MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 21, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Monday, January 21, 1985 at 9:00 a.m. in Room 312-3 of the State Capitol Building.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL 193: Hearing commenced on HB 193. Rep. Richard Nelson, the bill's chief sponsor, testified in its support. He informed the committee the bill was introduced at the request of Judge Michael Keedy from the 11th Judicial District in Kalispell, Montana. He stated that this bill would basically allow the Justice of the Peace to impose certain restrictions on a sentence. No further proponents testified on behalf of this bill.

Jim Jensen, representing the Montana Magistrates Association, testified in opposition to the bill. He stated that he has several concerns regarding the authority question of the bill. He said the bill would limit people's freedom in ways that they are not presently limited. He also stated that he doesn't feel that the J. P.s and city judges are prepared to make these decisions that would be allowed following the passage of this bill. Mr. Jensen referred to two subsections of the bill, in particular. He said that people make the decision by being able to elect those legislators whom they want. He further feels that subsection (e) of the bill would allow for a large loophole which would include the ability to deprive someone involuntarily of their freedom. Justice of the Peace's should not be able to make some of these decisions the bill would allow for.

Karl Englund, representing the Montana Trial Lawyers, stated his opposition to HB 193. He informed the committee that a bill introduced by Senator Fuller would be the better one to adopt.

There being no further proponents or opponents, Rep. Nelson closed with no further comments.

Rep. Addy asked Rep. Nelson if there was any particular incident in the Kalispell area that arose as a result of this bill's introduction. Although Rep. Nelson knew of none, he did say that Judge Keedy had experienced some problems in this particular area.

Rep. Bergene asked Rep. Nelson if the senate bill earlier referred to met with Rep. Nelson's approval. He stated that he was unfamiliar with that particular bill.

Rep. Gould asked Mr. Jensen if this bill would provide more leverage in requiring that J. P.'s be lawyers. Mr. Jensen stated that he doesn't see that as a motive.

There being no further questions or discussion, hearing closed on HB 193.

CONSIDERATION OF HB 210: Rep. Connelly, chief sponsor of HB 210, testified in support of it. She said this bill deals with two separate statutes. It would allow a peace officer to take a preliminary screening breath test to determine a person's alcohol concentration. The bill would also increase penalties. Rep. Connelly submitted some proposed amendments for the committee's information. She stated that the amendments were made because the bill, as originally drafted, did not clarify the penalty provisions of the per se DUI violation. Her amendments would repeal 61-8-714 and merge the penalties for violations of the traditional DUI and violations for per se in 61-8-722. (See Exhibit A)

Col. R. W. Landon, chief of the Montana Highway Patrol, testified in support of the bill. He stated that currently, an officer can administer a chemical test to determine a person's alcohol concentration. This does not affect the voluntary consent law at all. He said the main thing they are trying to accomplish through this bill is to provide a deterrent to keep people from both drinking and driving. He said that 23 states currently have adopted this type of legislation. Again, he emphasized the fact that the preliminary screening breath test would not be used as evidence. Col. Landon illustrated the two different types of devices that are used in determining alcohol concentration. He showed them the Alcotest which costs approximately $1.00 per use. The second device was the Alcotest Censure 3 which would cost considerably more to use. He feels the bill will certainly cause the highways to become even safer. He informed the committee that deaths on the highways have declined as a result of stiffer DUI laws.

Kimberly Kradolfer, assistant attorney general, spoke in favor of the bill. A copy of her testimony was submitted to the secretary and marked as Exhibit B. She stated that there are no penalties for refusal of the preliminary screening test, just as there are not penalties for refusing any other field test. She said that section 1 will

create the offense of negligent vehicular assault. It will provide penalties of up to three years in prison and/or a fine not to exceed $20,000. There were no further proponents of HB 210.

Jim Jenson, representing the Montana Magistrates Association, testified in opposition to the bill. He said his concern comes from the penalty portion of the bill. He feels that the legislation that was passed in the 1983 legislative session is adequate and working effectively. He feels that communities are being well informed about the consequences of drinking and driving at the same time.

There being no further opponents of the bill, Rep. Connelly made a few closing remarks. She said that the fact that people have to wait until their jail time can be served is in itself a deterrent.

Chairman Hannah opened the floor up for discussion at this time.

Rep. Brown expressed various problems with the bill that he said he would bring up during executive session.

Rep. Eudaily asked Col. Landon if a person had taken medicine with alcohol in it, and that person were asked to take a breath screening test, would the test prove to be positive. Rep. Landon said it would be possible, but the test can be administered in such a way to minimize that particular problem.

A question was asked in regards to the fiscal impact this bill would necessitate. Col. Landon felt that it would be in the neighborhood of $12,000 if the alcotest method were used. However, he doesn't think this figure would come out of the department's budget but rather from the National Highway Safety funds. He doesn't know what the fiscal impact would be if the alcotest censure 3 were used.

Rep. Eudaily asked if the department could be held liable for endorsing tests. It was Ms. Kradolfer's opinion that this would, in fact, reduce the liability question because people that could be capable of causing an accident would not be released.

In response to a question, Ms. Kradolfer stated that the initial test administered is not scientifically reliable. The basic purpose of the field test is to give the officer one more test to establish probable cause to arrest.

There was further discussion regarding the bill, but the chairman requested Brenda Desmond, the committee's legislative researcher and attorney, to prepare a legislative history of this particular issue. A fiscal note is also being prepared for this bill. The chairman informed the committee that this bill would be acted on at a later date following the review of the fiscal note and Ms. Desmond's legislative history summary.

CONSIDERATION OF HOUSE BILL NO. 222: Rep. Richard Nelson, chief sponsor of this bill, briefly testified. Again, he said this bill was requested by the 11th Judicial District. This bill would address the question of the ability of a person to pay a penalty. Upon hearing testimony regarding HB 210, Rep. Nelson stated that he would like to withdraw this bill. He feels he could coordinate his efforts better with the proponents of HB 210. Chairman Hannah asked if there were any other proponents or opponents who would like to go on record as either supporting or not supporting this bill. Jim Jenson, representing the Montana Magistrates Association, stated his support for this bill. There being no further testimony requested or discussion requested, hearing on HB 222 closed.

ACTION ON HB 222: Representative O'Hara moved that HB 222 BE TABLED. The motion was seconded by Rep. Keyser. The motion carried with Representatives Bergene, Krueger, Brown and Miles dissenting. It was Rep. Bergene's feeling that action should be taken on this bill rather than to just table it.

ACTION ON HB 193: Representative Brown moved that HB 193 DO NOT PASS. The motion was seconded by Rep. Rapp-Svercek. Discussion followed.

Rep. Brown said that people pay little attention to Justice of the Peace elections. He feels that J.P.'s are not qualified to make some decisions. He feels this bill goes beyond the power of what the traditional view has been. He feels the present system works just fine.

Rep. Bergene stated her support for the motion. She stated that she was interested to see the senate bill that has been introduced. Rep. Brown said that with or without the senate bill, he opposed this bill. The question was called, and the motion passed with only Rep. Gould dissenting.

Before adjourning, Chairman Hannah informed the committee that we would be switching rooms with the House Taxation Committee this Wednesday.

ADJOURN: A motion having been made by Rep. Keyser, and the motion having been seconded by Rep. Grady, the meeting adjourned at 10:45 a.m.

Tom Hannah

REP. TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 1/21/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

STANDING COMMITTEE REPORT

January 21 19 85

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 193

FIRST reading copy (WHITE color)

LIMITED JURISDICTION COURTS MAY IMPOSE CERTAIN RESTRICTIONS ON SENTENCE

Respectfully report as follows: That HOUSE Bill No. 193

DO NOT PASS

~~DO PASS~~

JJ 1/21/85

REP. TOM HANNAH Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

HOUSE BILL NO. 193 DATE 1/21/85

SPONSOR Rep. Nelson

(PLEASE PRINT NAME)

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
R. Nelson	Kalispell		✓	
Bob Buerr	Helena	MT Assoc. of Counties		
Jim Jensen	Blgs/Hlna	MT, Magistrates Assn		X
Mike Abley	Hlna	Supreme Court		
Karl Englund	Missoula	MT. Trial Lawyers		✓

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

HOUSE BILL NO. 222 DATE 1/21/85

SPONSOR Rep. Nelson

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
R Nelson	Kalispell		✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

HOUSE BILL NO. 210 DATE 1/21/85

SPONSOR Rep. Connelly

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Col. Rick London	Clancy	MT. Highway Patrol	X	
Kimberly Kradolfer	822 5th Ave Helena	Attorney General	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit A
H.B. 210
1/21/85

My name is Kimberly Kradolfer and I am an Assistant Attorney General for the State of Montana. I would like to speak as a proponent of HB 210. I will briefly address Sections 1 and 2, but I would like to do so in reverse order.

SECTION TWO---Preliminary screening breath test

Section Two would allow a peace officer to request a motorist to take a preliminary screening breath test to determine his alcohol concentration. This could be done only where the officer had a particularized suspicion that the person may have been drinking or in actual physical control of a motor vehicle upon the ways of the state open to the public while under the influence of alcohol. The test could then be used by the officer to help him decide whether to place the driver under arrest.

This section is based upon a model law which was drafted by the National Committee on Uniform Traffic Laws and Ordinances. It differs from the model law in that it uses language that is consistent with Montana's existing statutes on alcohol and driving related offenses. ("driving or in actual physical control of a motor vehicle upon ways of the state open to the public"). It also incorporates the standard set by the Montana Supreme Court for a traffic stop: "particularized suspicion." That standard was set out in State v. Gopher, 631 P.2d 293 (1981). It allows the officer to make an investigatory stop of brief duration to determine whether someone is engaged in wrongdoing, was engaged in wrongdoing, or is a witness to wrongdoing. It is similar to the Terry v.

Ohio "stop and frisk" standard for an individual on foot. In Gopher, the Court specifically considered the police interest involved (which here would be to increase highway safety and to remove unsafe drivers from the public byways). It held that where objective facts and circumstances existed from which an experienced officer could make certain inferences, and where that resulted in a suspicion that the occupant of a vehicle is or has been engaged in wrongdoing or was a witness to criminal wrongdoing, the particularized suspicion justified stop of the vehicle.

A preliminary breath screening test would be utilized only where the officer had developed that "particularized suspicion." The test would be used as just one more field test to aid the officer in making a determination of whether there was probable cause to place the person under arrest. It is a test which can be handled quickly on the scene. It is no more obtrusive than any other field test done in a DUI investigation. There are no penalties for refusal of the preliminary screening test, just as there are no penalties for refusing any other field test. There is still an incentive for a driver to take the test, however: If, indeed, that driver is not impaired, taking the test will speed him on his way----the officer will be able to release him. That is an incentive when you realize that many DUI investigations begin as stops for another reason, from which evidence of DUI (alcoholic odor on breath, etc.) then develop$. Many investigations begin as a Safety Spotcheck, an approach to see if someone needs assistance, or a stop on a minor traffic violation or equipment violation.

The preliminary screening test will provide one more tool---and a very valuable one---to peace officers in their fight against drunk drivers. Currently, the average breathalyzer score is approximately 0.186---significantly higher than the 0.10 presumption of impairment created by statute. This tool will help the officer to better judge when that "borderline" case is truly not safe to go. It will, therefore, help to get those impaired drivers off our highways----and to lessen what our Montana Supreme Court has most recently characterized as the "slaughter on our highways." Bozeman v. Armfield, January 3,1985.

*NOTE: The National Committee on Uniform Traffic Laws and Ordinance has indicated that at least 23 other states have some sort of preliminary screening breath test statute now.

SECTION ONE---Negligent vehicular assault

This section will create the offense of negligent vehicular assault. It will provide penalties of up to 3 years in prison and/or a fine not to exceed $20,000. The elements of the offense as created would be four. The prosecution would have to demonstrate that :

1. the driver was negligent because he
2. operated a vehicle while under the influence of alcohol and that
3. his conduct was the proximate cause of
4. serious bodily injury.

This offense will allow prosecution only where all four elements are present: the driver actually had to negligent in some manner because of his drinking and that cause serious bodily injury.

This offense will allow prosecution in the situation where the driver is so impaired that he cannot behave purposely or knowingly and someone is injured seriously. Currently, if the driver is that impaired, he may be charged with negligent homocide if the victim dies. If the victim lives, all that can be charged under the current law is DUI, driving while an habitual offender, or some like misdemeanor offense.

In State v. Pierce, 647 P.2d 847 (1982), the Montana Supreme Court upheld a conviction for aggravated assault in an injury situation. There, however, the state had to prove that the defendant was capable of behaving purposely or knowingly---a higher mental state requirement to establish. In Pierce, the defendant ran from the scene of the accident because he was scared. In at least two other alcohol-related cases which come to mind, the defendant was so impaired that he had no ability to form the mental state of purposely or knowingly. In State v. Campbell, 615 P.2d 190(1980), the defendant was absolutely incoherent after the accident. No one involved in the accident has any memory left of it. One victim died, so Campbell was able to be prosecuted for negligent homocide. Had that victim not died, all that the defendant could have been prosecuted for would have been DUI and driving while adjudged an habitual offender----even though one of his other victims, a Highway Patrol officer who was racing to the scene of another accident with siren blaring and lights flashing, is permanently paralyzed. Similarly, in State v. Lapp, 658 P.2d 400 (1983), the defendant was disoriented and incoherent

at the scene. He was so disoriented, in fact, that he attempted a search of the area for his twin daughters, whom he was sure had been thrown from the scene. They had not been in the car with him at all.

Section One will allow prosecution for those situations where a defendant may not be capable of forming the mental state of purposely or knowingly because he is so impaired before he ever gets into the car and where that negligence results in serious bodily injury to another.

(37) "Negligently"—a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

(58) "Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

(33) "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(59) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

EXHIBIT B
H.B. 210
1/21/85

PROPOSED AMENDMENTS TO HB 210, INTRODUCED COPY:

1. Title, line 8.
Following: line 7
Strike: "THE SECOND AND THIRD CONVICTIONS FOR"

2. Title, line 9.
Following: "MORE"
Insert: "TO PROVIDE THE SAME PENALTY AS THE PENALTY FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS"
Following: "SECTIONS"
Insert: "61-8-401,"

3. Title, line 10.
Following: "MCA"
Insert: "; AND REPEALING SECTION 61-8-714, MCA"

4. Page 2, line 11.
Following: line 10
Insert: "Section 3. Section 61-8-401, MCA, is amended to read:

"61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in ~~61-8-714~~ 61-8-722 for any person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a motor vehicle upon the ways of this state open to the public;

(b) a narcotic drug to drive or be in actual physical control of a motor vehicle within this state;

(c) any other drug to a degree which renders him incapable of safely driving a motor vehicle to drive or be in actual physical control of a motor vehicle within this state; or

(d) alcohol and any drug to a degree that renders him incapable of safely driving a motor vehicle to drive or be in actual physical control of a motor vehicle within this state.

(2) The fact that any person charged with a violation of subsection (1) is or has been entitled to use alcohol or such a drug under the laws of this state does not constitute a defense against any charge of violating subsection (1).

(3) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

(a) If there was at that time an alcohol concentration of 0.05 or less, it shall be presumed that the person was not under the influence of alcohol.

(b) If there was at that time an alcohol concentration in excess of 0.05 but less than 0.10, that fact shall not give rise to any presumption that the person was or was not under the influence of alcohol but such fact may be considered with other competent evidence in determining the guilt or innocence of the person.

(c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

(4) The provisions of subsection (3) do not limit the introduction of any other competent evidence bearing upon the issue of whether the person was under the influence of alcohol.

(5) Each municipality in this state is given authority to enact 61-8-406, 61-8-408, ~~61-8-714,~~ 61-8-722, and subsections (1) through (4) of this section, with the word "state" in 61-8-406 and subsection (1) of this section changed to read "municipality", as an ordinance and is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties therein provided.""

Renumber: subsequent sections

5. Page 2, line 17.
Following: "determining the"
Strike: "alcoholic content"
Insert: "alcohol concentration"

6. Page 2, line 18.
Following: "blood"
Insert: ", breath, or urine"

7. Page 6, line 1.
Following: "concentration"
Insert: "or under the influence of alcohol or drugs"

8. Page 6, line 2.
Following: "of"
Insert: "either 61-8-401 or"
Following: "imprisonment"
Insert: "in the county jail for not less than 24 consecutive hours or"

9. Page 6, line 3.
Following: "than"
Strike: "10"
Insert: "60"

10. Page 6, line 4.
Following: "$500."
Insert: "The jail sentance may not be suspended unless the judge finds that the sentence will pose a risk to the defendant's physical or mental well being."

11. Page 6, line 5.
Following: "violation of"
Insert: "either 61-8-401 or"

12. Page 6, line 14.
Following: "of"
Insert: "either 61-8-401 or"

13. Page 6, line 25.
Following: line 24
Insert: "61-8-401 or"

14. Page 7, line 25.
Following: line 24
Insert: NEW SECTION. Section 6. Repealer. Section 61-8-714, MCA, is repealed."
Renumber: subsequent section

PC5HB210.13
LH/MacMASTER