES asked if the Model Penal Code included the middle tier. **REP. NEWMAN** maintained that when Montana considered the Model Penal Code it included deliberate homicide, mitigated deliberate homicide, and negligent homicide. It did not contemplate the Gratzer decision and other court decisions that began to interpret that language.

CHAIRMAN GRIMES questioned whether a compromise was inadvertently suggested in nearly 40 percent of the cases. **REP. NEWMAN** noted that there would be a multitude of answers to that question. As a practical matter, having the middle tier offense does result in a number of persons being convicted of that offense. Prosecutors and defense attorneys also use the middle tier offense in plea negotiations. **Mr. Connor** stated that originally he believed the best way to address the problem would be to eliminate the mitigating aspect and make this a sentencing issue. He did not see that this would cause any damage to the defendant. If there was evidence of mitigation, the defendant would not be sentenced to more than 40 years. One of the pluses to the defendant was that he did not need to testify during trial to advance mitigation and risk cross examination as well as a possible conviction of the greater offense. He could do so during sentencing without risking that exposure. This would also reduce mental health testimony where mental health professionals state that the defendant had the capacity to act with purpose of knowledge but it was mitigated by certain factors. This decision should be left to the jury, not the expert.

He tried a case where the defendant shot and killed his cousin while they were both intoxicated. The state saw the facts as shooting and charged deliberate homicide. The defense was that the shooting happened in the course of an argument and because of the argument, which was precipitated by the victim, the defendant was in a situation where he was in control of the gun but the actual firing of the gun was an accident. He wasn't guilty of deliberate homicide because he didn't purposely or knowingly cause it. Mitigated homicide would not apply because it was not offered as an affirmative defense. It wasn't negligent homicide either because it was an accident. The state held that evidence of mitigation was in the record. The jury was instructed on deliberate, mitigated, and negligent homicide as lesser included offenses. The defendant was found guilty of mitigated homicide.

The jury saw it as more than an accident but less than a contemplated crime.

Closing by Sponsor:

REP. NEWMAN stated that the House Judiciary Committee as well as the House seriously considered this matter and determined that as a matter of public policy, we still need the middle tier offense. They wanted to make sure that the question was left in the hands of the jury instead of the judge. He firmly believes in the jury system.

HEARING ON HB 15

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **John Connor, Department of Justice and the Attorney General's Office**
Anita Roessmann, Montana Advocacy Program
Verner Bertelsen, Montana Senior Citizen Association
Jim Smith, Montana County Attorneys Association and Montana Sheriffs and Peace Officers Association
Chris Christiaens, Montana Chapter of the National Association of Social Workers

Opponents: **Rose Hughes, Montana Health Care Association**

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 15. This bill deals with the elderly and disabled abuse prevention act. In current statute, when dealing with abuse of the elderly or persons with developmental disabilities, we use the term "infliction of physical or mental injury". Those terms are defined in the code. Inflicting abuse upon an elderly or developmentally disabled person is a criminal offense. The changes in HB 15 would place the definition of bodily injury in the elder and developmentally disabled abuse prevention act. If these cases are prosecuted as criminal cases, the definition of bodily injury that is in the criminal code should be used.

Proponents' Testimony:

John Connor, Department of Justice and the Attorney General's Office, stated that this bill was requested by the Department of Justice, Medicaid Fraud Control Unit.

Anita Roessmann, Montana Advocacy Program, noted this bill inserts a definition of injury into the elderly and developmentally disabled abuse prevention act that is broader than the definition in the existing statute. The definition in the current statute is a felony definition. The new definition being proposed is not as demanding as the definition in the statute. It increases the likelihood that prosecutors will be able to use the elderly and persons with developmental disability abuse prevention statutes to prosecute crimes against some of the most vulnerable people in our communities.

Verner Bertelsen, Montana Senior Citizen Association, rose in support of HB 15.

Jim Smith, Montana County Attorneys Association and Montana Sheriffs and Peace Officers Association, rose in support of HB 15.

Chris Christaens, Montana Chapter of the National Association of Social Workers, rose in support of HB 15.

{Tape: 2; Side: A}

Opponents' Testimony:

Rose Hughes, Montana Health Care Association, stated the Association represents nursing facilities and assisted living facilities throughout the state. They have a problem with the practical application of HB 15. The elder abuse act deals with reporting requirements similar to child abuse reporting. It is important to raise awareness and make sure that people who come in contact with older people notice possible abuse and file reports. The reporting requirements apply to lay people to include employees in their nursing homes and assisted living facilities that may see something that concerns them. The language in the bill that is being stricken is a definition of mental injury and a definition of physical injury. When the law was enacted, they asked for a clear definition of abuse. There is a penalty for failure to report. The new language may be a good thing for the prosecutors and attorneys who understand the case law, but it sheds little light to the lay person who has the reporting requirement. The statute creates the criminal offense and also a reporting requirement. There are things that go on in their facilities that are not abuse but they would still counsel and/or discipline an individual staff member in that situation. The question they need to determine is at what point does this rise to the level of abuse under the elder abuse act and at what point do they have a reporting requirement.

Questions from Committee Members and Responses:

SEN. WHEAT remarked the definition of bodily injury in the criminal code is physical pain, illness or an impairment of physical condition and includes mental illness or impairment. Mental illness or impairment is not defined in the criminal code. The bill strikes the definition of mental injury. He questioned how the nursing homes would deal with the reporting requirement. **REP. NEWMAN** stated that he has discussed this issue with **Ms. Hughes**. Many of her concerns deal with criminal liability rather than the reporting requirement. Those determinations are left to the judge and the jury. The health care community reports suspected violations of the statute much along the lines of the child abuse reporting acts. The professionals do not make the call as to whether there is mental impairment or bodily injury as defined in the code. Cases of suspected injury are to be reported and the system will investigate, prosecute where appropriate and allow the finder of fact to make that call. There may be some growing pains for the health care industry while this is being implemented but in the long run this is good public policy. It means the same definition will be used throughout the stages to include the reporting, investigation, prosecution and the adjudication phases.

SEN. WHEAT asked how psychological abuse would be reported and also how it would be treated under the new definition. **REP. NEWMAN** conveyed the information would be reported to the elder abuse people who work for DPHHS and/or the sheriff or county attorneys office. It would be investigated, witnesses would be interviewed, and the injury would be observed. In the case of mental impairment, there would be consultation with an appropriate medical person. Perceived or slight injuries are weeded out in that process.

SEN. WHEAT further questioned whether the definition of mental illness or impairment was flexible enough to incorporate psychological abuse. **REP. NEWMAN** believed it was. Mental illnesses are typically organic in nature. They would look at the impairment which would include the apprehension, the fear, and the psychological well being.

SEN. WHEAT asked **Ms. Roessmann** if she had concerns regarding the definition of mental impairment being flexible enough to include those situations where elders are being subjected to psychological abuse. **Ms. Roessmann** did not have concerns in using the felony definition of bodily injury. Mental impairment is something that will be decided by the judge or the jury under the circumstances. The review will include the totality of

circumstances. This would not only include the injury but also the egregiousness of the conduct.

SEN. MCGEE stated that the existing language did not include reporting under the definitions section, 52-3-803. He asked **Ms. Hughes** if her concern was that they understood the old definitions but did not understand the new definitions. **Ms. Hughes** explained that the reporting requirements are in different sections of the elder abuse act. Section 52-3-811 includes the reporting requirements for health facility professionals and staff. Section 52-3-825 makes failing to report an offense. The reporting requirement is if you know or have reasonable cause to believe that an abuse occurred this must be reported. The definitions in the elder abuse act are clearer than the proposed definition.

SEN. MCGEE saw a disparity in the definitions between bodily injury as defined in Section 45 and all the other definitions of elder abuse. He asked **Kathy Seeley, Assistant Attorney General,** whether she had contemplated an amendment to the bodily injury section of the code to include the elder abuse statutes. **Ms. Seally** explained that they have situations come up where an aid in a nursing home is witnessed punching a patient with their closed fist. Under the current definition, they need to show a temporary disfigurement, permanent disfigurement, or death. This does not work for a misdemeanor count. Sometimes the cases are not reported. There may be no bruises although they know that an assault has taken place and it was elder abuse. The reporting requirements won't be changed. The criminal standard is clearer than the definition of physical injury and mental injury in the code at this time. People are reporting abuse and they know if it is something that could be raised to the level of a criminal prosecution.

SEN. MCGEE summarized that **Ms. Seeley** did not see a need to modify the bodily injury section of Title 45 to include any of the elder abuse language. **Ms. Seeley** affirmed this to be the case. She added that the criminal standard for a misdemeanor assault should not include a definition of death, permanent or temporary disfigurement.

SEN. MCGEE asked **REP. NEWMAN** if he would consider an amendment stating bodily injury has the meaning provided in 45-2-101, and then quote the language. **REP. NEWMAN** agreed to the friendly amendment and added that using the actual definition as opposed to the reference may be preferable. We do not want to look at narrowing the language in 45-2-101. The same protection should be afforded to seniors and the developmentally disabled that we afford to everyone else in the criminal code.

SEN. CROMLEY questioned if the statute contained an enforcement aspect. **REP. NEWMAN** asserted the abuse of the elderly or a person with a developmental disability was a criminal offense. This is in a different section of the code. House Bill 17 addresses the enforcement and penalties. House Bill 15 deals with the definitional portion of the elderly and developmentally disabled abuse prevention act.

SEN. CROMLEY further questioned whether the criminal statutes would refer to this section of the code. **REP. NEWMAN** explained that the statute that addressed the penalties is in the elderly and developmentally disabled abuse prevention act rather than in Title 45. This would be 52-3-825.

SEN. CROMLEY asked whether bodily injury included injury to the physical body and the mind. **REP. NEWMAN** clarified that bodily injury in the context of the physical injury would include physical impairment or pain.

{Tape: 2; Side: B}

SEN. PERRY asked for more clarification in regard to the changes that would occur by this legislation. **REP. NEWMAN** summarized that the intent is to make sure that the definition of injury is consistent and uniform with the definition used in all other criminal prosecutions. The definition of bodily injury that would be inserted into this act encompasses the definitions of mental injury and physical injury currently found in the elder and developmentally disabled abuse prevention act. It is important to use the same definition in all cases of prosecution. As a policy statement, they want to say that the definition used in the criminal code is the same definition that will be applied to the elder and developmentally disabled prevention act.

SEN. O'NEIL stated that a bedridden patient with arthritis would be in physical pain when the nurse would move the patient. Physical pain would be bodily injury. Page 3, line 10, of the bill states that serious bodily injury must occur before the department would review abuse. He questioned the definition of serious bodily injury. **REP. NEWMAN** stated that the definition would be found in 45-2-101(65) and states that serious bodily injury is bodily injury that 1) creates a substantial risk of death; 2) causes serious permanent disfigurement or protracted loss or impairment of a bodily function, member or organ; or 3) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function of a process of a bodily member or organ. Reporting will be done in a much broader scope of cases. In

cases of serious bodily injury there are other avenues of prosecution available.

CHAIRMAN GRIMES stated that the physical injury definition under this title is very similar to the serious bodily injury definition in Title 45. He questioned whether this might have a direct affect on the investigations. **REP. NEWMAN** reiterated that the definition of bodily injury used in the criminal code is broad enough to encompass the physical injury definition currently in the elder and developmentally disabled abuse prevention act. It is not as limited as the language on page 2, lines 19 and 20 in the current act. They do not want to restrict the definition of bodily injury only to cases of death, permanent or temporary disfigurement or impairment of a bodily function.

CHAIRMAN GRIMES noted that the definition under which an investigation would proceed would also change. He questioned the net effect of that change. **REP. NEWMAN** maintained that the definition of serious bodily injury, much like the definition of bodily injury, encompasses all of page 2, lines 19 and 20 of the bill. The definition would not be restricted.

CHAIRMAN GRIMES claimed that the change in definitions would apply only to institutions as far as reporting requirements due to the definition of professional. The elder and developmentally disabled abuse prevention act would apply to anyone. **REP. NEWMAN** affirmed this to be the case. Like the child abuse statutes, a laundry list of professional persons has been set up on whom the duty to report is imposed. The reporting duty is separate from who can be liable for the offense. A reporting duty may not be imposed on a family member who cares for an elderly person. If the family member abuses an elderly person, they can be prosecuted. This involves two distinct concepts.

CHAIRMAN GRIMES asked **Ms. Seeley** if she had thought about adding circumstances specifically to the existing definitions instead of tying this back to Title 45. **Ms. Seeley** explained the cases where no bruising is evidenced would be charged as misdemeanor assaults. They would like to use the elder abuse statute because it has a $1,000 fine or a year in jail as a maximum penalty on the first offense and a second offense would be a felony. Heightened protections for vulnerable adults makes sense. They did not consider appending more items onto the definition.

CHAIRMAN GRIMES questioned the number of misdemeanor charges that would now fall under Title 45. **Ms. Seeley** explained that her unit deals with people in facilities. In an average year, they charge a half dozen cases of abuse by a care giver in a facility.

SEN. PERRY asked **Ms. Hughes** if her objection was that persons caring for the elderly in a facility setting may be charged with a criminal offense. **Ms. Hughes** explained their concern is that the definitions used in the elder abuse act, which places a reporting requirement on them, be as clear as they can be so they know what needs to be reported. Under the current statute, they file hundreds of reports a year and perform follow up investigations in their facilities. A fraction of these instances are appropriate to be prosecuted. They want to be put on notice of what is expected of them.

CHAIRMAN GRIMES questioned whether there was a laundry list of circumstances that needed to be reported. **Ms. Hughes** explained that they try to help facilities figure out what to report. There is a lot of communication between their association, the facilities, and the DPHHS about reporting.

CHAIRMAN GRIMES asked **Ms. Seeley** whether there was a list of items that should be reported which were not being reported.

{Tape: 3; Side: A}

Ms. Seeley stated she did not have such a list. She does not see many of the reports that are made. If an aide is in the room and sees something they believe to be an abuse, they report it. Aides do no take this lightly because they are usually reporting a co-worker.

SEN. CROMLEY asked the origin of the term "bodily injury". **REP. NEWMAN** clarified that the definition came from the model penal code. As far as case law, this definition has been evolving since the early 1970s.

SEN. O'NEIL questioned whether the misdemeanor assault cases which were prosecuted had been reported. **Ms. Seeley** stated that a few were not reported and were brought to their attention through some other avenue.

CHAIRMAN GRIMES asked what additional items the nursing homes would need to instruct their employees to report under the new language. **REP. NEWMAN** answered this question in his closing.

Closing by Sponsor:

REP. NEWMAN remarked that he did not want to belittle the work done by the health care providers. Their work is very helpful in alerting the law enforcement community to potential cases of abuse. A great number of reports are generated and there is a limited number of prosecutions once the reports are investigated.

It may not be possible to prepare a laundry list. This is also the case in the current child abuse reporting act. **Ms. Hughes'** concerns are valid given a change in the law. In almost every case, the cases that are presently being reported will continue to be the cases that need to be reported. There may be some increase in reporting. The definition of bodily injury in the criminal code is more expansive than the current definitions of mental and physical injury that are in the abuse prevention act. **Ms. Hughes'** concerns are the same concerns that were voiced when the original language was enacted in the abuse prevention act. There is an important policy decision behind the elder and developmentally disabled abuse prevention act. These people are particularly vulnerable to abuse. The bodily injury definition encompasses physical pain, physical impairment, and mental impairment. There is over thirty years of case law interpreting those definitions.

HEARING ON HB 149

Sponsor: **SEN. DAN MCGEE, SD 11, LAUREL**

Proponents: **None**

Opponents: **None**

Opening Statement by Sponsor:

SEN. DAN MCGEE, SD 11, LAUREL, introduced HB 149 which he was introducing for **REP. DON HEDGES, HD 97, ANTELOPE.** This bill addresses the sentence review process by the Supreme Court. On page 1, lines 22 to 24, it states that the review division can meet in places other than Deer Lodge. On line 28 the language stricken allows for certain clerical help to be added for fixing their compensation. This would be a staff reduction. On page 2, line 4, there is a replacement clause. In 46-18-902, it states that a judge may not sit or act on a review of a sentence that the judge imposed. The new language would allow the Supreme Court to appoint an alternate member of the review commission. The current review is limited to those persons in state prison. Line 9 would allow the review of sentences to the Department of Corrections. Line 13 expands the notification that the clerk must perform to include the person's counsel. This is reiterated on lines 17 and 18. On line 22, it states that the review division may for cause shown consider any late request for review of sentence and may grant or deny the request. On lines 28 and 29, the language "either increasing or decreasing the penalty" is stricken. This language is inserted on page 3, line 1. Line 5 sets out that the person has the right to be represented by counsel. Lines 17 and 18 state that notifications should go out

to the defense counsel and the county attorney as well as the other entities enumerated. This bill allows the hearing officer to schedule the meeting in an appropriate place rather than just Deer Lodge.

Proponents' Testimony: None

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. CROMLEY questioned the reference to Billings. **SEN. MCGEE** noted that it may have to do with location.

SEN. WHEAT questioned whether the bill was requested by the Supreme Court. **SEN. MCGEE** was unaware of the genesis of the bill.

Closing by Sponsor:

SEN. MCGEE closed on HB 149.

ADJOURNMENT

Adjournment: 11:30 A.M.

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SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus19aad)