MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 30, 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:
Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: SB 123, 1/24/2003; SB 263, 1/24/2003
Executive Action: HB 48

HEARING ON SB 123

Sponsor: **SEN. BILL GLASER, SD 8, HUNTLEY**

Proponents: **Kristi Blazer, Montana Beer and Wine Wholesalers Association**

Opponents: **None**

Opening Statement by Sponsor:

SEN. BILL GLASER, SD 8, HUNTLEY, introduced SB 123. He noted that this bill was a concern of former **REP. KEN PETERSON** who was not reelected to the House. His concern dealt with young persons who had numerous DUI convictions. The bill adds that upon a third conviction, the court shall order the defendant's drivers license revoked until the offender reaches 18 years of age. The offender may not be issued a new license after reaching 18 years of age unless he or she presents to the driver's license examiner a certificate stating they have taken at least ten hours of instruction on the effects of driving under the influence of alcohol or drugs. The fine would not exceed the fine that could be imposed upon an adult. The person may not be imprisoned for failure to pay the fine. The language includes revocation of the license and seizure of the motor vehicle in an accident that exceeds $300.

Proponents' Testimony:

Kristi Blazer, Montana Beer and Wine Wholesalers Association, remarked that the association members are 27 small businesses throughout the state who sell beer and wine to retailers, not to consumers. The middle tier in the alcohol beverage industry, the wholesaling tier, came into existence in all 50 states at the end of prohibition. It was designed to put some distance between the manufacturer of the product and the ultimate consumer. Her clients' platform has always been to promote the responsible consumption of their products. They support many community programs that are directed towards that goal. One of the most important parts of the platform is zero tolerance for underage drinking. She grew up on a ranch and her first driver's license was her ticket to freedom. The wholesalers support effective laws aimed at drinking and driving.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JEFF MANGAN referred to the new language on page 2, lines 15-18 and noted the ten hours of instruction on the effects of driving under the influence of alcohol or drugs. He questioned whether this would be in addition to any previous courses taken in regard to the first or second DUI offense. **SEN. GLASER** believed the ten hour requirement would be handled in the rule making process. He would not be opposed to the Committee placing more requirements into the language.

SEN. DAN MCGEE raised a concern about ten hours of instruction on a third DUI. If a person was in treatment for 28 days, this would amount to 240 hours. Why would ten hours be sufficient for a third DUI offense? **SEN. GLASER** did not have the background information on that decision. Personally, he believed a third time DUI offender needed to do everything possible to break that habit. Ten hours would not be enough. He believed former **REP. PETERSON** may have felt the combination of having the offender lose his or her ability to drive and ten hours of instruction was probably the strongest language that could be used if the bill was to pass the Legislature. The Committee could further restrict this part of the bill.

SEN. MCGEE noted line 2 on page 4 stated the fine would not exceed the fine that would normally be attributed to an adult except that the person may not be imprisoned for failure to pay the fine. If a 17 year-old had his or her third DUI, they could take a ten hour course and be fined $1,000. If they chose not to pay, what would be the enforcement mechanism in this bill. **SEN. GLASER** believed the most important part of the bill was the loss of a driver's license. This bill is a starting point in addressing the issue.

SEN. JERRY O'NEIL commented that page 3, lines 18 and 19, stated, "A person under 18 years of age who is convicted of an offense under this title, except an offense under 61-8-401 or 61-8-406, shall not be punished by incarceration, but shall be punished by . . ." He questioned whether an offense under 61-8-401 or 61-9-406 would allow that the person would be punished by incarceration. **SEN. GLASER** noted that **REP. PETERSON** did not want youth incarcerated. He wanted to focus on young offenders changing their habits.

Closing by Sponsor:

SEN. GLASER closed on SB 123. Three DUI offenses would not be reasonable whether that offender was an adult or a child. **REP.**

PETERSON wanted to help these young offenders find a way to discontinue use of alcohol and drugs.

HEARING ON SB 263

Sponsor: **SEN. DUANE GRIMES, SD 20, JEFFERSON, BROADWATER, MEAGHER AND PARTS OF LEWIS AND CLARK AND CASCADE COUNTIES**

Proponents: **Judy Wang, Assistant City Attorney for Missoula**
Bob Weaver, Missoula Chief of Police
Beth Satre, Montana Coalition Against Domestic & Sexual Violence
Kristi Blazer, Kids Behavioral Health
Ali Bovingdon, Assistant Attorney General
Carl Ibsen, Missoula Police Officer
Kathy McGowan, Montana County Attorneys Assoc.
Tonda Moon, Self
Mary Guigen, Children's Program Coordinator and the Children's Advocate at the Helena Friendship Center
Tootie Welker, Executive Director of a non-profit organization in Sanders County
Jim Kembel, Self

Opponents: **None**

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, JEFFERSON, BROADWATER, MEAGHER AND PARTS OF LEWIS AND CLARK AND CASCADE COUNTIES, introduced SB 263. He stated that his four year old daughter has an amazingly clear memory. However, when she is in front of a stranger or in a crowded room, she is very shy and will not say much. This is typical of children this age. The second "WHEREAS" statement in the bill states: "WHEREAS, the state has an interest in protecting the well-being of children who are victims of or witnesses to sexual offenses and other violent crimes;". Senate Bill 263 gives judges narrow guidelines, rules and a procedure to evaluate children's hearsay statements on a case by case basis. When appropriate before trial, a judge may rule that a child's hearsay statement is admissible because it is reliable. If the judge finds there isn't sufficient evidence of the statement's reliability, the judge may declare the hearsay statements inadmissible. This bill places a test that is already in law into the code. He provided a copy of State v. J.C.E., **EXHIBIT(jus20a01).** The rules of evidence under the hearsay

exceptions primarily apply to adults. In regard to children's hearsay statements, the courts have adopted certain standards.

Proponents' Testimony:

Judy Wang, Assistant City Attorney for Missoula, presented her written testimony in support of SB 263, **EXHIBIT(jus20a02).**

{Tape: 1; Side: B}

Bob Weaver, Missoula Chief of Police, stated that as a peace officer he frequently sees children who are victimized by sexual and violent crimes. Children often are the witnesses to sexual and violent crimes. Frequently the offender is related to the child, loved by the child, and feared by the child. All to often that child witness is again victimized by the criminal justice system. A requirement that the child confront that loved and feared offender in the courtroom is very intimidating for the child. Senate Bill 263 protects the rights of the offender with rigid procedures and notice requirements. It provides the judge with a list of factors to evaluate a child's statement to determine whether or not it is reliable and trustworthy. It also makes it possible, under strict circumstances, that some children may not need to testify in a courtroom.

Beth Satre, Montana Coalition Against Domestic & Sexual Violence, presented her written testimony in support of SB 263, **EXHIBIT(jus20a03).**

Kristi Blazer, Kids Behavioral Health, stated many of these young people have experienced sexual abuse in their lives. An important part of dealing with their problems is obtaining justice through our legal system. This bill will accomplish that goal. In the legal system, it is important to exclude or limit hearsay evidence. Senate Bill 263 is narrowly drawn and is a refinement of the residual exception to the hearsay rule.

Ali Bovingdon, Assistant Attorney General, remarked that this bill would support the interests of justice in cases involving child victims and child witnesses while still protecting the rights of the offenders in the criminal justice system.

Carl Ibsen, Missoula Police Officer, commented that as a street cop, when he goes to a call where everything is very emotional, children tell him many things. They've seen something or been a victim of something that is really bad. Usually the offender is a friend or relative. By the time the case gets to court, he does not recognize what he has been told from what the child is saying because the child's mom, dad, brother and/or sister has

had time to tell the child that what they saw isn't what really happened. This bill provides protections for the defendant. It is also on the order of the long recognized "spontaneous utterance" they hear on the scene. This is something that was said in the heat of the moment and is evidence they are allowed to use. It is not fair for a child to sit in court and tell what they saw one family member do to another family member.
Kathy McGowan, Montana County Attorneys Association, rose in support of SB 263.

Tonda Moon, Self, proclaimed that she was voicing her own feelings and was also testifying as a voice for her own children. Disclosure is a very fragile thing with children. By nature, child predators are skilled manipulators using threats, coercion, and the simple office of being an adult - a father, a friend. They have the power. The children do not. A child will often cover for the perpetrator in initial investigations. It is wrong to tie the little hands that could help prove someone guilty. In regard to hearsay evidence, the law protects the guilty abusers who are the incestuous adult manipulators of child victims and of society in general. Her children were abused by their father. When her son was asked by a sheriff, whom he knows and loves, if his father had ever touched him in a bad way, he said "Nope. Can I sit in your car?" That is an example of admissible evidence. When her children were speaking to a counselor to help recover from some other issues, they spontaneously mentioned how their father would shut the drapes, strip them, and then they would chase each other around the house. He would duct tape them to the floor and misuse them. That's hearsay evidence.

Mary Guigen, Children's Program Coordinator and the Children's Advocate at the Helena Friendship Center, stated they provide services to victims of sexual assault and safe shelter and services to men, women, and children who have been victims of violence in their homes at the hands of someone who said they loved them. That someone is sometimes called brother, uncle, mommy, step dad, but most often "daddy". The rights of the accused have been carefully considered by allowing them to face their accusers. We must remember that children have the right to be protected from people and experiences that make them feel afraid. This bill would allow children's hearsay to be allowed as testimony, thereby alleviating an enormous amount of fear and potential emotional damage to children who already suffer. Sexual assault and domestic violence are abhorred crimes. Children who see, hear, and live with such crimes, need our protection at home and in the courtroom.

Tootie Welker, Executive Director of a non-profit organization in Sanders County, presented her written testimony in support of SB 263, **EXHIBIT(jus20a04).**

Jim Kembel, Self, stated that as a member of the Friendship Board in Helena, they could use this assistance to help them do their job.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. MIKE WHEAT questioned the circumstances when a police officer was called to the home where he or she understands the child is being abused. He further questioned whether the child was taken to the police station and interviewed by someone who has skills in dealing with traumatized children. **Ms. Wang** explained that the entire state varies and Montana is resource poor and land rich. In Missoula, they are developing a systemized procedure for making sure the child is safe from further trauma so if the offender is not arrested, the child will be in a safe place. Some questions do need to be asked of the child immediately to find out the circumstance. There is a forensic interview and exam which hopefully is videotaped if this is a sexual offense. The child is asked detailed questions by a skilled forensic examiner. The questions are non-leading. The forensic interview she has had most contact with was extremely detailed and handled very carefully, without an leading questions.

SEN. WHEAT maintained that the accuser would say the examiner is biased and wanted to find evidence to prove guilt. He questioned how this could be addressed. **Ms. Wang** acknowledged that the examiner needs to use great skill. The most recent case she has worked with was handled by a PhD psychologist who has handled many child interviews and has no bias about the case. The protection in this bill provides for notice and a careful list of questions for the judge. Also, the Montana Supreme Court has already approved the test to be used.

SEN. WHEAT asked whether the forensic psychologist was an employee of Missoula County or a private practitioner. **Ms. Wang** clarified that this person is a private practitioner who has had some associations with government agencies in the past and has extensive training in forensic child interviews.

SEN. WHEAT asked how rural counties would handle this situation. **Ms. Wang** acknowledged that rural counties would be resource poor

in this area. With training, many peace officers could handle an excellent forensic interview.

SEN. WHEAT questioned whether there was a program in place that involved law enforcement across the state that was designed to educate peace officers on how to handle these types of situations. **Ms. Wang** maintained that the Law Enforcement Academy has ongoing training on a regular basis and a fundamental part of training for peace officers is non-leading questions for everyone. **Chief Weaver** acknowledged that the Law Enforcement Academy provides training and interview techniques for all peace officers. Additionally, departments across the state are eligible for follow up school and training to officers who will become more engaged in these types of investigations. The Missoula Police Department has just sent three officers to this type of training which involved interviewing children who are victims or witnesses to crimes.

SEN. WHEAT referred to page 2, lines 4 and 8 of the bill.

{Tape: 2; Side: A}

He questioned why the language needed to be in the bill. Under (c)(i) the language states: "the child testifies and the court finds that the child has not fully and accurately described the offense and the facts and circumstances surrounding the offense;". **Ms. Wang** explained that the language in the bill follows State v. J.C.E. very carefully.

SEN. WHEAT asked **Ms. Wang** to provide the Committee with additional information regarding this language in the bill. **Ms. Wang** agreed to do so.

SEN. PERRY noted on page 2, line 2, the language refers to a hearing conducted outside the presence of a jury. He noted this does not state who can be present. He thought further clarification may be helpful. **SEN. GRIMES** stated that the Committee could clarify this but should consider the unintended consequences of requiring certain people or representatives. **Ms. Wang** maintained this is not an in-trial review. She would anticipate that in most cases this would occur long before the trial. There would be a pre-trial ruling and all parties would know whether or not a particular statement would be included. The people who need to be there are the defendant, his counsel, and the prosecutor. The child may or may not attend. A recent Supreme Court case involved a 33 month-old victim. It might be best not to specify who needs to be present but rather have this evaluation made by the court on a case-by-case basis.

SEN. PERRY remarked that **SEN. WHEAT** asked how one would guard against abuse by someone who wants to find guilt and **Ms. Wang** answered "great skill". He asked her to clarify who would determine the great skill and by what measure would that be quantified. **Ms. Wang** claimed that the interviewer needed to be trained to ask non-leading questions. A police officer who has been well trained to interview children, could perform a good forensic interview by asking non-leading questions and following a good format. This would involve covering issues with the children that are non-threatening at the beginning and then continuing with non-leading questions. Generally prosecutors and law enforcement personnel are very busy with offenders. They would not be interested in looking for people who did not commit an offense.

SEN. PERRY asked for more clarification of the word "suggestiveness" on page 3, line 12. **Ms. Wang** stated in State v. J.C.E. the court was concerned whether there were facts or circumstances that led the judge to look at the child's statements askance. This would be something they would review. If the questions asked were leading in some way and the child was taken in a particular perspective by the questions asked, the judge most likely would rule that it was inadmissible hearsay and therefore would not be admitted in court.

SEN. PERRY further asked for clarification of the word "act" on line 19, page 3. **Ms. Wang** explained this would be the offense at issue. Before a child's hearsay statement can be admitted into court it must reference the offense.

Closing by Sponsor:

SEN. GRMIES stated he has spoken with **SEN. MIKE HALLIGAN** who carried this legislation last session, and he noted from the meetings he has attended, that a great deal of work has been done in the area of national guidelines that are appropriate in child interviewing. There has been refinement in clarifying truth from guilt. This legislation will place into code that which is already being used in the state. During the hearing, it was noted that this kind of disclosure is a very fragile thing for a child. We need to keep the language broad so it will apply not only to the four year-old child but also to teens. Defendants may need to utilize hearsay evidence as well as the accused. Most children know right from wrong. It is not difficult for them to tell when something is bad and it is easy for us to know when they are confused about truth and error. He noted the horror a child goes through when being in the box of having something bad happen and then having absolutely no hope because the only person who is available would be the one who may be

perpetrating the bad happenings. These children are helpless victims. They can be victims just by virtue of being a witness to a crime. Clarifying this in statute is the least we can do.

EXECUTIVE ACTION ON HB 48

CHAIRMAN GRIMES explained this bill requires a motion to withdraw be filed.

Motion: **SEN. MANGAN** moved that **HB 48 BE CONCURRED IN.**

Discussion:

SEN. MCGEE remarked that on line 22 of the bill, the House had deleted the phrase, "and discussing why those issues lack merit." The motion to withdraw would need to accompany a memorandum discussing any issues that arguably support an appeal. He questioned why the language should be stricken. **John Connor, Department of Justice,** explained the language was the reason for this bill. There was a U.S. Supreme Court case in 1988 which held that the conclusary filings of frivolous appeals is not the correct process. A document needs to be filed stating the issues that are not of merit which the defendant wants to pursue. It addressed the fact that when doing so, the attorney is not arguing against the interest of his or her client. When telling the court there are no issues of merit, this needs to be explained.

SEN. MCGEE asked **Mr. Connor** if he would be amenable to having the Committee reinsert the language which had been removed by the House Judiciary Committee. **Mr. Connor** explained the Appellate Defender, Chad Wr Sen. Brent R. Cromley (D) ight, was present and objected to the language. He stated he did not want to be arguing against the interests of his client. **Mr. Connor** continued by stating the value of the bill would be that the court would be able to focus on those issues that counsel stated were not of merit. The court would decide if they were meritorious.

SEN. MCGEE claimed that the courts are backlogged. This is an important issue.

Motion: **SEN. MCGEE** moved that **HB 48 BE AMENDED.**

Discussion:

Ms. Lane clarified on page 1, line 22, following "merit", the words "and discussing why those issues lack merit" would be reinserted.

Substitute Motion: **SEN. O'NEIL** made a substitute motion that **HB 48 BE AMENDED.**

Discussion:

SEN. O'NEIL explained his amendment would allow an attorney in Montana to withdraw from the case without telling the Supreme Court that his client doesn't have a case. Under our Montana Constitution, a person has a right to have an attorney who will work for your interests. There is also a right to an unbiased court. Allowing an attorney to tell the court that his client doesn't have a case, is not in the client's best interest. This involves the attorney litigating on behalf of the opposition. If the attorney doesn't believe his client has a case, the attorney should be allowed to withdraw from the case. It is not the attorney's responsibility and it is also not ethical for the attorney to tell the court his client does not have a case.

{Tape: 2; Side: B}

SEN. PERRY asked **SEN. O'NEIL** if the amendment was consistent with his conservative views. **SEN. O'NEIL** replied that the Republican Party believes in justice. It does not believe courts should look at only part of the case before it. We believe the court should be unbiased and just. This involves clients who are unable to hire an attorney and have court appointed counsel. An attorney who was hired by a client could simply withdraw from the court without telling the court there was no case.

CHAIRMAN GRIMES asked whether an attorney could withdraw from a case if he decided it was questionable whether or not the case was frivolous. **SEN. WHEAT** explained the case law that supports this legislation is already in place. If the attorney does not believe there is a meritorious issue for appeal, the bill attempts to provide procedural guidelines to attorneys and to the court as to what should be addressed in the motion. The court and counsel for the Attorney General's Office will review the documents and make determinations about whether or not it is an appeal that lacks merit and will allow the attorney to withdraw from the case.

SEN. CROMLEY asked for further clarification of the amendments. **SEN. O'NEIL** remarked this amendment would allow the attorney who had been appointed to represent the client to withdraw under the

same conditions as an attorney hired by the client would be able to withdraw. This would allow equal justice in both cases.

SEN. CROMLEY noted he has withdrawn from civil cases where he had a disagreement with the client and did not believe he could go forward with the case. He has never had to explain to the court why he believed his client was wrong. This would be a concern for him regarding attorney/client privilege. He supported the amendment.

SEN. WHEAT spoke against the amendment. If the amendment became law, it would be confusing to the court. We have the U.S. Supreme Court decision in Anders v. California, upon which the statute in existence is based. He added the best thing to do would be to table the bill and leave the statutes in their current condition instead of adding the amendment.

SEN. MCGEE remarked that as a land surveyor, he has clients telling him where the boundary is located. His job is to determine the location of the boundary, irrespective of his client or any other land owner telling him where it is located. He opposed the amendment. The amendment would allow counsel to make his or her determination in reference to his defense of his client. This sends a message that this is the only basis upon which counsel can make a decision. He questioned why Montanans should continue to fund cases that are frivolous and wholly without merit. Montanans should have confidence in the legal system recognizing that attorneys have an inherent attendance to legal principles.

CHAIRMAN GRIMES asked **Mr. Connor** whether there would be cases where counsel would be more inclined to find someone's case frivolous or wholly without merit simply because they did not want to take the case. **Mr. Connor** believed the opposite to be true. Many criminal cases go to a post conviction process where the defendant claims counsel was ineffective. This bill would only address three or four cases a year out of the hundreds that are appealed. If the amendment were adopted, what would happen to the defendant. If a defendant were in prison, a new counsel would need to be appointed to represent him. This new counsel could make the same determination and the defendant would be left hanging.

SEN. O'NEIL remarked that, as a paralegal, he has worked for attorneys who wanted to get out of a case. The bill would provide that if an attorney wanted to get out of a case, he or she would need to state the case is frivolous. His amendment would make it easier for an attorney to withdraw. This would

save taxpayers dollars and it would also make the system more honest.

Vote: Motion **failed 2-7** with **SEN. CROMLEY** and **SEN. O'NEIL** voting aye.

CHAIRMAN GRIMES summarized that the Committee was now considering **SEN. MCGEE's** motion to reinsert the language on line 22.

SEN. WHEAT noted the language that had been stricken was taken care of in the new language which followed. It states the memorandum must create a summary of the procedural history of the case and any jurisdictional problems with the appeal together with appropriate citations to the record and to pertinent statutes, case law and procedural rules bearing upon each issue discussed in the memorandum. It further states the motion must attest that counsel has concluded an appeal would be frivolous or wholly without merit. This would force the attorney to attest there are no issues that are meritorious. An explanation of why the issues were not meritorious would follow.

CHAIRMAN GRIMES questioned whether **SEN. WHEAT** was claiming the reinsertion of the language would be contradictory. **SEN. WHEAT** stated it was simply unnecessary.

Vote: Motion **failed 4-5** on roll call vote.

{Tape: 3; Side: A}

SEN. PERRY remarked at the hearing **Mr. Connor** stated an attorney was an officer of the court and had an obligation to notify the court that the appeal has no merit, etc. He asked **Mr. Connor** to explain the comment. **Mr. Connor** clarified he was referring to the obligation of the attorney. If the attorney believed he was presenting something that was incorrect and untrue, he or she had the obligation, as a sworn officer of the court, to notify the court that they did not find anything worthy of the issue in the record. When he was a criminal defender, at times a client may want him to call witnesses who were non-existent. On appeal, he would want to argue that had the witnesses been available, he would have been found not guilty.

SEN. PERRY questioned whether the term "frivolous or wholly without merit" was defined in the code. **Mr. Connor** explained the phrase "frivolous or wholly without merit" was case law language. He was unaware if it appeared elsewhere in the statutes.

SEN. PERRY asked whether the term "frivolous or wholly without merit" could be applied to other areas. **Mr. Connor** maintained an

attorney had an inherent and ethical obligation not to promote a frivolous case.

SEN. WHEAT claimed Rule ll, Rules of Civil Procedure, stated the signature of an attorney or a party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, and, to the best of the signers knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument, for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a court finds a lawyer has signed any kind of a pleading that violates this, the lawyer can be held in contempt and fined. He further noted there is a thread that runs through all statutes, both civil and criminal, which requires the attorney, as an officer of the court, to advise the court in instances where there is nothing for the court to deal with.

Vote: Motion **carried 7-2 with CROMLEY and GRIMES voting no.**

ADJOURNMENT

Adjournment: 11:15 A.M.

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SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus20aad)