MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **ACTING CHAIRMAN LORENTS GROSFIELD**, on March 6, 1997, at 9:00 A.M., in Room 104.

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: HB 268, February 24
HB 111, February 24
HB 68, February 24

Executive Action: None

HEARING ON HB 268

Sponsor: **REP. DEB KOTTEL, HD 45, Great Falls**

Proponents: **None**

Opponents: **Scott Crichton, ACLU**

Opening Statement by Sponsor:

REP. DEB KOTTEL, HD 45, Great Falls, introduced HB 268. She stated that the committee had a policy decision to make between two bills with the same title which are very different

philosophically regarding this subject. She was referring to **SEN. JENKINS'** SB 31.

Her mother was very ill in the beginning of this session. She has smoked all of her life and was sitting in ICU with IVs, 80% of her lung capacity gone, and she said if she could have a cigarette now, she would smoke it. She knew she would die if she did and yet the addiction was so strong. The doctor gave her a nicotine patch. She is not smoking today. She couldn't do it alone. She had to have a chemical assistance to resolve not to smoke.

Chemical castration is a treatment device and not punishment. Even with the patch, if she didn't want to stop smoking, she can override that and have a cigarette. The first way that HB 268 is different from SB 31 is that it is not just the sentencing judge who orders the chemical treatment, it also takes recommendations of the Department during the sentencing hearing. Unless you voluntarily want to make a change, the chemicals can be overridden.

Why is this treatment necessary? One type of sex offender is very common to obsessive compulsive disorders (OCD). They see people in treatment with obsessive fantasies. The fantasies are so obsessive that as they are sitting through treatment, they cannot concentrate on the treatment at all because of the excessive fantasies. This bill would include other types of chemicals like prozac. Inadvertently, prozac was given to a sex offender for depression and they noticed a reduction in obsessive fantasies.

HB 268 is different from SB 31 in that it talks about any other chemicals which can be used to reduce obsessive sexual drives. **SEN. JENKINS'** bill refers to only one type of chemical use which is very expensive. Her bill allows the full array of neuropsychological agents, if medically safe, to be used to reduce sexual fantasies and sexual drive. Some of those agents, like prozac, cost pennies per day. Some men are sex offenders because of testosterone levels. Normal levels are about 600. There are people in Deer Lodge with 1200 to 1800 levels. This is an issue of biology and treatment and not one of punishment. Over 400 inmates in Deer Lodge are sex offenders. The number of sex offenders registered in the state of Montana is 2,227. When they leave prison, public safety issues are of concern.

She went through the handout which explained the differences in the two bills, **EXHIBIT 1.** Her bill parallels the registration of sex offenders. Because of the possibility of a constitutional challenge, it is important to show that this is not for punishment, but for public safety and treatment. This parallels the people who also have to be registered to include people who engage in the sexual abuse of children. This is not included in SB 31. This bill requires the treatment to be made medically safe. HB 268 also includes other medically safe drug treatment

which reduce sexual fantasies and sex drives. SB 31 states that the treatment can only be had after the second offense in some crimes. Her bill makes no distinction between the first or second offense. If the person is voluntarily willing to engage in treatment and the Department feels that that treatment would be successful, why do we have to wait for that person to sexually molest a child twice. The twice rule makes it look more like punishment.

Proponents' Testimony: None

Opponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:15; Comments: .}

Scott Crichton, ACLU, stated that HB 268 is far less intrusive and punitive than SB 31. He would feel much more comfortable with the bill if it stated that it had to have the consent of the sex offender, not only the informed consent but also the medical effects which can come from the chemicals. His understanding is that for any of these treatments to work, the individual must be comfortable with the treatment. The court can say you have to go to AA, but unless you are ready, it will not help. These drugs do not stop people from having the ability to be sexually aroused or sexually aggressive. Violent sexual acts are personal violent acts. It is not consensual sex. The sexuality is secondary. This is a small piece of therapy which works for a small amount of people. At what point does the state stop paying for this? Deprafovera would cost about $7,000 a year. It must be administered by a licensed health professional on a weekly basis. If sex offenders are registered for life, will the state pay for the treatment for life? The best methods of preventing reoffense is to make sure they are in group treatment for life.

Questions From Committee Members and Responses:

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

SEN. SHARON ESTRADA asked about the status of the bills. What happens if both bills passed?

REP. KOTTEL answered that the Governor cannot sign both, so the bills would have to go to a conference committee and one bill would then merge both concepts.

Ms. Lane clarified that the bills would not go to a conference committee unless one house amends the other house's bill. The first house rejects the amendment placed on it by the second house and then that bill will go into a conference committee. If neither bill is amended in the second house and they both pass, they would then go to the Governor and he could sign one or amend one. Being aware of the conflict, this committee has a responsibility to address the conflict. That could be amending

them so they no longer conflict or putting a coordination instruction on the bill to address the other bill.

CHAIRMAN GROSFIELD felt that another method would be to amend both bills so they would both be rejected and end up in the same conference committee.

SEN. HOLDEN stated that **SEN. JENKINS'** bill was tabled in the committee for sometime because of the voluntary aspects of the treatment. HB 268 uses the word "shall" and this would make the bill non-voluntary.

REP. KOTTEL stated that no one could receive treatment unless the Department recommends it and the judge orders it. She put both aspects in the bill because she wanted the judge involved for due process reasons and the Department involved because the Department would never recommend treatment unless the person voluntarily is willing to accept that treatment and also the Department believes it is medically suitable. Without the Department recommendation, public outcry will force judges to order chemical castration in the form of a punishment and also some sex offenders will want the treatment even though the types of sex offense which they have committed are not suitable to treatment at all. This has no impact at all on violent offenders. It has impact on OCD persons and persons with biological abnormalities. From a medical standpoint, once the person is released and under life supervision, there needs to be a way to pull the person back into the system if he decides to no longer continue the treatment. Sex offenders have stated that their lives become very gray. They need boundaries.

SEN. HOLDEN stated he might not trust the Department so he may put on the voluntary amendment which **REP. KOTTEL** could resist and thus force the bill into a conference committee.

SEN. SUE BARTLETT commented that the committee would also be hearing HB 111 which amends 46-23-502 and wondered how the two bills worked together?

REP. KOTTEL stated she included all sex crimes that are defined under that statute for registration because of the public safety issue. This would include crimes which SB 31 would not include such as sexual abuse of children and indecent exposure. If someone is serving time for indecent exposure and has OCD behavior, the idea of this bill is that if it is suitable treatment could begin early.

SEN. BARTLETT stated her concern was with HB 111 which amends the definition of sexual offense.

REP. KOTTEL stated that the section refers to two different issues which would be sex offenders and violent offenders. Her bill refers to the section but only to sex offense and not to violent offenses under that section.

SEN. BARTLETT asked **Sandy Heaton** if it makes a difference if the offender agrees to undergo the chemical treatment?

Sandy Heaton, Director of the Sex Offender Program at Montana State Prison, stated she has worked with sex offenders for 18 or 19 years. It is very important for an offender to voluntarily agree to the chemical treatment. It has to be taken frequently so compliance becomes a real issue or it can be overridden in their heads and they offend anyway. Her biggest concern is to not give people a false sense of security. This can help with some offenders under the right circumstances.

SEN. BARTLETT stated that this recommendation would be made at the time of sentencing. She wondered about offenders currently in the prison who would not have this included in their sentence.

Ms. Heaton stated that if they are in treatment and she feels it is appropriate, she can make a recommendation that the offender be given the chemical.

Dave Ohler, Department of Corrections, commented that if this was voluntary on the part of the offender there would be no issue. If someone was forced, there would be an issue. A person ready to leave the system and does not want to volunteer for treatment could be handled by including the Board of Pardons as a sentencing authority.

REP. KOTTEL stated she did not make the bill retroactive because of constitutional challenges. It would mean that judges would sentence differently under a bill like this. The Department would evaluate specifically with the persons's feasibility to treatment. The sentencing that the judge would issue might say that the person would be eligible for treatment upon the Department's recommendation. On a violent rapist, the judge would issue a sentence that does not allow the treatment provision.

SEN. REINY JABS asked why the bill was necessary if this treatment is already in place in the prison.

REP. KOTTEL said there is no provision for the payment once the person is released from prison. The Department would like this bill to authorize them to continue in this vein. Her bill has a fiscal note of $181,000. **SEN. JENKINS'** bill was over $300,000. She did not sign her fiscal note, because she felt people are on treatment until they are able to settle their behavior. She felt the first thing the sex offender would stop doing once out of prison is continue treatment if they could not afford the treatment.

{Tape: 1; Side: b; Approx. Time Count: 9:48; Comments: .}

There are two things which must take place. The due process of a judge in terms of a sentencing hearing and it also must take the

recommendation of the Department that this is suitable for treatment.

CHAIRMAN GROSFIELD stated one bill amends Title 45, which deals with crimes. The other amends Title 46, which is criminal procedure. He asked why the bills deal with two different titles?

Ms. Lane stated that was done at the sponsor's requests. SB 31 puts this into the criminal law sections and the penalties for criminal law. HB 268 involves a different philosophical approach and wanted the state to approach this as treatment for certain offenders. That is why it went into Title 46. The drafter felt the more direct approach of making it a penalty for the crime is the more appropriate way from a drafting standpoint to draft. The question the legislature needs to decide is what policy statement they want to make.

CHAIRMAN GROSFIELD stated the reason SB 31 was tabled dealt with surgical castration. They amended that language out. This bill is not about castration. You need to be in the right frame of mind to even have the drug work.

REP. KOTTEL stated she was sorry she succumbed to the press. She wanted the word treatment to be used instead of chemical castration.

CHAIRMAN GROSFIELD asked if the Department envisioned paying for this for the life of the offender?

Ms. Heaton stated that from a clinical standpoint the answer would be no. Legally, she doesn't know how this will be resolved. Clinically the idea is to put the person on the drug while he is in treatment. The hope is that treatment will work and there is good data that it does. All the drug is designed to do is to help the person control his behavior while he is learning other controls through treatment.

SEN. CRIPPEN said the testimony on the other bill was just the opposite. If the person was not continued on the chemical, they would go right back to where they were before. This would be an ongoing treatment for the rest of their lives. He felt the fiscal note implied the same thing.

Ms. Heaton said it would be an ongoing situation if the offender did not have treatment or want to have treatment. By forcing him to take the medication, the only hope is to drop his sex drive enough where he won't override it. Ideally, their hope is that the treatment will take over and the person will learn his own controls. A person with a high testosterone level will gradually lessen with age.

SEN. HALLIGAN stated that Dr. Salatey stated to him that there were 6 or 7 people in the prison who were on this treatment right now. He questioned the need for the bill?

Ms. Heaton stated that Dr. Salatey has 6 or 7 people in the community on this treatment. They have 3 or 4 who they think should be on the treatment in the prison.

Closing by Sponsor:

{Tape: 2; Side: b; Approx. Time Count: 10:00; Comments: .}

REP. KOTTEL stated this is a treatment device for a handful of people. The average sex offender molests 240 times before being caught and when that person leaves prison he will molest 240 times again before being caught again.

HEARING ON HB 111

Sponsor: **REP. CHRIS AHNER, HD 51, Helena Valley and East Helena**

Proponents: **Dave Ohler, Department of Corrections**
Beth Baker, Department of Justice

Opponents: **Scott Crichton, ACLU**

Opening Statement by Sponsor:

REP. CHRIS AHNER, HD 51, Helena Valley and East Helena, stated the bill is revising state law to comply with federal law. It revises the laws pertaining to registration of sexual and violent offenders, creates classifications of sex offenders, and imposes new requirements for addressing the verification and dissemination of how this information is recovered. It also transfers responsibility for maintaining registry from the Department of Corrections to the Department of Justice, implements the Federal Jacob Wetterling Crimes Against Children Act and Sexually Violent Offender Registration Program. Funding could be penalized if the state does not adopt the provisions to the sex offender registration laws to be consistent with the federal statutes. This could mean a loss of $260,000 to Montana. Every person convicted of a sexual or violent offense would be required to register with the local law enforcement at the time of sentencing, if the offender is not sent to prison, or with the Department of Corrections, at least 10 days prior to release from the confinement in prison, and with the local law enforcement for out-of-state offenders who locate to Montana. Community notification will be handled at the local level by law enforcement agencies where the offender expects to reside.

Proponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 10:04; Comments: .}

Dave Ohler, Department of Corrections, rose in support of HB 111. This bill is a joint effort by the Departments of Corrections and Justice. The purpose of this bill is to streamline the current sex and violent offender registration and to insure that federal funds are continued under the Jacob Wetterling Act. Offenders are required to register 10 days prior to being released from confinement. Current law states they must register 10 days after they leave prison. Offenders provide an address which turns out to be an attorney's address. This bill would require violent offenders to only register for ten years.

Sex offenders have a physical and physiological problem which follows them throughout life. However, oftentimes violent offenders commit one act of violence which may be a crime of passion and they may not commit another crime throughout the rest of their life. A violent offender would register for ten years, if they were crime free during that time, they would be relieved of the duty to register.

Under current law, failure to register is an offense but not keeping your registration current is not an offense. They amended the penalty provision of the bill to make it a crime to not keep your registration current.

Prior to the last session there were no provisions for public notification of the residence of sex offenders. That changed during the last session whereby if the Department thought that an offender was likely to reoffend and posed a serious threat, they could petition the District Court in Powell County and ask the district court for an order to release information about the sex offender which included his height, weight, a photograph, etc., for public notification. The problem with that is that it comes at the end of the incarceration. Oftentimes there is not enough time to get the petition, the order, and then the notification out to the public before the offender has left prison. This bill puts that determination up front. The sentencing court will receive recommendations from a sex offender evaluator about the sex offender and the level of the sex offender. The sentencing court will then make a determination and designate the sex offender a tier 1, 2 or 3 offender. The tiers refer to the likelihood that the offender will reoffend. A tier 1 offender would involve notification with local enforcement whereby a tier 3 would be notification for the public in general.

The bill provides immunity to state and local employees for their good faith efforts in notifying the public about sex offenders. A local official who mistakenly, but in good faith, notifies the public and releases information which he shouldn't have will not be subject to liability. Also, if he fails to notify the public accidentally, he would not be subject to liability.

Beth Baker, Department of Justice, spoke in favor of HB 111. She passed out a handout, **EXHIBIT 2.** They joined the Department of Corrections with this legislation for two reasons. The first was

to assist with the efforts being made at the national level and across the country, it will allow a better notice to Montana communities of sex offenders who may be a danger to children or other residents in entering their communities.

It will improve the state's ability to keep track of the registrations of sexual and violent offenders by transferring that function to the Department of Justice which already is responsible for maintaining most criminal history of record information.

The substance of the bill starts at page 13 and is contained in the last seven pages which deal with the sex and violent offender registration. The bill removes the requirement that a judge be involved in deciding whether there will be notice to the community. This is important because of the delay involved. Local law enforcement in our own communities are better able to decide when community notification is appropriate. An example in last Friday's paper was an article of a sex offender who assaulted a six year old girl in Deer Lodge who had been released from the state prison but the community was not notified until two months later that he had moved to Deer Lodge. By placing the requirement for registration before they are released from prison there would be immediate notice to local law enforcement through the Department of Justice. Both law enforcement in the community where the crime occurred and where the offender will be residing are notified immediately. The Department of Justice operates the criminal history records system and the state criminal justice information network which provides information to law enforcement agencies statewide. They will be able to compare the criminal history records they already keep with the offense registration records to make sure that offenders who are supposed to be registered in fact are registered. Because the bill transfers the record keeping function to the Department of Justice as well as imposes new obligations, there will be some extra costs. With most offenders, they will send out annual address verification notices to the offenders and they are required to respond within 10 days. Those designated sexually violent predators, have to meet this requirement every 3 months. The main cost will be the first year and after that the ongoing cost will be approximately $35,000 per year. This costs will ensure retention of federal funds. Montana receives approximately $2.6 million each year in federal grant funds under the Omnibus Crime Control and Safe Streets Act. Up to ten percent of that money could be lost if this system is not implemented. One of the highest occupations for former sex offenders is over the road trucking. It is important that they are able to share information with other states.

Opponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 10:18; Comments: .}

Scott Crichton, ACLU, presented his written testimony in opposition to HB 111, **EXHIBIT 3.**

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 10:25; Comments: .}

CHAIRMAN GROSFIELD was concerned with the House amendments in Section 17. The two-thirds vote required for Section 14 now is required for the whole bill.

Ms. Baker stated that some members of the House Judiciary Committee were concerned about the importance of the immunity provision. They didn't want the bill passed unless local law enforcement would have immunity. They wanted the bill to have the immunity or not pass the bill. The vote was well over two-thirds.

CHAIRMAN GROSFIELD also questioned the designation. The offender could petition the judge to change the risk level designation.

{Tape: 2; Side: a; Approx. Time Count: 10:28; Comments: .}

Ms. Baker stated that because the risk level designation was made at the time of sentencing, it was felt that those offenders who completed treatment and their risk of committing a repeat offense had changed since the time of sentencing had changed, would be able to petition to have their risk level upgraded.

CHAIRMAN GROSFIELD asked if the offender could go from a level 1 to a level 3 as well?

Ms. Baker felt that by the time a person was convicted of a sex offense they would have committed many more. The evaluation at the time of sentencing should give the court enough information to determine the risk level.

SEN. BARTLETT asked which provisions were required to maintain the eligibility for federal funds?

Ms. Baker stated Megan's law requires them to give local law enforcement and law enforcement agencies the ability to release information. The other federal law which Megan's law amended is the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act. This requires the sexually violent predator designation. It requires that that registration requirement last at least ten years. It requires the registration for criminal offenses against minors include kidnapping of a minor, except by parents. The federal law does not have any requirements for violent offenses. That was in state law as of last session. The federal law requires address verification provisions and that there be a designated state law enforcement agency to handle the address verification process. They did not want to set up a state board to handle evaluations.

They chose to have the evaluations performed by prison staff. The tier 2 is not mandated by federal law. This is to strike a balance on what information is released to the community. That was done in Section 11 of the bill. The law enforcement agency will be authorized to release information which is relevant to the public if the agency determines that the offender is a risk to the community. There are guidelines set out in the tier system.

SEN. BARTLETT asked if it was necessary to take out the judicial process which was put in last session?

Ms. Baker stated that this would involve removal of the courts. Megan's law states that the designated state law enforcement agency and any local law enforcement agency authorized by the state agency shall release relevant information which is necessary to protect the public concerning a specific person required to register under this section. Previous law allowed the information to be disclosed to local law enforcement agencies for law enforcement purposes, to be disclosed to government agencies who were conducting confidential background checks and then provided that the designated state and local law enforcement agencies "may" release relevant information. They interpreted that to allow for a process of the court to be involved under the Jacob Wetterling Act but as amended it does put the discretion with the law enforcement agencies.

SEN. DOHERTY stated that on the floor they would be asked if there would be more funds for the additional responsibilities of local law enforcement under this bill.

Ms. Baker stated that this bill did receive the endorsement of the Attorney General's Law Enforcement Advisory Council which is made up of local law enforcement officials. There was some opposition in the House because it would require offenders to register with local law enforcement if they were not sent to prison. That was amended so they will register with the probation officer.

SEN. DOHERTY posed the hypothetical situation where law enforcement went to the wrong address due to a clerk's transposing error. The wrong house was broken into. This would be a simple act of negligence and not gross negligence. Would the immunity cover?

Ms. Baker stated the immunity provision provided immunity for good faith decisions to release or not release. If law enforcement wrongfully broke into someone's house there may be other remedies.

SEN. DOHERTY stated in a level 3 situation, if someone transposed the number in good faith, that individual would have no recourse?

Ms. Baker felt that would be correct.

SEN. DOHERTY stated that the feds have always given deference to state constitutions which provide greater protection for individual rights. How heavy is the federal hand?

Ms. Baker stated that Article II, Section 10, of the Montana Constitution provides that the right of individual privacy may not be infringed upon except on showing of a compelling state interest. The state's interest of protecting the community is compelling.

CHAIRMAN GROSFIELD asked for clarification of Section 11 regarding dissemination of information.

Ms. Baker explained the registration under current law is law enforcement agency to law enforcement agency. The goal of the bill is to have a centralized records keeper, which would be the Department of Justice, which would make sure that the local law enforcement agencies that has some connection to the offender gets the notice. Lines 7 through 9 set the general rules. The laundry list is the minimum requirements where they try to set out some guidelines for local agencies so that there is more uniformity about what information is to be released.

CHAIRMAN GROSFIELD felt that the House amendments in Section 12 would have a terrific fiscal impact on the bill. If every offender goes through the petition process to get their level lowered, that will be an expensive proposition.

Ms. Baker felt the offender could not petition unless they have enrolled in and successfully completed sex offender treatment. The court's involvement is up front.

CHAIRMAN CRIPPEN wondered why the judge's involvement could not be left in as an option.

Ms. Baker stated the federal law states the local law enforcement should have this discretion. The court is involved in the beginning.

Closing by Sponsor:

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

REP. AHNER commented that petitions take time and sometimes there are little six year old girls who do not have time. If the local law enforcement broke into her residence by mistake, she would be pleased that the local law enforcement was doing their job and be cooperative in any way that she could in helping them. If it upset her family and household, she would explain to her children the situation and try to inform them and pick up the attitude that we are a community that is trying to help one another.

HEARING ON HB 68

Sponsor: **REP. DAN MCGEE, HD 21, Billings**

Proponents: **Dave Ohler, Department of Corrections**

Opponents: **Rus Hill, MTLA**
Scott Crichton, ACLU
Ed Sheehy, ACLU

Opening Statement by Sponsor:

{Tape: 2; Side: b; Approx. Time Count: 11:02; Comments: .}

REP. DAN MCGEE, HD 21, Billings, introduced HB 68. Article II, Section 18 of the Montana Constitution states that the state, county, cities, towns, and all other local governmental entities shall have no immunity from suit or injury to a person or property except as may be specifically provided by law by a two-thirds vote of each house of the legislature. This bill is attempting to limit the state from suits for simple negligence by inmates in the state prison. They currently have in the bill, for medical malpractice, the immunity granted by this section. The term they will be using is "deliberate indifference". They will still be able to sue for an intentional tort and 1983 civil rights claims under federal court. The contentious part of the bill in the House was found on page 2, section 4, which was the retroactivity date. That has been amended out of the bill.

Proponents' Testimony:

Dave Ohler, Department of Corrections, spoke in support of HB 68. This is an attempt to get a handle on inmate litigation. President Clinton has signed the Prison Litigating Reform Act in April which put some limits on the ability of inmates to bring lawsuits in the federal court. The state has introduced HB 68 and HB 122 which deal with inmate litigation. HB 68 requires a two-thirds vote.

The original bill would prohibit people in local jails, who have been adjudicated as committing a criminal offense, from suing the state or local government for torts. The bill was amended in the House to limit that to simple negligence. He referred to his amendments, **EXHIBIT 4.** The House amendments stated that state or local government employees are immune from suit for simple negligence and then there is a long laundry list of exclusions which include gross negligence, willful or wanton misconduct, medical malpractice or an intentional tort. His amendments incorporate the standard used by federal courts when deciding civil rights issues and that standard is deliberate indifference.

With respect to inmates, they are putting the standard of proof on an equivalent level with the federal government. Another amendment made by the House is found on page 2, new section 2,

which created a somewhat higher standard when inmates are bringing suit. The higher standard related to motions to dismiss which were filed at the initial pleading stage and also to include Rule 56 which is motions for summary judgment. It would state that there is not clear and convincing evidence to find for the claimant with respect to the claim. In the last six years, the Department has defended 700 suits, over half are for damages. There have been two cases which have made it to a trial where an inmate has been awarded damages. The remainder have been settled prior to trial.

Opponents' Testimony:

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

Rus Hill, MTLA, spoke in opposition of HB 68. The amendments apply the same standards which are used in federal courts for civil rights violations. Civil rights violations are intentional acts thus deliberate indifference does not have a relation to the negligent standard. The negligent standard is a sliding scale standard.

The Department of Corrections wanted to protect themselves from their negligence which resulted in the deaths and serious injuries of prisoners who died in the prison riots. Juries don't look at prisoners and have bleeding hearts to give monies to prisoners. They can look at facts. There was only one Republican who voted against this bill on the House floor. **REP. BOHARSKI** spoke of an incident in his county where someone convicted of a DUI was put in the same cell as Ronnie Saddler and was killed. This bill says the king can do no wrong.

There are terrible equal protection problems in this bill. This bill says there is a difference between prisoners and everyone else. This bill treats prisoners in state run correctional facilities differently than prisoners in private correctional facilities. This bill tells the judicial system to adopt a different standard for summary judgment motions when prisoners are involved. The Montana Constitution does not allow denying equal protection to persons. A corporate person can never be put in jail.

HB 68 would reach all deaths or injuries to anyone who is in the custody of the state for a sentence imposed upon conviction of a criminal offense. It doesn't take into consideration the age, sex, seriousness of the offense, etc. This bill reaches the losses suffered by children, parents and spouses of people in custody. **EXHIBIT 5,** written testimony of Russell Hill.

Scott Crichton, ACLU, stated that there are times when people are responsible and need to be held responsible. Inmates do not give up every human right they have when they enter the prison gates. The state cannot expect to be free from being held responsible.

Ed Sheehy, ACLU, stated he is appointed by federal and state judges to represent inmates on lawsuits they have filed pro se against the state of Montana. Approximately two years ago there was a settlement reached between the ACLU and the Department of Corrections on a conditions lawsuit over the conditions at Montana State Prison. There is now improved medical care at the prison. At the time the lawsuit was filed, there were 60 people on a waiting list to see the dentist. Dental care at the prison has improved. It is more difficult for an inmate to bring a suit in federal court. If this legislation passes and a jail puts a DUI inmate in with someone convicted of homicide, they will not have any responsibility if the DUI inmate is beaten or killed unless it can be established that they knew or should have known that it was going to happen. Montana State Prison transports a lot of prisoners. If there were a car accident and the inmate was injured, under this legislation, he could not recover. The Montana Constitution provides access to the courts. Where do we draw the line? Will this mean that only inmates cannot sue? This legislation tells the court how to rule on litigation in front of it.

Questions From Committee Members and Responses:

{Tape: 2; Side: B; Approx. Time Count: 11:32; Comments: .}

SEN. GROSFIELD was concerned about an equal protection problem involved with the limited liability applying to a DUI offender, or someone awaiting trial who had not been convicted.

Mr. Ohler stated that the bill recognizes that persons who have been convicted of criminal offenses have fewer rights than people who have not been convicted.

SEN. BARTLETT asked **Mr. Ohler** who was involved in deciding that this legislation was the approach which needed to be taken?

Mr. Ohler stated that inmates forum shop. HB 68 and HB 122 sought to narrow down the forums and keep the primary forum as the federal courts.

SEN. BARTLETT questioned whether anyone outside the Department was involved in this legislation?

Mr. Ohler stated the Department of Corrections drafted the legislation without consulting others.

SEN. ESTRADA asked who was involved in discussions with the Department after the bill was drafted?

Mr. Ohler stated they discussed the legislation with the Risk Management Tort Defense Division and the Department of Justice.

SEN. HOLDEN asked how many lawsuits were filed last year?

Mr. Ohler stated they had 85 to 100 actions filed last year.

SEN. HOLDEN asked how many pending complaints they had?

Mr. Ohler stated their open/active files would number 150 to 200.

SEN. HOLDEN asked how many inmates there were?

Mr. Ohler answered there were 1300 inmates at Montana State Prison, 70 inmates at the Women's Correctional Center, and 20 to 30 inmates at the Swan River Boot Camp.

Closing by Sponsor:

{Tape: 2; Side: B; Approx. Time Count: 11:35; Comments: .}

REP. MCGEE asked what was the protection for the citizens of Montana? He felt it would be the elected representatives. Prisoners have their representation. A suit filed by an inmate is against the citizens of the State of Montana. Inmates who are injured on the job are covered. This bill does not limit access to the courts. It limits the liability the State of Montana will occur as a result of their access to the courts. The prisoners have treated society as second class citizens. Montana citizens are the second victim of crime. They pay for the inmate's housing, education, treatment, skill development, food, medical care, dental care, defense attorneys, etc.

ADJOURNMENT

Adjournment: The meeting adjourned at 11:45 a.m.

SEN. LORENTS GROSFIELD, Acting Chairman

JUDY KEINTZ, Secretary

LG/JJK