

## **MINUTES**

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

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN BRUCE D. CRIPPEN**, on February 5, 1997, at 8:00 A.M., in the Senate Judiciary Chambers (Room 325) of the State Capitol, Helena, Montana.

#### **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)

**Members Excused:** Sen. Walter L. McNutt (R)

**Members Absent:** None

**Staff Present:** Valencia Lane, Legislative Services Division  
Judy Keintz, Committee Secretary  
Jody Bird, Committee Secretary

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

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 231, posted January 27  
HB 122, HB 135, posted  
February 5,  
Executive Action: SB 109, SB 210, SB 222, HB 29

#### **EXECUTIVE ACTION ON SB 109**

**Amendments:** sb010903.avl. (revision of sb010902.avl from February 4, 1997)

**Discussion:** **SENATOR RIC HOLDEN.** If we strike "unless the Court makes a finding...", we will have a revised Fiscal Note with about three more FTE, so I want to leave this in the bill. It still gives the judge discretion.

**SENATOR SUE BARTLETT.** This bill specifies cases with incarceration of one year or more. I suspect this is enough to kill the amendment. I want it noted in the record that in the work of the Study Commission, in dispositions collected from documents, about four out of ten had no pre-sentencing investigations. So this raises questions as to what information judges are relying on in making sentences, and the Courts are not issuing findings as to why they don't think PSI is needed.

**SENATOR MIKE HALLIGAN.** What if we said, "the Court shall make findings, unless they make a specific finding?"

**Motion/Vote:** SENATOR HALLIGAN MADE A MOTION TO ADOPT THE LANGUAGE HE JUST PROPOSED AS AN AMENDMENT TO SB 109. THE MOTION CARRIED UNANIMOUSLY.

**SENATOR BARTLETT.** With these amendments, where do we stand with regard to release of the psychological/sexual evaluation?

**Valencia Lane.** I tried to address the amendment on page 2. 112 is contents of the report, and 113 is who gets the report.

**SENATOR BARTLETT.** The evaluation should not be attached to the pre-sentencing report because of confidentiality and privacy issues. **Valencia Lane.** On page 5, lines 19-20, I inserted "probation and parole officer" to make it the same as 46-18-113, MCA.

**SENATOR HALLIGAN.** My concern is the availability of and not the attachment of the report. **Valencia Lane.** The law says the report may not be open to public inspection, so I don't see how confidentiality is breached by the evaluation being included in with the report.

**SENATOR BARTLETT.** The degree of protection of confidentiality is not always what it should be.

{Tape: 1; Side: A; Approx. Time Count: #19.7; Comments: 8:30 a.m..}

**SENATOR SHARON ESTRADA.** Mary Fay, the Bureau Chief for Probation and Parole Officers, said the defendant gets a copy of this report, and that is a problem in psychological/sexual reports, as it contains confidential information such as other victim's names. **Valencia Lane.** The bill, as drafted, said the psychological/sexual evaluation must be provided to probation and parole, law enforcement, the county attorney, and the judge. What is the desire of the Committee and the Department on this? That would mean taking #12 out of the amendments.

**SENATOR BARTLETT.** I prefer this original language, and then removing the amendment on Section 4, 48-18-112, MCA, and leaving in Section 4, 46-18-113, MCA. **SENATORS HALLIGAN AND HOLDEN.** That would be okay.

**Valencia Lane.** Do you want to leave it on page 5 of the bill as it currently appears? **SENATOR HALLIGAN.** Yes. **VICE CHAIRMAN LORENTS GROSFIELD.** We should delete amendment #7. **Valencia Lane.** Then Section 5 would become Section 4. **SENATORS HALLIGAN AND BARTLETT.** That would be okay.

Motion/Vote: **SENATOR HALLIGAN MADE A MOTION TO ADOPT AMENDMENTS SB 010903.AVL WITH THE CORRECTIONS JUST DISCUSSED. THE MOTION CARRIED UNANIMOUSLY.**

Motion/Vote: **SENATOR HOLDEN MADE A MOTION THAT SB 109 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.**

**EXECUTIVE ACTION ON HB 29**

Amendments: sb02902.avl

Motion: **SENATOR MIKE HALLIGAN MADE A MOTION TO ADOPT AMENDMENTS sb02902.avl. I believe the amendments are self-explanatory in dealing with the K-12 building and home schools.**

Discussion: **Valencia Lane.** The Office of Public Instruction (OPI) made a suggestion to better the amendment by striking "K-12" in the bill and inserting "school building", and inserting in the title, "definition of a school building".

**SENATOR HALLIGAN REVISED HIS MOTION TO INCLUDE THE OPI LANGUAGE.**

**CHAIRMAN CRIPPEN.** Vo-Techs will not be covered, but the Career Center deals only with K-12 kids? **VICE CHAIRMAN GROSFIELD.** I believe it is a good amendment, as a lot of local school districts are not K-12.

Vote: **SENATOR HALLIGAN'S MOTION TO ADOPT AMENDMENTS sb02902.avl CARRIED UNANIMOUSLY.**

Discussion: **Valencia Lane.** I have an amendment prepared if you want to include private schools.

**CHAIRMAN CRIPPEN.** **REPRESENTATIVE BOHLINGER** did not indicate it was his intent to also address private schools, and no committee members seem to want to make the bill apply to private schools.

Motion: **SENATOR ESTRADA MADE A MOTION THAT HB 29 BE CONCURRED IN AS AMENDED.**

**SENATOR RIC HOLDEN.** Knives are worn to school in a leather case as a matter of course. I believe this should be up to the individual schools, and so oppose the bill.

**SENATOR ESTRADA.** I live three blocks from Senior High in Billings, and I support the bill.

**CHAIRMAN CRIPPEN.** How do we define a firearm? And what about ROTC (Reserve Officers Training Corp) functions at school?  
{Tape: 1; Side: A; Approx. Time Count: #39.6; Comments: None.}

Motion/Vote: SENATOR HOLDEN MADE A SUBSTITUTE MOTION TO TABLE HB 29. THE MOTION FAILED 4-4 IN A ROLL CALL VOTE - SENATORS DOHERTY AND MCNUTT WERE NOT PRESENT AND DID NOT LEAVE A VOTE.

{Tape: 1; Side: B; Approx. Time Count: 1.5; Comments: None.}

**CHAIRMAN CRIPPEN.** I have a problem with parents being held responsible.

**SENATOR ESTRADA.** I represent the South side of Billings, and I believe parents should be accountable.

No action was taken on SENATOR ESTRADA's MOTION THAT HB 29 DO PASS AS AMENDED.

{Tape: 1; Side: b; Approx. Time Count: #4.8; Comments: None.}

EXECUTIVE ACTION ON SB 222

Motion: VICE CHAIRMAN LORENTS GROSFIELD MADE A MOTION THAT SB 222 DO PASS.

Discussion: SENATOR RIC HOLDEN. I would need a compelling reason to vote for this bill. CHAIRMAN CRIPPEN. It does broaden the law. VICE CHAIRMAN GROSFIELD. It only applies if we are dealing with an erratic driver, and it has a "zero" threshold for illegal drugs.

{Tape: 1; Side: B; Approx. Time Count: #8.5; Comments: None.}

**CHAIRMAN CRIPPEN.** On page 4, lines 9-10, the requirement to test for alcohol first is being eliminated as, if the test shows 1.5 or more, then they can't test for drugs.

**SENATOR MIKE HALLIGAN.** The percent of people driving with dangerous drugs in their system is growing so rapidly, that is the compelling reason for this bill.

**SENATOR STEVE DOHERTY.** I am concerned with the "zero" tolerance level.

**SENATOR BARTLETT.** Would poppy seeds eaten show up on the test?

**VICE CHAIRMAN GROSFIELD.** I believe this is a serious bill. We are talking about DUI per se, and if there is no erratic driving, they won't be stopped.

{Tape: 1; Side: B; Approx. Time Count: #13.0; Comments: None.}

Brenda Nordlund, Department of Justice. The Department won't recommend a urine test for past exposure.

Vote: SENATOR GROSFIELD'S MOTION THAT SB 222 DO PASS CARRIED 6-4 IN A ROLL CALL VOTE.

HEARING ON HB 135

Sponsor: REPRESENTATIVE LIZ SMITH, HD 56, Deer Lodge.

Proponents: Norma Jean Boles, Health Services Manager, Department of Corrections  
Clancy L. Cone, M.D., Medical Director, Department of Corrections

Opponents: None

Opening Statement by Sponsor: REPRESENTATIVE LIZ SMITH, HD 56, Deer Lodge. This is a Department of Corrections bill. It adds a second auxiliary member to the Board of Pardons and Parole to relieve the problem of not enough members able to be present to meet timely. The bill also staggers member terms each year.

Page 3, lines 23-26 were amended. A physician should not be rating the risk factor for medical parole. Language was changed to "unless after consulting with a physician..." The intent is to put this risk onto the Board, and off the physician.

Proponents' Testimony: Norma Jean Boles, Health Services Manager, Department of Corrections (EXHIBIT #a). The bill removes the requirement that the physician determine whether an inmate would be a danger to society, if the inmate were released on medical grounds. There has been only one medical parole granted since the original inception of this legislation. The bill allows the Board to identify the most appropriate medical treatment and cost management thereof. The Board also has quasi-judicial authority, while a physician would be libel to error.

{Tape: 1; Side: B; Approx. Time Count: #22.6; Comments: 9:16 a.m..}

Clancy L. Cone, M.D., Medical Director, Department of Corrections. There have been no medical paroles granted since the last biennium.

Questions From Committee Members and Responses: VICE CHAIRMAN LORENTS GROSFIELD. How many medical paroles have been applied for. Dr. Cone. Four.

VICE CHAIRMAN GROSFIELD. How does the Board feel about this bill? Diana Leibinger, Legal Counsel, Department of Corrections. The Board asked for this legislation.

**VICE CHAIRMAN GROSFIELD.** So the Board would go to four members?  
**Diana Leibinger.** No, just two alternate members.

**CHAIRMAN CRIPPEN.** The title of the bill is confusing, as it was not changed when page 3 was amended in the House.

*{Tape: 1; Side: B; Approx. Time Count: #31.8; Comments: None.}*

**Closing by Sponsor: REPRESENTATIVE LIZ SMITH.** I am proposing an amendment On page 3, line 25, we ask that following "syndrome" you add "that the Board renders the..." I haven't given this amendment to the Department (**EXHIBIT #1**).

**HEARING ON HB 122**

**Sponsor: REPRESENTATIVE DAN MCGEE, HD 21, Laurel.**

**Proponents:** Dave Ohler, Chief Legal Counsel, Department of Corrections.  
Clancy Cone, M.D., Medical Director, Department of Corrections

**Opponents:** Russell Hill, Montana Trial Lawyers Association (MTLA)

**Opening Statement by Sponsor: REPRESENTATIVE DAN MCGEE, HD 21, Laurel.** The bill does five things. It requests a report of the prisoner's account be given to the Court, and requires prisoners to pay a filing fee when they file a complaint and are not indigent.

The bill also requires any award to go to child support, victim restitution, incarceration costs, etc. It would preclude filing with the Human Rights Commission, but would prisoners would still have access through federal court. The bill allows the Department to object to transfer of an inmate and allows that inmate to pay for a transfer in writs of habeas corpus at civil proceedings.

The bill defines prison 28-U.S.C., 1915 language and the Prison Legislation Reform Act (PLRA) recently passed by Congress. Section 4 would eliminate complaints filed by prisoners against licensed professionals. Section 6 provides for funds in Section 2 to be put in an account.

**Proponents' Testimony: Dave Ohler, Chief Legal Counsel, Department of Corrections.** The Department stands in support of the bill. It is important to note that Section 3 has an escape provision for the truly indigent, patterned after the Prison Legislation Reform Act, signed by the President in April, 1996

We have seen a 15 percent reduction in federal court filings, but an increase in filings in state court. Sometimes an inmate doesn't know what he has agreed to file, so I believe this legislation would deter such filings.

Clancy Cone, M.D., Medical Director, Department of Corrections.  
I rise in support of this bill.

**Opponents' Testimony:** Russell Hill, Montana Trial Lawyers Association (MTLA). We see a specific problem with the bill. Anecdotal evidence sits with us. This bill is frivolous and creates more problems. Section 1 is not based on security, but on trustee level. Access to court via constitutional guarantee is not in the absolute power of the Legislature.

We have no problem with restitution in Section 2, but it operates as a disincentive, clearly an additional penalty. For example, prisoners promised protection by the State were brutally murdered and tortured.

Section 3, page 3 has many provisions regarding whether you are going to require an inmate to put up \$100 or \$200. Sections 4 and 5 are still being amended, as they create a class of people who can't complaint about licensing or human rights issues.

*{Tape: 1; Side: B; Approx. Time Count: #6.3; Comments: None.}*

We ask that the Committee look at amending Section 9 retroactively to 1890 and not 1990, as the only reason for this bill is the prison riots.

**Questions From Committee Members and Responses:** VICE CHAIRMAN LORENTS GROSFIELD. Who is being currently filed against? David Ohler. Ninety-eight percent are as a result of a conviction or condition at the prison or parole revocation. Defendants include the State of Montana, all of the Department of Corrections employees, and sometimes county employees.

In Section 2, pertaining to repayment of per diem costs, are we adding a penalty after the fact? David Ohler. No, just a requirement that the inmate pay his bills. Only two cases have gone to trial in which judgment was rendered for the inmate (totaling \$9000) since I've been with the Department.

VICE CHAIRMAN GROSFIELD. Does Section 4 apply to attorneys? David Ohler. I don't know, but it applies to medical doctors, and dentists. In 1992 we had 60-70 nearly identical complaints against the Board of Pardons. In 1995 we had 10-15 complaints against medical license holders.

David Ohler passed out Department Amendments.

SENATOR STEVE DOHERTY. Why is it not a good idea to make a prisoner repay the State from inheritances, etc., as well as with money received from filing a complaint. David Ohler. The Department has another bill to deal with this.

SENATOR DOHERTY. What if a licensed individual commits a clear act of malpractice? David Ohler. I don't belie this bill

precludes filing a suite for medical malpractice, but precludes filing with a medical/legal panel.

**SENATOR DOHERTY.** I don't believe they can file medical malpractice without filing with the medical/legal panel first. Why did you pick the date of January 1, 1990? What is the number of cases filed since that date? **David Ohler.** I believe the number of active human rights cases are about 10-15.

**SENATOR DOHERTY.** What is the compelling reasons for extinguishing these claims? **David Ohler.** We are eliminating a particular avenue of filing these claims.

**SENATOR BARTLETT.** Is the intent to limit inmates who are security risks or any inmate? **David Ohler.** We transport prisoners around the State for any number of case situations, and are concerned about the cost, as well as security.

*{Tape: 2; Side: A; Approx. Time Count: #16.6; Comments: 9:56 a.m..}*

**SENATOR BARTLETT.** If a prisoner were being such, he would be subject to this legislature, just as if here were the complainant. In Section 3, Subsections (5) and (6), who will do the certification of the trust account? **David Ohler.** We have been doing it this way since April, 1996. we make a copy and file it with the Court, who determines what a prison can pay.

**SENATOR BARTLETT.** In Subsection (6) concerning indigence policy, what procedures are used, and how long will it take the Department of Correction to change, if it decides to do so. **David Ohler.** It would typically take a couple of months, and could be done at their discretion.

**SENATOR REINY JABS.** What rights do prisoners retain? **David Ohler.** The first amendment guarantees free speech, equal protection, due process, and prohibits unreasonable search and seizure.

**SENATOR BARTLETT.** The language regarding civil awards to go to victims seems to be much broader. Am I correct in this? **David Ohler.** The money would only to go the victim of that inmate.

**CHAIRMAN CRIPPEN.** Where would the extra dollars go for crime victims? To the general fund? **David Ohler.** I believe so, but I'm not sure.

**Closing by Sponsor: REPRESENTATIVE MCGEE.** An individual in my district who was formerly imprisoned, told me he would flood the system with filings if things didn't go his way. This bill is about non-couple filing, about costs paid by all Montanans, and about fairness to the people of Montana.



Montana State Prison inmates knew more than I did about prison legislation. I believe we're creating jail-house lawyers while these people are incarcerated. They're already supplied with attorneys, and law students for help. Our citizens don't have this luxury.

A lot of inmate litigation is wrong and inappropriate. Let's make them go through the same hoops and hurdles as anyone else.

The Committee recessed at 10:03 a.m. and resumed at 10:13 a.m.

HEARING ON SB 231

Sponsor: SENATOR CASEY EMERSON, SD 14, Bozeman

Proponents: Jerry O'Neil

Bob Steele, Montanans for Due Process

Michael Fellows, Montana Libertarian Party

Opponents: Gary Davis, Luxan and Murfitt, Committee on Practice,  
Montana State Bar

John Alke, Montana Defense Trial Lawyers

Ward Shanahan, Pro Bono Lobby Committee, Montana State  
Bar

Pat Chenovick, Administrator, Montana Supreme Court

Bob Gilbert, Montana Magistrates Association

Russell Hill, Montana Trial Lawyers Association

John Conner, Montana County Attorneys Association

*{Tape: 2; Side: A; Approx. Time Count: #1.9; Comments: None.}*

Opening Statement by Sponsor: SENATOR CASEY EMERSON, SD 14,  
Bozeman. This is a fairly short bill for a constitutional  
amendment of big importance. Page 2 strikes "make" and inserts  
"recommends to the Legislature".

These legislative powers don't really belong in the Court system,  
but to the Legislative branch as a protection for the people.  
They were with the Legislature until the Montana Constitutional  
Convention in 1972. Now the Judicial branch has total power to  
make, administer, and enforce rules, and we've had some things  
change that are not right.

In general, the judicial system has gone downhill. Seventeen  
states accepted this change around 1972, just as Montana did. I  
am providing an article by Judge Harold Rothwax who spent 25  
years in the New York judicial system (EXHIBITS #3, #3a-#3i).

Jack Levitt, a retired judge from California agrees with most of  
the book. He also taught judges in New York. Federal Judge  
Bork, who was turned down for the U.S. Supreme Court believes the  
Legislature should override the Courts. Jerry Pence, a well-  
known attorney, and attorneys Grimes and Isaac, all agreed the  
justice system is in shambles.

I don't believe we got justice in the Courts in the O.J. Simpson case, as he was judged guilty in the civil case, and innocent in the criminal case.

In reading records, it seems the Constitutional Convention didn't intend full power to go to the Judicial branch. In 1975, in McCabe v Zimmon, the Montana Supreme Court claimed all powers, and the Legislature did not object.

**Proponents' Testimony:** Jerry O'Neil, Kalispell (EXHIBIT #4). I am a paralegal and a licensed attorney in Blackfeet Tribal Court. Some Supreme Court caws appear to be secretive. For example, I am not allowed to go into justice court, as I'm an attorney for Blackfeet Tribal Court.

Each court is allowed to set its won rules, so 20 different courts could have 20 different sets of rules.

{Tape: 2; Side: B; Approx. Time Count: #2.0; Comments: 10:28 a.m..}

**Bob Steele, Montanans for Due Process** read from prepared testimony and referred to Alexis De Toppel and an in-depth analysis of how democratic government is run. He also quoted Thomas Jefferson with regard to individual rights and those who make their living off the law, and have special privileges, thus creating an aristocracy.

I went to law school and was told about the elite status in society as an attorney. This defies reason, and it is time for a change.

**Michael Fellows, Chairman, Montana Libertarian Party.** We support SB 231.

{Tape: 2; Side: B; Approx. Time Count: #4.9; Comments: 10:31 a.m..}

**Opponents' Testimony:** Gary Davis, Luxan & Murfitt. I am one of eight attorneys serving on the Committee on Practice of the Montana State Bar, along with three public members: Patricia Decries, Gary Buchanan, and Bill Goth. We spend about two days per month on committee business, and rely on unpaid volunteers across the state in cases of discipline.

The bill doesn't indicate where discipline of attorneys would go. If it went to the Department of Commerce, it would cost twice as much and take twice as long, as well as establishing more state bureaucracy.

{Tape: 2; Side: B; Approx. Time Count: #8.0; Comments: 10:35 a.m..}

**John Alke, Montana Defense Trial Lawyers.** The Bill is significantly different from the description in Section 2. Then, lines 2-5 on page 2 would preclude basic rules pertaining to civil procedure, promulgation, and appellate rules.

I do favor separation of powers. The Legislature resolved a misconduct session of a form member of legislature a few years ago. The Courts should contort misconduct of their own.

Anyone can to court without an attorney. The purpose of attorneys is to minimize misconduct in courts, but this bill is an attempt to seriously undermine the checks and balance in the three branches of government.

**Ward Shanahan.** I am a member of the Pro Bono Lobby Committee of the Montana State Bar. I'm a life-long Montanan and graduate of the University of Montana School of Law, the grandson of a farmer and a miner, and the son of a state official.

The Montana State Bar Association set up a client security fund to reimburse people who've lost money at the hands of attorneys.

Separation of powers is in the U.S. Constitution for a good reason, even though I don't agree with all the decisions of the Supreme Court. If there is a problem with the judiciary, it is a political problem with appointments. We need the uniform rules that we have now which are published in the Montana Codes Annotated (MCA).

An independent judiciary is one of the most important things we have in this country today. My father wanted me to be a lawyer, and I'm proud of the profession I've practiced for 39 years.

**Pat Chenovick, Administrator, Montana Supreme Court.** Article 3, Section 1 of the Montana Constitution has provided for three separate powers now. He read verbatim a comment from the Montana Constitutional Convention transcript with regard to citizen choices and options being enhanced. The emphasis was on judges being responsive to the people, the lawgivers, and being as strong as the Executive and Legislative branches. He urged the Committee to vote no on SB 231.

**Bob Gilbert, Montana Magistrates Association.** The Association is made up of mostly non-attorney judges. We believe this bill deals directly with the weaker of the three branches of the system. The Legislature's job is not to micromanage, but of set policy. We're not here enough to micromanage. This bill takes apart the rights of citizens in the guise of giving to the rights of citizens.

**Russell Hill, Montana Trial Lawyers Association (Exhibit #5).** Realty in the world is complex. Montanans for Due Process tried to pass a initiative with similar language. This bill amends the jurisdiction of the court, but doesn't address Article 7, Section

1. The Legislature can't change this without affecting Article 2, Section 9. The legislature already has the power to disapprove the actions of the Supreme Court within two sessions, and approves appointments to the Supreme Court.

**John Conner, Montana County Attorneys and Department of Justice.** My wife and I have been members of Montana Criminal Defense Attorneys for years. I believe I'm not personally hitting the mark in conveying trust, but I don't believe the system is broken; rather it's designed to protect rights and provide for due process.

Prosecutors and judges work to ensure truth prevails and justice is served. I am proud to be a criminal prosecutor, but since I am salaried I lose hundreds of over time hours per year to get the job done right. I urge you to defeat this bill.

**Questions From Committee Members and Responses: SENATOR RIC**

**HOLDEN** asked about the lined out language on Page 2, line 3. The Senate Judiciary Committee passed **SENATOR VAN VALKENBURG's** bill at the request of the Supreme Court on post -adjustment review of criminals. If we strike "in either of...promulgation", we would still be allowing the Legislature to have authority of the Judiciary. **SENATOR EMERSON.** That isn't a bad idea. I'm afraid the bill won't pass. I believe a lot needs to be changed now, and I believe this bill is a better way of doing it.

{Tape: 2; Side: B; Approx. Time Count: #32.6; Comments: 10:50 a.m..}

**CHAIRMAN CRIPPEN.** There are rules of conduct for members of the State Bar. Would it be your intent to change this, so nothing would be required for admittance to the Bar? Who would make these decisions? **SENATOR EMERSON.** The Legislature would.

{Tape: 3; Side: A; Approx. Time Count: 00; Comments: 11:02 a.m..}

**CHAIRMAN CRIPPEN.** I see a void as to who would be responsible. Is that your intent? **Ward Shanahan.** yes, there would be a void. Other problems would be created if we tried to license attorneys like we do doctors. Who would do the testing? Would there be a national test? A local test?

**CHAIRMAN CRIPPEN.** The framers of this wanted to make sure the Legislature had time to disapprove of judicial rules and procedures. Do you want to do away with this? **Ward Shanahan.** No. **SENATOR EMERSON.** The Legislature would have the power to do whatever it wants. It appears that rules made by the Legislature now would be upheld.

{Tape: 3; Side: A; Approx. Time Count: #2.5; Comments: 11:06 a.m..}

**SENATOR CRIPPEN.** I see a conflict on page 2 with leaving this line in and the section you are changing.

**SENATOR AL BISHOP.** Does the Legislature have powers over the profession of law right now? I am looking at the Professional and Occupational Licensing Act in the MCA, and wonder if this legislation is being limited to the practice of law. **Larry Alke.** The current Constitutional provision is that the Court "may make". The bill changes this to "make recommendation to the Legislature", and this is a huge change. The bulk of criminal procedure statutes are established by the Legislature. This bill says the Judicial system will stop. Also, the civil rules of procedure are a whole other area of law. I believe **SENATOR EMERSON** is trying to deal with criminal procedure. What if, however, the Legislature refused to act and there were no rules?

{Tape: 3; Side: a; Approx. Time Count: #8.0; Comments: 11:13 a.m..}

**SENATOR MIKE HALLIGAN.** At that time (1972) only 11 states didn't have centralized rule-making authority with the Supreme Court, and Montana was one of those. Why don't you accept the balance struck then? What's wrong with it? **SENATOR EMERSON.** The Constitutional Convention talked about the Legislature having power, but in a 1975 decision, I believe the Supreme Court didn't see it this way, and took this total power.

**SENATOR HALLIGAN.** Don't you see the mischief in the Democrats or Republicans influencing rules one way? The Court is not afraid of political rules. Do you want to change this? **SENATOR EMERSON.** I asked the Committee to hold off on this bill until they hear SB 255 after February 10, 1997.

Closing by Sponsor: **SENATOR EMERSON.** I believe statements made concerning the Commission on Practice are true. They meet in secret, like a fox guarding a hen house. If this bill passes, the Supreme Court can still suggest laws they think they need.

The Bar members are the only ones who can represent others in court. This makes them elite. If everyone in the Legislature were a plumber, we would have a mess. I believe the same thing is happening with the Judicial system. They're protecting their own turf, and not protecting the minorities, the poor. For example, an Indian girl was raped and jailed in Havre and no one would represent her.

The FOX Network conducted a survey of legislators. Why do legislators get such a bad rating? I don't believe we're doing much to solve problems such as crime, education, and taxes. We need to correct all parts of the Judicial system. The old system seemed to work pretty well, prior to 1972.

A district judge in Bozeman didn't like his jury room and took the matter to the Supreme Court who ordered the Gallatin County

Commissioners to provide a jury room. Then that judge retired, and I don't believe the new judge will demand a different room.

{Tape: ; Side: ; Approx. Time Count: ; Comments: 11:26 a.m..}

EXECUTIVE ACTION ON HB 29

The Committee resumed its action on HB which had been interrupted for hearings.

**Motion:** SENATOR ESTRADA'S EARLIER MOTION THAT HB 29 DO PASS AS AMENDED CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS MCNUTT AND DOHERTY WHO VOTED NO.

CHAIRMAN CRIPPEN advised the Committee that SB 219 and HB 111 need to be addressed together.

EXECUTIVE ACTION ON SB 210

**Discussion:** SENATOR RIC HOLDEN. I believe there are constitutional problems with this bill, as someone could refuse a test and plead the Fifth Amendment.

**Motion:** SENATOR HOLDEN MADE A MOTION THAT SB 210 BE TABLED.

**Discussion:** CHAIRMAN CRIPPEN. There are two amendments for this bill.

SENATOR HALLIGAN. The law is clear that driving is a privilege and when one goes to get a drivers' license, the right to test is presumed at that time. This is why automatic penalties have been allowed to be associated with this presumed contract.

CHAIRMAN CRIPPEN. If, under the fourth conviction a person goes to prison, does this happen without their having the ability to go to court? Brenda Nordlund. CHAIRMAN CRIPPEN is correct. Four refusals in a five-year period, would make a person subject to felony provisions, but they would have the option of due process. The prosecution would have to prove probable cause and particularized suspicion.

CHAIRMAN CRIPPEN. What happens under a single per se violation? Brenda Nordlund. They would first be charged with DUI, and secondly charge with refusal.

CHAIRMAN CRIPPEN. If you couldn't prove DUI, how would you prove per se? Brenda Nordlund. Because of refusal.

CHAIRMAN CRIPPEN. What would the defense do? Brenda Nordlund. They could say the initial encounter with the police office wasn't lawful.

{Tape: 3; Side: A; Approx. Time Count: #33.7; Comments: 11:39 a.m..}

**CHAIRMAN CRIPPEN.** If it's only per se, what defense does the parson have, after the fourth time, from going to prison? **Brenda Nordlund.** I don't believe criminalizing of test refusal will be upheld as constitutionally-based in Alaska and other states.

**CHAIRMAN CRIPPEN.** The fact remains that, if for whatever reason, you refuse the test, you will go to prison for a year. My concern is for a more definable situation. We put per se in as a little extra measure to the public; now we're expanding this way too far. **Brenda Nordlund.** I can't give you a particular example. Killing someone in a motor vehicle accident is also an absolute liability offense.

*{Tape: 3; Side: B; Approx. Time Count: 00; Comments: None.}*

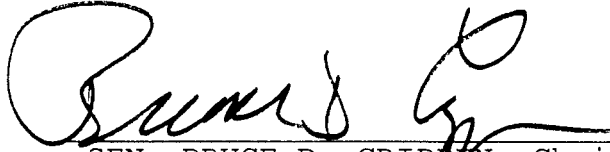
We are not presumed to be able to withhold evidence of a crime ant where in Montana law, but here. I believe this doesn't apply to anyone but hard-core drinking drivers.

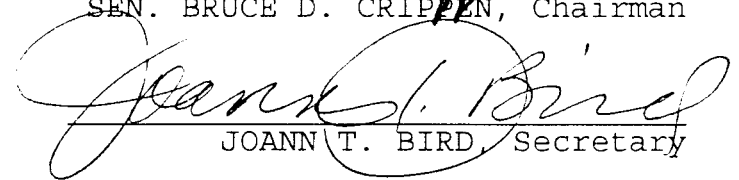
**CHAIRMAN CRIPPEN.** I won't vote for the bill they way it is now, even though parts of it are good. I believe it's poor public policy. Absolute liability is a very serious power, and before we do this we need to be absolutely convinced.

**Vote:** SENATOR HOLDEN'S MOTION TO TABLE SB 210 CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS GROSFIELD, HALLIGAN, AND JABS WHO VOTED NO.

ADJOURNMENT

Adjournment: 11:47 A.M.

  
SEN. BRUCE D. CRIPPEN, Chairman

  
JOANN T. BIRD, Secretary

BDC/JTB