MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE CRIPPEN**, on February 3, 1997, at 9:00 a.m., in Room 325.

ROLL CALL

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

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Sharon Cummings, Acting Committee Secretary

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 230 (date posted); SB 222 (date posted); SB 210 (date posted)
Executive Action: SB 96 Tabled

HEARING ON SB 230

Sponsor: SENATOR FRED THOMAS, SD 31, Stevensville

Proponents: Susan Good, Montana Right to Life
Richard Tappe, Montana Right to Life Association
Russell Hill, Montana Trial Lawyers Association
Sharon Hoff, Montana Catholic Conference
Arlette Randash, Eagle Forum
Laurie Kutnick, Christian Coalition of Montana

Opponents: **Ruth Sasser, Registered Nurse**
Ashby Burchard, Great Falls

Opening Statement by Sponsor: **SENATOR FRED THOMAS, SD 31, Stevensville.** The purpose of SB 230 is to make certain that assisted suicide, especially physician assisted suicide, does not take root in Montana. Most likely assisted suicide does happen here in Montana. We don't have statistics at this time, an Oregon study indicated that approximately 7 percent of doctors surveyed admitted deliberately ending the life of another human being. Everyone knows of Dr. Kevorkian, and the attempts to convict him of criminal offenses and charges of assisted suicide.

Like Michigan, Montana has criminal penalties for the offense of assisted suicide. The problem is that the levels of evidence must be so high under the criminal statute "guilty beyond a reasonable doubt" that convictions are almost impossible to obtain.

Civil suits require a preponderance of evidence in order to convict. Civil damages and injunctions, when ignored, call for stiff contempt of court penalties, and compensatory/punitive damages that will make physicians sit up and take notice. That is what we are calling for in this bill.

The bill gives individuals standing within the law to bring forth charges and ask for damages. Sections 1 and 2 clearly state that no individual may be prosecuted for administrating drugs that relieve pain even if it hastens death. No one will be left to die in agony under this bill. Our families will still be able to do what they can to alleviate suffering at the end of a loved ones life.

{Tape: 1; Side: A; Approx. Time Count: 9:07; Comments: None.}

Proponents' Testimony: **Susan Good, Montana Right to Life.** The recent acquittal of Dr. Jack Kevorkian has sent a message to physicians everywhere. Convictions for assisted suicide under criminal statutes are tough to come by. We thank **SENATOR THOMAS** for bringing SB 230 for your consideration.

The Netherlands allow physician assisted suicide, by rule, if the doctor follows simple guidelines. I am distributing a chart showing death by lethal injection in Holland, and how it would look if the same proportions would be applied in the U.S. **(EXHIBIT #1).**

With the repeated acquittals for Dr. Kevorkian, the medical community could get a message that it is okay for them to choose whose life is "unworthy of being lived". The Montana legislature needs to send another message to the medical community and Montana families. Taking a life, any life, is wrong and won't be tolerated in Montana. Again, Section 1, subsection (2) of the

bill guarantees that any person may be given all the pain medication he/she needs for pain relief even if it hastens death.

Richard Tappe, Montana Right to Life Association. (EXHIBITS #2-11) handed out to the committee in support of the bill.

Russell Hill, Montana Trial Lawyers Association (MTLA). MTLA is not taking a position on the underlying issue in this bill. On the legitimacy of using civil liability when the state decides on a policy, it is not just a court generated policy, as the legislature often imposes it. It is an efficient way of enforcing strong state policies using attorney's rather than state enforcement.

Sharon Hoff, Montana Catholic Conference. We stand in support of SB 230.

Arlette Randash, Eagle Forum. We support SB 230. The legislature has debated in the past the merit of revoking the professional licenses of those who have failed to repay their student loans and child support payments. Surely Montana has a more compelling interest in protecting human life than in debt collection. A more compelling interest in maintaining a clear line between physician as healer and physician as instrument of death. An interest meriting, at minimum, the revocation of licensure for those legally guilty of assisting in suicide. We believe SB 230 merits your approval.

Laurie Kutnick, Christian Coalition of Montana. I rise in support of SB 230. The state has always had a interest and responsibility to protect the lives of its citizens. In our current climate every measure needs to be taken to ensure individuals/families of their right to live. Health care professionals take an oath to promote healing, but are being sent a confusing message that they might have an ethical option in deciding who lives and who dies. We need to clarify our state's position on its willingness to protect even the most vulnerable among us. We need to send a message, loud and clear, that in Montana, which always works so hard to promote quality of life, we do not stand for assisted suicide.

{Tape: 1; Side: A; Approx. Time Count: 9:21; Comments: None.}

Opponents' Testimony: **Ruth Sasser, Registered Nurse.** Eighteen of my nursing years have been spent primarily working with terminally ill people, through hospice and other home health agencies. I do not support SB 230, however, I don't support assisted physician suicide. My concern with this bill is that when they hear the word "litigation" doctors will run scared. It is very difficult now to get correct pain management to the terminally ill patient. Over the years there has been some improvement, in that physicians tend to be more educated in pain management, but we still have not crossed the path where physicians are comfortable in adequately managing the pain.

How is an assisted suicide going to be determined with this bill? It is not clear to me who determines this. I support the principle, but not in the way the bill is written now.

Ashby Burchard, Great Falls. I don't see how you can tell a person in a lot of pain that they can't ask their physician to help. It seems like a strange decision for someone else to make. I oppose this bill.

{Tape: 1; Side: A; Approx. Time Count: 9:27; Comments: None.}

Questions From Committee Members and Responses: **VICE CHAIRMAN LORENTS GROSFIELD.** On page 1, line 19 we're talking about a person who withholds or withdraws life support in compliance with a living will. Shouldn't that section be expanded to include, "at the request of the terminally ill patient?" **Susan Good.** I was confused when I read this, and am thinking about an amendment. We want it to be clear that whether one has a living will or not, all Montanan's will be able to be treated for the pain they experience even if it ends up hastening their death. We are simply trying to prohibit a person from saying, "I don't believe that your life is worthy of living, therefore we're going to give you a lethal injection."

VICE CHAIRMAN GROSFIELD. A living will is a living document under our statutes. If we are dealing with a person who does not have a living will, but requests to withdraw life support or perhaps is not competent to make the request, then that person's legal representative might make the request. **Susan Good.** I appreciate your comment. What we are talking about is the real difference between a decision to stop treatment by the individual himself, rather than another person saying, "you're finished." I believe the this bill states all Montanan's and the physician who withdraws life support in accordance with a living will are protected.

SENATOR SHARON ESTRADA. My mother died in 1979 at age 55 from cancer. She did not have a living will, and I made the decision not to put her on life support. The doctor told me he could keep her alive for a couple of years but her quality of life will not be good. Do you think I assisted her suicide? **Laurie Kutnick.** I am not in the position to judge that. I share your experience with my own mother. I believe, along with you, that in acting in the best interest of your mother you had to make a decision at that time as a family member. We're not here to play God and judge, what we are saying is we need to have guidelines in place to address a case where a doctor or someone who has a vested interest in terminating a life inappropriately does so, and where a family can come back and address this in a court of law.

SENATOR ESTRADA. In my opinion, if you do not administer help for an individual to continue with life, you are actually assisting in their death. I would like Susan Good and Laurie

Kutnick to be here for executive session on this bill. **Susan Good.** I will be there.

SENATOR REINY JABS. I realize the object of this bill is to discourage and make assisted suicide illegal. On page 2, section 3 it states, "the following may seek compensatory or punitive damage against the physician...even if the plaintiff consented to or knew about the suicide." It appears you're more or less encouraging them to agree to the suicide and then sue the physician. I don't understand this. **Susan Good.** Sometimes people make wrong decisions under severe emotional duress later regret them.

SENATOR SUE BARTLETT. I'm requesting the sponsor and the proponents to clarify the limits of living wills, durable powers of attorney for health matters, and orders not to resuscitate. I believe these are addressed in Montana law and are being used. What do each of these do and how do they come into play in relation to this bill?

I also want the sponsor to address the concerns Ms. Sasser raised, because we are clearly in an area where we are attempting to address a particular set of circumstances and its a very fine line to address that without having unintended consequences that are undesirable. Who will make the judgement about whether the decision was reached in accordance with the wishes of the terminally ill person in a responsible medical manner versus a medical person saying you no longer deserve to live and making that decision? How is the judgement going to come about, and how do we address the effect this will have on medical personnel? **SENATOR THOMAS.** We will be happy to work on obtaining the data you requested that. Who makes the judgement? If I could quantify it in a phrase, "angels of mercy are not intended to turn into angels of death." It is not a physician or nurse's prerogative to retain someone else's pain killer in the refrigerator and administer it to another patient that is still alive. There are rules and procedures to follow in this area and they must remain intact, we are not taking them away in this area. This bill does not deal with medical care, it deals with suicide and the attempting of it by a physician or one of that nature in the medical field.

SENATOR BARTLETT. Who makes the judgement, after the fact, regarding whether or not someone will be charged with a civil case? Who makes the judgement whether the treatment was appropriate or assisted suicide? **SENATOR THOMAS.** We propose that this question will be answered through the civil side of the judicial system. A certain individual, sibling, spouse, etc., will be able to have standing within the law to bring that case forward in civil court and either enact an injunction either before or after assisted suicide. The jury will ultimately answer your question.

SENATOR BARTLETT. With that hanging over a physician or medical personnel, how can this act not serve as a chilling effect on their treatment of terminally ill patients and perhaps lead to increased suffering because of the reluctance to get near a territory that might bring a civil action or judgement? **SENATOR THOMAS.** We're talking about assisted suicide here, not medical treatment. I believe the lines are drawn very clearly between the two.

CHAIRMAN CRIPPEN. You don't provide for codification instructions, particularly in Section 1. Can you explain the rationale behind having the Human Rights Commission provide an injunction against assisting in suicide? You have provided actions against health care providers, specifically individuals, but you don't against health care facilities. Is there a reason for that? **SENATOR THOMAS.** I cannot tell you why health care facilities were not included, other than that they would not be administering directly. **Susan Good.** The Human Rights Commission has been set up to take care of the rights of the oppressed. They might speak up for people who were unempowered, like Alzheimer patients who might not have anyone to speak for them. I don't see why we can't, include health care facilities.

{Tape: 1; Side: B; Approx. Time Count: 9:50; Comments: None.}

Closing by Sponsor: **SENATOR THOMAS.** In the weeks before his death, Joseph Cardinal Bernadin wrote to all of us saying that he had decided to stop his chemotherapy treatments because they were not working. He stressed the difference between declining medical treatment and actually seeking to end one's life. He wrote that a person who forgoes treatment doesn't choose death, but instead chooses life without the burden of disproportionate medical intervention. There is a difference.

{Tape: 1; Side: B; Approx. Time Count: 9:52; Comments: None.}

HEARING ON SB 210

Sponsor: **SENATOR MACK COLE, SD 4, HYSHAM**

Proponents: **Harold Hanzer, State DUI Task Force**
Brenda Nordlund, Department of Justice
Ron Ashabrenner, State Farm Insurance Companies
Brent Brooks, Deputy Yellowstone County Attorney
Addison Clark, Kalispell Chief of Police
Ashby Burchard, Great Falls
LouAnn Himel, Victim
John Miller, Great Falls
Joan Himel, Victim

Opponents: **Russell Hill, Montana Trial Lawyers Association**
Mark Staples, Montana Tavern Association

Opening Statement by Sponsor: SENATOR MACK COLE, SD 4, Hysham. SB 210 was requested by the DUI Task Force and Harold Hanzer. SB 210, with amendment sb021001.avl **(EXHIBIT #12),** is an act making it unlawful for a driver to refuse to submit to blood, breath or urine tests. This bill does not change the basics on a DUI charge, all the same laws and rules must be followed before subjecting someone to a possible DUI arrest. A person would not come under this legislation unless they had been previously convicted of driving under the influence of alcohol or the person had refused a blood, breath, or urine test as required by the DUI law.

{Tape: 1; Side: B; Approx. Time Count: 9:55; Comments: None.}

Proponents' Testimony: Harold Hanzer, State DUI Task Force. We looked at legislation that could improve the arrest and conviction of DUI offenders. From the standpoint of victimization, DUI is the most serious crime in Montana. There is no other criminal activity that even approximates the carnage and destruction of the DUI driver.

Our task force looked at some Canadian laws and were particularly impressed with the fact that they had criminalized refusal and that the refusal penalty was the same as the conviction. The State of Minnesota, in 1989, criminalized refusal for the multiple offender. Last year they criminalized the penalty for refusal for all offenders. This is legislation that has been in force in Canada and Minnesota for several years. The law in Minnesota has stood the constitutional test and I have no reason to believe it would be viewed differently in Montana.

We want to give officers better tools for removing these dangerous drivers from our streets. Currently, in Montana, about 1 out of 3 drivers refuse the test. With a test refusal more time is involved for officers, prosecutors, courts and juries. We need constitutional laws that take these high risk drivers off the road. In 1996, 63.4 percent of those convicted of DUI were first time offenders; 36.6 percent had one or more offenses.

The criminalization law simply makes sense, it's effective and efficient. We ought to do what is necessary to remove one of the most serious threats to the people of Montana and the senseless killing. Not one of the 91 people killed by DUI drivers had to die. Is it cost effective not to provide law enforcement with the best tools available?

Brenda Nordlund, Department of Justice (DOJ). This bill criminalizes any testing refusal under Montana's implied consent law. This does not apply to Montana's PBT (preliminary brass tester) law. We are only talking about those individuals who have been arrested for DUI, and who have been asked to submit to a blood, breath, or urine test by the arresting officer.

The proposed amendment narrows the focus of this crime to those who cause the most problems, the hard-core drinking driver. They don't comprise the largest number of incidents, but in terms of the number of incidents and the consequences to individuals throughout the state, they comprise an exceedingly large number of that population. We propose that if you are an individual who has previously been convicted of a DUI or a per se offense, that's .10 excess of alcohol, or have previously refused an implied consent testing request within the past 5 years and you now refuse a test, you would be guilty of a crime. The penalty is the same as if you were convicted of a DUI.

Section 1, subsection (2) states you can be prosecuted or charged with both the DUI and the refusal. That is how it works in Minnesota. You may only be convicted in one of the two offenses. These two offenses are generally prosecuted in the same criminal proceeding but only one sentence is imposed. It is an absolute liability offense, just like the underlying offenses that the offender is able to avoid when they refuse a testing request. That means the State of Montana needn't prove the defendant's mental state to prove this crime. We do not have to prove the defendant acted purposefully, knowingly or negligently. The remainder of the bill is basically parallel amendments to the drivers licensing laws that will allow the motor vehicle division to suspend a drivers license upon the conviction of a testing refusal.

In section 6 are the habitual traffic offender statutes and the criminalization of testing refusals as an offense for which 10 conviction points can be noted.

The purpose of the amendment is to narrow the focus to the hardcore drinking driver. Under Montana's implied consent law, people have the privilege of refusal to avoid forcible taking of blood. It is a privilege and not a right to refuse blood or breath testing in the State of Montana. The legislature confers this privilege and if the legislature changes its mind in terms of the extent of that privilege, it is entirely within its providence.

Brenda Nordlund. The Causes and Consequences of Implied Consent Test Refusal, is a case study of the Minnesota experience. A Journal of the American Medical Association article, published in January 1997, addresses the incidence of drunk driving experiences in Montana. They estimate there are approximately 546 drunk driving incidents per every 1000 people. This is a self-reported number based, on the number of respondents who indicated they drove after they believe they may have been impaired as a result of drinking alcohol during the past month.

This is a significant problem. We are asking for a fairly unusual law, but it is not unique and has been tested in Minnesota and withstood constitutional challenges there. I urge a do pass recommendation for this bill.

Ron Ashabraner, State Farm Insurance Companies. We support this bill.

Brent Brooks, Deputy Yellowstone County Attorney. In 1995 there were 1,142 DUI arrests in Yellowstone County. I handle a variety of cases, from zoning violations to deliberate homicide. A DUI case is one of the toughest for a prosecutor to prove to a jury or judge. I feel more comfortable and confident prosecuting a homicide case than a DUI case.

The County and our office stand in full support of SB 210. Because these are difficult cases to prove, defendants have developed a sophisticated way of getting around the charges. Right now, when you refuse a breath test, you have an administrative civil penalty. A person can get bail and actually be driving again within hours after being arrested. The administrative revocation of their driving privileges does absolutely no good. It is an administrative penalty right now, not a criminal penalty.

With this bill a person has to be under arrest, but also the focus is narrowed to whether or not that person refused a breath test. Preparation and court time would be greatly reduced and this would ease the burden of prosecutor offices and court time/ testimony by these officers.

These cases are often contested, particularly by those who are chronic, repeat offenders. Let's get these people off the street. If they need help, let's get them the help they need. Driving is a privilege, not a right. In the past, the Legislature has indicated a great interest in protecting us from an impaired driver. The chemical analysis now being criminalized will make sure that a person is criminally responsible and not just civilly or administratively responsible for their actions and the consequences of their free-will choice to drink and then drive while impaired.

Addison Clark, Kalispell Chief of Police. I have been a police officer for over 22 years. If you really want to help us get the drunk drivers off the highways of the State of Montana; if you want to save lives and taxpayers money; if you want to save the time of our courts, prosecutors and police officers, I ask you to pass SB 210 to criminalize the refusal to take a chemical test. The Legislature has passed tougher DUI legislation in the past. There is an increasing trend for everyone to refuse to take the test. Some prosecutors feel that, without a test, they have a weak case as jurors like to see the test results.

Many times people arrested for DUI simply refuse to cooperate. On a DUI arrest an officer will spend about two hours and up to two days in court. In Kalispell, we arrest an average of one DUI per day. We can't possibly try every one of these. An advantage of SB 210 is in three choices for a DUI arrest: 1) take the test and fail; 2) take the test and pass; 3) refuse the test and have

the same consequences as a DUI. We wouldn't spend a lot of time in court with this. We often look at this from the perspective of the DUI defendant, I think it is time for us to look at it from the perspective of the victim and the rest of society in Montana. Please pass SB 210.

Ashby Burchard, Great Falls. I think you are supporting drunk driving if you don't support this bill.

LouAnn Himel, Victim. Thirty-one years ago my grandfather was killed by a drunk driver. Three and a half years ago my friend, Patty Smith, was killed by a drunk driver in Great Falls. One and one-half years ago my husband was killed by a drunk driver. The man who killed my husband had a blood alcohol content of .21, which was a very important piece of evidence in the criminal trial. I am very much in favor of this bill. How can we prevent our law enforcement officials from taking the steps they need to prosecute these people? How can we tie their hands and not allow them to gather the data they need? How can we allow drunk drivers the privilege of not giving a blood or breath test? Let's pass this bill and give them the tools they need.

John Miller, Great Falls. I'd like to add to what my daughter just said. A friend of the family, Patty Hysell, decided to go out one night and was hit head on by a drunk driver. The driver didn't spend one minute in jail, which is not right. The State of Montana has control of licenses: the bar, driving, hunting, gamblers.

I think we should go further than this bill, and come down on bars that let these people drink all afternoon and drive. Our state is trying to be more lenient with DUI's to avert overcrowding of the prisons. Drunks on the road today are much worse than a robber. My daughter and mother have suffered terribly getting over the deaths in our family. I urge you to pass SB 210 and then start passing some laws against the bars.

Joan Himel, Victim. I support this legislation to give our law enforcement people what they need to take drunk drivers off the roads. Drunk driving is America's most frequently committed violent crime. I think it is also be one of the most preventable, and I ask you to please pass this bill.

{Tape: 1; Side: B; Approx. Time Count: 10:25; Comments: None.}

Opponents' Testimony: **Russell Hill, Montana Trial Lawyers Association (MTLA).** I want to thank Brenda Nordlund for being open about the bill. The amendments that have been brought to you are excellent, and I don't think there is a constitutional challenge. The MTLA has consistently stood up in favor of harsher penalties for DUI. There is a big difference in getting tough in the penalty phase, and relaxing the standards of proof that the state has to bear for a criminal conviction against one of its citizens.

There may be a problem with the phrase "refusing to submit." This bill makes it an absolute liability offense when somebody refuses to submit to an invasive medical procedure, and that deserves some investigation. There are many reasons to refuse to submit to a test besides guilt and evasion. Criminal law generally distinguishes between criminal conduct and criminal status and that is an important distinction.

This bill is going to make the issue of probable cause for stopping someone a much more problematic legal issue. You've heard about the cost benefit analysis of drunk driving, in a state where the maximum fine for the second offense of DUI is $500, it seems there are much better ways for the legislature to discourage this crime than to create the potential for accidentally convicting someone who is innocent. There are many reasons why the state carries the burden of proof in a criminal action.

Mark Staples, Montana Tavern Association. While I have been an attorney and lobbyist for the Montana Tavern Association we have not opposed any DUI legislation. We have supported some, and are now meeting with Senator Wilson on his interlock device proposal dealing specifically with those people who have been identified as the real problem in this milieu.

We will probably come before you as a proponent on the interlock device. Because I was a deputy county attorney, I know the State is not without tools, and most of them are black and white. We had probable cause stated by the officer and, in most instances, the jury predilection to take that officer's word. We had the video from the car showing the errant driving and street behavior of the arrestee. We had the field tests, which usually were conducted in front of the video camera. Even without a blood or breath test, I never lost a DUI case as a prosecutor and I knew few prosecutors who did. The DUI conviction rate is extraordinarily high and they don't throw out a lot of those cases. We didn't hear what the conviction rate is or the rate of the people who don't go to court.

The bar is, has been, and will be responsible if someone is injured or killed having come from a bar where the driver has been drinking; however, that is not the only place the drunk driver gets his alcohol. For those who do, and can be traced back to that bar, the penalties are very severe. They face loss of license, uninsurability, and many other aspects.

Driving is a privilege. We have a punishment for refusing to take a test, which is loss of driving privileges. We should not take all the rights of drivers of this state. They are punished enough now. Criminalizing this means the cases don't have to be tried. In this system we should have to try the cases.

{Tape: 1; Side: B; Approx. Time Count: 10:32; Comments: None.}

Questions From Committee Members and Responses: **SENATOR STEVE DOHERTY.** There was testimony that, in no other instance, is a defendant able to withhold physical evidence from the prosecution. If, in a homicide case you are looking for physical evidence from an individual that has been charged and they refuse to give you that evidence, what is the procedure you need to follow in order to get the physical evidence? **Brent Brooks.** A person can be forcibly taken to a hospital and the samples can be removed. In some circumstances there may be the need to get a search warrant. When you take the time to get a search warrant the evidence is evaporating as the body eliminates alcohol. There are certain tools depending on the facts, circumstances and the emergency situation involved.

SENATOR DOHERTY. When you get a search warrant, who makes the call, you or a judge? **Brent Brooks.** If it's a non-emergency situation, an affidavit has to be prepared by law enforcement individuals which is then submitted to a judge. It takes at least two or three hours to prepare a search warrant.

SENATOR DOHERTY. What do you have to overcome in order to make a search valid, and those results admissible in court, in instances where a test refusal has occurred? What are the exigent circumstances and, in the case of a DUI arrest, can you use those exigent circumstances right now to obtain that evidence? **Brent Brooks.** In terms of your last question, I do not know what our Supreme Court would say. My suspicion is they would say that the implied consent statute applies to those situations, in that those people cannot forcibly have samples removed from their body.

I know that with negligent homicide cases the implied consent statute has been held not to apply. In anything less than that the implied consent statute does apply, and we do not have the right to forcibly remove those chemicals from a persons body. In theory, a search warrant may sound pretty comforting, and fairly innocuous and reasonable, but in practicality it simply does not work with the prosection of DUI cases.

SENATOR DOHERTY. What other statutes do we make an absolute crime? **Brent Brooks.** Most of our traffic offenses, some animal control ordinances and non-traffic misdemeanors are absolute liability offenses. Negligent homicide, where a traffic death occurs, has to be proven negligent. I don't think any person would purposely or knowingly, as our criminal statutes indicate, drive an automobile. They have impaired judgement, however, so they don't have the mental state to exercise that judgement. This is what this bill is aimed at.

VICE CHAIRMAN GROSFIELD. I like the concept, but am troubled by the absolute liability section. Our justice system is based on the premise that you are innocent until proven guilty. The absolute liability section, especially since it involves a lack of action or choice not to do something concerns me. I want you

to comment on that, and can you be a little more specific along the lines of what other kinds of offenses are treated this way, where you're guilty from the beginning rather than the other way around? **Harold Hanzer.** I can appreciate your concern about that; however in existing DUI statutes we have the per se violation. If you test at .10 or above, it is an automatic conviction.

All of the highway statutes are basically absolute liability statutes. This bill increases the penalty that we now have on implied consent. Driving is a privilege, not a right. Under the law the driver impliedly consents to the test. We provide, under statute, that the driver has the right to refuse the test. This modifies that statute.

We are finding that the penalty of having your driver's license suspended for six months is not sufficient to cause people to take the test. After Minnesota passed this law the number of refusals went down and convictions went up. It is within the authority of the State of Montana to increase the penalty for refusing to take the test.

Closing by Sponsor: **SENATOR COLE.** We have had and will continue to have a good discussion on this bill. I will be available when you take executive action or if any question arise before.

Questions From Committee Members and Responses: **SENATOR DOHERTY.** We have been told that a law similar to this has been upheld in Minnesota. Does Minnesota have a similar right of privacy section in its constitution? **Brenda Nordlund.** I don't know that they do have an explicit right to privacy. I know that their court has interpreted a very expansive right to privacy because, contrary to fourth amendment federal law, their court has held that there is an individual right of privacy that prevents the use of roadblocks for purposes of detecting DUI's. That shows, in part, the divergence between the federal law standard and Minnesota's standard, as being more strict.

CHAIRMAN CRIPPEN. The way I read this bill, if you are convicted under this, it counts toward your four convictions after which you are sent to prison. In theory, a person could refuse four times and be sent to prison. Do you have any problem with that? **Brenda Nordlund.** I am a bit uncomfortable with that. I'd like to talk to the Committee about some data we garnered from the fourth offense felons - the people who have actually been convicted and whose records have been examined by the Motor Vehicle Division upon report of the felony.

In the group of 58 drivers who were convicted for fourth offense felony in the last year, there were a total of 71 refusals that resulted in a DUI conviction. There were also 21 refusals from those same drivers for which there was no DUI conviction. That works out to be approximately 23% of the time an individual who

refuses, this is a seasoned drunken driver, did not result in either a DUI conviction or a per se conviction.

Can refusing cause you to become a felon? I guess if you have a persistent ability to drive and drink and be detected while driving and drinking, then yes, I think it is reasonable.

CHAIRMAN CRIPPEN. We're talking about absolute liability and refusal. The fact remains that a person can refuse four times and mandatorily become a felon. I think you have a problem there. Perhaps you could change this so a person would not go to prison for the fourth refusal to take a test. **Brenda Nordlund.** The purpose behind this bill is to increase the penalty for refusing. Currently a person loses their drivers license for six months for refusing the first time, and for one year for refusing two-five subsequent times.

People continue to drive even though that privilege has been suspended. For that same group of fourth offense felons that were convicted last year, 64% were driving with a suspended or revoked drivers license at the time their felony offense was committed. If you are not comfortable with fourth offense felonies, could you at least agree to a penalty that is equal to a first offense DUI each and every time a refusal is made? **Mark Staples.** I would like to point out **SENATOR WILSON**'s interlock device bill, because it addresses the problem of these people driving after conviction. SB 210 is fairly unusual - 50 other states don't do this.

{Tape: 2; Side: A; Approx. Time Count: 10:55; Comments: None.}

HEARING ON SB 222

Sponsor: **SENATOR BILL GLASER, SD 8, Billings**

Proponents: **Harold Hanzer, State DUI Task Force**
Brenda Nordlund, Department of Justice
Addison Clark, Chief of Police, Kalispell

Opponents: **Russell Hill, Montana Trial Lawyers Association**

Opening Statement by Sponsor: **SENATOR BILL GLASER, SD 8, Billings.** SB 222 criminalizes the ingestion of dangerous drugs, eliminates the requirement that a driver may be tested for drugs, unless the driver has passed an alcohol test, and eliminates the provision that failure of a test is not alone sufficient to convict a person of driving under the influence. It also creates a per se offense of driving with any amount of illegally possessed dangerous drugs in their body.

Proponents' Testimony: **Harold Hanzer, State DUI Task Force.** In 1993 the Montana legislature made some major changes in the drug DUI law, and as a result, the drug DUI law became virtually unenforceable.

We have very few prosecutions under the current law. Our state task force looked at what the other states have done to prosecute drug DUI. Georgia provides that a person testing positive for any illegal drug is a per se DUI.

Montana is probably the only state in the union that does not have ingestion as an offense under drug possession. We are recommending an amendment on the possession statute. We're also recommending that some of the obstructive language be taken out. We are suggesting a tool that efficiently and effectively assists in removing drug-impaired drivers.

Brenda Nordlund, Department of Justice. The Forensics Science Division's study **(EXHIBIT #13)** shows that 40 percent of those who had blood sent in for a suspected DUI had a positive drug detection in that sample and the blood alcohol of the driver was in excess of .10. Thirty-nine percent had a positive drug rate. This is evidence that Montana's current law prohibiting a drug test from being given after a BAC of .10 or greater is eliminating some very important evidence about the nature of the impairment of certain drivers.

This bill would eliminate that prescription and create a new law whereby driving with a certain amount of dangerous drug(s) in your body would be an offense if you did not have a legal right to possess and use the drug. It is a per se offense, an absolute liability offense, so you don't have to prove mental state in terms of how or why the driver ingested the dangerous substances before driving.

This bill changes Montana's criminal possession of dangerous drug laws to recognize that internal possession of a dangerous drug is equally as unlawful as external possession of a dangerous drug. I was told recently of an example that occurred in Hardin, Montana. An individual who had traces of cocaine in his pocket and automobile was not convicted of criminal possession of a dangerous drug despite the fact that a drug test taken indicated cocaine had been ingested. And the trace amounts of cocaine found in the car were not sufficient to prove the case.

Montana is are unique in the U.S. in not recognizing internal and external possession of dangerous drugs. The intent of this bill is to allow urine testing as an acceptable means of determining and detecting dangerous drugs in a persons body, if the charge is criminal internal possession of dangerous drugs. Urine creates difficulties for the impaired driver prosecution, it doesn't create difficulties of a criminal possession dangerous drug prosecution.

The remainder of the bill is basically parallel sections, providing the authority to take away a drivers license similarly to a DUI or per se alcohol offense. It recognizes a per se drug offense under Montana's Habitual Traffic Offender Act, and assigns it the same number of points as if someone were impaired

as a result of drinking, or had an excess alcohol content of .10 or more.

Addison Clark, Chief of Police, Kalispell. If it is good to get impaired drivers off the highways because they have ingested alcohol, the same arguments apply to get them off the highway if they are using designer or chemical drugs. I support SB 222.

{Tape: 2; Side: A; Approx. Time Count: 11:11; Comments: None.}

Opponents' Testimony: **Russell Hill, Montana Trial Lawyers Association.** This bill is not limited to cases where a person is driving, it also affects people walking on the street. The phrase, "knowingly ingests dangerous drugs" includes situations that will be problematic, such as lapsed prescriptions or when a teenager in a concert knows they are smelling marijuana. By simply knowing they are inhaling, they are committing an offense.

On page 2, lines 7-8, there is a fairly unique exemption. If the state can make the presence of chemicals in your body a crime, it can also make the absence of those chemicals in your body a crime. This bill equates presence of chemicals in your body with possession in a criminal sense. That is a significant assumption.

Questions From Committee Members and Responses: **SENATOR DOHERTY.** We just heard SB 210. Should both of these bills pass, a person would be guilty of possession of drugs without a trial or evidence because they refused a test, is that right? **Brenda Nordlund.** If I understand your question correctly, they are guilty of the new offense that would be created under SB 210 for refusing a test. They could not be found guilty of a drug per se because the state would not have the evidence to prove they were operating a motor vehicle with dangerous drugs in their body. Whereas the one offense is an absolute liability offense, in Section 1 you are talking about criminal possession of dangerous drugs. That is not, and we do not propose to make it an absolute liability offense.

Under current law Montana defines possession to be "knowing possession long enough in order to discontinue exertion of control over the dangerous drug." In the criminal dangerous possession of a dangerous drug you have to show "knowing ingestion."

SENATOR DOHERTY. Reading this definition of possession, I would say that the presence within your body would have been covered. I don't understand how that happened in Hardin. Are there any other examples of individuals avoiding prosection because of this anomaly? **Jim Hutchison, Forensics Science Division.** The case in Hardin is the only case I know of today.

Closing by Sponsor: **SENATOR GLASER.** Impaired alcohol- and drug-related driving is a scourge in the State of Montana. We must do

all that is reasonable to assist our law enforcement and Judiciary system in handling impaired driver problems. There was a famous man who said, "one man's right to swing his fist ends at the other man's nose."

{Tape: 2; Side: A; Approx. Time Count: 11:20; Comments: None.}

EXECUTIVE ACTION ON SB 109

Amendments: sb010902.avl **(EXHIBIT #14).** **Valencia Lane** explained the amendment.

Motion: **SENATOR RIC HOLDEN MADE A MOTION TO ADOPT AMENDMENT SB010902.AVL.**

Discussion: **SENATOR DOHERTY.** Why are we taking out the requirement that the evaluation must be available to the County Attorney's office, the defense attorney, Probation and Parole Officer and the sentencing Judge? I thought those would be the people you would really want to have that information. **Valencia Lane.** These are amendments from the department. **SENATOR HOLDEN.** I believe some of this had to do with costs. If you left No. 19 and 20 in, you are dictating a cost that would have to be incurred. I believe there was some concern during testimony about the cost of a fiscal note.

SENATOR DOHERTY. Amendment 9 takes away the requirement that individuals be notified. **Valencia Lane.** They are not repealing 46-24-203, MCA. They are simply striking No. 11 from the bill to change it back to the original language.

Motion: **SENATOR HOLDEN MADE A MOTION TO SEGREGATE AMENDMENT #7 AND THE TITLE FROM THE OTHER AMENDMENTS. THE MOTION CARRIED UNANIMOUSLY.**

Motion: **SENATOR HOLDEN MADE A MOTION TO ADOPT AMENDMENTS 1-6 AND 8-12, sb010902.AVL.**

SENATOR DOHERTY. What does Section 2 amend? **Valencia Lane.** On page 3, line 8, it says "Department of Corrections". The Code Commissioner has changed that from Department of Health and Human Services (DPHHS) to the Department of Corrections (DOC) because of reorganization. This one hadn't been get changed. When the bill was originally drafted the code said one thing, and by the time the final bill came out, the code had already been corrected. That section ended up in the bill without a discernable amendment.

SENATOR BARTLETT. Please explain amendment #8, striking subsection (2) at the end of page 5. **Valencia Lane.** I'd like to go on record as saying I drafted this amendment the way I thought the Department meant it. I asked them to double check it, and I have not heard back from them.

SENATOR BARTLETT. Does that mean we would be deleting that entire section from the law overall? **Valencia Lane.** The amendment would delete subsection (2) of that MCA section from the law overall, which is how I interpreted their instruction to strike lines 24-30 in their entirety.

Motion: **SENATOR BARTLETT MADE A MOTION TO SEGREGATE AMENDMENT #8 AND ANY TITLE CHANGES UNTIL IT CAN BE UNDERSTOOD MORE CLEARLY.**

CHAIRMAN CRIPPEN. We need some advice from the Department of Corrections on this, unless you are comfortable with them and want to proceed.

SENATOR HOLDEN. I'd be willing to proceed today but I think **Valencia Lane** misunderstood the Department's instructions regarding amendment #8. It seems like it should have been returned back to the way it was, rather than striking the whole section. **Valencia Lane.** Their instructions were to strike lines 24-30 in their entirety. To me that means strike subsection 2. I feel uncomfortable that I had to change their amendments quite a bit to make them work. I sent the amendment to them and asked them to respond. They haven't responded. I am not absolutely comfortable that I have done exactly what they wanted, but I did them to the best of my ability.

SENATOR HOLDEN WITHDREW HIS MOTION TO AMEND SB 109. No further executive action was taken on SB 109 this date.

{Tape: 2; Side: B; Approx. Time Count: 11:40; Comments: None.}

EXECUTIVE ACTION ON SB 96

Amendments: sb009601.avl **(EXHIBIT #15). SENATOR DOHERTY** explained the amendment.

Motion: **SENATOR DOHERTY MADE A MOTION TO ADOPT THE AMENDMENT SB009601.AVL TO SB 96.**

Discussion: **VICE CHAIRMAN GROSFIELD.** I oppose the amendment because it doesn't have a limit. I don't think we should pass an amendment without a ceiling. It seems an upgrade kit could be offered to change the games as well as the chip. I don't believe it is good public policy to cover the cost of upgrading the games.

Motion: **VICE CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION TO ADOPT AMENDMENT sb009602.AVL (EXHIBIT #16).** He explained the amendment.

Discussion: **VICE CHAIRMAN GROSFIELD** called on **Larry Akey** to provide information on the machine upgrade costs from raising the poker machine limits from $100 to $800 last session? **Larry Akey, Montana Coin Machine Operators and Video Lottery Technologies.** My manufacturer tells me the chip change costs between $250 and

$650, depending on the age of the machine. In some of the older machines it required that the entire board be replaced, not just the game chip itself.

VICE CHAIRMAN GROSFIELD. Do you have any numbers on the cost of the automatic accounting portion of this? **Larry Akey.** Our manufacturer says to convert a VLC machine to a VLC central system would be approximately $500 per machine.

VICE CHAIRMAN GROSFIELD. What about the concept of offering an upgrade while you are at it? Is that included in the price? **Larry Akey.** The manufacturer indicated some upgrades would probably be included in the cost of the conversion.

CHAIRMAN CRIPPEN. What percentage of tax credits made available are taken? Are there situations where the tax credit does no good because you have to take it between a 12-quarter period? **Attorney General, Joe Mazurek.** If you apply this in the income tax context, that is probably true. We're talking about a gross revenue tax, so the only way there would be no tax due is if the machine didn't operate. This would come off the top of the machine owner's tax, as it is a machine tax credit. This will reduce the amount they remit. You will see that in the fiscal note.

CHAIRMAN CRIPPEN. Why did you put in the plus "$50" and not make it just "$450"? **VICE CHAIRMAN GROSFIELD.** We could do that. The bill says, "cost or $300 whichever is less". This may be a convoluted way of saying we're paying attention to the interest and loan cost. The interest is not considered in the bill as part of the actual cost.

CHAIRMAN CRIPPEN. If these people are making that much money on the machines, why would they want to borrow the money and not just pay it off? **VICE CHAIRMAN GROSFIELD.** My understanding is that the tax credit and the "$50" is only offered if asked for. If it is not worded that way perhaps we need to address that.

VICE CHAIRMAN GROSFIELD. Since there is confusion, I have no problem with dropping the language regarding "for each machine" and the "$50" and changing it to "$450", if that would make the Chairman more comfortable with what we are trying to do.

Motion: **VICE CHAIRMAN GROSFIELD AMENDED HIS MOTION** to strike language "plus $50" or "plus $50 for each machine" in amendments 2, 3, 4, and 5, and to change "$400" to "$450" in amendments 1, 2, and 4.

SENATOR DOHERTY. The amendment would still stretch out the tax credit and loan over a period of 3 years.

Vote: **SENATOR GROSFIELD'S SUBSTITUTE MOTION TO AMEND SB 96 CARRIED** with all members voting aye except **SENATORS ESTRADA AND DOHERTY** who voted no.

Amendment: sb009603.avl **(EXHIBIT #17). VICE CHAIRMAN GROSFIELD** explained the amendment.

Discussion: **CHAIRMAN CRIPPEN.** Where did you get two-thirds? **VICE CHAIRMAN GROSFIELD.** I'm not hung up on the two-thirds; whatever you want to do there.

CHAIRMAN CRIPPEN. Read the language on line 12, concerning the actual hardware or software cost necessary for conversion to the automated system. Can you get those figures out of the package? **Larry Akey.** I'm confused by what this amendment does. I'm not sure how you'd segregate the overall cost of a conversion kit by saying this is necessary for the system and this isn't.

CHAIRMAN CRIPPEN. He is trying to more clearly define the definition of actual cost, when you have a package that upgrades a machine for other purposes, but also puts in the automated system for electronic reporting. If that package costs $600, what percentage is attributable to the amount for automated reporting? **Larry Akey.** It would be readily definable if a manufacturer were to offer two different conversion kits - one required for the upgrade and the other offering additional enhancements. I'm not sure manufacturers will do that. I anticipate there will be a single conversion kit for each type of machine on the market, and that some manufacturers may include enhancements.

CHAIRMAN CRIPPEN. You could have two conversion kits. **Larry Akey.** If manufacturers were to do that, it would be easy to distinguish. I'm not certain that will actually happen.

VICE CHAIRMAN GROSFIELD. The language on line 12 talks about actual hardware and software costs. In light of the upgrade which will probably be offered, I'd like Janet Jessup to address how the Department will sort this out if the amendment does not pass. **Janet Jessup, Department of Justice (DOJ).** I think, if so directed, we would take a look at the actual cost issue and would be looking at rule making for this.

Perhaps we can set up some guidelines, but certainly we have to examine, inspect, and approve each of those chips as they come in. We will know what those chips do, and will be able to make some comparison between the previously approved chip and the new chip to determine what portion can be attributable to 'new game' as opposed to the communications elements of that item. We may be able to deal with this through rule-making with the current language in the bill and with our examination process.

VICE CHAIRMAN GROSFIELD. I'm sensing that the Department is comfortable with this and can deal with it. For my own comfort level, we have had this discussion on the record. The upgrade costs are not going to reflect what this bill requires. I don't think any of us expect tax credits to cover the cost of normal business upgrades.

VICE CHAIRMAN GROSFIELD WITHDREW HIS MOTION TO ADOPT AMENDMENT sb009603.AVL.

SENATOR DOHERTY. There is still a limit. I know you are uncomfortable with no limits but we still could have a situation where a machine owner is not made whole. **VICE CHAIRMAN GROSFIELD.** Yes. That may be correct, although it will be hard to sort that out, and I don't think it would be responsible for us not to have some kind of a limit.

SENATOR DOHERTY. For purposes of the record, if the Department feels it can comfortably figure out a percentage that can be allocated to an upgrade and the percentage that can be allocated to a chip that would comply with the new statute, it would seem to me that the Department would be able to figure out when someone is submitting an actual bill for the cost of the upgrade and when someone is trying to send Grandma to the Bahamas in order to take advantage of the tax credit. If they can do the one, I don't understand why they can't do the other.

Attorney General Mazurek. One of the concerns the Department of Justice has is that the credit you set will drive manufacturers. The best estimates we've had, as testified to by the Gaming Industry Association is $200-$600. If you set it at $600, the cost will be $600. If you set it at $300, I think it will be closer to $300. You are actually setting a market here, that is one of the reasons we want to be careful.

CHAIRMAN CRIPPEN. I still have some concern about spreading it out for that length of time. Is there any thought about making it a shorter period of time?

Motion: **VICE CHAIRMAN GROSFIELD MADE A MOTION THAT SB 96 DO PASS AS AMENDED.**

Discussion: **Valencia Lane.** The only amendments adopted are in three places in the bill, stating that $300 is being increased to $450. There are no other changes.

SENATOR HOLDEN. Are there provisions in one of these pages that require any kind of direct withdrawal or payment of taxes out of the business' checking account? **VICE CHAIRMAN GROSFIELD.** No.

SENATOR HOLDEN. During testimony I alluded to the fact that this is big government regulating a specific industry; making them check by computer. You said this wasn't big government, and I'd like to know why. **VICE CHAIRMAN GROSFIELD.** I said that I do not view this as step one of big government stepping into a lot of other industries. The reason is that this industry is highly regulated, and we are asking for better accounting for this industry. I can't think of any other industry in the state that is regulated as this industry is.

Yes, it is more government for the people who own these machines, but once this process is in place the net result will be less government in the sense of less expense to our government and less expense to the people who own the machines.

SENATOR HOLDEN. You said this industry is already highly regulated, more so than other industries. They have 18,000 machines that are nothing more than a glorified cash register. We have hundreds of thousands of cash registers across the State of Montana without this intense regulation, without a proposed dial up system to the state. In testimony there was talk about $40,000 in discrepancies which could be explained by transposed figures, ink pads, etc. I don't understand why you want to give government more and more authority over any particular industry in this state. **VICE CHAIRMAN GROSFIELD.** The legislative audit found that 30 percent of the 1,000 machines checked appeared to be okay. Definite discrepancies were found in another 30 percent of this 1,000. Forty percent did not have enough information for the auditors to make a judgement. In other words, 70 percent of the machines sampled had bad or insufficient information.

It seems to me that when we are dealing with the mega dollars we're talking about here, it's not responsible of the legislature not to have better information. This bill tries to correct that situation.

CHAIRMAN CRIPPEN. Testimony at the offset reflected that industry is in favor of some kind of monitoring. Their primary concern was cost. **SENATOR HOLDEN.** There are a lot of things that come before the legislature that don't seem to bother people. They frequently come to testify in favor of it, and then two years later they are complaining about it. The industry being in favor of monitoring doesn't hold much water with me.

CHAIRMAN CRIPPEN. They all testified that it was very difficult to fill out all the forms required. This bill does away with that. **SENATOR HOLDEN.** What they are saying is, "cut down the government paperwork. but don't start another program with automated dial-up."

CHAIRMAN CRIPPEN. Maybe you need to address the question to the Attorney General, asking if there will be a reduction in paperwork if this bill doesn't pass. **SENATOR HOLDEN.** The Attorney General can't operate the system as is, apparently we need the reduction in paperwork.

SENATOR DOHERTY. I think **SENATOR HOLDEN'S** question about a highly-regulated industry in the state, being subject to instantaneous monitoring and fines, is an interesting question.

Vote: **SENATOR GROSFIELD'S MOTION THAT SB 96 DO PASS AS AMENDED FAILED IN A ROLL CALL VOTE (4-5).**

Motion: **SENATOR ESTRADA MADE A SUBSTITUTE MOTION TO TABLE SB 96. THE MOTION CARRIED** with all members voting aye except **VICE CHAIRMAN GROSFIELD AND CRIPPEN VOTING** who voted no.

ADJOURNMENT

Adjournment: 12:25 p.m.

SENATOR BRUCE D. CRIPPEN, CHAIRMAN

SHARON CUMMINGS, SECRETARY

BDC/SC