

MINUTES

**MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on February 4, 1997, at 9:00 A.M., in Room 108.

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
Judy Keintz, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 216, 1/25/97
SB 219, 1/25/97
SB 247, 1/29/97
SB 232, 1/27/97
Executive Action: SB 109
SB 216

HEARING ON SB 216

Sponsor: SEN. FRED VAN VALKENBURG, SD 32, MISSOULA

Proponents: Beth Baker, Department of Justice

Opponents: None

Opening Statement by Sponsor:

SEN. FRED VAN VALKENBURG, SD 32, MISSOULA, introduced SB 216 which he brought at the request of the Department of Justice. This bill would clarify legislative intent with respect to the issue of post-conviction relief and particularly with respect to death penalty cases in Montana. The essence of this bill is to give greater weight to a sentencing court's factual findings with respect to the sentence that it imposes. The Montana Supreme Court examines death penalty cases very closely. The Department feels that a trial judge is in a better position to make those findings of fact and unless they are clearly erroneous, the legislature would then be directing the Supreme Court to uphold those findings of fact. This bill also attempts to assure that people who are pursuing post-conviction relief have an incentive to get all the issues in beforehand, thus limiting the issues considered in post-conviction relief.

Proponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:10}

Beth Baker, Department of Justice, stated the purpose of this bill is to reaffirm the legislature's intent that the main event of a criminal case is the trial. The trial judge should be given the opportunity to address the legal issues which arise in the case and those issues should be presented on direct appeal of the conviction. Post-conviction proceedings are not a substitute for direct appeal of the case.

Section 1 of the bill is an amendment to 46-18-310, which is in the death penalty section of the sentencing statute, and provides for the scope of the Supreme Court's automatic review of the death penalty.

Subsection (1)(c) adds language to clarify and adopt the ruling of the Montana Supreme Court in the Roland Allen Smith case that review is limited to cases in which a death sentencing hearing was held. In a death penalty case, the Supreme Court conducts a proportionality review. They look at the crime which was committed by the defendant and decide whether the sentence is proportionate in comparison to other similar cases. The Court in Smith held that that proportionality, review should look at other cases in which the death sentencing hearing was held. Only in those cases, is there a record presented of aggravated circumstances and mitigative circumstances which sentencing judges are required to consider and for which specific statute findings have to be adopted. The problem with looking at all other cases, is that there is not a comparable record which can be examined by the Supreme Court.

Subsection (2) is in response to the decision of the Supreme Court in the Vernon Kills-On-Top case. In that case, the Supreme Court, on post-conviction appeal in 1996, overturned its previous decision

in 1990 of upholding Mr. Kills-On-Top's death sentence. The purpose of this subsection is to make it clear that the Supreme Court's review on appeal is not to reweigh the evidence, and not to judge on its own the credibility of witnesses heard by the trial court, but to uphold the sentence of the trial court as supported by the evidence. The trial judge is in the best position to make these decisions because he sees the witnesses and listens to the testimony.

Section 2 of the bill clarifies that the petition for post-conviction relief must identify the facts on which the claim is based.

Page 2, line 25, of the bill contains a technical error. The word "attach" should read "attached".

The first change in subsection (2) on line 10, clarifies that if the petitioner has been afforded the opportunity for appeal, he cannot come back and raise claims which could have been raised on direct appeal. This codifies current case law in that if the defendant takes advantage of his right to appeal, this does not determine his ability to raise claims in post-conviction. If the appeal is afforded, but not timely filed, the court will not consider claims of post-conviction proceedings which could have been raised on direct appeal.

Line 12 incorporates the judicial doctrine of res judicata in post-conviction statutes. Res judicata means the matter adjudged. The principle is that once an issue has been decided by a court, it is finally decided and cannot be raised again. In the Kills-On-Top case, the Montana Supreme Court stated that the Montana Legislature had not adopted these principles for post-conviction cases. However, it has been adopted in the Uniform Post-Conviction Act. The Supreme Court has applied that doctrine judicially for many years. Subsection (3) is also a response to the Kills-On-Top decision. It clarifies that a ground for relief is in the meaning of the post-conviction statutes and includes all arguments, both factual and legal, which could have been or were raised in support of the claim for relief. This is a long standing principle applied in criminal cases that new arguments in support of a claim cannot be raised for the first time on appeal. The reason is that the trial judge is to be given the opportunity to hear those issues, consider them, and try to correct errors when they occur at the trial level. In Kills-On-Top, the court said that a ground for relief means the claim as a whole and new arguments could be presented in support of that claim. This will prolong the appeal process.

This bill deals with finality. The only difference, substantively, between the 1990 decision and the 1996 decision was that the members of the court had changed. Only two of the justices who sat on the appeal were still on the court when the case came back in 1996. The record is the same. The transcripts are the same. The law had not changed. Post-conviction proceedings should be

reserved for extraordinary matters which could have not been raised during the trial. She provided the committee with a handout, **EXHIBIT 1**. Additional handout, Kills-On-Top v. State opinion, **EXHIBIT 2**.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 1; Side: a; Approx. Time Count: 9:20; Comments: .}

SEN. STEVE DOHERTY asked **Ms. Baker** to provide the committee with the Supreme Court decision which they were being asked to directly overrule.

Ms. Baker replied she would do so.

CHAIRMAN CRIPPEN did not feel that they were directly overruling the court. The role of the legislature, by statute, is to correct and give guidelines to the court. He referred to Section 1(2), stating that the language is very clear and concise. It states that as a matter of law, the Supreme Court may not substitute its judgement for that of the sentencing court in assessing the credibility of witnesses drawing inferences from testimonial, physical, documentary or other evidence.

SEN. VAN VALKENBURG agreed that this would primarily clarify the law and more succinctly stated the legislative intent with respect to the standards for review in post-conviction relief.

SEN. MIKE HALLIGAN asked if there was parallel law in other jurisdictions which have been looked at to make sure there was consistency?

Ms. Baker stated that some of the principles are consistent with the Uniform Post-Conviction Act and that a lot of this bill came from other decisions by the Montana Supreme Court.

Closing by Sponsor:

{Tape: 1; Side: a; Approx. Time Count: 9:24; Comments: .}

SEN. VAN VALKENBURG felt the most important reason for the legislature to pass this bill was to clearly state its own intent, with respect to the standard of review in post-conviction relief, and in doing so to ensure that the process of review, particularly in death penalty cases, would be shortened. We do not need to have a 20 year review on death penalty cases.

HEARING ON SB 219

Sponsor: SEN. EVE FRANKLIN, SD 21, GREAT FALLS

Proponents:

- John Connor, Department of Justice and Montana County Attorneys Association
- Tim Shanks, Montana Police Protective Assoc.
- Mike McGrath, Montana County Attorneys Assoc.
- Becky Malensek

Opponents:

- Lawrence Hubbard, Legal Counsel for State Compensation Insurance Fund
- Martin T. Mangon, Montana Private Investigators and Security Operatives Assoc.
- Greg Van Horssen, State Farm Insurance
- Ron Mackey, Ron Mackey Investigations
- Rick Hawk, Private Investigator
- Michael Day, Private Investigator

Opening Statement by Sponsor:

SEN. EVE FRANKLIN, SD 21, GREAT FALLS, explained that this bill deals with a serious intrusion to another person's private and personal life and space. The behavior known as "peeping tom" in SB 219 is referred to as surreptitious visualizations. This is sometimes a precursor to other more aggressive crimes. This act is codified in a portion of law entitled "Offense Against a Person", Title 45.

Our laws recognize that there are certain acts which pose significant danger to individuals such as stalking, indecent exposure, and malicious intimidation. However, nothing in current statute covers the behavior called surreptitious visualization. This will allow law enforcement to prosecute individuals engaged in this conduct.

The Great Falls Police Detective Unit did a tremendous amount of independent research on this matter. They collected current statute from Utah, Arizona, California, and South Dakota. All these states have laws which are working.

In Section 1 (2) there is the issue of recordation. In Helena a young woman, who had not given consent, was videorecorded in a dressing room by an adult male business person who had other designs for the videotapes.

REP. CHRIS AHNER has presented a bill in House Judiciary which deals with this issue. She asked REP. AHNER to co-sponsor this bill so these two pieces of legislation could be coordinated. SB 219 is a little broader in scope. This bill creates a graduated offense from misdemeanor to a felony on third instance. There is no fiscal impact on the state. Private investigators have some concern about this bill. She would be supportive of the two amendments which will be presented today. One by the Fraud Unit

of the State Fund and also one by John Connor. Both amendments provide an exception for legitimate investigative purposes which includes law enforcement and private investigators.

Proponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:33; Comments: .}

John Connor, Department of Justice and Montana County Attorneys Association, appeared in support of SB 219. In the '91 Session there was a bill known as the "peeping tom" bill which did not pass. They changed the terminology to address a serious problem of every law enforcement agency on a local level. There is no statutory scheme designed to address situations where people engage in this activity. Criminal trespass or disorderly conduct are hard to prove.

This bill will allow local law enforcement to tag the person with the offense they actually are committing. People who engage in this type of offense often become progressively more predatory. When a records check is done on someone for sexual intercourse without consent or sexual assault, if they had a conviction for what is contained in this bill, they might be able to get a search warrant of that person's property to obtain information to support prosecution for the more serious sex offense.

The amendment he submitted to the committee (**EXHIBIT 3**) incorporates State Fund's language and also covers licensed private investigators.

Tim Shanks, Montana Police Protective Association, presented his written testimony in support of SB 219. (**EXHIBIT 4**) He commented this would not apply to the person sitting at the corner bus stop watching people go by. He was involved in an investigation in Great Falls where the individual started this activity at fifteen years of age. By the time this individual was caught, he had already visited nine or ten houses that evening. There is a diary of hundreds of names and asterisks by those names and addresses. He assumes that these are places which he had frequented in the past.

Mike McGrath, Montana County Attorneys' Association, spoke in support of SB 219. In Helena a few years ago there was a situation with a man who ran a record store in the mall. He sponsored a number of contests alleged to be modeling contests. He would persuade young girls to audition for these modeling contests. They were required to change clothing. When they were changing, he had his electronic surveillance camera set up to watch them. Eventually he was apprehended. He took a fifteen year old girl to his home and sexually assaulted her. The search warrant for his home resulted in these videotapes being discovered. There is no legislation to cover this particular set of facts. They were able to charge the sexual assault case.

Becky Malensek stated that in 1980 there was a person peeking in her windows. The police talked to this person and he told them that he was looking in the window because there was a guy reading a story to a little girl and he thought he was molesting her. One month later this person was arrested for raping a little girl and was sentenced to forty years. He was released two and a half years ago.

She fears this person will still come by and look in her windows. Had this person been looking in windows before and this little eight year old girl had to pay for it? Her daughter was the person videotaped. People need to be made responsible for their crimes. Her daughter has suffered for five years. It is hard for her. She has learned not to trust people.

Opponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 9:47; Comments: .}

Lawrence Hubbard, Legal Counsel for State Compensation Insurance Fund, appeared as a conditional opponent. State Fund would support the bill with the amendments drafted by **Mr. Connor**. State Fund, in 1993, was reposed with the authority, by the legislature, to investigate, protect and prosecute Workers' Compensation fraud. As part of that effort, State Fund has a Workers' Compensation Fraud Unit. Over the last three years, the State Fund has realized savings of approximately \$3 million by the direct use of private investigators.

Martin T. Mangon, Montana Private Investigators and Security Operatives' Assoc., stated that as a private investigator surveillance is very significant to develop information to save individuals and corporations money and also to prosecute individuals involved in fraud or other criminal activities. He would be in favor of the bill with the proposed amendments.

Greg Van Horssen, State Farm Insurance, rose as a conditional opponent. He passed out amendments. **(EXHIBIT 5)** He believes these amendments reflect the amendments submitted by the Department of Justice. State Farm was concerned about a prohibition against legitimate insurance investigation. State Farm had a strong hand in drafting the fraud bill in 1995 which has had a significant impact on the amount of insurance fraud perpetrated against state and private insurance companies. State Farm and the American Insurance Association would support this bill with the proposed amendments.

Ron Mackey, Ron Mackey Investigations, stated initially he was opposed to the bill, but would be willing to support the bill with the proposed amendments. They use videotape exclusively for recording person's activities away from their home. They have a large investment in equipment for their business.

Rick Hawk, Private Investigator, stated he was opposed to this bill initially but would support the bill with the amendments which would allow legitimate investigations for private investigators and law enforcement officers.

Michael Day, Private Investigator, stated he would support the bill with the proposed amendments.

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 9:57; Comments: .}

SEN. LORENTS GROSFIELD asked if "place of residence" included a motel?

Mr. Connor felt the language intended to include a motel.

SEN. GROSFIELD, referring to the amendment, "or to any person engaged in fraud detection . . . while the person is acting in an official capacity", asked if the word "person" applied to private investigator or law enforcement officer?

Mr. Connor explained the term person was referencing investigators.

SEN. GROSFIELD was concerned about the language in the bill which read "hides, waits, or otherwise loiters in the vicinity". There was no mention of length of time. A teenage son or daughter who is grounded may have friends outside waiting for them to come out. This could have some unintended consequences. Why wouldn't the stalking law cover this?

Mr. Connor stated the stalking law has elements which require a longer pattern of behavior than the peeking tom situation. All of the elements of the events have to be read in total and be proven beyond a reasonable doubt. The state would have to prove that one hid or waited or loitered and then take into consideration the place where it occurred. The third element would be to prove that the loitering, hiding, or waiting was for the purpose of looking at or gazing upon an occupant in a residence in a surreptitious manner.

SEN. DOHERTY posed the scenario of a photographer following John Kennedy, Jr. around Montana. He took his picture in a place in which the person had a reasonable expectation of privacy. He saw him eating dinner in the restaurant in Big Sky. Wouldn't this bill make the photographer a criminal?

Mr. Connor stated the reasonable expectation issue is what is important. A reasonable expectation of privacy would be the privacy upon which one relies in conducting his or her daily affairs. Being in a restaurant does not give one a reasonable expectation of privacy.

SEN. DOHERTY commented that as an attorney he may not want to hire a private investigator. He would send his secretary. As a suspicious spouse, he might follow his spouse to the motel so that he could get pictures to confront that individual at a later time. If he is rich, he would hire an investigator. If he is poor, and acted in the same manner as the investigator, is he guilty of this crime?

Mr. Connor stated that he may be. He is not sure that the individual described has a right to be doing what they were doing. It is not their intent to make this apply to those situations in which one might be engaged in a legitimate investigation. They would be willing to broaden the language in the amendment to do so.

SEN. DOHERTY stated there would be disreputable attorneys who have disreputable staff members who would investigate. Where is the line drawn?

Mr. Connor answered that if a person is in a private dwelling house, the people intent upon peering at that person in a private dwelling house in a surreptitious manner, would provide probable cause to believe that that offense had been committed. What is and is not legitimate is the issue which is left to the investigating agency, the law enforcement agency, or the prosecutor in each instance.

SEN. SHARON ESTRADA asked to be provided with a copy of the statutes of the states mentioned in earlier testimony.

Mr. Shanks replied he would provide the committee with that information.

SEN. SUE BARTLETT asked if the amendment, in addition to addressing the Workers' Compensation Fraud Unit, would include insurance investigation in general?

Mr. Connor stated the first statute referred to in the proposed amendment was the statute which relates to the licensing of private investigators in general. The second and third statute relate to the State Fund Fraud Investigation Program. He stated that **Mr. Van Horssen** felt this would cover the situations in which they employed investigators. There was a question about whether the investigator needed to be licensed. It is the position of the investigators that they ought to be, otherwise they are not making lawful investigations.

SEN. HALLIGAN did not want every insurance agent to be allowed to take pictures of people. He wanted this tied to law enforcement and private security people who are licensed in the state of Montana.

CHAIRMAN CRIPPEN asked if insurance personnel had to be licensed to investigate?

SEN. HOLDEN stated they did not.

SEN. GROSFIELD was concerned with the loose language of "watch, look at or gaze upon."

Mr. Connor stated that there was the prerequisite two mental states in line 10 and the purpose requirement in line 12. The first part of the statute (1)(a) and (b) come from a different state. He could get some case law statutes from that state.

Closing by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 10:15; Comments: .}

SEN. FRANKLIN commented there was no intent in the bill to limit lawful investigation or police work. She would want to make sure they were not limiting legitimate activities. They have made a decision that private investigative work is sensitive enough that they may need to have a level of training and professional ethics which go along with that occupation.

HEARING ON SB 247

Sponsor: SEN. KEN MESAROS, SD 25, CASCADE

Proponents:

- Tracey Mikes, Rancher
- John Strandell, Undersheriff of Cascade County
- John Youngberg, Montana Farm Bureau
- Candace Torgeson
- John Lindquist, Montana Stockgrowers Association
- Jim Richard, Montana Wildlife Federation
- Jim Richard, Montana Wildlife Federation
- Rick Seidlitz, Sheriff of Meagher County
- Mark Bridges, Administrator of the Department of Livestock Enforcement Division
- Walter H. Savoy, Rancher

Opponents: None

Opening Statement by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 10:17; Comments: .}

SEN. KEN MESAROS, SD 25, CASCADE, introduced SB 247. This bill targets recreational users who are convicted of damaging or destroying property, public or private, in that they are held liable for the restitution of the market value. This bill evolved from frustration of law enforcement officers trying to do their job and property owners frustrations of being forced to file civil lawsuits to recapture their loss resulting from other person's actions.

The criminal mischief statute is often pursued but intent, knowingly and purposely, must be present. He passed out a

handout regarding state lands, **EXHIBIT 6**. A hunter who shoots a cow may not do so knowingly or purposely but nonetheless the property owner suffers a loss. There are cases which go unresolved in compensation for this loss. Damages to public property are also a concern.

This bill will hold people accountable for their actions when it can be proven that their actions caused damage to public or private property. SB 247 will hold people accountable for their actions when it is proven that their actions resulted in damage to property. The state receives compensation for property loss and that is identified.

This bill is a direct extension to other property owners. Fish, Wildlife and Parks has a partial compensation program for livestock and livestock entities.

The question arises about what happens to property other than livestock? This would be equipment, buildings and other facilities. If he were backing out of a parking lot and hit another car, he is responsible for those damages. If he were backing out of a parking lot and hit a statue, he should be responsible for those damages as well.

Proponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 10:24; Comments: .}

Tracey Mikes, Rancher, explained that on November 16th his horse was shot within 100 yards of his house. There was a hunter across the river and he informed him that he had shot his horse. Within a half an hour that person had turned himself in to the sheriff's department and told them that he had shot the horse across the river. The county attorney released him because they could not hold him responsible because they could not prove intent. He called **Mr. Mikes** and told him that he did shoot his horse and that he wanted to compensate him but **Mr. Mikes** would have to go through his insurance company.

Without being criminally charged, the insurance company was not so inclined to reimburse him for his horse. There is a fund through the State Land Department to reimburse him for his horse, since the horse was on state land when he was shot. That fund should be held for the person who loses livestock or personal property and there is no one to reimburse him for it. In this instance, he had someone who had turned himself in and admitted to shooting the horse, but there was nothing in the law to charge him with a criminal act. Without a criminal act, the only thing he can do is go to civil court. His attorney has informed him that he would be the only person making any money in that instance.

John Strandell, Undersheriff of Cascade County, rose in support of SB 247. He was involved in the incident involving **Mr. Mikes'**

horse which was valued at \$3,500. His office along with the Department of Fish, Wildlife and Parks and the Department of Livestock responded to the incident. The investigation revealed that an out-of-state hunter who was shooting at a deer across the Missouri River, acknowledged that he missed the deer and that he knew horses were in the area. The investigation was turned over to the Cascade County Attorney's Office after the individual was detained and charged with criminal mischief at the scene. Upon review by the Cascade County Attorney's Office, they were ordered to release him because they could not prove that he purposely and knowingly shot the horse. There was not a criminal charge which could be filed on this individual within current state statute. This bill would hold hunters accountable for their negligent acts and for full restitution to the property owners who are victims of their acts.

John Youngberg, Montana Farm Bureau, commented that the position of their members is that even though someone may not be knowingly and negligently harming your property, the property owner should still be compensated for their damages. In a lot of cases, they admit liability and initially say they will take care of compensation. Down the road, however, they do not follow through and the property owner's only recourse is to take them to civil court. The only people making money in that instance is the attorney involved. There has to be proof that the individual did the act.

Candace Torgeson spoke in support of this bill. Under Section 1(3), the statute 45-2-104 is referred to as "The offense of damaging or destroying property in recreational use is an absolute liability offense within the meaning of 45-2-104." That statute states that "A person may be guilty of an offense without having to admit each element of the offense including the intent . . . only if the event is punishable by a fine not exceeding \$500 or if the statute defining offense clearly indicates a legislative purpose to impose absolute liability for the conduct described." This statute fulfills both those requirements. Punishment is defined as up to \$500 and it gives the clear legislative intent that absolute liability be imposed.

John Lindquist, Montana Stockgrowers Association, rose in support of this bill. The Department of Livestock has 30 to 45 of these cases every year. Many are not prosecuted. There is no restitution unless the victim goes through the civil proceedings to accomplish that.

Jim Richard, Montana Wildlife Federation, questioned why this was restricted to recreational users? Since this includes both public and private lands, there are a lot of opportunities for property damage by any users. Those in industry and agriculture are examples.

Rick Seidlitz, Sheriff of Meagher County, stated this bill would give him the opportunity to enforce his duty to protect property.

Mark Bridges, Administrator of the Department of Livestock Enforcement Division, rose in support of this bill.

Walter H. Savoy, Rancher, rose in support of SB 247. This bill would cause people using the land to have more respect for the property of others.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 2; Side: a; Approx. Time Count: 10:37; Comments: .}

SEN. HALLIGAN, referring to the statement that any use of property could result in an absolute liability, asked for examples of a situation wherein an individual would be on private or public land that this would apply. If you are an invited guest, there would be some rules applying. Perhaps he would be visiting a farmer or rancher and jumped over a fence damaging the fence. He would not be there for recreational purposes.

Mr. Richards explained that if an individual had a contract to log on private or public land this would apply. This would relate to grazing or travelling through to a place of work.

SEN. MESAROS stated that he was responding to the problem at hand. He does not see any need to go further than the bill goes as written.

SEN. HALLIGAN asked **Ms. Lane** why the existing language on misdemeanors was not used in this bill?

Ms. Lane explained that they wanted to include damages not just criminal penalties. They are asking for restitution and that is not a criminal penalty, it would be a civil penalty.

SEN. HALLIGAN commented that restitution is a possible sanction in a criminal action.

Ms. Lane stated she did not know why that couldn't have been used. Apparently the problem is they chose not to charge them criminally because they did not feel they could prove intent. They would not be under the criminal codes. This would create absolute liability without having to prove intent. They have put in the specific restitution language. They could have referenced restitution as it already appears in the criminal codes. They chose to draft it this way.

SEN. DOHERTY stated that the criminal code allows for a negligent arson charge. If this is to be used for any users, there could be negligent criminal mischief charged. Would there be a problem with widening the scope of this bill?

SEN. MESAROS explained that the problem was in the area of proving intent.

SEN. DOHERTY questioned whether this could be covered by making a criminal charge where intent would not have to be proven by using a negligent mischief charge instead.

SEN. MESAROS would consider that if it would achieve the same result.

SEN. DOHERTY asked whether this bill would apply both ways in the scenario where he was floating the Smith River and there was a wire strung under the surface of the river which ripped out the bottom of his raft. Would the property owner be strictly liable?

SEN. MESAROS answered that the law would be applied both ways.

SEN. AL BISHOP asked about someone damaging property while being lost in a recreational pursuit? Would they be liable?

SEN. MESAROS replied that if their action created damage to property they would be held accountable.

SEN. BISHOP asked if this covered accidentally hitting a dog?

SEN. MESAROS stated that this statute dealt with recreational use. The law enforcement people would deal with that.

Mr. Savoy felt that the driver's automobile insurance would cover the damage related to hitting a dog.

CHAIRMAN CRIPPEN asked if the intent of this bill was that the farmer or rancher, who placed the impediment in the stream which destroyed the raft, would be held absolutely liable?

Mr. Lindquist did not believe that the person who put the impediment in would be liable. If he rented skis and damaged them, the person's use of real property would address that situation. That clarification needs to be made. The person who installed the fence should not be liable for the raft. The intent is to have restitution on recreationists who damage property.

CHAIRMAN CRIPPEN clarified that this new section would not impute any liability to an adjacent landowner. Would that be handled elsewhere? Should the property owner be liable?

SEN. MESAROS stated that voyage routes are allowed. He was not sure if anyone was liable if recreational property was damaged.

Closing by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 10:50; Comments: .}

SEN. MESAROS felt that this bill would give law enforcement a tool to do their job effectively and hold people responsible for their actions.

HEARING ON SB 232

Sponsor: SEN. STEVE BENEDICT, SD 30, HAMILTON

Proponents: --David Johnson, Montana Society of CPAs
--Tom Harrison, Montana Society of CPAs
--Rus Hill, Montana Trial Lawyers Association

Opponents: None

Opening Statement by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 10:55; Comments: .}

SEN. STEVE BENEDICT, SD 30, HAMILTON, introduced SB 232. This bill would reduce the normal statute of limitations for an accountant's negligent conduct to three years. The cost of malpractice insurance is exceedingly high and this is an attempt to make certain that known claims of negligence would be made within a more reasonable time frame.

Proponents' Testimony:

{Tape: 2; Side: a; Approx. Time Count: 10:58; Comments: .}

David Johnson, Montana Society of CPAs, stated the purpose of this bill is to limit the statute of limitations on certain work done by accountants. That is found in paragraph two of the new section pertaining to examined, compiled, reviewed, certified, audited, or otherwise reported on or for which an opinion is given by the accountant as a result of the work. This would be audited or reviewed financial statements. Errors in these statements come to the surface quickly because of the nature of the item being reported on. That is generally a one year period. He provided the committee a handout, **EXHIBIT 7**, which provided the statute of limitations for the other states. The cost of filing and maintaining work papers is prohibitive. He recently worked on a case which consisted of 50 boxes of files. The firm had already disposed of the '91 and '92 files. This state had a six-year statute of limitation. Tail coverage insurance is necessary for 10 years. The federal statute of limitations on income tax returns is three years. He is working on a case which goes back to 1978. The accountant involved cannot remember conversations which took place that many years ago.

Tom Harrison, Montana Society of CPAs, stated there are two areas which are addressed by statute of limitations. One is malpractice in general and the other is breach of contract. Most of the work of certified accountants and accounting firms are within the statute of limitations under breach of contract. This

bill does not seek to change that. In the last few cases he has had to defend, there has been either a delay by the lawyers to bring suit or by the clients taking longer than necessary to make a decision to file a suit. Cases are filed within the last week before a statute runs. After filing a suit in Montana, there is an additional year to serve the suit on the other party. The other party may not know of the problem for three to four years. Malpractice insurance runs from \$1000 to \$3000 a year per accountant. When the accountant retires or leaves the firm, there is continued exposure for eight to ten years.

Rus Hill, Montana Trial Lawyers Association, recommended an amendment. They would like to have the statute of limitations for accountants conform to other malpractice professional negligence. They recommend three years. Financial cases are complex and are not immediately apparent. They are difficult to detect and are slow in developing. A one year statute of limitations creates a situation where the instant an attorney or a financial client suspects malpractice, they will have to file a lawsuit. They can't take the chance of missing the one year statute of limitations. There will not be the flexibility to resolve the problem without a lawsuit.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 2; Side: a; Approx. Time Count: 11:05; Comments: .}

SEN. RIC HOLDEN asked Mr. Hill for his amendment.

Mr. Hill explained that the amendment they proposed would be that the statute of limitations conform with general professional negligence.

SEN. DOHERTY asked why accountants should be subject to a shorter statute of limitations than attorneys?

Mr. Harrison felt that accountants dealt with facts and figures and a degree of definitiveness much more than lawyers. When a lawyer commits malpractice, the client often times could not have known there was negligence.

SEN. DOHERTY commented he only knew of one successful case of accounting malpractice where a significant shareholder of Montana Grains obtained a verdict because the account misrepresented the worth of the corporation and almost bankrupted this individual. Would this bill have applied in that case?

Mr. Harrison did not know the facts of that case. He felt that that case dealt with contractual effort on the part of the accounts, so this bill would not have applied. Large firms are usually under contract for their work.

CHAIRMAN CRIPPEN asked how long the IRS had to audit tax returns?

Mr. Johnson explained that they had three years from the due date of the return. In comment to **Mr. Hill's** testimony, when the inventory is missing and it is determined that something is stolen or misappropriated, it becomes apparent at that point in time.

CHAIRMAN CRIPPEN wanted to make sure individuals were protected when filing their taxes if there was malfeasance on the part of the accountant. He thought the IRS could go back seven years.

Mr. Johnson stated that this bill would not address those issues. This bill addresses financial statements, audits, reviews, projections, etc. and does not impact tax returns.

Mr. Harrison stated that the Uniform Act has the additional language which includes breach of contract. That has been deleted from this Act so that anything done under contract would not be included.

Closing by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 11:12; Comments: .}

SEN. BENEDICT closed on SB 232.

EXECUTIVE ACTION ON SB 109

Amendments: sb010902.avl EXHIBIT 8

Motion: SEN. HOLDEN MOVED SB 109 DO PASS.

Substitute Motion: SEN. HOLDEN MOVED TO AMEND SB 109.

Discussion:

Ms. Livender explained that lines 19 and 20 were being deleted. The reason is that 46-18-113 reiterates that the evaluation must be made available to the county attorney, defense attorney and probation and parole office. The reason they included it in the first place is that there was an incident which occurred where the report was not provided to those parties.

SEN. HOLDEN, referring to amendment no. 8 on page 5, lines 24 and 30, stated that the original bill would strike the entire section. Was the intent to strike the language which was underlined or the entire section?

Ms. Livender stated the intent was to delete the sections that were stricken to say that it could not be waived. The psychosexual evaluation had to be done and could not be waived. The language in this statute right now actually says the same thing. It is something the judge must order.

SEN. HOLDEN asked if their intention was to have lines 24 through 30 stay the way current law is now.

Substitute Motion/Vote: SEN. HOLDEN MOVED TO SEGREGATE AMENDMENT NO. 8. The MOTION CARRIED.

Amendments: sb010902.avl - Amendments 1-7 and 9-12 EXHIBIT 8

Motion/Vote:: SEN. HOLDEN MOVED TO AMEND SB 109 (sb010902.avl 1-7 and 9-12) The MOTION CARRIED UNANIMOUSLY.

Discussion:

CHAIRMAN CRIPPEN asked Ms. Lane to explain amendment no. 8.

Ms. Lane explained that they would draw a line through the entire subsection and the result would be that (2) would be removed from the law. The intent was not to strike lines 24 through 30 but to strike the amendment to it thereby returning it to its original form. This would require several amendments striking the underlined language and reinserting any stricken language.

SEN. HOLDEN asked SEN. HALLIGAN if he felt this should be returned to current law?

SEN. HALLIGAN felt that it should be returned to current law. He did not understand why they took out the wording that psychosexual evaluation must be made available to the county attorney's office.

SEN. HOLDEN felt that was in another area of the law.

CHAIRMAN CRIPPEN explained that the stricken language in subsection (2) would be reinserted into the bill and the underlined language would be stricken. On page 5, line 7, (1) shall be reinstated.

Vote: The MOTION CARRIED UNANIMOUSLY.

Motion: SEN. HOLDEN MOVED SB 109 DO PASS AS AMENDED.

Discussion:

SEN. HALLIGAN, referring to 46-18-113, asked Ms. Livender to explain their intent.

Ms. Livender stated that the first sentence of 46-18-113 provided that all presentence investigation reports must be part of the court record. They are relying on the presentence investigation report as encompassing the psychosexual evaluation.

SEN. BARTLETT felt that any form of mental health evaluation was a privileged document and would not be incorporated in its entirety in the presentence investigation. It is a separate

document which they take findings from to incorporate in the presentence investigation to give the judge a foundation for why the parole officer is making the recommendation on the presentence investigation report. Psychosexual evaluation is not given to the county attorney in its entirety. The defense attorney and the defendant can chose to release it. That would not be automatic.

SEN. HALLIGAN stated that alcohol and substance abuse evaluations would also be protected by federal laws. Prosecutors would not be getting that information. There needs to be a clarification that a presentence investigation report should include those reports.

Substitute Motion: **SEN. HALLIGAN MOVED TO AMEND THE SECTION OF THE CODE WHICH STATED THAT "ALL PRESENTENCE INVESTIGATION REPORTS MUST BE PART OF THE COURT RECORD BUT MAY NOT BE OPEN FOR PUBLIC INSPECTION."**

Discussion:

Ms. Lane stated she could amend this to include the psychosexual evaluations by amending 46-18-113 to say that the presentence report must go to certain people and must include the psychosexual evaluation under this section. She is not clear as to what other kinds of evaluations the committee wanted to pick up.

SEN. HOLDEN withdrew his motion.

SEN. BARTLETT stated that the Sentencing Commission polled the district court case files for 1000 sentences which were issued in 1994 in felony cases. In over half of those cases, there was no presentence investigation. Subsection (2) will restore the phrase "unless the court makes a finding that a report is unnecessary." She would like to see that language stricken to make it the intent of the legislature that these presentence investigation reports be prepared in felony cases.

SEN. ESTRADA felt that was a very important matter to include.

SEN. HALLIGAN stated that he has a lot of first time felons and there would be no reason for a presentence investigation.

Ms. Lane explained that she understood that she should not reinsert "unless the court makes a finding that a report is unnecessary."

EXECUTIVE ACTION ON SB 216

Motion: **SEN. HALLIGAN MOVED SB 216 DO PASS.**

Discussion:

SEN. GROSSFIELD asked about the change mentioned on page 2, line 25.

Ms. Lane suggested inserting the word "have".

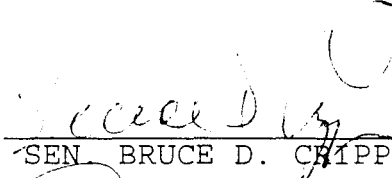
SEN. HALLIGAN withdrew his motion.

Motion/Vote: SEN. HALLIGAN MOVED SB 216 BE AMENDED. The MOTION CARRIED.

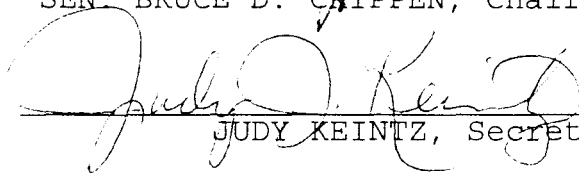
Motion/Vote: SEN. HALLIGAN MOVED SB 216 DO PASS AS AMENDED. The MOTION CARRIED UNANIMOUSLY.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:05 p.m.



SEN. BRUCE D. CRIPPEN, Chairman



JUDY KEINTZ, Secretary

BDC/JJK