MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 27, 2003 at 9:00 A.M., in Room 172 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:
Executive Action: HB 293, HB 358, HB 256, HB 390, HB5 36, HB 489, HB 579

EXECUTIVE ACTION ON HB 293

Motion: **SEN. BRENT CROMLEY** moved that **HB 293 BE CONCURRED IN.**

Substitute Motion: **SEN. JERRY O'NEIL** moved that **SB 56 BE AMENDED, HB029301.ace, EXHIBIT(jus65a01).**

Discussion:

SEN. O'NEIL stated there should be a statewide policy on racial profiling. Each law enforcement agency in the state should not have their own policies in this regard. The law enforcement agencies in his district are not currently using racial profiling.

SEN. AUBYN CURTISS supported the motion. She is unaware of any activities related to this that are currently occurring. The testimony before the Committee did not bring out any occurrences in Montana where this was a problem. She questioned whether the bill was necessary.

SEN. JEFF MANGAN questioned whether the state policy would need to be drafted or would the definition in the bill be sufficient.

SEN. O'NEIL believed the definitions in the bill were sufficient to accomplish the objectives set out in the bill.

SEN. MANGAN asked **Pam Busey, Department of Justice,** to comment on the amendment.

Ms. Busey disagreed. When they attended the convention, attorneys who represent departments, cities, states, and counties urged the passage of the bill. The best defense for them was having policies set up by departments. It would be difficult to have a uniform policy because departments are very different. Billings, Great Falls, and Missoula have police review boards that prepare and review the policies and have their own legal counsel. Rural counties would not have that ability. Their policies would be very simple. This is why the bill was drafted to leave the development of the policies to the discretion of the departments. There are three lawsuits pending. Billings has settled a $50,000 lawsuit last year on this issue.

SEN. MANGAN was opposed to the amendment because the bill was very concise and the amendment would change the intention of the bill.

SEN. CROMLEY also opposed the amendment. His understanding was that the various law enforcement agencies are fairly autonomous and run their own agencies under the auspices of the city. They want this type of policy.

SEN. O'NEIL asked **Ms. Busey** if sample policies were sent to agencies. **Ms. Busey** claimed there were two drafts of policies that were sent to the **Montana Association of Counties (MACo)** and to the **Leagues of Cities and Towns**. She agreed to provide copies of the drafts to the Committee.

SEN. MIKE WHEAT claimed the bill required the communities to develop a policy. All the police departments have operations manuals. This bill requires that they deal with racial profiling.

Vote: The motion failed on roll call vote with CURTISS, O'NEIL and MCGEE voting aye.

SEN. DAN MCGEE asked if there was any reason why a governing agency could not adopt policies regarding racial profiling at the present time. **Ms. Busey** stated there wasn't and they could do so if they wanted to. The bill will simply give them some impetus to do so.

SEN. MCGEE noted a similar bill did not pass in the last legislative session and yet the highway patrol has already adopted policies in compliance with the bill. Departments can adopt these policies at the present time. The bill will not set a statewide standard. Testimony at the hearing was that all agencies are receiving training for racial profiling at the present time. He can envision law enforcement patrolling north of Great Falls looking for Arab people on some mission of terrorism in this country. He would like the officers to be able to stop a car and investigate. He did not think the bill was necessary. If there was a statewide bill there should also be a statewide policy to back it up.

SEN. O'NEIL noted the highway patrol has to note the racial characteristics of a person they are stopping. He wants officers to look at persons on a racially neutral basis.

SEN. CURTISS claimed elevating the issue could create another cause for appeals.

SEN. GERALD PEASE did not see any harm in the bill. This bill asks the agencies to study the issue so they will not be in trouble.

SEN. WHEAT maintained the bill set a statewide policy because it defined racial profiling. It leaves the decision to the local communities in regard to adopting the policies and procedures in conformance with the racial profiling issue. Law enforcement is in support of the bill.

{Tape: 1; Side: B}

SEN. MCGEE questioned whether there is currently a definition of racial profiling in law. Could a complaint be filed against someone for racial profiling?

SEN. WHEAT believed a complaint could be filed by using case law. He did not believe it was defined in statute. The claim would be based on violation of civil rights.

SEN. MCGEE claimed the highway patrol has already adopted procedures in this regard. They did not need this bill. In their procedures they probably have adopted a definition of racial profiling. They have adopted a format to racially profile when they stop someone. They mark what they believe to be the race of the individual that they have stopped.

Vote: The motion carried on roll call vote 5-4.

EXECUTIVE ACTION ON HB 358

Motion: **SEN. CROMLEY** moved that **HB 358 BE CONCURRED IN.**

Discussion:

SEN. CROMLEY noted there was an interest in expanding this provision to all counties. He agreed it should be expanded but was concerned the bill may not pass if this is done.

SEN. O'NEIL had asked for an amendment to be prepared that would allow the counties to have their justice court be a court of record if this was their desire. The law currently states a district court judge shall have practiced law in Montana for five years and that a justice court judge does not need to do so. It is silent in regard to a county court judge. If a justice court became a court of record, it is important the judge have some experience and an understanding of the law but he would not like to see a requirement that the judge be a graduate of an American Bar Association accredited law school and also have five years of practice. Since the amendment was not prepared at this time, he decided not to move a conceptual motion and would address the issue on the Senate Floor.

SEN. WHEAT raised a concern in regard to converting justice of the peace courts to county courts. The Constitution states there shall be elected in each county at least one justice of the peace with qualifications, training, and monthly compensation provided by law. It also states that justice courts shall have such original jurisdiction as provided by law. A person convicted of a DUI who wanted to appeal the conviction could claim a county court did not have jurisdiction under the Constitution because county courts are not provided for in the Constitution.

SEN. CROMLEY believed the Constitution is fairly broad and the legislature could define the jurisdiction of the justice courts. It states the judicial power of the state is vested in one Supreme Court, district courts, justice courts, and such other courts as may be provided by law. If existing justice courts were used, there may be a dual system. In Yellowstone County there might be a justice court that could be a court of record and the appeal would only be on the record. The person would only be entitled to one jury trial. In neighboring Treasure County, a defendant would have two jury trials to include one in justice of the peace court and one in district court.

Ms. Lane added Article V of the Constitution states that there shall be elected in each county at least one justice of the peace. She believed the bill still allowed for that.

SEN. CURTISS raised a concern in regard to the costs to the counties.

SEN. MANGAN noted this was a permissive bill. A county undertaking this type of decision would be fully aware of the costs to local governments.

SEN. GARY PERRY was bothered by the fact that the counties did not testify at the hearing. He noted the fiscal note did state the change will be an expensive change for the counties. He questioned whether cases from district court could be heard in county courts to alleviate the burden on the district courts.

SEN. WHEAT did not think this would work. Justice courts handle traffic citations and small claims issues. In regard to DUI cases, the district court would review the proceedings because there would be a record of the proceedings. A trial de novo would not be necessary.

SEN. CROMLEY believed some of the counties felt they would save money with this bill because there are a lot of cases which end up being a free pass for the defendant to have a jury trial in the justice of the peace court. If there is a guilty verdict,

this can be appealed to the district court with a new jury trial instead of a review of the record.

SEN. WHEAT suggested deleting the language which stated that if the justice's court is established as a court of record, it must be known as a county court. The county could make the justice's court a court of record.

Substitute Motion: **SEN. O'NEIL** moved that **HB 358 BE AMENDED.**

Discussion:

SEN. O'NEIL explained his amendment. On page 4, line 9, he would strike the word "the" and insert the word "a". This would state that the county may establish "a" justice's court as a court of record. If "a" justice's court is established as a court of record it may be known as a county court. The county would not need to replace their justice's court with a county court.

Ms. Lane raised a concern in that this would provide a hierarchy in one county. This would make the question of equal protection worse if there was a hierarchy in some counties and not in others. Some counties may have county courts and people going into county courts would not have a second trial in district court.

{Tape: 2; Side: A}

SEN. O'NEIL claimed Flathead County has a hierarchy of courts. There is a small claims court and a justice court. People are channeled to the courts. The clerk of court helps the people prepare cases for the small claims court.

Vote: **The motion failed with O'NEIL voting aye.**

SEN. MCGEE suggested language on page 4, line 8, "(5) In a county of the first class, as provided in 7-1-2111, WITH A POPULATION EXCEEDING 20,000 the county may establish a justice's court as a court of record." The following sentence would be stricken through the word "chapter" on line 10. The last sentence on lines 13 through 14 would also be stricken.

SEN. WHEAT agreed to the language change. This would allow justice's courts to be created as courts of record. They would not be called county courts.

Substitute Motion: **SEN. MCGEE** moved that **HB 358 BE AMENDED.**

Discussion:

SEN. MCGEE would use the language as outlined above for his amendment. He would strike all references to county court and reinsert the justice court language.

SEN. CROMLEY added for ease of editing wherever the term "county court" is used the language could state "justice court established as a court of record".

SEN. MCGEE raised a concern regarding the original intent of using the term "county court".

SEN. WHEAT believed they wanted to distinguish the courts that become courts of record from the justice's court that are not courts of record. He did not see any harm in striking the term "county court".

SEN. MCGEE noted there had been earlier discussion in regard to making all counties able to convert justice courts to courts of record. He wanted to include this concept as a friendly amendment.

SEN. WHEAT remarked Section 3-1-102 states the court of impeachment, the supreme court, the district courts, and the municipal courts are courts of record. It would necessary to amend this section as well.

SEN. MCGEE included this as a friendly amendment.

SEN. MCGEE asked **REP. JIM SHOCKLEY** if he saw any problem with an amendment stating all counties would have the discretion to make their justice courts a court of record. The reference to a county court would be eliminated.

REP. SHOCKLEY noted the original bill included all counties but with the politics involved, it had to be limited to the larger counties. This is an annual bill from Yellowstone County and it is always opposed by the Montana Magistrates Association because the justices of the peace and the city court judges are afraid that this is the first step towards the requirement that the judges be attorneys.

SEN. CROMLEY further asked **REP. SHOCKLEY** if deleting the term "county court" from the bill would be problematic. **REP. SHOCKLEY** noted the justice of the peace in his county did not like the bill.

SEN. MCGEE noted the concerns raised by the Montana Magistrates Association at the hearing dealt with training requirements, the provision being limited to only first class counties, and constitutional concerns.

SEN. PERRY requested the amendment be segregated. He was in favor of the primary amendment involving changing county courts to justice courts. He was concerned about removing the first class county differentiation because it may affect the passage of the bill.

CHAIRMAN GRIMES requested the amendment be drafted and presented to the Committee for action at a later date.

SEN. MCGEE withdrew his motion to amend HB 358.

SEN. CROMLEY withdrew his motion to concur in HB 358.

Motion: **SEN. PERRY** moved that **HB 358 BE INDEFINITELY POSTPONED.**

Discussion:

SEN. PERRY maintained the Committee did not receive a great deal of input from the counties.

SEN. O'NEIL resisted the motion. This is discretionary in regard to the counties. If they believe it will save them money, they can use this tool.

Vote: **The motion carried with CROMLEY and O'NEIL voting no.**

EXECUTIVE ACTION ON HB 256

Motion/Vote: **SEN. MCGEE** moved that **HB 256 BE RECONSIDERED. Motion carried unanimously.**

Motion: **SEN. MCGEE** moved that **HB 256 BE CONCURRED IN.**

Substitute Motion: **SEN. CROMLEY** moved that **HB 256 BE AMENDED.**

{Tape: 2; Side: B}

Discussion:

SEN. CROMLEY provided a copy of his amendment, Rose II, **EXHIBIT(jus65a02)**. It would leave intact the current geographical jurisdiction of one mile around the campus for campus-related activities, other buildings, etc. It allows a

university security department to seek an agreement with local law enforcement authorities. It would be up to them to define the jurisdiction both geographically and in subject matter.

CHAIRMAN GRIMES noted several DUI offenders who were stopped by campus security got off due to the issue of campus security not having the proper authority.

Bill Johnston, University of Montana, claimed there were six DUI cases pending in Missoula court. Three of the cases are on appeal in district court.

Kenneth Willett, Public Safety Director, University of Montana, stated that currently there is a memorandum of understanding by mutual agreement between the University and the City Police Department. The campus security has been asked to assist with traffic and handle calls. There have been two occurrences of hostage situations in Missoula and campus security was able to take all the 911 calls during that time because the other teams were tied up. This was not campus related but it was covered in their letters of agreement.

Vote: The motion carried unanimously.

Motion/Vote: **SEN. MCGEE** moved that **HB 256 BE CONCURRED IN AS AMENDED. The motion carried unanimously.**

EXECUTIVE ACTION ON HB 390

Motion/Vote: **SEN. MCGEE** moved that **HB 390 BE INDEFINITELY POSTPONED. The motion carried with WHEAT, CROMLEY, and MANGAN voting no.**

EXECUTIVE ACTION ON HB 456

Motion: **SEN. CROMLEY** moved that **HB 456 BE CONCURRED IN.**

Discussion:

SEN. MCGEE opposed the bill. He believed in this case the predominant aggressor will always be the male. The issue is who is charged. Predominant means having superior strength, influence or authority.

CHAIRMAN GRIMES remarked there is a connection between primary and first. He did not believe using the word "predominant" would have a negative result and would help in many cases.

SEN. O'NEIL believed the word primary could also mean predominant but the word predominant would not be used as primary. By changing the term to "predominant aggressor", this will ensure the male will be the one charged.

CHAIRMAN GRIMES maintained the use of the word "predominant" would address the person most blameworthy and the one who was the major contributor to the violence.

SEN. WHEAT claimed that the peace officers responding to these kinds of calls will not always make the right decision. It is always easy to go back after the fact with 20/20 hindsight. All we can do is rely on these folks, who have a horrendous job, and believe that they will do the right thing.

SEN. MCGEE stated that when he was a peace officer the domestic violence statutes required that whoever made the phone call was okay and the other person was arrested. There were times when it was blatantly clear that this was not the case. On line 16, page 1, the language states that arrest is the preferred response.

Vote: The motion carried on roll call vote with CURTISS, O'NEIL, and MCGEE voting no.

{Tape: 3; Side: A}

EXECUTIVE ACTION ON HB 536

Motion/Vote: **SEN. MCGEE** moved that **HB 536 BE RECONSIDERED. Motion carried unanimously.**

Motion: **SEN. CROMLEY** moved that **HB 536 BE CONCURRED IN.**

Substitute Motion: **CHAIRMAN GRIMES** moved that **HB 536 BE AMENDED.**

Discussion:

SEN. WHEAT pointed out the last time executive action was taken on the bill, amendments were adopted. The bill was subsequently indefinitely postponed.

Substitute Motion: **CHAIRMAN GRIMES** moved that **ALL AMENDMENTS PREVIOUSLY PLACED ON HB 536 BE STRICKEN.**

SEN. WHEAT claimed that an amendment by **SEN. MANGAN** had been placed on the bill.

Vote: The motion carried.

Substitute Motion: SEN. CROMLEY moved that **HB 536 BE AMENDED, STRAWBERRY III, EXHIBIT(jus65a03).**

Discussion:

SEN. CROMLEY explained in Instruction No. 1 it states if the seller or landlord or an agent of either has knowledge, this needs to be disclosed. Subsection (2) would have a new first sentence. There is also a duty on the part of the person renting or buying the property that if they have a test performed, they are also obligated to give a copy of the test to the seller or landlord.

CHAIRMAN GRIMES requested Instruction No. 6 be segregated from the rest of the amendments.

SEN. O'NEIL requested Instruction No. 5 also be segregated for a separate vote.

Vote: The motion carried on Instructions Nos. 1-4.

Discussion on Instruction No. 5:

SEN. O'NEIL addressed Instruction No. 5. If the prospective buyer paid $500 for a mold test, they would have some property rights in the test. The results should not have to be given away.

SEN. PERRY noted the language stated "a prospective buyer or tenant who contracts for the testing". That person would be asked to provide a copy of the test to the seller. We are also saying, whenever a seller or a landlord knows the building has been tested for mold, they are required to provide that information to the buyer or tenant.

Vote: The motion on Instruction No. 5 carried with O'NEIL voting no.

Discussion on Instruction No. 6:

SEN. CROMLEY remarked that a checklist is usually completed. This amendment states those duties remain intact.

CHAIRMAN GRIMES noted there were other sections of code that addressed liabilities separate from the issue of mold. The amendment would make sure that relationship disclosure

requirements were not unintentionally being eliminated from the language.

Ms. Lane did not know why the language was necessary. Page 3, lines 13 and 14, (3) grants immunity only as to the presence of or propensity for mold. She did not see how it could be construed as eliminating duties or liabilities for other disclosures.

Vote: The motion on Instruction No. 5 failed with WHEAT and CROMLEY voting aye.

Motion: SEN. CROMLEY moved that **HB 536 BE CONCURRED IN AS AMENDED.**

SEN. PERRY remarked the issue has not been discussed wherein the seller or landlord may not have a copy of the test. He suggested the words "if available to the seller or landlord" be added. On Instruction No. 5 he would add the words "if available". On the same Instruction he would also add the words "of the results of that test" following the word "copy".

Substitute Motion/Vote: SEN. PERRY moved that **HB 536 BE AMENDED AS STATED ABOVE. The motion carried unanimously.**

Substitute Motion: SEN. MANGAN moved that **HB 536 BE AMENDED, HB053602.avl, EXHIBIT(jus65a04).**

Discussion:

SEN. MANGAN explained his amendment. In the disclosure agreement, the language would state, "a seller, landlord, seller's agent, buyer's agent, or property manager provides this mold disclosure statement and provides for the disclosure of any prior testing in a subsequent mitigation or treatment for mold, is not liable in any action based on the presence of or propensity for mold in the building that is subject to any contract to purchase, rent or lease." Since an immunity is allowed in the bill, it is prudent that this is set out in the disclosure agreement.

SEN. CROMLEY suggested adding "and provides information concerning knowledge of mold, is not liable."

SEN. MANGAN agreed to adding this to his amendment.

Ms. Lane suggested using the words "and discloses any knowledge of".

Vote: The motion carried unanimously.

tape 3b

Motion/Vote: **SEN. CROMLEY** moved that **HB 536 BE CONCURRED IN AS AMENDED. The motion carried on roll call vote with MANGAN, O'NEIL, PEASE, and WHEAT voting no.**

EXECUTIVE ACTION ON HB 489

Discussion:

SEN. MCGEE explained the Joint Subcommittee on SB 134 addressed the same issue as is found in HB 489. **Ms. Lane** was drafting amendments to SB 134 that would incorporate the language in HB 489.

Ms. Lane noted SB 134 would be drafted with several other changes and one of them will be identical to the change made in HB 489. It would be advisable to place a coordination instruction on HB 489 which stated that if SB 134 is passed and approved HB 489 would be void.

Motion: **SEN. MCGEE** moved that **HB 489 BE CONCURRED IN.**

Substitute Motion: **SEN. MCGEE** moved that **HB 489 BE AMENDED.**

Discussion:

SEN. MCGEE explained his amendment would be the above coordination instruction.

Vote: The motion carried unanimously.

Motion: **SEN. MCGEE** moved that **HB 489 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. CROMLEY questioned whether any other funds would have been involved in the items on page 2, line 16.

SEN. WHEAT remarked there is a district court budget that may include some of these items but there is also a district court county fund that takes care of the clerk of the court's office and other matters related to the district court. He believed the language was okay.

Vote: The motion carried unanimously.

EXECUTIVE ACTION ON HB 579

Motion: **SEN. CROMLEY** moved that **HB 579 BE CONCURRED IN.**

Discussion:

CHAIRMAN GRIMES raised a concern that the hearing on the motion would delay the prompt filing of a temporary restraining order.

SEN. MCGEE noted this does not involve a temporary restraining order but a temporary injunction.

SEN. CROMLEY explained the temporary restraining order would be issued without a hearing. This is only for 20 days. Currently there is no notice in the temporary restraining order or in the temporary injunction that if there is a violation of the same the person could lose his or her ability to carry firearms. This bill would give additional notice to the person so they would be aware after the hearing that violation of this matter could subject the person to federal restrictions on the right to bear arms.

SEN. MANGAN stated his biggest concern about this bill was when **SEN. O'NEIL** suggested the information regarding the federal restrictions on the right to bear arms be placed into the hearing notice. Between the time of the notice and the hearing there could be some real problems.

SEN. PERRY remembered at the hearing the sponsor was asked what other rights the bill selected. This was the only right selected. He suggested on page 3, line 27, deleting the words "relating to firearms" and inserting "constitutional rights".

SEN. O'NEIL believed it was the issuance of a temporary injunction that would cause the right to keep and bear arms to be taken away. He maintained the person should be noticed that he or she may lose their right to keep and bear arms.

Substitute Motion: **SEN. O'NEIL** moved that **HB 579 BE AMENDED.**

Discussion:

SEN. O'NEIL explained his amendment. The notice of the hearing would inform the person that they are subject to losing their Second Amendment rights.

SEN. MANGAN pointed out that a man may love his gun more than his wife. If he receives this notice in the mail, he has 20 days to figure out how to solve that problem.

Substitute Motion/Vote: **SEN. WHEAT** moved that **HB 579 BE INDEFINITELY POSTPONED. The motion carried with CROMLEY, O'NEIL and CURTISS voting no.**

ADJOURNMENT

Adjournment: 12:20 P.M.

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SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus65aad)