MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **SENATOR BRUCE CRIPPEN, Chair**, on January 24, 1995, at 10:00 a.m.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

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

Committee Business Summary:
Hearing: SB 165, SB 175, SB 185
Executive Action: SB 148, SB 185, SB 165, SB 175, SB 149

{Tape: 1; Side: A; Approx. Counter: 0.0}

HEARING ON SB 165

Opening Statement by Sponsor:

SENATOR GARY AKLESTAD, Senate District 44, in Northcentral Montana, gave the committee a brief overview of SB 165. The bill would apply only to post-conviction petitions filed in criminal matters in the State Court. It would amend Montana codes to clarify that petitions for post-conviction relief may be amended

only once. The courts have interpreted the law differently over the last few years, he said, and the main intent of SB 165 would be the one amended appeal. He said that the bill would attempt to cut down on abuse and unnecessary process in death penalty cases.

Proponents' Testimony:

Beth Baker, representing the Department of Justice, said that **SENATOR AKLESTAD** had asked their department what could be done, if anything, to reduce the amount of time taken up by death penalty cases. Because many appeals are in federal court, she said it was difficult for the state legislature to do anything, but they could clarify the law on how many amended petitions for post-conviction relief could be filed. The state law allows a post-conviction procedure after direct appeal, she said, and in the David Dawson case in Billings the district court agreed with Dawson that a second amended petition could be filed late in the proceedings after the state's motion for summary judgement had been granted on almost all other issues. It further delayed the proceeding. The bill won't hamper the defendant's ability to pursue his post-conviction remedies; it would only limit him to one amended petition, she said. It would apply in every post-conviction case, not just death penalty cases, but she found that there is more incentive in a death penalty case to try to delay the proceedings. That is where she thought the bill would have the most impact.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR STEVE DOHERTY asked **Ms. Baker** how a criminal defense lawyer would make constitutional arguments against this proposal and how would she respond in defending the act in meeting constitutional questions.

Ms. Baker said that the Constitution does not require the state to provide any post-conviction procedure. The state Constitution does have a provision, however, that preserves the writ of *habeas corpus* and the legislature has chosen to allow the post-conviction petition. They would argue that the right, she said, if there was one, of collateral proceeding in a criminal case has been preserved allowing amended petitions but limiting them to a reasonable number.

SENATOR MIKE HALLIGAN referred to Line 13, "at the request of the state or the court on its own motion," he asked why always just 'at the request of the state.' Would that be the only way it could come up? Why couldn't the court, on its own motion, set the deadline for the filing of the amended petition, he asked, either up-front or when the petition is filed?

Ms. Baker said that in any case the court would have the discretion to set a deadline but this would simply require that the deadline be set if so requested by the state. The court could start right off with a scheduling order setting the deadlines for amended petitions.

SENATOR HALLIGAN questioned what if the state did not request it.

Ms. Baker said that the state would not, but that they would have no objection if he wanted to insert, "or on its own motion."

Closing by Sponsor:

SENATOR AKLESTAD closed on SB 165 by emphasizing that presently and in the past, Montana has a problem with lingering death penalty cases. This bill would not be retroactive, he said, but would help in many cases in the future. He said the bill would be beneficial not only to society but to the judicial process itself, which now has a black eye because of the processes and the length of time involved. SB 165 would make the process more efficient, he said, and perhaps correct one of the wrongs in the procedure. He urged the committee to seriously consider the bill and recommended a Do Pass resolution.

CHAIRMAN CRIPPEN concluded the hearing and assured the sponsor that all bills are considered seriously by this committee.

HEARING ON SB 185

Opening Statement by Sponsor:

SENATOR FRED VAN VALKENBURG, Senate District 32, Missoula, sponsor of SB 185 opened the discussion telling the committee that the bill was at the request of the Department of Justice. The bill would do the following, he said: 1) convert the means by which a person would be declared a traffic offender from a judicial to an administrative proceeding, 2) provide that a person who has been declared an habitual traffic offender will have the right to appeal that decision to a district court thereby preserving that person's access to the courts to contest the decision that has been made, and 3) provide for a minimum sentence with respect to a violation of the habitual offender law for 14 days in the county jail as opposed to no minimum under the current law.

Proponents' Testimony:

Brenda Nordlund, an assistant attorney general working with the Motor Vehicle Division, represented the Montana Department of Justice and spoke in favor of the bill. She said the bill would streamline the process by which they declare habitual traffic offenders. A habitual traffic offender is someone who over the

course of three years has accumulated 30 traffic conviction-points on the Motor Vehicle Division records. A DUI counts 10 points; she said, reckless driving counts 5; failure to maintain insurance is 5; and driving while suspended or revoked is a 6-point ticket. In order to obtain 30 points in three years, she estimated it would be a motorist with a great deal of disrespect for the motor vehicle laws. The current process is cumbersome, she said, because it involves not only the MVD, but requires the co-operation of county attorneys and law enforcement merely to initiate the process declaring someone an habitual offender. The advantage of the bill is that law enforcement would no longer be involved in the process. Only a call to the county attorney is needed in the event that the motorist challenges the accuracy of the records maintained by the MVD. Their records are the result of disposition copies of court records of convictions at the justice court level and the district court level. There are a substantial number of habitual traffic offenders, she maintained, quoting more than 600 last year. She urged a Do Pass recommendation for SB 185.

Mike McGrath, County Attorney for Lewis and Clark County, representing the County Attorneys' Association, spoke in support of SB 185. He told the committee that under the current system when a person accumulates 30 points, the MVD contacts the county attorney's office which is required to initiate a court proceeding and file a lawsuit. They get the sheriff to serve papers on the offender and have at least one court hearing. He liked to think of the this bill as a significant paper reduction act. There are a significant number of the cases taken to court, and he said they are rarely contested. These cases clog the courts and create unnecessary paperwork, he contended. This would be a better way to handle these cases administratively.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

None.

Closing by Sponsor:

SENATOR VAN VALKENBURG said in closing that the 14-day minimum was appropriate in this case because an habitual traffic offender is someone who has consistently violated the serious traffic laws in the State of Montana. We have minimums for DUI's, he said, that are less in some cases than this, but 14 days would put some teeth into the law with respect to a violation of law, which is driving after one has been declared an habitual traffic offender. He asked to keep that in the bill, and urged favorable consideration of the bill.

HEARING ON SB 175

Opening Statement by Sponsor:

SENATOR FRED VAN VALKENBURG, Senate District 32 of Missoula, introduced SB 175 to the committee on behalf of the **Montana County Attorney's Association.** The bill would provide immunity from prosecution for statements made by a person who has been participating in a sexual offender treatment program after conviction for a sex offense. The reason the association asked for the bill was because of a decision by the Montana Supreme Court which, in essence, said that the state could not revoke the probation of someone who had been ordered to enter sex offender treatment and did not successfully complete that treatment. In most, if not all, instances, sex offender treatment programs require that the offender admit to the acts that he has been convicted of performing. In order to get that admission, the person would have to give up the rights for post-conviction relief, *habeas corpus*, etc., and the court said it was a violation of their 5th Amendment privilege against self-incrimination. To treat an individual who has committed a sex offense, it is essential that the person admit to the act. If they remain in a period of denial, he said, even in the face of overwhelming proof, the prospects for reforming or rehabilitating that person are slim. The treatment is not an easy course to follow, nor produces great success, he said, but it would be wiser to pursue treatment than to simply ignore the problem and hope to jail someone long enough that they would never again offend. He said we could try to change the behavior of people in custodial settings with eventual release in mind to lessen the danger to society. There were a number of cases, he maintained, that it would not be appropriate to even incarcerate a person at the outset. A person could be placed on probation and certain requirements could be imposed by a suspended or deferred sentence. That person could be left in the community to support his family, or maybe earn a living. In order to do that, the association had concluded that immunity must be granted for statements made in the treatment, so they could go back into court to revoke probation and use a person's failure to complete sex offender treatment as one of the grounds for irrevocation.

Proponents' Testimony:

Mike McGrath, Lewis and Clark County Attorney, spoke in support of SB 175. The bill was designed to close significant loopholes in the criminal justice system in the treatment of incarcerated sex offenders, he said. The supreme court held that a person's suspended sentence cannot be revoked for failure to complete a sex offender program. What they determined, he said, was that the majority of offenses were sentenced with a combination of requirements to complete programs before they are eligible for parole. The problem, following the State vs. Imlay, is that they cannot go back to court and incarcerate for failure to comply with the program. They have found that the people will offend again unless they are subject to the treatment programs. He thought that about 60 per cent of the men incarcerated at the

state prison were sex offenders, whether they had been jailed for that offense or others. This would be closing a loophole, forcing people to complete a program, or force imprisonment.

Ron Silvers, a licensed professional counselor, Helena, spoke favoring enactment of SB 175. He is the director of a sexual treatment program, working with perpetuators and victims for approximately 14 years. He is a vice-president of the Montana Sex Offender Treatment Association and has been a member since 1986. He expressed a positive estimate of the number of sex offenders helped in active proactive treatment programs. Many of the sex offenders (perhaps 95 per cent) have victimized many more people than what they have been charged with; at least six per offender, he said. There were two reasons for his support of the bill: 1) sex offenders who maintain their secrecy and shame will not stop offending; basic to treatment is full disclosure, including providing names of victims and a history of their behaviors, and 2) this bill would effectively remove essential barriers which discourage sexual offenders from disclosing all of their victims. It is an extremely difficult change process, he said, and many times when offenders get a sense of the program, they prefer jail.

Questions From Committee Members and Responses:

SENATOR AL BISHOP asked the sponsor if it was possible for someone who committed a rape-murder and another crime to evade prosecution by the immunity of the sexual offender law?

SENATOR VAN VALKENBURG called attention to Line 13, the use of use-derivative immunity, with respect to these statements. This is not total immunity from prosecution to offenses, it only says the statements made in the course of the program cannot be used to prosecute them. Another reference in the bill states that one can't use the statements directly or indirectly. Indirectly may open up discussion, he said.

John Connor, appearing on behalf of the Montana County Attorney's Association was asked to respond. He said that the discussion revolved around the dilemma prosecutors are faced with in any situation in which immunity is granted. During the prison riot cases, a prosecutor must show to the court, in the Castegar hearing, that the information developed was not information received in an immunity situation. For instance, he said, if a person in a sex offender treatment made a statement that they committed a homicide, unrelated to the offense for which they are granted immunity, the prosecutor would be required to prove that homicide by means other than the statement derived. It is incumbent upon the prosecutor to show the means and the information may be requested by the defendant. They wished to make the bill appropriate for only sex offenses, but the Imlay case prevented that narrow definition.

SENATOR SHARON ESTRADA asked **Mike McGrath** if a minor sexual

offender was entered into a treatment program and was found out to be a serial rapist, could he be prosecuted or held responsible for statements he might make? Also, how would they handle the confession?

Mr. McGrath said that they would be prevented from using in the prosecution the statement that the person made in the course of treatment. If the victims come forward and identify the person or they are able to acquire other evidence, then the prosecution would proceed. This bill limits the ability to use that statement made to the treatment person only. He equated the statements made to a confessor. It often happens that the offenders will admit the offenses themselves to law enforcement personnel, he said.

SENATOR STEVE DOHERTY asked **Mr. McGrath** if the Oliver North case proved that is was difficult to convict someone if you have to prove in the Castegar hearing that you have independently determined the facts?

Mr. McGrath said it depends on the facts of the case. That case was difficult, some are not.

CHAIRMAN CRIPPEN asked that without the immunity granted, a sex offender, objecting to the treatment, hamstrings the county attorneys in that he would be testifying against himself?

Mr. McGrath said that even though the person has already been convicted, they still have the Fifth Amendment right not to admit their crime.

CHAIRMAN CRIPPEN said that would be a second good reason for the bill.

SENATOR LARRY BAER asked **Mr. McGrath** to clarify whether any statements made by the person during treatment would be held confidential for medical reasons, or was this public knowledge and open to public disclosure.

Mr. McGrath said it would depend on the treatment program and the agreement they have going into it. Most state up front that part of the treatment is to notify the victim and families.

SENATOR LINDA NELSON asked **Ron Silvers** what the success ratio was for offenders who do admit their wrongdoings, to which he replied that it was essential that they do admit to committing the crimes. He said he would not participate in a program unless that admission came about. He said that he knows of six known re-offenses of the 300 to 500 participants in his 14 years of practice.

<u>Closing by Sponsor</u>:

SENATOR VAN VALKENBURG said everyone's worst nightmare in passing

this bill would be to grant immunity to a person and then they admit a heinous murder that no one knew about. The public would scream for prosecution, the county attorney would want to, but the legislature wouldn't let him because the immunity had been granted. The likelihood of that kind of story happening is very rare, he said, and particularly unlikely that law enforcement prosecutors would not be able to develop independent means to prove that kind of a case. What happens every day, though, he maintained, is that there are sex offenders committing offenses who are identified and not being treated for various reasons. The most significant reason treatment is not given is due to the Imlay decision, which says that if you force someone into treatment, anything they say subjects them to future prosecution. The bill would take away the impediment of admitting to the offense. He asked that the committee come down on the side of making sure of
the incentive for sexual offender treatment.

{Tape: 1; Side: B; Approx. Counter: 00}

EXECUTIVE ACTION ON SB 148

Motion: **SENATOR BISHOP MOVED THAT SB 148 DO PASS.**

Discussion: **SENATOR BISHOP** said that the bill had no opposition and had a complete airing. The people have voted on this, he said, and he saw no point in creating anger if people can't vote on something and have it as a fact.

SENATOR RIC HOLDEN asked **SENATOR HALLIGAN** for his thoughts, to which the senator replied that this language was in the other section of the Constitution, the referendum section, but not the initiative section. He did not see any mischief here, he said.

Valencia Lane told the committee that the other place that the language appears in the Constitution is in Article 3, amendments to general laws, not to the Constitution. When **SENATOR EMERSON** was questioned about the research, history and the Constitutional Convention, he had not researched the minutes and did not know why this was left out in the section.

CHAIRMAN CRIPPEN asked if it would be an initiative process like I-105? In that case, the legislature can change that, he said.

SENATOR DOHERTY asked what "sufficiency" means and "shall not be questioned" would be better than "may not be challenged".

CHAIRMAN CRIPPEN asked **Valencia** if that was the language used in the amendments and she replied, "yes".

SENATOR DOHERTY said that if an initiative passed which amends a statute, the legislature can act immediately if there is any

problem. If we amend the Constitution, he said, and there is a problem, the only entity that can deal with the problem is the Supreme Court. He thought the language would remove the Supreme Court's ability to decide, and they must decide if a Constitutional amendment is proper or it offends another part of the Constitution or the U.S. Constitution.

CHAIRMAN CRIPPEN said he did not think the discussion talks about the petition of sufficiency, but rather the circumstances surrounding the election and that would be a different matter.

SENATOR SUE BARTLETT asked what would happen if after the issue appeared on the ballot that it came to light that there was fraud in the petition signatures. Would it go to the sufficiency of the petition because figuring out the language and the procedures go through the legislative council, the attorney general and the secretary of state's office, giving people a hard look at the language.

CHAIRMAN CRIPPEN said he thought the Supreme Court would have the ability to handle a case of fraud with enough evidence to substantiate that. He did not think that it dealt with the internal aspect of the petition and he would infer "sufficiency of the petition" to deal with that.

SENATOR LORENTS GROSFIELD said that he understood **SENATOR EMERSON** to say that once you go through the election process, the people made the decision. What's the difference then if the petition was sufficient or not when the people have already spoken, he asked.

SENATOR BAER echoed the senator's comments. The language of sufficiency of the petition is in reference to the structure and language and appropriateness to be put before the public. That is addressed very carefully by county attorneys and/or the Attorney General prior to approval to correctness for the petition. We are not restricting the Supreme Court or restricting a citizen from the substantive content of the petition itself, he said.

SENATOR REINY JABS asked if the intent was to keep it out of court and let the people have the final say.

CHAIRMAN CRIPPEN said he believed the testimony said that.

SENATOR BARTLETT pointed out in terms of the word "sufficiency" that there was a provision in the statutes on ballot issues which requires the Secretary of State to notify the Governor when sections or sheets of a petition contain a sufficient number of signatures.

Vote: The **DO PASS MOTION ON SB 148 CARRIED** on an oral vote with **SENS. DOHERTY AND HALLIGAN** voting no.

EXECUTIVE ACTION ON SB 149

Motion: **SENATOR DOHERTY MOVED TO ADOPT HIS AMENDMENTS TO SB 149.**

Discussion: The senator explained the purpose of the amendments saying if they were taking away the right for full legal redress, then that's what it should say and if they were going to let the legislature abolish remedies and claims for relief, then that is what they should tell them.

CHAIRMAN CRIPPEN had a hard time with using the word "abolishing", which is a method of saying that you are taking away rights, which goes further in pushing the point of those opposed to this would want.

SENATOR DOHERTY said he would disallow "limiting," but maintained that's what the proposal is to do.

CHAIRMAN CRIPPEN said if Section 3 was abolished and the word "full" taken out, there would be no mischief.

SENATOR NELSON said if Section 3 was eliminated, there is no need for the bill at all.

Motion: **SENATOR HALLIGAN MADE A SUBSTITUTE MOTION THAT SB 149 BE TABLED.**

Discussion: **SENATOR HALLIGAN** said that the sponsor's intent was in the right place, but that they did not want to send a message to the public that they would limit their rights in any way.

Discussion: **CHAIRMAN CRIPPEN** said he saw the point, but you also could make the same point if the "full" isn't followed by the Supreme Court. Why have it in there in the first place, he asked? This is another area that could be bothersome down the road.

SENATOR NELSON asked if it would then be important enough to clutter up the ballot?

SENATOR HALLIGAN said the message he was getting from the people was to preserve rights and not take more away. If you take the "full" out, it means something to the public, he said. It would take the full legal redress we have now and reduce it. We don't want to do that, he said.

Vote: By a roll call vote, **THE MOTION TO TABLE SB 149 CARRIED** with 6 members voting aye and 5 members voting no.

EXECUTIVE ACTION ON SB 185

Motion\Vote: **SENATOR HALLIGAN MOVED THAT SB 185 DO PASS.** The motion **CARRIED UNANIMOUSLY** on an oral vote.

EXECUTIVE ACTION ON SB 165

Motion\Vote: **SENATOR HALLIGAN MOVED THAT THE AMENDMENTS CONTAINED IN EXHIBIT 165-1 BE APPROVED.** The motion **CARRIED UNANIMOUSLY** on an oral vote.

Discussion: **SENATOR BARTLETT** questioned the effective date. In further discussion with **SENATOR DOHERTY** and **John Connor,** they determined it best left as is.

Motion/Vote: **SENATOR HALLIGAN MOVED THAT SB 165 DO PASS AS AMENDED.** The motion **CARRIED UNANIMOUSLY** on an oral vote.

EXECUTIVE ACTION ON SB 175

Motion\Vote: **SENATOR HALLIGAN MOVED THAT SB 175 DO PASS.** The Motion **CARRIED UNANIMOUSLY** on an oral vote.

ADJOURNMENT

Adjournment: **CHAIRMAN CRIPPEN** adjourned the hearing at 11:30 a.m.

BRUCE D. CRIPPEN, Chairman

JUDY FELAND, Secretary

BDC/jf

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 1-24-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

SENATE STANDING COMMITTEE REPORT

January 24, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 175 (first reading copy -- white), respectfully report that SB 175 do pass.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord.
Sec. of Senate

211308SC.SRF

SENATE STANDING COMMITTEE REPORT

January 24, 1995

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration SB 165 (first reading copy -- white), respectfully report that SB 165 be amended as follows and as so amended do pass.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 13.
Following: "state"
Insert: "or on its own motion"

-END-

Amd. Coord.
Sec. of Senate

SENATE STANDING COMMITTEE REPORT

January 24, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 185 (first reading copy -- white), respectfully report that SB 185 do pass.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord.
Sec. of Senate

211254SC.SRF

SENATE STANDING COMMITTEE REPORT

January 24, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 148 (first reading copy -- white), respectfully report that SB 148 do pass.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord.
Sec. of Senate

211244SC.SRF

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 1-24-95 BILL NO. SB 149 NUMBER #1

MOTION: Sen Doherty Moved to Accept Amendments -
Sen Halligan - Subsq. Motion to Table

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN	/	
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS	/	
LINDA NELSON	/	

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Vote to table

Roll call

SB 149

Amendments to Senate Bill No. 165
First Reading Copy

Requested by Senator Halligan
For the Committee on Judiciary

Prepared by Valencia Lane
January 24, 1995

1. Page 1, line 13.
Following: "state"
Insert: "or on its own motion"

DATE 1-24-95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 165, SB 175, SB 185

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
Beth Baker	Dept of Justice	165	✓	
Dean Roberts	Dept Justice - MVD	185	✓	
Brenda Nordlund	Dept of Justice	185	✓	
Ron Silvers	LPC #124 Private Practice	175	✓	
Mike McGrath	Co Attys Assn	165, 175	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY