HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
March 2, 1979

The meeting was called to order by Chairman Scully at 8:00 a.m. in room 436 of the Capitol Building on Friday, March 2. All members were present with the exception of Representatives Iverson and Seifert.

Scheduled for hearing were Senate Bills 153, 215, 217, 225, 261, 291, 296, 380, and 488.

SENATE BILL NO. 261: Senator Turnage. This bill would provide sovereign immunity from liability resulting from the design, construction or maintenance of public highways. This would not be covered gross negligence has been established. We are caught in a fiscal bind and if we can keep Montana government fiscally solvent then I believe this is desirable. We have the means of reducing the cost of government. Even if Montana did win it might be very costly.

MIKE YOUNG: The primary impetus of this bill is because of the insurance dating back to 1973. He discussed the rise in cost. In 1977, 1850 thousand and we cancelled, and we have been self-insured ever since. The insurance cost will be virtually the same for 1979. We have had 125 claims and 25 of those have matured into lawsuits. With half of the time with icy roads in the winter time it doesn't take much of a crystal ball to see that when most of the claims are of one type of risk you should take some kind of action. He gave statistics and examples of highway death claims and guardrail claims. He gave an example of a wrongful death action by a woman near Livingston.

MIKE STEPHENS: Montana Association of Cities and Towns. We support the bill.

GLEN DRAKE: Insurance Companies. We support this bill. There has to be some risk involved and this bill address that risk.

JIM BECK: We support this bill. We would like to point out to the committee that in addition to the cost there are also attendant costs of proeparation of the lawsuit. I think it will provide a mojor protection for the taxpaying public.

MIKE MELOY: He briefly explained his position on the bill. The state has paid approximately 13 or 14 claims, $2600.31 paid out. He gave examples of types of claims that will be eliminated. He also commented on 30 claims that dealt with road oil, chuck holes, gravel, protruding obstatcles and that type of claim.

What Mr. Young didn't tell you about that accident was that four accidents had already occurred. The Highway Department knew about those accidents. There was a unanimous jury award to the survivor of that family. When it was designed in 1937 it was designed with a guardrail but it was never put up. What we are really doing is talking about accountability. If you have a complaint you take it to jury and they will decide whether there is any negligence. But in those cases here that would not be true.

J. C. Weingartner: State Bar of Montana. We are also opposed to this bill. Since you do away with the states liability you also do away with the states responsibility. If we do away with this then there would be no reason for the state to even put up a guardrail. Just because the state is the state we should not put them on any other standing.

SENATOR TURNAGE: I would like to respond to Mr. Weingartner. How did we get along before 1973. We didn't have sovereign immunity and we functioned ok. Montana is probably the only state in the U. S. who has a sovereign immunity law like ours. He talked about the constitutional convention. It takes 2/3 to get this bill on the books but the people realize that the Montana Constitution went too far. Kill this bill if you want to and we will go right on incurring expenses. The real beneficiary of the bill will be the local governments, but the counties and the cities are the ones that probably will benefit from this bill.

Representative Rosenthal asked about the law, what was the intent.

MR. WEINGARTNER: I am saying that the state would not go out and put in a guardrail where it should. He gave the example mentioned earlier.

MR. ROSENTHAL: Would you call four accidents in one place gross negligence.

MR. TURNAGE: Yes indeed, and the bill takes care of that.

REPRESENTATIVE KEMMIS: Asked of Miles Young, you said the ones for Highway design were how many, the claim

MR. YOUNG: About 50%. Mr. Kemmis then asked, was there any other reason for eliminating this liability other than design.

MR. YOUNG: No, we have other kinds of categories. Mr. Kemmis then asked, isn't this the area where the state has been the most negligent.

MR. YOUNG: That, of course, is a question of judgement. Cases are oftentimes unwarranted. Even the case we were talking about in Livingston.

REPRESENTATIVE KEMMIS: When the jury makes a determination like that they can't make it just because someone was injured, they have to find a certain duty. You have to show duty, you have to show harm and you have to show breach, answered Mr. Young.

MR. KEMMIS: I was surprised to find that driving on a highway was the same as skiing down a mountain, referring to a comment that Mr. Young had said concerning a bill on ski resort liability that Mr. Scully has introduced. Do you really think there is a comparison.

MR. YOUNG: Actually, that was a poor comparison. I agree the guardrail should have been put in. Is that gross negligence. Some would say it is. We are talking about auto cases here, someone hitting a dumptruck or something like that, or a snowplow.

REPRESENTATIVE KEYSER: What would you think about line 17, if plan and design were amended out of this bill? Mr. Turnage answered, that would be a mistake. You would be better off taking maintenance off.

REPRESENTATIVE BARDANOUVE: It is always important to keep up with the latest design. 1980 design is already obsolete.

REPRESENTATIVE ANDERSON: You said the cities and towns would benefit from this bill, yet I didn't hear that much talk about it. Mr. Turnage answered, it is hoped that the insurance premiums would decrease.

REPRESENTATIVE ROTH: What is the ratio on county roads and city roads. The answer was, about 2700 city roads and 65,000 county.

There was no other discussion and the hearing closed on Senate Bill 261.

SENATE BILL NO. 380: Senator Hafferman. This is housekeeping legislation. When we passed this in 1973 we failed to repeal. It will revise laws relating to casualty insurance and sovereign immunity to make the law consistent with limits already set by statute.

GLEN DRAKE: American Insurance Association. Just as backup on this bill, we served on an interim committee that studied sovereign immunity and this was a result

and became the 1977 bill. I don't recall why we did not repeal at that time. We all agreed that it was the intent of the act to give insurance companies that benefit. It merely allows the local government unit to claim immunity. It does not change the status of the law at all. Exhibit #2-A.

With no other discussion the hearing closed on Senate Bill No. 380.

SENATE BILL NO. 153: Senator Story. This is another housekeeping bill. This was drafted for the Administrative Code Commission. Most of the changes don't amount to much. However, one change is the definition of person to include agency, and number 2, the Attorney General is in support of the Administrative Code procedure in making these rulings. In section 7, it is just to make clear that the Secretary of State has the format to provide notice. On page 17 is the only substantive change. It describes the authority of the Code Commissioner slightly.

REPRESENTATIVE EUDAILY: Was there a fiscal note with this, and Senator Story said "no".

There was no other discussion and the hearing closed on Senate Bill #153.

BOYCE CLARKE: Independent Insurance Agents of Montana I want to present written testimony for two bills, Senate Bill No. 380 and also 261. Exhibit #1 and 2.

SENATE BILL NO. 291: Senator Lensink: This deals with appointing to fill vacancies in county and legislative offices. At the present time under present law there is 40 days or more, and after 40 days by appointment. Section 1 changes the time span from 40 to 60 days. Section 2 deals with the county commissioner. Section 3 deals with county offices with four year terms. He presented an amendment to the committee for their consideration. (copy attached, exhibit #3)

MIKE McGRATH: Department of Justice. We asked that this bill be introduced because of the vacancies within county offices. One of the present problems we have is when a candidate dies between the primary and a general election. This would treat county offices the same as state offices. He suggested an amendment on page 4, concerning the justice of the peace positions.

REPRESENTATIVE UHDE: Questioned the appointment and election to fill a vacancy.

REPRESENTATIVE EUDAILY: Was this not included in Senate Bill 65, the elections bill?

MR. McGRATH: No.

The hearing closed on Senate Bill 291.

SENATE BILL NO. 296: Senator Van Valkenburg. This bill just adds tribal judges to the list of people who can solemnize marriages.

The hearing closed on Senate Bill 296.

SENATE BILL NO. 488: Senator Jergeson. It gives an additional tool to the Administrative Code Committee. What it does is set up a sunset process. On page 2, line 25, it does list the Department of Fish and Game. There is a fiscal note.

REPRESENTATIVE SCULLY: I will read a letter from George Bandy, the Acting Commissioner of Higher Education. Letter attached, exhibit #4, which states that the Board of Regents is excluded from the Administrative Procedure Act.

SENATOR JERGESON: Would you like to strike the reference to the University system. Discussion.

The hearing closed on Senate Bill 488.

SENATE BILL NO. 215: Senator Ryan. This bill would punish physical violence perpetrated upon a child by an adult. The purpose of the bill is to increase the penalty. She discussed subsection 3 on page 2.

There was no other discussion and the hearing closed on Senate Bill 215.

SENATE BILL NO. 225: Senator Ryan. This is an attempt to clarify the recall. On page 1, subsection 3, I have had it interpreted to me that because this reads misconduct this would exclude judges and county attorneys, that they would have to indict themselves. He went on to discuss line 24.

Representative Rosenthal asked what kind of physical fitness. Senator Ryan said that one of the judges in Cascade County was incapacitated for a long time and this would clarify.

Representative Holmes questioned line 22, to change the wording. With no other discussion the hearing closed on Senate Bill 225.

SENATE BILL NO. 217: Senator Bob Brown. This bill provides an alternative for the exclusionary rule. The rule was created in 1914, the Weeks decision. The fourth amendment to the U. S. Constitution prevents unusual search and seizure. This country didn't have the exclusionary rule until the case of Weeks vs Colorado and in that case the Supreme Court determined that the exclusive remedy for violation of the 4th amendment was suppression of the evidence and then in 1961 in the case of Mapp vs Ohio the U. S. Supreme Court said the suppression doctrine or the exclusionary rule should be applied to all the states. And so, we have only had the exclusionary rule in Montana since 1961.

In 1971 in the case of Bivens vs 6 unnamed federal narcotics agents, Chief Justice Warren Burger wrote a dissenting opinion which was highly critical of the exclusionary rule. The facts in the Bivens case were as follows: The Federal Bureau of Narcotics agents were informed that a sizable quantity of narcotics were at a certain location in New York City. Somehow a mistake was made and the narcotics agents rushed into the apartment of Bivens and his family, terrifying them and subjected Bivens to a humiliating search and soon decided that they had searched the wrong place and unreasonably harassed an innocent man. Bivens brought suit in District Court asking for damages because of the terrifying experience that he and his family had had as a result of the search. The Federal Court ruled, in keeping with the Weeks and Mapp decision precedents that the only remedy for an unreasonable search and seizure was suppression of the evidence.

The irony in the Bivens case was that Bivens was innocent and there was no evidence to suppress. And so, in his dissenting opinion Chief Justice Burger suggested that Congress or some state legislatures legislate an alternative to the exclusionary rule making it possible for an innocent person to have legal standing to sue for violation of his 4th amendment rights. Burger also stated that with the irrationality of the exclusionary rule in cases where valid evidence is obtained as a result of an unreasonable search, because of a minute technical violation and error on the part of a policeman or even the person responsible for preparing a search warrant, valid evidence can be suppressed and if our Judicial system has as one of the most important purposes, the search for the truth, then to suppress incriminating and valid evidence because of a violation of the 4th amendment is contrary to those purposes.

In almost no case, would a motion to suppress benefit a defendant except if the evidence suppressed was incriminatory. Therefore, the exclusionary rule would seem unfair to innocent people on the one hand and irrational in its effect on the search for the truth on the other, and so Chief Justice Burger in his Bivens dissent proposed an alternative

to the exclusionary rule. We have attempted in Senate Bill 217 to follow as closely as we can the recommendations of the Chief Justice and it is our hope that SB 217 provides a justicable alternative to the exclusionary rule.

This bill is based on Burgers dissent because in new section 2, we provide for a course of action to sue if your rights have been violated. On page 2, subsection 2, we admit the evidence if it is reliable evidence. On page 5, section 12, we provide for penalties against the policeman. All it does is take the case away form the prosecutor. He gave a quotation in closing.

JUDGE R. J. NELSON: Retired District Judge. I am representing a group that was formed last summer. A criminal should not go free because of the exclusionary rule. This bill goes further than Justice Burgers bill does. It goes further than just awarding the damage action. It is a rebuttable assumption. This would weed out the overzealous. Canada and England have not had it. Canada considered it for a time.

Hard cases frequently make better law. I know that about 1/5 of the Supreme Courts time is spent on examining suppression of evidence. The Sheriffs Association supports this bill. The suppression of evidence is an anomaly. It doesn't protect the public from search and seizure. It protects the guilty party. There is a conclusive assumption.

SENATOR WATT: Missoula. I appear very briefly in behalf of Senator Browns bill. I do want to tell you that it was debated from all angles in the Senate. We think it is a good bill and the pendulum has swung too far. I support the bill.

JACK D. SHANSTROM: Retired District Judge, Livingston. I strongly support the bill. There is nothing that causes more problems than motions to suppress. The burden is upon the judge to suppress or exclude the evidence. I think this bill would relieve a lot of that. I don't think there is a more controversial law than the search and seizure law. He went through the procedure, affidavit, probable cause, and gave an example of a case with wrong numbers. I know you will hear a lot of arguments about Montana being the first to pass this law.

SENATOR RYAN: Those of us on the peripheral of the judicial system feel strongly about this. I want you to pass this bill.

RICHARD SHAFFER: Sheriff, Yellowstone County. I support this bill. It is badly needed. It becomes quite discouraging to law enforcement. The only fault I can find with this bill is section 12. You should look at it closely.

TOM HONZEL: District Attorneys Association. I have a handout for you. We support the bill. He gave a copy of handout, exhibit #5.

HAROLD ZANZER: Yellowstone Attorney. I will be brief. I have been with this office since 1974. He quoted facts from a case he had been involved with, in which he represented the accused. We have created an imbalance. I am thinking they are placing much too big a burden on my shoulders when they say that this bill will cause society to crumble and fall. I personally support this. I think we tend to overlook the fact that there are real victims of crime. The exclusionary rule ignores the fact that there are real victims. The exclusionary rule that has been stated is not constitutionally mandated. This was a judicial man-made rule. We need a viable alternative that ought to be available. When we talk about technical errors, in 97% of cases it is the opinion of the judge. A judge has examined the facts and has made a judicial determination that it is proper.

JUDGE SHANSTROM: Most of the opinions in the appellate courts are split opinions. Many of these cases will then go into the federal system. It can then go to the circuit court and can be a split opinion again. Some ultimately go to the U. S. Supreme Court. The pliceman may have won or lost depending on the opinion of the judge. I would suggest to you that you can take the same set of facts to a variety of district judges and you will have a variety of opinions. When you examine search and seizure from that standpoint all that happens is that the guilty goes free. It seems to me that that is not fulfilling the responsibility of government to let this happen. He quoted a case, Coolidge vs N. H. the plain view doctrine. If the U. S. Supreme Court cannot agree what the rule is, how can we ask an officer in the state to know what the rule should be. When you are working with rules that judge, most of these final decisions are coming down 2 or 3 years after the fact. I don't believe reasonable people can disagree. I would ask that you look at this seriously and in depth.

SENATOR STIMATZ: Butte. I have had personal experience with this exclusionary rule. I am a former County Attorney and I served 4 years as an assistant U. S. Attorney. I have lived with and seen the actual workings of the exclusionary rul The flaws in this bill can be worked out. We need to put the law back in balance. This bill is not attacking the 4th amendment of the U.S. The thrust of this judge-made rule was to punish an offending officer but not to exclude evidence. I went to the law library and grabbed one of the State Reporters He gave examples of cases where evidence was thrown out. This bill will deter wrongful police action. It is the police officer who doesn't have hindsight. The exclusionary rule puts too big a burden on the police officer. I am very interested i the rights of the criminal suspect. It does not attack rights. It speaks only to physical evidence. It does not attack our right to privacy as guaranteed in the 4th amendment.

OPPONENTS:

BILL LEAPHART: Montana Trial Lawyers. I think this bill is unconstitutional. It would do away with the Montana statute on the suppression of evidence. The exclusionary rule is to avoid the taint of police unlawfulness and to assure that the law will not profit from its own unlawful behavior. He went on to talk about confessions taken involuntarily. With particular reference to the bill you should not be swayed by the civil remedy that is provided in the bill. A private citizen has cause of action since the 1800's. In terms of public policy it makes no difference. If any home is illegally searched there is a remedy.

JIM LEWIS: Vice-president, Montana Chapter, Civil Liberties Union. I am here on behalf of myself and the Cascade Public Defenders office. He gave examples of his personally suppressing evidence. In those cases I felt that the constitutional violations were culpable. The bonding costs will be increased by $15 per month per officer. I would like to refute some of the statements of Senator Brown.

1. technical errors do not cause the problem, it must be caused by some greivous discrepancy.
2. the idea that the exclusionary rule does not keep police officer from violating constitutional rights.

Most basically I do not agree that its a bad thing for society to have evidence suppressed.

MIKE MELOY: Montana Trial Lawyers. I want to point out three things.

1. With the assertion that it will cut down on crime by increasing convictions, studies indicate it will not do anything about the conviction rate.
2. The critics that you have heard are not attacking the exclusionary rule they are attacking the 4th amendment. The rule that says you cannot illegally search someones house.
3. The remedy. I want to be inconsistent, if you will let me. The alternative is a lawsuit against the state and the officer personally. You can sue under this bill if there is a violation of the constitutional right. The lawsuit would probably be against the county or the city. Look at the elements of damage, section 5. I think you will see a far greater impact on the local governments to get insurance. I am interested as a trial lawyer, in the proper administration of justice.

JUDGE BENNETT: ACLU. Beware of a young man with a book, but beware especially of an old man with two books. This was stated as he stood up to testify, holding two volumes. I want to point out in case you have an illusion that some judges enjoy suppressing evidence. It makes you feel guilty because you know that in your hands is the ability to turn off a good criminal

case. There would be only one thing worse and that would be for a judge to join hands with a lawbreaking policeman. The right of a person to be secure against unusual searchs and seizures is a basic right. He discussed the 4th amendment and what it is all about. Your courts stand as a shield against police misconduct. The guts of this bill is to wink at the 4th amendment. It is going to be found patently unconstitutional. Warren Burger is the champion of the modification of the exclusionary rule. He went on to quote Justice Burger, and talked about the Burger concept of a meaningful alternative. He sets down guidelines for substantial violation. He talked about outstanding cases of search and seizure such as Watergate.

The time has come to modify this legislation, not to eliminate it. I suggest that, in spite of its grave shortcomings, until a rational alternative is found. It seems to me that this is a method that needs to be implemented. I have to chip away at this bill again. It does define what needs defining. It is a sloppy piece of legislation. Justice Burger thought there should be a court of claims to determine the judgment. He also thought it should be something detached. You have section 12. Then you have this interesting bunch of standards. Did he do it knowingly or in a grossly negligent manner. Does it mean and or does it mean or? It is compounded in part 2 of the same section.

They say nothing in the act is going to relieve anybody for criminal trespass. Justice Burger calls for a meaningful alternative, this bill is not that alternative. The law needs an exclusionary rule. The Supreme Court has the ability to fine-tune this rule. They are passing the buck because it is a judge-made rule. What we need to do is to reduce illegal searchs and seizures, not to legalize them. We need to impose proper education for police officers. We need to update the tort act. It seems to me that we are caught up in a kind of overenthusiasm for doing something about the rise in crime. Nobody questions that there is going to be more crime all the time, but I refuse to accept the credit for it. He discussed the dirty-hands doctrine. He discussed the Stone vs Powell case. He went on to quote from Justice Cordozo and also Justice Brandeis "If the government becomes a lawbreaker, it breeds contempt for the law".

LARRY ELISON: University of Montana Law School. I am afraid the proponents are not current with the law now. I feel it is risky to take this big step forward. The fact is, the law is changing and those merely technical details are no longer going to cause evidence to be suppressed. He quoted the Peltier case and the Powell case. No lawyer is going to sanction the suppression of evidence on mere technicalities. They are doing the same thing at the Supreme Court now. I do see the crisis because in Montana we have had the exclusionary rule since it started. We have a new provision about the dignity of the individual that has not been tested yet. We need to modify.

ROBERT J. CAMPBELL: Bill of Rights Committee, Constitutional Convention. I was the author of the right to privacy section. These are constitutional rights that we all have. We have the best rights of protection in the nation. We should have a judicial impact statement. What is the cost of going all the way through the courts on a test case. Section 15, page 7, how can you possibly tell how this should be used.

SENATOR BROWN: In closing, talked about what the opponents said and rebutted them. He talked about the three rationales used to justify the exclusionary rule. We are talking about valid evidence. He talked about it not being a deterrant of illegal search and seizure. The provision rule is a deterrant in SB 217. We have had the 4th amendment since 1895 and we have only had the exclusionary rule since 1914. He reviewed the case of Coolidge vs New Hampshire. He quoted the 4th amendment. There is nothing about excluding evidence in the 4th amendment. I don't know how Judge Bennett knows that this will be found unconstitutional. Justice Powell, of the U. S. Supreme Court agrees with Burger. Justice Harland agreed, also. What we propose here is an alternative to the exclusionary rule.

He went on to give examples of people going free because of the suppression of evidence. It only benefits people who are quilty. SB 217 takes Chief Justice Burger up on his opinion. Three things are provided in the bill.

1. it provides that we can still use the evidence.
2. allows people whose 4th amendment rights have been violated to sue.
3. it keeps police officers from being careless, we provided procedure directed at them.

It is obviously a test, and we will see if it is a valid alternative.

REPRESENTATIVE HOLMES: I want to ask Sheriff Shaeffer, if someone has knowingly violated the law, page 5, should that be strengthened. Mr. Shaeffer said, yes, they should be suspended when they do something wrong.

There was discussion with Mr. Elison about some of the cases that had been mentioned in the hearing, such as the Powell and Peltier case.

REPRESENTATIVE UHDE: He asked that a distinction be made between a valid search and seizure and one that was not.

SENATOR STIMATZ: It could be yes and no and he went on to give reasons.

JUDGE BENNETT: I would suggest that you refer to section 15 of the act.

Discussion followed about this.

REPRESENTATIVE CURTISS: You alluded to a study that the U. S. Supreme Court had done, could you elaborate on this. Judge Bennett said, it has been a year and 1/2 they are working on this problem in connection with the deterrant effect.

REPRESENTATIVE HOLMES: On page 7, line 9, why was the term "lawfully seized" eliminated?

SENATOR STIMATZ: I don't know.

MR. ELISON: It totally conforms the bill. Regardless of how it was used, it can be used in any proceedings. Before if it were legally seized it can be used in admissable proceedings.

After some further discussion about the various cases the hearing closed on Senate Bill No. 217.

The meeting adjourned at 11:20 a.m.

Other exhibits include information on the exclusionary rule, exhibits numbers 6, 7, 8, and 9.

A letter was read from Howard Strause, admitted into the testimony, exhibit number 10.

Mary Ellen Connelly

Mary Ellen Connelly, Secretary

John P. Scully, Chairman