

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 17, 2003 at 10 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 220, HB 246, HB 284, 3/5/2003
Executive Action: HB 246, HB 127

HEARING ON HB 220

Sponsor: REP. JEFF LASZLOFFY, HD 22, LAUREL

Proponents: Diana Koch, Legal Counsel, Department of
Corrections (DOC)
Rhonda Schaffer, DOC
Bill Slaughter, Director of the DOC
Steve Hollingshead, Victim
Mike Mahoney, Warden at the Montana State Prison
Matthew Dale, Office of Victim's Services and
Restorative Justice, Department of Justice
Alene Moss, Crime Victim's Advisory Council
Anita Richards, Victim
Mike Touschette, DOC
Beth Satre, Montana Coalition Against Domestic and
Sexual Violence
Bill Dove, Montana Police Protective Association
Jim Smith, Montana County Attorneys Association

Opponents: None

Informational Witnesses:

Russ Hyatt, Bureau Chief DOR Accounts Receivable
and Collections

Opening Statement by Sponsor:

REP. JEFF LASZLOFFY, HD 22, LAUREL, introduced HB 220. He stated that while perpetrators of crimes are routinely ordered to pay restitution to their victims, few ever do. The Supreme Court has recently rendered a decision that will wipe out 70 percent of all restitution that is currently owed. Passage of HB 220 has become imperative.

Proponents' Testimony:

Diana Koch, Legal Counsel, Department of Corrections (DOC), reviewed the major points in House Bill 220, **EXHIBIT(jus56a01)**. She further provided a proposed amendment, **EXHIBIT(jus56a02)**.

Rhonda Schaffer, DOC, related that Section 3 of HB 220 would allow the collection of restitution by the DOC. She provided a handout, **EXHIBIT(jus56a03)**. The fiscal department has worked with the Department of Administration to develop queries in the current accounting system which provide the probation and parole officers a monthly report to track payments made to victims.

This has increased the collections for the victim's restitution as the total amount collected for 2001 was \$16,294 and the total collected by the DOC for 2002 was \$30,792.

Bill Slaughter, Director of the DOC, introduced **Nancy Hollingshead.** Ms. Hollingshead's son was killed by a drunk driver. Nancy and Steve Hollingshead could see the offender every day after he came back into the community either at a stop sign or a grocery store. The offender had a smirk on his face because he no longer was under the supervision of the DOC and he still owed restitution but had no intention of paying it and no one could make him pay it. It is time to take the smirk off of the offender's faces. This is not about money. It is about accountability. Offenders work hard to forget their crimes but restitution helps them remember their crimes.

Steve Hollingshead, Victim, stated that his son was killed in 1993. The drunk driver who killed his son had no insurance and the car he had borrowed had no insurance on it. The sentencing judge gave the offender a certain amount of restitution to pay. There was no way to collect while he was in prison. While he was on parole and probation, they were told that he had to make a living. In December of 1999, he was discharged from the prison system. They went to the judge, the county attorney, and the clerk of records to seek restitution. No one could tell them what to do to collect restitution. They have been told there are good laws on the books but they do need fine tuning. They disagree. The laws do not need fine tuning but they do need replacing.

Mike Mahoney, Warden at the Montana State Prison, rose in support of HB 220. This bill is therapeutic for the victims and the offenders.

Matthew Dale, Office of Victim's Services and Restorative Justice, Department of Justice, stated they have a full-time restitution officer. His department administers the Crime Victim Compensation Fund. This bill will strengthen their hand and help them to hold victim's accountable as well as help to enforce victim rights.

Alene Moss, Crime Victim's Advisory Council, rose in support of HB 220. On June 22, 1998, her 19 year-old daughter was killed and her 18 year-old daughter barely survived an accident. The offender was also without insurance and they had to pay all the expenses. They have found the restitution laws are not effective for the victims. Offenders need to be more responsible and accountable for their actions and the toll they make upon people's lives. The obligation to pay full restitution should

remain with the offender until he dies and beyond. The DOC should collect the felony restitution until full restitution is paid, even after the offender has completed supervision. The laws allowing victims to be reimbursed for future medical and counseling expenses, due to the injury by the offender, need to be revised. Interception of state and federal tax refunds should take place and the funds should be disbursed through the Department of Revenue to the collecting agencies to be credited for restitution.

Anita Richards, Victim, stated that they have been working on this issue for the past six years. There are various restitution laws on the books but they do not work.

{Tape: 1; Side: B}

Mike Tuschette, DOC, rose in support of HB 220.

Beth Satre, Montana Coalition Against Domestic and Sexual Violence, rose in support of HB 220. She provided an e-mail from **Kit Hunter** from Kalispell, **EXHIBIT(jus56a04)**.

Bill Dove, Montana Police Protective Association, rose in support of HB 220.

Jim Smith, Montana County Attorneys Association, rose in support of HB 220. A uniform standard system across the 56 counties in the state would be better than the fragmented system currently in place. This will involve a lot of work for the DOC.

Opponents' Testimony: None

Informational Witnesses:

Russ Hyatt, Bureau Chief DOR Accounts Receivable and Collections, was available to answer questions regarding HB 220.

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY remarked there are debts which are non-dischargeable in bankruptcy including deaths incurred as the result of an intoxicated driving offenses. He questioned whether restitution obligations were non-dischargeable. **Ms. Koch** claimed there is a Montana case, State v. Woods, that indicates restitution is not dischargeable in bankruptcy.

Closing by Sponsor:

REP. LASZLOFFY closed on HB 220.

HEARING ON HB 246

Sponsor: REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN

Proponents: John Connor, Department of Justice (DOJ)
Bill Dove, Montana Police Protective Association
Jim Kembel, Montana Chiefs of Police Association
Beth Brenneman, ACLU

Opponents: None

Opening Statement by Sponsor:

REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN, introduced HB 246. The bill codifies the Miranda warning. The Miranda warning comes from a Supreme Court case, Miranda v. Arizona. The court held the right against self-incrimination under the Fifth Amendment is not confined to the courtroom but occurs anyplace where there is a custodial situation and interrogation begins. Current police practice will not be changed. If the Supreme Court were to modify the terms of custody or interrogation, the law would track.

Proponents' Testimony:

John Connor, Department of Justice (DOJ), rose in support of HB 246. Originally, the DOJ was concerned about the bill because it provided that Miranda warnings be given when anyone was arrested. The concern was that it might tend to cheapen the effect of the warnings if there was no interrogation involved. The bill has been changed to address this concern. It is very difficult to define custodial interrogation because the cases dealing with the issue address the fact that it is a factual situation.

Bill Dove, Montana Police Protective Association, rose in support of HB 246. The bill reenforces the state of the law and the environment within which they work on a day-to-day basis.

Jim Kembel, Montana Chiefs of Police Association, rose in support of HB 246.

Beth Brenneman, ACLU, stated one cannot find a more identifiable statement of our rights as citizens in this country than the Miranda warning. It provides a convenient rule for law enforcement, lower court judges, and the citizenry.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL claimed the U.S. Supreme Court already requires a Miranda warning in these cases. **REP. HARRIS** affirmed and added that the Legislature has often found it necessary to place into statute language so that anyone can find the law. That is the purpose of this bill.

SEN. O'NEIL questioned whether the U.S. Supreme Court had made any exceptions to the Miranda warning. **REP. HARRIS** noted the Terry exception which is relevant to the stop-and-frisk bill. If both HB 40 and HB 246 were to pass in this legislative session, both the Terry exception and the Miranda warning would be codified.

SEN. O'NEIL questioned the effect of a Miranda warning which has been given to an individual for the fifth or the tenth time.

REP. HARRIS maintained there was a constitutional requirement to give the Miranda warning whether this involved the first time or the one hundredth time. This is afforded under the Fifth Amendment to the Constitution.

SEN. CROMLEY questioned whether the Miranda warning would be given in the smallest of misdemeanor cases. **Officer Dove** claimed the Miranda warning would be given whenever there is a custodial interview or interrogation. When the person is not free to leave and is being interrogated as a suspect to the crime, the Miranda warning is given.

SEN. CROMLEY noted he had heard the U.S. Supreme Court may revisit the Miranda warning. **Mr. Connor** noted this to be the case. The Miranda warning is under attack on the federal level. It is important that it be codified in Montana before anything takes place on a federal level. The Miranda warning only relates to the information that was elicited from a person and whether the information was elicited after the Miranda warning was given in a custodial interrogation situation.

SEN. DAN MCGEE remarked his understanding of the language was that the Miranda warning would be given before interrogation but not necessarily before arrest. **REP. HARRIS** affirmed. He added not every arrest would trigger the Miranda warning. It is necessary before the suspect is in custody and before the questioning begins. This is upheld by both the Montana Supreme Court and the U.S. Supreme Court and that is what would be codified by the bill.

SEN. MCGEE noted if an officer did not disclose to a person why they are being stopped, the person being stopped may become very

animated about the issue. At some point the officer may do a frisk and the person may be seen as resisting arrest. If the person is then arrested, would they be read the Miranda rights?

REP. HARRIS stated they may not be given their Miranda rights because there may be no need to ask this particular person any questions. An arrest may be appropriate but interrogation may not be necessary.

SEN. MCGEE raised a concern that the present bill and HB 40 did not provide any statutory requirement that the person be informed as to why they are being stopped. **REP. HARRIS** claimed this was an excellent point. The current police practice of informing the suspect of why he is being stopped is a good practice. It is outside the scope of either of the bills.

{Tape: 2; Side: A}

SEN. O'NEIL questioned whether it was necessary for the police officer to allow the suspect to have an attorney appointed at state expense. **REP. HARRIS** explained the Miranda warning would be given to the suspect after they are in custody. An element of the Miranda warning is that if the person cannot afford an attorney, one will be provided for the person at no cost to the person.

SEN. GARY PERRY asked the difference between "interrogate" and "question". **REP. HARRIS** claimed there wasn't a difference. The stop-and-frisk situation is an exception to the Miranda warning. It has been interpreted by the Supreme Court in a case called Terry v. Ohio. In the Terry case the Court held that stopping and frisking is not a custodial situation and the Miranda warning would not be triggered.

SEN. MIKE WHEAT questioned whether the frequency with which a persistent felon would be read his Miranda rights would lower the responsibility for giving the Miranda right. **Mr. Connor** claimed it did not matter how many times the warning was given. There is no lesser requirement. It may become a question of fact if a defendant waived his rights and then contended he didn't really know what he was doing. Evidence may be given that the defendant was given his rights on ten prior occasions and he had indicated on those occasions that he understood his rights. This would not negate the legal requirements that the rights be given to him.

SEN. WHEAT asked if **Mr. Connor** saw a difference between questioning and interrogating. **Mr. Connor** did not see a difference. There is a Montana Supreme Court case and a U.S. Supreme Court case that state the "Terry" stop, the stop-and-frisk situation, is not a custodial interrogation for purposes of

Miranda. His understanding of HB 40 was that it was not necessarily designed to aid in identifying the person stopped or the fact that they were being stopped for a particular offense but rather it details all the other things the officer had to say. This could promote dissension between the officer and the person being stopped.

SEN. WHEAT questioned if, under the Terry situation, the police officer determined the person had a warrant and placed the person under arrest and they wanted to question the person, the Miranda warning would be necessary. **Mr. Connor** affirmed this to be the case.

SEN. CROMLEY questioned whether the state was obligated to pay for an attorney for the most minor misdemeanor. **Mr. Connor** clarified the state would be obligated to pay for an attorney if the defendant is looking at potential incarceration for the offense being charged.

SEN. O'NEIL asked if a breathalyser would involve a form of interrogation under the law. **Mr. Connor** stated it would not.

Closing by Sponsor:

REP. HARRIS pointed out whether or not a person had a right to an attorney paid for by the state depended on the person's economic situation. The Miranda warning would only be triggered in this situation if there would be a jail sentence. The purpose of the bill is to codify existing police practice and existing Montana Supreme Court and U.S. Supreme Court law so we place the law into the code so any ordinary individual can find the law.

HEARING ON HB 284

Sponsor: **REP. KIM GILLAN, HD 11, BILLINGS**

Proponents: **William Robinson, MD, Emergency Physician, Bozeman Deaconess Hospital**
Jim Smith, Montana County Attorneys Association
Spook Stang, Executive Vice President of the Montana Motor Carriers Association
William F. Muhs, Mothers Against Drunk Driving

Opponents: **None**

Opening Statement by Sponsor:

REP. KIM GILLAN, HD 11, BILLINGS, introduced HB 284. This bill would allow a police officer to request a blood alcohol content (BAC) test if an accident involved serious bodily injury or death. The neighboring states of South Dakota, North Dakota, and Wyoming have enacted a mandatory BAC test of drivers who are involved in serious or fatal injuries. Montana has a high incidence of fatalities involving an impaired driver. We also have a very high rate of drivers who are able to escape detection because they end up in the hospital. The preponderance of drunk driving in Montana is a public safety issue. Two out of five Americans will be involved in some type of alcohol-related crash. Currently 31 states test 70 percent or more of fatally injured drivers. Many impaired drivers are actually escaping detection. In 1997, 74 percent of impaired drivers left the scene without being tested even though there was a serious injury or fatality involved in the accident.

Proponents' Testimony:

William Robinson, MD, Emergency Physician, Bozeman Deaconess Hospital, presented his written testimony in support of HB 284, **EXHIBIT(jus56a05)**.

Jim Smith, Montana County Attorneys Association, rose in support of HB 284. This bill is an important piece of the puzzle.

Spook Stang, Executive Vice President of the Montana Motor Carriers Association, rose in support of HB 284. The Federal Motor Carrier Safety Regulations mandate that any commercial motor carrier involved in an accident, whether bodily injury is involved or injury to another vehicle, be subject to a drug and alcohol test. This individual cannot proceed until the test has been taken. They had considered a bill which would make it necessary for any person involved in an accident involving bodily or property damage be subject to the mandatory test, but decided HB 284 was a good start in addressing the problem in Montana.

William F. Muhs, Mothers Against Drunk Driving, provided written testimony in support of HB 284, **EXHIBIT(jus56a06)**. (Mr. Muhs was not able to attend the hearing. **REP. GILLAN** provided his written testimony to Committee members.)

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. WHEAT remarked that he agreed with mandatory testing and as he reviewed the statute, it appeared this had already been in statute. **REP. GILLAN** explained that line 25 (A) stated that there needed to be some evidence of intoxication or impairment before a BAC could be requested. The new language on lines 26 and 27 states that by virtue of the fact that the driver was involved in an accident that resulted in a serious injury or death means there is probable cause. If the driver goes to the hospital or there is confusion at the scene of the accident, the conditions of 61-8-401 may not have been met. With the new language if there is a serious injury or a death, the police officer can ask for the BAC.

SEN. WHEAT asked if the need for the bill was to address obtaining the blood test of someone who may not be intoxicated by alcohol but may be impaired as a result of drugs. The only way to get at the issue would be a blood test. **Dr. Robinson** stated that was not his interpretation of the bill. He did not interpret the bill to provide a drug screen on the blood of someone involved in a serious injury. He believed this was specific for blood alcohol. If an injured driver is transported to the hospital immediately, the officer has very little opportunity to interact with that individual and establish that there is probable cause that he is intoxicated.

SEN. WHEAT asked whether, in the emergency room situation, a doctor could tell if a person has been drinking probably from the odor. **Dr. Robinson** affirmed anyone experienced in emergency department work is fairly accurate. Although it is difficult to quantify, qualitatively there is a high degree of accuracy between the clinicians assessment by breath odor and activity as to whether alcohol has been imbibed or not. This clinical assessment correlates reasonably well with the presence of alcohol in the blood.

{Tape: 2; Side: B}

SEN. WHEAT still believed mandatory testing was in the statute. He questioned why the new language was necessary. **SEN. MCGEE** explained (A) is qualified under 401, which is a DUI statute. The new (B) would provide that this not be subject to 401.

Dr. Robinson added the simple fact that someone was involved in a crash that caused serious injury or death is sufficient cause to draw a blood alcohol test. It is not necessary to establish that the individual is probably intoxicated. The other valuable part is it will provide the denominator. The numerator is those who are impaired but they have no idea of the denominator. This will provide a much more accurate picture besides detecting the

individuals who need prosecution. When a person is transported directly from the scene to the emergency department, it is difficult for the officer to establish probable cause because of the medical priorities.

REP. MCGEE stated that on line 26, page 1, the words "bodily injury or death" had been stricken. This would be related to 61-8-401. He questioned why the wording had been stricken. **REP. GILLAN** explained that the word "or" would make the condition automatic. The decision was to keep bodily injury or death separate.

REP. MCGEE further noted that "bodily injury" was stricken in (A). The insertion in (B) was "serious bodily injury". If the accident simply involved whiplash, the person would not be subject to (B). **REP. GILLAN** was agreeable to an amendment if needed. The House Judiciary Committee found that amendments offered to address this caused more problems than they would alleviate.

CHAIRMAN DUANE GRIMES asked if there were cases in the law enforcement world where impairment was suspected, but the officer was not able to obtain the BAC. **Officer Dove** claimed that he has been personally involved in such situations. In one situation, a motorist ran over a man getting off of his motorcycle. Refusal of testing can be problematic for law enforcement.

Closing by Sponsor:

REP. GILLAN noted the existing law for refusal would still be in place. Crash scenes involve chaos. One driver may be dead and the other driver is injured. Thirty-four other states have mandatory testing if an accident involves serious bodily injury or death. Driving in Montana is a privilege, not a right. When a person gets a drivers license, there is an implied consent that a BAC is allowed.

EXECUTIVE ACTION ON HB 246

Motion: **SEN. PERRY** moved that **HB 246 BE CONCURRED IN.**

Discussion:

SEN. CROMLEY stated if evidence is given that the defendant knew he had the rights and did not receive the warning, this would not be a Miranda violation but it would be a violation of the statute.

SEN. O'NEIL believed the bill would provide that everyone given a Miranda warning would have a right to a state-appointed attorney if they were unable to hire their own attorney. This would place into stone the Miranda warning requirements. He expects the Supreme Court to back off to a reasonable degree in regard to Miranda warning requirements. If a person has received a Miranda warning on five previous occasions and has been in prison, giving the Miranda warning for the sixth time may not be necessary.

SEN. WHEAT pointed out the bill was supported by **Mr. Connor** who represents the Department of Justice, by **Officer Bill Dove** who represents the Police Protective Association, and by **Jim Kembel** who represents the Chiefs of Police. This bill has the support of law enforcement. They are the ones who carry out the Miranda warnings. He did not see anything wrong with the bill. Trying to anticipate future decisions of the U.S. Supreme Court, is not the right way to go. The law enforcement community is in favor of the bill and it should be passed.

Vote: Motion carried on roll call vote 6-2 with CROMLEY and O'NEIL voting no.

EXECUTIVE ACTION ON HB 127

Motion: **SEN. CROMLEY** moved that **HB 127 BE CONCURRED IN.**

Substitute Motion: **SEN. O'NEIL** moved that **HB 127 BE AMENDED, HB012702.av1, EXHIBIT(jus56a07).**

Discussion:

SEN. O'NEIL explained his amendment. If a person was not able to obtain an attorney and represented themselves, they should be allowed to receive compensation for the time taken to study the case and the law.

Vote: The motion carried with CROMLEY voting no.

Substitute Motion: **SEN. MCGEE** moved that **HB 127 BE AMENDED, HB012701.av1, EXHIBIT(jus56a08).**

Discussion:

Ms. Lane noted the amendments were coordination instruction amendments. This bill amends three sections of law that are also amended in HB 571. Instruction 2 incorporates part of the amendments in HB 571 to 30-14-133.

Vote: The motion carried unanimously.

Substitute Motion: SEN. MCGEE moved that HB 127 BE CONCURRED IN AS AMENDED.

Discussion:

SEN. AUBYN CURTISS commented the fiscal note stated it may be beneficial to amend Section 25 to cover the lemon law gap with Washington State to include vehicles registered or purchased in Montana.

Ms. Lane clarified that section had been removed from the bill and would no longer apply in the amended version.

SEN. PERRY believed the opportunity for a prevailing party to win attorneys fees had been taken out.

Ms. Lane explained Instruction no. 2 would replace Section 5 of the bill. Subsections 3 and 4 are out of HB 571. Subsection 3 applies to the plaintiff who brings the action. Subsection 4 provides reasonable attorney fees incurred by a defendant in defending the action.

SEN. MCGEE noted the court would only award attorneys fees to the defendant under Subsection (4) if the court determined the action filed was brought in bad faith.

SEN. PERRY claimed that would be almost impossible to prove and therefore would be almost moot.

Ms. Lane clarified the amendment was simply a coordination instruction that states if both bills pass, this is how the section will read. The problem was that (1) in both bills had different amendments. It could not be codified in that condition. Subsections (3) and (4) did not conflict but they are both in HB 571.

{Tape: 3; Side: A}

Ms. Lane stated the amendments were one suggested way to handle the conflict between the two sections. The amendment could be drafted to only address (1). Subsections (3) and (4) would fall on their own merits in HB 571. If HB 571 did not pass, (3) and (4) would not be amended. If both bills passed, it would be necessary to address the conflict.

Substitute Motion: SEN. PERRY moved that HB 127 BE AMENDED.

Discussion:

SEN. PERRY explained his amendment would remove paragraph 2 and subsequent paragraphs from the previous amendment.

Vote: The motion carried unanimously.

Substitute Motion/Vote: **SEN. MCGEE** moved that **HB 127 BE CONCURRED IN AS AMENDED**. The motion carried with **MCGEE** and **CROMLEY** voting no.

ADJOURNMENT

Adjournment: 12:00 P.M.

SEN. DUANE GRIMES, Chairman

JUDY KEINTZ, Secretary

DG/JK

EXHIBIT (jus56aad)