

MINUTES

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

COMMITTEE ON JUDICIARY

Call to Order: By **ACTING CHAIRMAN SEN. RIC HOLDEN**, on March 7, 1997, at 9:10 a.m., in the Senate Judiciary Chambers (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)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
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: HB 137, HB 168, HB 257
Executive Action: HB 137, HB 168, HB 222, HB
257, HB 68, HB 111

HEARING ON HB 257

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

Proponents: John Connor, Office of the Attorney General,
Department of Justice, and for Dennis
Paxinos, Yellowstone County Attorney
Shaun Donovan, Mineral County Attorney
Christopher Miller, Powell County Attorney

Bob Gilbert, Montana Magistrates
Mike McGrath, Lewis and Clark County Attorney, and
President, Montana County Attorneys
Bob McCarthy, Butte-Silver Bow County Attorney

**Jim Smith, Montana Sheriffs and Peace Officers
Jim Kimball**

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

Opening Statement by Sponsor: REP. DEB KOTTEL, HD 45, Great Falls. This bill deals with trial de novo issues. If a defendant doesn't like the outcome, he or she can have a new trial in district court. As there have been concerns about cost, the bill still provides for a two-tier system. The bill applies only to criminal cases and jury trials, and comes from the Montana County Attorneys, the Montana Magistrates, and the Montana Association of Counties (MACO).

The bill streamlines the process and saves counties money and citizens time on juries. It also balances the rights of victims.

Proponents' Testimony: John Connor, Office of the Attorney General, Department of Justice, and for Dennis Paxinos, Yellowstone County Attorney (EXHIBIT #1). If you will recall Judge Harkin's testimony last session, the magistrates have come forth with some of the language in this bill.

Shaun Donovan, Mineral County Attorney. My experience on most cases is that they are appealed for another jury trial, but don't have merit. Speeding tickets are a good example, so I wholeheartedly support this bill.

Christopher Miller, Powell County Attorney. In particular, DUI cases have become burdensome. These cases are often dismissed because they have lost witnesses, etc. I believe this bill will streamline the process.

Bob Gilbert, Montana Magistrates. We are no longer wearing a black hat, and now have a white hat. We believe this will be a good process and that it will work well.

Mike McGrath, Lewis and Clark County Attorney, and President, Montana County Attorneys. If the defendants proceed in city, court or justice court they would waive their right to appeal with a jury. I mostly see speeding tickets and basic rule violations in Lewis and Clark County. The Constitution is satisfied by allowing jury trial once.

Bob McCarthy, Butte-Silver Bow County Attorney. I filed over 1000 misdemeanor cases last year, so there is a backlog of 200-plus jury trial cases, because the city judge became ill. At times there were four jury trials scheduled in one day.

Jim Smith, Montana Sheriffs and Peace Officers. This is a human resource management issue for us, and so we support the bill.

Jim Kimball. We support the bill as it frees up time.

Opponents' Testimony: Russell Hill, Montana Trial Lawyers Association (MTLA). This is a much better bill than last session. I want to point out that the justice and city court proceedings are different. It is basically a prejudicial forum. The heart of the matter is if the defendant wants justice in municipal court, he or she needs to be given the same opportunity for discovery, and this bill doesn't do that.

Questions From Committee Members and Responses: SEN. SUE BARTLETT. What would happen after I appeal to the District Court level? John Connor. In Justice Court, the defendant has a jury of six persons, so the District Court Judge would sit as a fact-finder and hear the same trial information and make a decision. If it's in the District Court first, the process would be reversed.

SEN. BARTLETT. Could the outcome be fewer jury trials at the Justice Court level and more trials at the District Court level? John Connor. When you look at the whole picture in this bill, there will be one less jury trial.

{Tape: 1; Side: A; Approx. Time Count: #24.6; Comments: None.}

SEN. BARTLETT. REP. SHIELL ANDERSON has a bill on post-conviction relief issues as to when validity of sentence may be challenged (46-21-101, MCA). That bill strikes the ability of the petitioner to file directly with the Supreme Court. How will these two bills work together? John Connor. I don't believe this to be a problem.

SEN. BARTLETT. If you had a misdemeanor trial in the District Court and were found guilty, and then HB 22 were to pass, you'd have to petition the Justice Court and have no other place to go.

SEN. REINY JABS. Can one by-pass Justice Court and ask for a jury trial in the District Court? Mike McGrath. Yes, under the current system in limited situations, but they would still get review in the Montana Supreme Court. In this bill, no. It would still have to go to Justice Court.

Closing by Sponsor: REP. KOTTEL. This is a good government bill as it saves time, and saves costs and citizen participation. This bill is effective and on time.

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

HEARING ON HB 168

Sponsor: REP. ROYAL JOHNSON, HD 10, Billings

Proponents: Mary Ann Wellbank, DPHHS.

Opponents: None

Opening Statement by Sponsor: REP. ROYAL JOHNSON, HD 10, Billings. This bill was requested by the Child Support Enforcement Division of the Department of Public Health and Human Services (DPHHS). It clarifies telephonic hearings and services of some proceedings by administrators. There are minor changes in technology to make it more efficient.

Proponents' Testimony: Mary Ann Wellbank, DPHHS. This is a simple, straightforward bill. Anyone on public assistance is eligible for our 4-D services. We enforce child and spousal support obligations and insurance coverage. We are required to do so by federal law which specifically states how we are to do this. Most are provided via administrative hearings and not via court process initially. We have 44,000 cases now.

The bill clarifies the right to in-person hearing following a telephonic hearing. Of 673 hearings in 1996, only 20 were in person. This eliminates travel and other costs (Sections 1, 2, 6, 10, 13, 14, and 16). It refers to UIFSA which replaced URESA. The replacement is referred to within federal law.

The bills allows the Department to serve documents by certified mail with the option to use personal services. It alleviates a great burden on the county sheriff's office. We want to be able to establish and support and establish action at the same time in Sections 4, 5, and 7. Subsection (16) of Section 4 allows an efficient method of collecting money from the parent. In September we certify the amount of debt to the IRS, and possibly by January of the next year, the debt gets paid via the intercept. Often the obligated parent files an amended claim, however, and then we can't collect.

Section 8 clarifies paternity when action needs to be taken. CSED action in compliance with Rule 4. Section 9 codifies existing case law regarding the 20-day filing time frame from Montana rules and appellate procedure. Section 10 revises CSED's administrative modification process and eliminates bureaucracy regarding Federal Child Support Law 45, Part 8, and provides a party can't appeal a decision when it is based on their agreement. Subsection (4) extends ten days to thirty to get an order.

Title 45, Part 4 and Part 2 make definitions consistent and uniform. Section 12 clarifies withholding and doesn't include custody and visitation issues. That is already under federal requirements. Section 15 allows early enrollment and health benefit plans for the children. Sections 17 and 18 allow collection of child support from a decedent's estate. John Koch, Administrative Child Support Judge, is also here to answer questions.

Opponents' Testimony: None

Questions From Committee Members and Responses: SEN. MIKE

HALLIGAN. On page 17, Subsection (4), lines 14-16, we need to clarify why this language is there. Mary Ann Wellbank. At times we are served at the last minute, and we don't know about the judicial review.

SEN. BARTLETT. Why are you eliminating the 60-day period? Mary Ann Wellbank. On January 7, 1997 the CSED lost the Reed Connell decision in the Supreme Court, and then Freestone and Blessing are also being looked at now. The time frame had passed and audit standards require a certain percentage of cases to conform, but federal requirements were never intended as due process. The Supreme Court interpreted them as absolutely regulatory due process requirements and not as administrative. Twenty days is not enough time for continuances.

{Tape: 1; Side: B; Approx. Time Count: #9.2; Comments: 10:02 a.m..}

SEN. HOLDEN. Will this conflict in any way with SEN. HARGROVE's bill? Mary Ann Wellbank. No.

Closing by Sponsor: REP. ROYAL JOHNSON. I thank the Committee for a good hearing and for your indulgence. I ask that SEN. HARGROVE carry the bill.

HEARING ON HB 137

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

Proponents: John Pohle, Powell County Coroner
Christopher Miller, Powell County Attorney
Thomas Blaz, Chief Investigator, Department of
Corrections

Opponents: Scott Crichton, Executive Director, ACLU of
Montana
Russell Hill, Montana Trial Lawyers Association
(MTLA)

Opening Statement by Sponsor: REP. LIZ SMITH, HD 56, Deer Lodge. This changes from mandatory to discretionary an inquest for a prisoner's death caused by illness or execution. It eliminates some duplication of processes. I do have an amendment to lines 20-22 on page 1.

Proponents' Testimony: John Pohle, Powell County Coroner read from prepared testimony (EXHIBIT #2).

{Tape: 1; Side: b; Approx. Time Count: #13.3; Comments: 10:06 a.m..}

Christopher Miller, Powell County Attorney. We approached REP. SMITH on this bill after the McKenzie execution, as the regulations were a bizarre and unnecessary experience. We do a

large number of inquests in Powell County. The purpose of the law regarding inquests in deaths in penal institutions is to protect public confidence in the penal institution processes.

County jails are getting larger, and I believe this will affect other counties in the future. Also, as the age of the prison population increases, there will be more and more of these types of cases. I believe you can rely on our judgements in this.

Thomas Blaz, Chief Investigator, Department of Corrections. Our primary purpose is to investigate all deaths in incarceration facilities in Montana and to make a report for review. In FY 95-96, we had 9 inmate deaths as a result of natural causes. An autopsy costs about \$1400. There are also costs of escorted transportation for inmate witnesses and for staff overtime. We support this bill, and ask for favorable review.

{Tape: 1; Side: B; Approx. Time Count: #21.; Comments: None.}

Opponents' Testimony: Scott Crichton, Executive Director, ACLU of Montana (EXHIBIT #3). In 1988 when I worked for the Montana Low Income Coalition, we made a simple word change in the Constitution from "shall" to "may" to look after citizens. To me, it means the state "may not" be doing its responsibility in terms of looking after Montanans. We need to clarify what terminal illness is. Is it lingering or a heart attack or a pulmonary embolism? I believe the taxpayers need to know what the reason for death is.

In the Langford suit, a lot has been argued and remedied. There seem to be many good reasons to know all we need to know about the conditions and circumstances of a death. Dignity needs to remain for people who are incarcerated.

Russell Hill, Montana Trial Lawyers Association (MTLA). The language on page 1, line 18 says there is no inquest if the county attorney determines death was not caused by terminal illness or execution of a death penalty. Then on page 1, line 26, it says an inquest is a public proceeding. In an example, the movie character "Columbo" investigated a death where the murdered person also had a terminal illness. State law makes it a crime to withhold necessities from a prisoner, and that includes medical treatment.

Execution is not as compelling a situation, but in guillotine executions in France sometimes took 10-16 attempts to completely behead someone. The public needs to know that executives are being properly carried out. The amendments proposed on page 1, lines 21-22 are not sufficient.

{Tape: 1; Side: B; Approx. Time Count: #32.9; Comments: 10:25 a.m..}

Questions From Committee Members and Responses: SEN. AL BISHOP.

Doesn't the last half of the amendment on page 1, lines 21-22 provide sufficient language? **Scott Crichton.** It is not clear to me what falls under medical care? Questions have arisen under litigation. There's too much gray area in this in my mind.

Closing by Sponsor: REP. SMITH. I appreciate the hearing and the testimony. The definition of "terminally ill" is not found in Montana code. "Under medical care" means under the care of a competent physician, and that would be thoroughly documented. We don't do duplication on non-inmate deaths.

This bill does three things: 1) it changes mandatory to discretionary and reduces costs according to the Fiscal Note; 2) it is a cost-saving measure; and 3) it covers documentation.

I ask that SEN. BECK carry the bill.

{Tape: 2; Side: A; Approx. Time Count: #1.8.}; Comments: None

EXECUTIVE ACTION ON HB 137

Motion: SEN. BISHOP MOVED THAT HB 137 BE CONCURRED IN.

Discussion: SEN. BARTLETT. I asked Valencia Lane to compare page 1, line 18 of HB 137 with SB 109 for consistency of language. **Valencia Lane.** I quickly checked the amendment and it seems to be referencing as a "correctional facility" and not as a "correctional institution". The exception is where they actually are institutions, so on page 1, line 18 I would change "institution " to "facility".

Substitute Motion: SEN. HOLDEN MADE A SUBSTITUTE MOTION TO AMEND THE BILL AS STATED BY VALENCIA LANE.

Discussion: VICE CHAIRMAN LORENTS GROSFIELD. Shouldn't it just read, "in a correctional facility" and get rid of "prison" and "jail"? **Valencia Lane.** We would need to do so on line 18 and the end of line 19 and the beginning of line 20.

SEN. BISHOP. Are jails and correctional facilities one and the same? **Christopher Miller.** I don't believe jails are the same as correctional facilities, and so they should be left in the bill. **Valencia Lane.** I proposed to leave "prison, jail or other correctional facility". So, on page 1, lines 18 and 20, you would strike "institution" and insert "facility".

Vote: SEN. HOLDEN'S MOTION TO AMEND CARRIED UNANIMOUSLY.

Discussion: SEN. HALLIGAN. Is there any interest in tightening up the "terminally ill" language? **Christopher Miller.** I understand this term is well-defined within the medical community.

Vote: SEN. BISHOP MOVED HB 137 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED UNANIMOUSLY IN A ROLL CALL VOTE.

EXECUTIVE ACTION ON HB 168

Motion/Vote: SEN. WALTER MCNUTT MOVED HB 168 BE CONCURRED IN. THE MOTION CARRIED UNANIMOUSLY IN A ROLL CALL VOTE.

EXECUTIVE ACTION ON HB 222

Amendments: hb022202.av1 (EXHIBIT #4)

Motion: SEN. ESTRADA MOVED HB 222 BE CONCURRED IN AS AMENDED.

Substitute Motion/Vote: VICE CHAIRMAN GROSFIELD MADE A SUBSTITUTE MOTION TO ADOPT ONLY #3 OF THE AMENDMENTS WHICH CLARIFY THAT IF A PERSON BECOMES INDIGENT LATER ON THEY CAN HAVE AN ATTORNEY APPOINTED. THE MOTION CARRIED UNANIMOUSLY.

Discussion: Valencia Lane. The Department of Justice has an amendment to insert a sentence for payment of counsel, as it was left out when the bill was drafted.

Motion: SEN. HALLIGAN MOVED THE AMENDMENT BE ADOPTED.

Discussion: SEN. HOLDEN. I am asking that the Department clarify 46-8-201, MCA. Beth Baker. It sets out compensation and payment by the county, as it is necessary for opting into the federal procedure. This makes it clear that we are using the same method in civil and criminal post-conviction proceedings, and it applies only to capital cases.

Vote: SEN. HALLIGAN'S MOTION TO ADOPT THE DEPARTMENT OF JUSTICE AMENDMENT CARRIED UNANIMOUSLY.

Discussion: SEN. CRIPPEN. Subsection (2) on page 1 line 30 makes a provision for 180 days. On page 2, line 3 the extension is reduced from 60 days to 30. Mr. Sheehy said 90 days is a rather short period of time in an extensive trial. Valencia Lane. There is another 90-day period, but I don't believe it's relevant at all. Beth Baker. The attorney must be prepared and cognizant of sentencing possibilities throughout the trial, and whatever limit the Legislature sets would become the standard. Our concern is with the precedent set in the Kills On Top case of one year ago.

Motion: SEN. CRIPPEN MOVED TO STRIKE "90" ON PAGE 1, LINE 30, FOLLOWING "WITH", AND TO INSERT "180", AND TO STRIKE "60" ON PAGE 2, LINE 3 AND INSERT "30".

VICE CHAIRMAN GROSFIELD. I am not enthralled by the proposed amendment, as it seems the extra amount of time is not necessary, because most often sentencing takes place immediately after

conviction. So, I believe it is important to keep this limit.

SEN. ESTRADA. I concur with **SEN. GROSFIELD**.

SEN. CRIPPEN. I appreciate your concern, but there may be other post-conviction proceedings in other states to guarantee extensions of time.

{Tape: 2; Side: A; Approx. Time Count: #27; Comments: 11:17 a.m..}

Any defense counsel worth their salt would look to provide the best possible defense during the trial period whether looking for the truth or proof, so 90 days is not enough time. Now we are looking at one year in the Kills-On-Top case. I'm saying let's give them six months or cut this period in half.

SEN. BISHOP. In the Gallahan case, he filed a post-conviction in December 1996, at about 90 days, and the state hadn't yet responded. So, maybe both sides are dragging their feet. **Beth Baker.** The state is usually given 30 days to respond. I can't tell you if the Department of Justice response has now been filed or not.

SEN. BISHOP. I believe 180 days would be appropriately sufficient, and I support **SEN. CRIPPEN's** amendment.

SEN. ESTRADA. I would support 120 days. **SEN. CRIPPEN.** I believe 90 days is too short, and one year is too long, so I would like to meet at the half-way point.

Vote: **SEN. CRIPPEN'S MOTION TO AMEND FAILED IN 4-6 IN A ROLL CALL VOTE WITH SENATORS BARTLETT, BISHOP, DOHERTY, AND CRIPPEN VOTING AYE AND ALL OTHERS VOTING NO.**

Motion/Vote: **SEN. CRIPPEN MOVED TO INSERT "120 DAYS" AND TO LEAVE THE 60-DAY PERIOD ALONE. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS HOLDEN AND BARTLETT WHO VOTED NO.**

Motion/Vote: **SEN. ESTRADA MOVED HB 222 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON HB 257

Motion/Vote: **SEN. ESTRADA MOVED HB 257 BE CONCURRED IN. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SEN. HALLIGAN WHO VOTED NO.**

EXECUTIVE ACTION ON HB 68

Amendments: Department of Corrections hb006801.av1 (EXHIBIT #5)

Motion: **SEN. ESTRADA MOVED TO ADOPT THE AMENDMENTS.**

Discussion: Valencia Lane. The amendments take out "dismissal or for" in the Title, on line 8 and delete 12(B)(6), 12(C), or" on page 2, line 3, leaving only 56(C). On page 2, line 2, "dismissal and" needs to come out. Whereas clauses state that negligence is insufficient, and would limit prisoners bringing legal action against the state and/or its employees to situations of deliberate indifference. Page 1, lines 23-25 deal with the exception clause for medical malpractice.

SEN. DOHERTY. The amendments are fine as far as they go, but they suffer from a fundamental misunderstanding of the distinction between civil and criminal law. Deliberate indifference is a term of art for civil rights violations, and only for deliberate acts. I could not find this language anywhere in case law. I understand what they're trying to do, but they're not doing it right.

The other amendment inserting "clear and convincing evidence" and taking away the test for dismissal is okay. There is a problem on page 2, pertaining to "clear and convincing evidence". In a summary judgement it is standard that if any facts are in dispute, you can't obtain that summary judgment. It's only granted when there are no disputes and the law is on your side. This is an unworkable amendment to a totally unworkable bill.

{Tape: 2; Side: B; Approx. Time Count: #00.; Comments: 11:37 a.m..}

SEN. HALLIGAN. As the amendment is written for page 1, line 20, you couldn't sue if you were over at Montana State Prison and a prisoner reached out of a cell and hit you.

Vote: SEN. ESTRADA'S MOTION TO ADOPT THE DEPARTMENT OF JUSTICE AMENDMENTS FAILED 5-5 IN A ROLL CALL VOTE.

Discussion: SEN. HALLIGAN. I would like to have 24 hours to clarify some of the questions we have on this bill.

CHAIRMAN CRIPPEN. We can table the bill. I believe this is poorly drafted, and I don't believe amending it will help one whit.

Motion: SEN. HALLIGAN MOVED TO TABLE HB 68.

Discussion: SEN. HOLDEN. I believe this bill is what the people want, that they understand it, and that it's a good bill.

CHAIRMAN CRIPPEN. This is not a good bill and goes far beyond reason to infringe upon due process, and it is not workable.

SEN. ESTRADA. I believe SEN. HALLIGAN had the right idea to take one more day to look at this bill. It's important, and I'd hate to see it tabled. **VICE CHAIRMAN GROSFIELD.** If we table the bill we're giving it 24-hours or a week, so I support the motion, and agree that the bill needs more work.

SEN. HOLDEN. Do you have any amendments? **SEN. HALLIGAN.** In good faith, I would look at this. The whole summary judgment issue should not be in the bill.

SEN. HALLIGAN. I withdraw my motion to table HB 68, so we can readdress it later on.

{Tape: 2; Side: B; Approx. Time Count:#10.1.}; Comments: 11:45 a.m.

EXECUTIVE ACTION ON HOUSE BILL 111

Motion: **SEN. MCNUTT MOVED HB 111 BE CONCURRED IN.**

Discussion: **SEN. CRIPPEN.** Why didn't they reinsert the stricken language? Why can't we let the agencies go to a judge to let him do what he's doing now, as local law enforcement may not always be in a position to understand what they're supposed to do. We're trying to conform to federal law. **Beth Baker.** You did ask about making it optional to have the Court review. We wouldn't resist this, but want to ensure there would be time limits, so the offender isn't released before the information is.

SEN. CRIPPEN. Is this a relatively simple thing to do? **Valencia Lane.** I believe it is. You'd have to trust me to come up with what **SEN. CRIPPEN** means.

Substitute Motion: **SEN. CRIPPEN MADE A SUBSTITUTE MOTION THAT THE LANGUAGE OUTLINED BY VALENCIA LANE BE ADOPTED.**

SEN. HALLIGAN. The drafted language must be very delicate here to ensure the information is released before the offender is released. **Beth Baker.** If they are in prison, they must register ten days prior to their release. If they're not in prison, it would have to be done immediately upon sentencing. I will work with Valencia Lane on the language.

Vote: **SEN. CRIPPEN'S MOTION TO AMEND HB 111 CARRIED UNANIMOUSLY.**

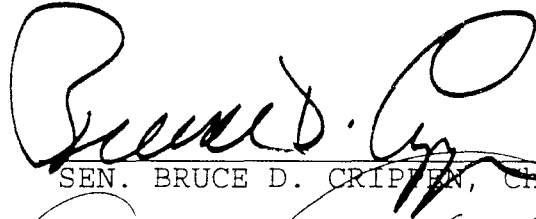
SEN. DOHERTY. I want it on the record concerning the immunity section on pages 19 and 20, in Section 14, that mistaken release of information and failure to release information are also being immunized. If the victims aren't notified in time and are harmed, under this language they'd have no recourse. We ought to think about this.

SEN. BARTLETT. Does immunity also cover a private entity, and who would this be? **Beth Baker.** It's in the federal guidelines for privately contracted registry, but at this time we have no plans to do this.

Motion/Vote: **SEN. MCNUTT MOVED HB 111 BE CONCURRED IN AS AMENDED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATORS DOHERTY AND CRIPPEN WHO VOTED NO.**

ADJOURNMENT

Adjournment: 11:55 a.m.



SEN. BRUCE D. CRIPPEN, Chairman



JOANN T. BIRD, Secretary

BDC/JTB