MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 7, 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: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted: HB 197, 2/25/2003; HB 211, 2/25/2003; HB 171, 2/25/2003
Executive Action:

HEARING ON HB 211

Sponsor: **Rep. Brad Newman, HD 38, Butte.**

Proponents: **Craig Thomas, Montana Board of Pardons and Parole**
Don Hargrove, Gallatin County,
Montana Board of Pardons and Parole
Diana Koch, Chief Legal Counsel,
Department of Corrections
Jim Smith, Montana County Attorneys' Association

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Newman stated HB 211 will revamp the structure and procedures of the Montana Board of Pardons and Parole to make it more efficient in delivering services to the criminal justice system and incarcerated individuals. The primary change includes an expansion of the number of persons currently on the board. The bill will add two more auxiliary members to this board, so there will now be a pool of seven members, rather than five, from which the board could draw to hear parole applications. In the old days there was only a state prison and it was a fairly easy process to hear and process appeals for parole. Today, there are various facilities and regional detention centers throughout the state. Logistically, this creates a different situation. The shear numbers of applications for parole have skyrocketed over the past decade. It makes sense to expand the number of persons who can sit on the Board of Pardons and Parole to increase the efficiency of this system.

An amendment was placed on the bill in the House, and **Rep. Newman** directed the Committee to look at lines 24 through 26, on page 1. This amendment requires that one member of the board must be supported, at the time of their application, by letters of recommendations from at least two of the tribal governments in the state of Montana. The Montana Supreme Court decision indicated that American Indian Parole Applicants have a right to insist that a person who has particular experience, education, and training in American Indian issues, shall sit on the board when hearing a question of parole. This has created a dilemma for the board. If an inmate wants their hearing done in a timely fashion and that one particular person is not available, the inmate is faced with the question of either waiving their right to have that person serve on the panel, or get a continuance and wait several more months. The Board of Pardons only meets monthly. In an effort to respond to the Supreme Court's

decision, the bill originally provided that each and every member of the Board of Pardons and Parole would, either through experience or training, would gain experience and knowledge in American Indian issues. The House wanted to make sure there was a more affirmative statement in the law that would require that at least one member of the board should be supported by tribal governments.

The bill also provides for a hearing by two members and, if those two members agree, that is the decision of the Parole Board. If, however, those members disagree, the inmate would be entitled to a subsequent hearing in front of three members. Currently, three members are on the panel, but two members will aid in streamlining the process to make it move quicker, more economically, and more efficiently.

Proponents' Testimony:

Craig Thomas, representing the Montana Board of Pardons and Parole, stated the board was created 100 years ago when there was one penitentiary. Rather than their being one facility in Deer Lodge, there are now facilities all over the state. The Supreme Court has been actively involved in a number of cases and has directed the board to ensure that offenders have at least two parole board members at every hearing. They used to send hearing examiners to conduct cases and make a recommendation to the full board, and they were able to handle the increase in the numbers. The Supreme Court has indicated that is not appropriate, and there needs to be a majority of the board. In addition, the numbers have gone from 300 or 400 hearings a year to 2,500 cases. This number includes 1,149 parole hearings, 190 revocation hearings, 53 recision hearings, and 513 administrative reviews, and 600 other cases they are handling. HB 211 is an effort to put together the fairest system for the best cost to the people of the state of Montana. A legislative audit performed in November 2000 recommended that the board consider putting together hearing panels of two members that can make decisions on the spot. The audit also recommended consideration of going to a full-time chairman. It was decided, however, that a part-time citizen board was very appropriate for the state of Montana, has been very effective, and the board chose to go with the hearing panel concept. At the present time, offenders are signing waivers of their rights in order to handle the number of cases.

Don Hargrove, representing Gallatin County, and a member of the Parole Board, feels the board provides a very important function in dealing with individuals and creates ripple effects both inside and outside the institution. It is therefore, very important to make the right decisions. This bill will provide

better service in the name of justice for the people of Montana. The county's concerns are particularly with those of the victims. **Mr. Hargrove** feels Section 6 is very positive, particularly where the victim's statements are allowed to remain confidential.

Diana Koch, Chief Legal Counsel for the Department of Corrections, was aware of the drafting of the bill and recent rulings on parole dealing with the constitutional rights of inmates. **Ms. Koch** feels this bill complies with all of those rulings and gives inmates constitutional rights while still striking a balance between those and the parole board's ability to do their job.

Jim Smith, representing the Montana County Attorneys' Association, feels this is a timely upgrade of the statutes as they relate to the Board of Pardons and Parole. There was concern with the ability of crime victims to present evidence and testimony from their perspective to the Board. They support the bill since victims are explicitly involved in the process.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. JEFF MANGAN stated to **Mr. Hargrove** that the language regarding victims' statements is permissive in stating victims' statements "may" be confidential, and wondered if this was an issue.

Mr. Hargrove did not feel it was an issue and that victims' statements will be kept confidential.

SEN. MANGAN asked **Rep. Newman** if he was concerned because the language regarding confidentiality of victims' statements was permissive.

Rep. Newman replied originally they thought the bill expanded a victim's participation in parole consideration by using very generic language. As soon as the bill was presented to House Judiciary, a number of victim rights groups and fellow prosecutors were concerned that by going to the more general language in the bill, they were short changing the victims. Therefore, they reverted back to existing statutory language and added the provision about the confidentiality of the victim's statements to make sure it was clear the legislative intent is that victims are allowed to participate fully in pardons and parole determination and to make sure the impact on the victim, both at the time of the offense and even at the time of a parole application, is still a fundamental concern for the board. **Rep.**

Newman did not believe the language was a problem and addresses, not only the cases where a victim wants his/her statement to be confidential, but cases the victims are very public about their concerns. This language will allow that flexibility.

SEN. GERALD PEASE inquired how many members were currently on the board.

Rep. Newman responded there are three members and two auxiliary members. As proposed, HB 211 will add two more members, giving them a pool of seven members to draw from.

SEN. PEASE asked if there were currently any tribal members on the board.

Rep. Newman stated for the past 20 years, there has always been a member with tribal expertise. With the new language, they are hoping to enhance the knowledge of all the board members. One of the members will need to be supported by letters of recommendation of at least two tribal governments. This is an attempt to make sure there is a committed and knowledgeable American Indian presence on the board. **Rep. Newman** stated requiring an American Indian on the board would present constitutional problems. The language about particularized knowledge has worked to make sure there is someone with that expertise on the board.

SEN. PEASE asked what the percentage of Native Americans currently incarcerated is.

Rep. Newman replied the number of Native Americans in the prison system is greater on a pro-rated basis than the percentage of American Indians in the Montana population as a whole. This poses unique questions and issues that the board has to consider. This is why they want a presence and knowledge on the board.

CHAIRMAN GRIMES responded he believes the number is 27 percent.

Mr. Thomas stated his understanding is that approximately 25 percent of the male population is American Indian, and that percentage is a little higher on the female side at approximately 35 percent.

SEN. DAN McGEE asked if the repealer was the consequence of court action and why Section 46-23-107 is being repealed.

Ms. Koch replied the language was repealed was because it talks about a majority of the board to make decisions and the bill

calls for a two-member panel to make decisions and reviewability will still be nil.

SEN. McGEE asked if on page 1, subsection (2), and the language inserted by the House Judiciary, was in response to a court decision.

Rep. Newman responded it is in response to a case entitled George v. Mahoney. Pursuant to that decision, the Supreme Court interpreted the statute as it presently exists to require that the single member of the board, with the particularized Indian knowledge, had to hear the cases when an American Indian inmate was involved. Under existing statute, out of the three members and two auxiliary members, one member had to have particular knowledge of Native American Indians. A panel of three out of those five, many not necessarily include the individual with that knowledge. This would force inmates who were up for application to either sign a waiver or wait for their hearing until that particular member became available. The intent of HB 211 is to provide that all of the members, if they do not already have the expertise, will gain it through training. The amendment from the House requires at least one member of the board be approved by at least two of the tribal governments.

SEN. McGEE stated the language strikes him as being discriminatory and asked if justice is supposed to be blind, why does it matter what a person's race is if they have committed a crime and have been sentenced under a blind justice system.

Rep. Newman pointed out the requirement that at least one member of the board have this particular knowledge of American Indian issues is existing law. The court has interpreted that statute as discussed in the George decision. As a matter of pure philosophy, it should not make a difference. **Rep. Newman** stated one of the proposed amendments discussed in House Judiciary was that one member of the board must be an American Indian. This brought up constitutional concerns and opening the door to further challenges such as adding members for other protected categories of individuals.

SEN. McGEE wondered if having a member who is supported by two tribal governments could create another action. He suggested putting a period after "auxiliary members" on line 22, and striking the language through the middle of line 26. He feels that will put the blindfold back on race.

Rep. Newman stated he could not speak to why the existing law has that requirement, but his best guess is that it is because the population of American Indian is so high. He feels this language

was inserted to address this situation and to ensure the prison system in general, and the Board of Pardons in particular, is aware there may be certain cultural or socioeconomic reasons for the disparity. **Rep. Newman** thought **SEN. McGEE's** recommendation may fly in the face of previous decisions where the Legislature thought it was important to pay attention to the disparity in numbers.

Ms. Koch responded to the same question by stating the constitutional law on equal protection states it is valid to give more protection to a group, as long as it is a protected class. Native Americans are a protected class, meaning the state can do something a little different to protect their rights.

In addressing the George decision, the Montana Supreme Court ruled the way they did because they said the Legislature must have meant that the one Native American member, or the one with particular knowledge of Native American affairs, on the parole board. If the Legislature now decides to take care of that, they need to state that was not the intention, and their intention was for someone to be on the parole board who has knowledge of American Indian affairs. This would solve the problem in the George decision. **Ms. Koch** stated that by keeping the language added by the House requiring a member to be affirmed by two of the Native American tribes, it goes back to the George decision problem.

SEN. JERRY O'NEIL asked **Ms. Koch** what auxiliary members would be used for.

Ms. Koch replied all six members would be eligible to sit on the panels, and it could be two auxiliary members, or two board members, or one of each.

SEN. O'NEIL asked what would happen if they were all made board members rather than designate auxiliary members.

Ms. Koch could not think of any reason for making the distinction.

Rep. Newman replied they currently have a three-member board and two auxiliary members. They are asking to add just auxiliary members because the decision of two board members does constitute a majority of a three-member board. If they make it a seven-member board, a majority would be four members. They are trying to develop a system that is efficient and economical and still protect inmates rights. The idea is to expand the number of members available, not to expand the board itself. Auxiliary members have the full rights of board members. Use of auxiliary

members will also solve geographic problems. Most states have full-time parole board members. In Montana, we use part-time citizens.

SEN. O'NEIL was under the impression the panel would have three members and two of the members would be able to make the decision, whether they are auxiliary members or board members.

Rep. Newman replied they contemplate having hearings in front of two of the panel members. If the members agree, that represents a majority of three and that decision will be final. If the two panel members do not agree, the inmate will receive a subsequent hearing in front of a panel of three.

SEN. O'NEIL wondered why they are not just all termed board members, rather than auxiliary members.

Rep. Newman explained this will create a situation where a majority of seven will then be needed for a decision.

SEN. BRENT CROMLEY opined the panel of two would be efficient only if they agreed, and not very efficient if they disagreed. He wondered how often they agree.

Rep. Newman stated most generally they agree, but there will be cases where they do not and the case will be heard before a panel of three. For the most part, they will agree.

SEN. MANGAN asked **Rep. Newman** how he would feel about the bill were amended to strike the reference to Native Americans.

Rep. Newman replied that this language was not in the bill when he presented it to the House. He understands why the bill was amended, but is not sure he agrees that it causes a George problem. The current statute says at least one member must have particular knowledge in American Indian culture. The George case looked at that language in existing statute and thought it was a problem. American Indian applicants are entitled to have that one member on their panel. This bill will require all members to have this knowledge base to address the George decision.

(Tape : 1; Side : B)

SEN. MANGAN asked **Rep. Newman** how he would feel about striking current law the reference to one individual having knowledge of Indian culture and problems.

Rep. Newman replied striking that language from current law would invite court challenge. Philosophically, striking the language

would be the right choice, but it would be challenged since this protection has, in the past, been afforded to Native American inmates. Therefore, he would not support the amendment.

CHAIRMAN GRIMES stated the George decision was in 2001, but the statute has been on the books a long time. **CHAIRMAN GRIMES** wanted to know the background of the Native American representation requirement and whether this requirement exists in other states.

Mr. Thomas did not know the specifics of the history of the statute, but he has been working for the Parole Board since the early 1980s, and the language existed since that time. **Mr. Thomas** feels the person with this expertise has been extremely valuable to the board throughout the years. The problem is that there is only one person with this knowledge. When this statute was enacted, there were no auxiliary members.

Mr. Thomas did research that revealed only two parole boards which specifically indicated a member have a certain background. One of the boards required a female be on the board and the other required an American Indian.

SEN. McGEE asked if there is an Indian member on the board, was he hired specifically because he was an Indian.

Mr. Thomas replied the Parole Board members are appointed by the Governor, and one member has to have a particular knowledge of American Indian culture and problems; ever since Mr. Thomas has been employed by the Parole Board, that has meant an American Indian.

SEN. McGEE asked if the American Indian member has ever been a part of the panel reviewing a non-Indian offender for parole.

Mr. Thomas replied that is frequently the case.

SEN. McGEE asked if there was any specification that indicates the Indian member has particular knowledge of culture and problems of whatever the race the offender belongs to.

Mr. Thomas was unaware of the Indian member having that particular knowledge.

SEN. McGEE has a problem with someone being put on the Board of Pardons and Parole because of race and feels that is unconstitutional. He asked **Rep. Newman** if, by not striking this language, we are, by definition, saying Indian culture and problems are contributing factors in the commission of crime.

Rep. Newman stated it at least creates the appearance that is what is being stated. **Rep. Newman** stated he has not read the legislative intent from the body that originally placed this language in statute.

SEN. McGEE asked **Rep. Newman** if he were prosecuting a person in Butte, and that person was of Native American background, would he argue before the jury that the individual committed the crime because of this Indian culture and problems.

Rep. Newman reported he would not and he would argue the case based on the facts of the case.

SEN. McGEE was not trying to create racial issue and was, in fact, trying to eliminate a racial issue. He asked if **Rep. Newman** were a defense attorney and was representing a person of Asian descent before the Board of Pardons and Parole, and the Board denied the decision, and the decision was appealed based on discrimination, would he be able to state his client did not get a fair hearing based on the fact there was no one of Asian descent represented on the board.

Rep. Newman stated a creative attorney could make that argument, and it is a possibility. However, clearly, there is not the same percentage of Asian Americans in Montana as Native Americans.

SEN. McGEE asked **Mr. Thomas** if the Governor, who makes the appointments to the Parole Board, has historically appointed women to the board in proportion of women incarcerated.

Mr. Thomas did not have specific information on this, but stated the majority of the time, there has been a woman on the parole board.

CHAIRMAN GRIMES asked **Ms. Koch** to comment about the language.

Ms. Koch requested the opportunity to perform research and prepare organized arguments as she is not aware of current case law on equal protection.

SEN. GARY PERRY asked **John Connor, Department of Justice**, about his testimony the previous day on HB 166 where he talked about the case of State v. Pepplo and the use of the term "may" to confer power on officer, court, or tribunal and the public or third person has an interest in the exercise of the power, then the exercise of that power becomes imperative. In reviewing Section 5 of HB 211, **SEN. PERRY** is wondering if there is an impact of that ruling on the actions of a Parole Board, where "must" could be used in place of "may" in several places. **SEN.**

PERRY wondered if that could have an undesirable impact on the Parole Board.

Mr. Connor stated that is a good point and the language from the Pepplo decision was generic in nature. Therefore, the decision could have a bearing on the Parole Board.

CHAIRMAN GRIMES asked **Ms. Koch** to review the issues in HB 166 because he does see the parallel to HB 211.

SEN. AUBYN CURTISS asked if the findings in the George case could be made available to the Committee.

CHAIRMAN GRIMES thought that was a good idea, and felt the Committee should hold off taking executive action on the bill until such time as they have an opportunity to review the findings in the George case.

In reviewing the language on page 6 which grants rulemaking authority to the Board, **SEN. CURTISS** felt the language was broad and asked if it gave the Board the authority to make substantive policy decisions. Also, she wondered about making the word "prisoners" on page 6, line 11, singular rather than plural.

Ms. Koch responded it could be singular or plural.

CHAIRMAN GRIMES asked how video conferencing is working.

Mr. Thomas replied it is not used very often because the technology is not available in regional prisons and in the private prison in Shelby.

CHAIRMAN GRIMES does not remember an interim study ever being done, but suggested an interim study might be appropriate.

Mr. Thomas commented an interim review had not been performed, other than the policies and practices of the board have been reviewed on a regular basis.

CHAIRMAN GRIMES asked **Mr. Thomas** to convey the Committee's appreciation to the people who sit on the Board of Pardons and Parole and asked for the board members' sentiments on the efficiency of the board and whether there were any other tensions or issues of which the Committee should be aware.

Mr. Thomas agreed to express the ideas and thoughts of the Committee and stated the board was supportive of the panel idea. The auditors laid out three or four different scenarios for handling the increase in the caseload. The board felt the

hearing panel concept as the most efficient and fair means of handling the increased case load. **Mr. Thomas** added that having an American Indian on the board in the past has been very valuable. Originally, the appointment of a Native American individual to the board has always been to assist in understanding their culture and to seek involvement in setting policies. The appointment was made because of the large percentage of American Indians in the system. **Mr. Thomas** feels the big problem is with the language that says that particular individual must hear and act on every American Indian case. If that particular issue were addressed and the language required training for all members, that would be a very valuable addition.

SEN. McGEE pointed out that in 1997-98, the Corrections Oversight Committee looked at the Board of Pardons and Paroles, as well as other prison issues.

Mr. Thomas agreed the Board of Pardons and Paroles was part of that process.

Closing by Sponsor:

Rep. Newman appreciated the good hearing and thoughtful questions. Rep. Newman feels the amendment added when the bill was on the floor of the House was causing the Committee concern. Rep. Newman stated he would support striking that language. Because of the George decision, he feels it is imperative that members of the board have knowledge and training in the area of Native American culture and problems. They do not need to mandate a member of the board has to be a member of a protective class because of constitutional concerns. **Rep. Newman** directed the Committee to look at the fiscal note which states the cost of making these changes at $35,000 to $40,000. This amount has been included in the Governor's budget. **Rep. Newman** felt requiring board members to have this knowledge base will help avoid challenges like the George case.

(Tape : 2; Side : A)

HEARING ON HB 171

Sponsor: **Rep. John Parker, HD 45, Great Falls.**

Proponents: **John Connor, Department of Justice**
Jim Smith, Montana County Attorneys' Association

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Parker stated the reason for HB 171 is that every criminal case needs to end at some point. This bill will impose a one-year statute of limitation during which time a criminal defendant can withdraw their guilty plea. A criminal defendant has a wide array of constitutional rights, including the right to try their case and the right to counsel. For the benefit of victims and the system, there needs to be finality to each case. **Mr. Parker** told of a case where a person failed to register as a sexual offender and attempted to withdraw a guilty plea on an underlying sex offense entered several years earlier. **Rep. Parker** stated there was nothing in code to prohibit this from occurring. He feels this proposed change hangs well with other aspects of the code because the statute of limitations on post-conviction relief is also one year.

Proponents' Testimony:

John Connor, representing the Department of Justice, supports HB 171 and submitted proposed amendment 1HB017001.avl, **EXHIBIT(jus48a01).** The basic reason for the bill is to bring an end to a criminal case in the guilty plea prospective. In the 1997 session, the Legislature changed the post-conviction petition statute of limitations period from five years to one year. This applies to all post-conviction situations except when the defendant enters a plea of guilty. There is no time limit with respect to when the defendant might come back and attempt to withdraw that plea of guilty. When a defendant appears before a court and desires to change his guilty plea to guilty plea or enter a guilty plea initially, the court has to ascertain it is a knowing and voluntary act by the defendant in the first instance, and that it is an intelligent choice being made after he has received full awareness of the facts from his attorney. When the court is looking at whether the plea is voluntary, it considers such things as the adequacy of the court's interrogation at the time of the plea, the promptness at which the defendant attempts to withdraw his plea, whether the result of the plea was the result of a plea bargain in which other charges may have been dismissed. When a defendant enters a plea of guilty, there are established legal principles the court looks at to determine whether it was voluntary. Often, defendants claim they did not receive adequate information or instruction from their attorney. This bill deals with after an appeal time has passed, and the defendant decides that because he did not get the relief he was hoping for from the Supreme Court, he is going to petition through the post-conviction process, to have the plea withdrawn. **Mr. Connor** explained the amendments are being presented because there is never a statute of limitations on a claim of actual

ignorance. Courts use the term "fundamental miscarriage of justice" when referring to a claim of actual innocence. **Mr. Connor** felt the bill, in its title, relates to final judgment, and then on line 20 it says "within one year after judgment is entered." Often, appeals are not even concluded within one year. The post-conviction process is intended to occur after the appeal process, and **Mr. Connor** does not feel it makes sense to have the potential for post-conviction expire before the appeal is completed. The amendment will instead refer on line 20 to "within 1 year after the judgment becomes final." **Mr. Connor** looked to Section 46-21-102 for language about finality, and that is the language he is proposing be inserted on line 22, on page 1. He feels this language would make it more clear and useful to a person who would like to avail himself of this post-conviction process.

The last amendment **Mr. Connor** is proposing will address retroactivity. If the act becomes effective on July 1, 2003, there may be a situation where someone has less than a year to avail themselves to the provisions of the act. A better approach would be to insert language stating the act applies to all offenders who plead guilty on or after the effective date of the act. **Mr. Connor** feels this is a good bill with the amendments he is proposing.

Jim Smith, representing the Montana County Attorneys' Association, supports the bill with the amendments offered by **Mr. Connor**.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY asked what the standard is for withdrawal of a guilty plea.

Mr. Connor explained the defendant has to be able to show, to the court's satisfaction and by a preponderance of the evidence, that the plea was not voluntarily entered. When the court looks at this issue, it looks at whether there was an adequate examination by the court, whether the defendant made a prompt request for withdrawal, and whether it was part of a plea agreement. Voluntariness is the underlying concept the court will look at. The court views the plea not be voluntary, unless the defendant is adequately informed and makes a conscious choice.

SEN. CROMLEY asked for a comparison of that standard to the standard in the proposed bill regarding fundamental miscarriage of justice. In seems to **SEN. CROMLEY** if an involuntary plea is

entered, that would constitute a fundamental miscarriage of justice.

Mr. Connor replied the concept of a fundamental miscarriage of justice has only been applied in cases where there is a claim of actual innocence. Defendants often plead guilty to avoid trial for any number of reasons. Sometimes they plea guilty because they think the state can prove they did. The most common basis for lack of voluntary entry of plea is where the defendant claims the attorney did not adequately inform him, and the court did not adequately inform him, of the potential for a lesser included offense instruction if he were to go to trial.

SEN. CROMLEY is thinking that if two years have gone by since the defendant pled, and the defendant is arguing it was not voluntary and there is no statute of limitations regarding making that argument, if this bill is passed, the court may deny this argument. At that time, the defendant may claim this is a fundamental miscarriage of justice if he cannot withdraw his guilty plea, because it is not voluntarily entered. **SEN. CROMLEY** cannot imagine a situation where that argument would not be made. Therefore, he really wonders if the bill will accomplish anything.

Mr. Connor stated it is a policy matter, and he believes passing the bill will put defendants on notice that they have one year. First of all, a defendant cannot get to the post-conviction process without going through an appeal and exhausting that remedy. If they want to claim on appeal that their appeal was not voluntarily entered, the court will make a decision as to whether it was or was not. After that process is concluded, the defendant still has one year to apply the post-conviction process. **Mr. Connor** feels the one year is enough, and defendants should not be allowed to come back seven or eight years later.

Closing by Sponsor:

Rep. Parker urged the Committee to consider the amendments because they take a worthwhile bill and improve it. **Rep. Parker** believes this bill will contribute to judicial efficiency in the state.

HEARING ON HB 197

Sponsor: **Rep. Arlene Becker, HD 18, Billings.**

Proponents: **Brenda Nordland, Department of Justice**
Dean Roberts, Administrator,
Motor Vehicle Division

Opponents: **Tony Steffins, Rocky Mountain Traffic School**
Sen. John Esp, SD 13, Big Timber

Opening Statement by Sponsor:

Rep. Becker is sponsoring this bill at the request of the Department of Justice. The bill will change and streamline business practices mandated under state law for the Records and Driver Control Bureau of the Department's Motor Vehicle Division (DMV). This bureau is responsible maintaining the individual driving records of all the drivers' licenses in Montana. They revoke a person's driver's license as required by law and oversee the issuance of probationary drivers' licenses. In 2001, the bureau entered 95,692 traffic convictions on various driving records. They took 19,189 conduct-based suspension and revocation actions against the driving records. HB 197 will change three mandates in state law in an effort to streamline the bureau's business practices. First, it will repeal the requirement that the department develop a program to require drivers who obtain 18 or more traffic conviction points within a two-year period attend a driver rehabilitation and improvement program offered by private entities certified by the department. The bureau has developed standards for the program, but was unable to implement the program prior to the imposition of the executive budget cuts in the 2002 Special Session. As a result of these cuts, the bureau can no longer hire an employee to complete the development of the program and oversee the program. The DMV was cut seven FTEs in the special session.

The second objective of the bill is to clarify the record-keeping responsibilities when a driver, who is previously licensed in another jurisdiction, is issued a Montana driver's license. Thirdly, the bill changes mandates for the withdrawal of an individual's driving privilege from a revocation to a suspension.

Proponents' Testimony:

Brenda Nordland, representing the Department of Justice, submitted a fact sheet in support of HB 197, **EXHIBIT(jus48a02).** **Ms. Nordland** addressed the Committee about the wise use of motor vehicle resources in austere times. **Ms. Nordland** explained these

are policy choices made by the Legislature in past sessions and she would like the Committee to reconsider these past actions by changing DMV mandates.

The first thing **Ms. Nordland** would urge the Committee to do is repeal SB 334. This bill was passed by the 57th Legislature and was sponsored by **Sen. Grosfield** and had a fiscal note which reasonably estimated what it would take to start the program. It also stated it would take one FTE, plus operating expenses for the FTE. During the last biennium, they were unable to set up that program. The program required setting the standards for private companies to render a service to drivers who accumulate 18 conviction points on their traffic record in a two-year period. This standard would be applied to any vendor who chose to operate the service in Montana. The standard would also have to be applied, and the state-approved curriculum developed, to any Internet provider who would provide services to offenders in remote locations. **Ms. Nordland** did not appear to argue the merits of the program, but informed the Committee that if the DMV is not given the resources to implement the program, they cannot live with a mandate in the laws. In the past year, Ms. Nordland has seen two habitual offender declarations jeopardized because the mandate was not implemented. Criminal defense attorneys argued that Montana law says a driver in need of rehabilitation must be notified when he reaches 18 points. Since that notification did not occur, an offender's due process is violated. The DMV is between a rock and a hard place. Since the FTE and operating expenses were denied, then the provisions of SB 334 need to be repealed. Without the repeal, the DMV will be called into court to respond as to why they are not providing the notice required by law.

Section 1 of the bill is the gateway for probationary drivers' licenses in Montana. Most of the bulk of the changes in this section deal with repealing SB 334. **Ms. Nordland** directed the Committee to page 4, lines 26-30, and continuing onto page 5. This will repeal the mandate that states when DMV receives a driver's license application from an individual previously licensed in another state, they will obtain that individual's driving record from the other jurisdiction, and then treat it as if that driving record occurred in Montana. **Ms. Nordland** then spoke about the Supreme Court's decision, Chain v. Mont. Dep't of Motor Veh., 2001 MT. 224, 306 Mont. 491, which states that an out-of-state driving record of an applicant must be treated as if the violations occurred in the State of Montana. This required the DMV to implement an entirely new business practice where they had to contact the other state, obtain the driving record, analyze the record, and decide what would have happened under Montana law.

(Tape : 2; Side : B)

Ms. Nordland is asking the Committee to recommend changing the law so they will no longer have to go through this process. **Ms. Nordland** feels they should only have to go after the out-of-state records if they know they are going to be issuing a driver's license. They will then respect the sovereign authority of that state.

Ms. Nordland explained a suspension or revocation of a driver's license is a withdrawal of the privilege. The difference between a revocation and a suspension is important. If they suspend a driver's license, the license comes back into being as soon as the period of suspension passes. A revocation, even if it is only for one year and the license had six years left before the expiration date, the license is terminated, meaning the individual starts over at the beginning. This is a resource-intense activity. **Ms. Nordland** asked the Committee to reduce the number of actions which require revocation of a license and change them to license suspensions. This will reduce the number of applicants that get routed through the exam stations. **Ms. Nordland** feels these stations should be used for those applicants who truly need them as a service.

Ms. Nordland explained Section 4 will eliminate some of the bureau's discretionary authority to suspend a driver's license. **Ms. Nordland** would not advise the bureau to exercise that authority under any circumstance since there are no standards. For the most part, there are other laws they can use to take an action against a driver.

Section 5 will convert suspensions into revocations for those who have a second or subsequent DUI or BAC. They believe felony DUIs should receive a revocation of a driver's license. Suspensions, however, should be considered for early DUI offenses, implied consents, BACs, and preliminary breath testing refusals.

Under current law, each time a person is convicted of driving while suspended, a like period of suspension is given. **Ms. Nordland** explained that just adding an additional one-year period to the suspension makes it easier to administer.

Ms. Nordland explained this is a technical bill, but stated the DMV is struggling to meet its workload, and that workload is steadily increasing. This is a problem that needs to be dealt with pro-actively.

Dean Roberts, Administrator of the Motor Vehicle Division, supports HB 197 and stated he would be glad to answer any budget questions regarding the legislation.

Opponents' Testimony:

Tony Steffins, representing Rocky Mountain Traffic School, and a law enforcement officer, submitted written testimony in opposition to HB 197, **EXHIBIT(jus48a03),** and stated he worked with a number of people in the development of SB 334. Rocky Mountain Traffic School works closely with the Department of Justice, Department of Transportation, and other agencies. **Mr. Steffins** opposes HB 197 because it makes SB 334 ineffective and eliminates his entire program. **Mr. Steffins** believes SB 334 is a good law, and urged the Committee to keep the law in tact. The only thing missing is the one FTE. **Mr. Steffins** would like to see more authority with the DMV, not less. **Mr. Steffins** closed by stating safety on the roadways requires the commitment of everyone. The safety program of the Federal Highway Administration focuses on the three Es-- engineering, education, and enforcement. **Mr. Steffins** believes that education is a very effective tool.

Sen. John Esp, SD 13, Big Timber, representing former **Senator Lorents Grosfield,** submitted written testimony from **Sen. Grosfield, EXHIBIT(jus48a04).**

Questions from Committee Members and Responses:

SEN. CROMLEY asked **Ms. Nordland** if the challenges made by habitual offenders due to lack of notice were successful.

Ms. Nordland responded Judge Fagg ruled in favor of the county attorney who defended the DMV. However, in Judge Harkin's court in Missoula, the county attorney stipulated to the due process violation. Therefore, there are competing authorities.

CHAIRMAN GRIMES stated some of the language in the bill deals with mandates and some of the language deals with notice requirements and the driver improvement program, and he wonders if there is a way to amend the law, as opposed to taking it completely off the books. **SEN. GRIMES** wondered if there were alternatives which would deal with the notice requirements, but still allow the programs to exist.

Ms. Nordland stated this is not just an issue about providing notice. The problem is bringing up and overseeing a program where multiple vendors are asking to be certified by the state as

providing this service, and having a person that can oversee the program. **Ms. Nordland** suggested there has been a sizeable drop in the number of FTEs in the division, but the workload has increased exponentially. The bottom line is there is no easy way out without the FTE.

CHAIRMAN GRIMES asked about the funding and the expenditure made in the last session.

Ms. Nordland responded there was contemplation that fees would be paid to the Department for individuals who were effected and fees paid to the private vendors for participating. Those fees were to go into a special revenue account, and there was no authority to spend any general revenue funds.

(Tape : 3; Side : A)

This means hiring a Grade 12 FTE with no funding authorization. The assumption was this position would eventually be funded from a revenue stream created by the special funds. However, when you hire an employee, you need to pay them like everyone else. The seed money was not there to hire the FTE. There are many things in Montana that we do not have that other states do have such as a graduated driver licensing program or a medical review board to oversee medically impaired drivers. Montana is a resource-scarce state.

SEN. MANGAN stated there are private businesses in place ready to provide these services. He wondered about having the private businesses to do the certification and collect the fees.

Ms. Nordland responded their hiring authority has to come from the Legislature. They do not hire anybody unless the Legislature says they can.

SEN. MANGAN clarified that he is not speaking about hiring a company, but maybe granting authority in the rules. Then everything could be done by the private sector, with just one company reporting back to DMV and the state only providing oversight.

Ms. Nordland stated **SEN. MANGAN's** suggestion sounds like an RFP process. Fundamentally, whenever third parties perform services which are governmental functions, there needs to be oversight. That oversight would need to be provided by an FTE. Even when there is a contract with a private entity, there are contract management responsibilities. It is not a resource-free situation. While she understands the appeal of having this provided by private entities and she believes the private

entities are passionate about what they teach, they still need to figure out a way for these individuals to operate under the auspices of state government.

SEN. O'NEIL asked **Mr. Steffins** if he could write an amendment for the bill which would address **Ms. Nordland's** concerns, as well as provide a way for **Mr. Steffins** to keep his program going.

Mr. Steffins stated his desire was to get a program which was certified and overseen by the state for a number of reasons. The state has the ability to check driving records, and he does not. The state also has the ability to decide who is a driver in need of improvement, and he does not. For the most part, his referrals come directly from courts of limited jurisdiction. He believes firmly that if the state could get a FTE funded for the first year, this program would not only generate funds, but would cover that full-time employee and would generate an excess of revenue for the state because of the fee.

SEN. CURTISS inquired how many private entities are available to provide these services.

Mr. Steffins knows of at least three other private venues which currently offer defensive driving courses in the state.

SEN. CURTISS asked **Ms. Nordland** if there were requirements in SB 334 which would have necessitated the certification procedures set forth by the Department.

Ms. Nordland directed the Committee to page 2 of the bill, lines 2 through 8, which is where the Legislature decided what was required for these types of programs.

Dean Roberts responded that DMV had rulemaking authority to develop standards. There are number of Internet companies that do this now, and those are used by most states. **Mr. Roberts** stated the Steffins helped develop most of those standards for these companies.

SEN. CURTISS wondered why it took so long for the Department to determine that they were not going to be able to do this within the time frame set forth.

Mr. Robert replied that they have limited staff and were responsible for implementing many laws. They also ran into problems with their budget in April 2002 when they were informed there was going to be substantial cuts made. They then had to make a decision not to use their general fund resources since those funds were very limited. They had to make decisions about

how to spend their resources. There is currently an amendment on HB 2 to take another $700,000 out of DMV. It comes down to asking yourself where are you going to spend your resources. There resources right now are in driver's license stations. DMV feels it has an obligation to the citizens of Montana to keep rural driver's license stations open.

SEN. CURTISS commented that given the fact there was only one FTE involved, it seems difficult to understand why DMV could not go forward with this program. Also, **SEN. CURTISS** would like to know what happened to the $33,000 which was specified for the one FTE.

Mr. Roberts stated the $33,000 was never allocated out of the general fund. All of the money in the program, including the administrative expense, was to come from the proceeds. Not one nickel in HB 2 was appropriated for this program.

SEN. CURTISS asked if there was federal money available for a project such as this.

Mr. Roberts stated that was a good question and they are presently working with Senator Baucus's office. He told the Committee that taking the provision out will not stop them from having the ability to do a driver rehabilitation program; it just makes it permissive. They have been working with Senator Baucus's office, through Department of Transportation funds to try to fund this program. By removing this language, you stop the courts from saying your habitual offender laws are not effective because you have a statute on the books that says you are supposed to warn people at 18 points. Under the current law, they have the ability to collect fees and conduct a driver's rehabilitation program. The state will continue to pursue that route. It just is not going to happen within the timetable initially set out. **Mr. Roberts** feels Montana needs a habitual offender driver rehabilitation program, and added it needs a medical review board as well.

SEN. CURTISS asked if there was a projected amount expected to initiate the project.

Mr. Roberts replied the fiscal note had $36,000 for this program, and this included one FTE and some operating expenses. One FTE can serve five rural driver's license stations.

SEN. MIKE WHEAT heard **Mr. Steffins** testify that he believes with the proper amount of seed money to prime the program, it could be off and running.

Mr. Roberts agreed.

SEN. WHEAT affirmed with **Mr. Roberts** that approximately $36,000 is the amount of seed money needed to prime the program. **SEN. WHEAT** asked if that amount of money were found, could the program sustain itself on the fees generated. **Mr. Roberts** replied it could.

SEN. O'NEIL asked if it would take a full year before the program could sustain itself.

Mr. Roberts replied it would take some amount of time. There is a whole bunch of oversight needed when dealing with a number of companies performing a state contract.

SEN. O'NEIL asked how long it would take before enough fees were in the special account before it would become self-sustaining.

Mr. Roberts could not answer that question, but did not feel it would take very long. The choice is to either stay suspended and not go to the program because of the fee, or you can agree to participate in the program and get your license back. It is difficult to say how many of those citizens who are suspended or revoked would put themselves through the program to get their licenses back. He suspects the program would be self-sustaining within a year.

Ms. Nordland stated that based on an approximate $31,000 FTE expenditure, and what was used in the fiscal note for SB 334, which was a fee of $65, the breakeven point is 553 persons would have to pay the fee before the line would be crossed. As a point of reference, last year 513 individuals were declared habitual traffic offenders. There needs to be a significant number in the pipeline before you get to that breakeven point.

SEN. O'NEIL asked if was true the $36,000 would not be paid to the FTE at the beginning of the year and that they would be paid monthly. In addition, fees would come in monthly.

Ms. Nordland stated that mathematically you could find that breakeven point but there will always be fluctuations in the fees, whereas an employee's salary is constant. Therefore, you would want to build up a cushion to ensure the employee was paid on a biweekly basis. Otherwise, you put the DMV in the same position as it is now, which is they are supposed to pay from a special revenue account, but that account does not have enough money, so they have to borrow from themselves from another revenue sources.

SEN. O'NEIL asked what would happen if the fee were doubled and the program was made mandatory.

Ms. Nordland responded that as you increase fees, you see a choice made by individuals as to whether law enforcement will catch them driving while suspended, as opposed to paying the fees up front. **Ms. Nordland** cautioned there are points at which individual people make economic decisions.

Closing by Sponsor:

Sen. Becker closed by reaffirming it is a good program and a needed program, but there is no money to fund it. That is why she is asking to make the program permissive. The other portions of the bill are important, and they need to be able to get people's out-of-state driving records and treat them as a history. The suspension versus revocation issues are a matter of how a person gets their license back at the end. It will not change any treatments, penalties, or lengths of time.

ADJOURNMENT

Adjournment: 11:30 A.M.

_____
SEN. DUANE GRIMES, Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus48aad)