MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 11, 1997, at 8:05 A.M., in Senate Judiciary Room, Room 325.

ROLL CALL

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

Members Excused: Sen. Ric Holden

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 44,	March 4
	HB 65,	March 4
	HB 339,	March 4
Executive Action:	HB 343, HB 352, HB 65, HB 68, HB 325, HB 339	

EXECUTIVE ACTION ON HB 343

Amendments: hb034302.avl - **EXHIBIT 1**

Motion: **SEN. LORENTS GROSFIELD MOVED HB 343 BE AMENDED.**

Discussion: **SEN. GROSFIELD**, referring to page 9 of the bill, stated he asked the police officer in the hearing about what that part of the bill would mean. He understood the procedure to be that the police officer had to receive a complaint from more than one person who is a family member before they could consider a determination of primary aggressor. If the original call comes from the wife and is then corroborated by a neighbor, that

neighbor is not a family member or partner and, therefore, would not trigger (b). The only time the officer is authorized to make the determination of primary aggressor is when more than one person who is a family member or a partner complains. When the neighbor is the first one who calls, the officer cannot make the determination under (b). Subsection (a) states that the summoning of a peace officer to a place of residence by a partner or family member constitutes an exigent circumstance for making an arrest and that the arrest is the preferred response. That only applies if the first call comes from a partner or family member. Section 6 deals with the basis for arrest without a warrant. That is a fairly serious issue. His amendment no. 2 would state that when a peace officer responds to a partner or family member assault . . . It doesn't matter who calls. If it appears the partners were involved in mutual aggression, the officer shall evaluate the situation and then make the determination on primary aggressor. He would like to eliminate sections 1 and 9 from the bill. They would charge anyone who wants a divorce $30. He did not think that was appropriate. He is willing to give it to them for two years and have them find another funding source. Oftentimes both parties are arrested. There is probably not a need for arresting both. That leaves the children home alone.

SEN. SUE BARTLETT was concerned about the phrase "if it appears the parties were involved in mutual aggression." Her impression is that they want clear statutory authority to make a determination on who is the primary aggressor. They often feel compelled to arrest both parties because there is no basis to make a distinction about who may have instigated and carried out the majority of the aggression.

SEN. STEVE DOHERTY commented that **SEN. GROSFIELD's** proposed amendment no. 2 could include "and the officer in the response hears from both sides and then they have to evaluate" or "and if it appears that both parties have complaints."

Ms. Lane felt that **SEN. GROSFIELD** intended his amendment to be broader than the original bill. The original bill would require that both parties complained against each other. If by the time the cops get there, the wife is insisting that she simply fell down the stairs and refuses to complain against the husband, they do not have a complaint from more than one party. They do not need to decide who was a primary aggressor unless their is mutual aggression.

Vote: The **MOTION CARRIED** on voice vote with **SEN. MIKE HALLIGAN** voting no.

Amendments: hbo34301.avl - **EXHIBIT 2**

Discussion:

Ms. Lane explained this occurred on page 9, line 14. The amendment would strike subsection (iv) which referred to when deciding who was the primary aggressor they would look at the relative sizes and apparent strength of each person.

Motion: **SEN. HALLIGAN MOVED TO FURTHER AMEND HB 343.**

Vote: The **MOTION FAILED.**

Motion: **SEN. GROSFIELD MOVED HB 343 BE CONCURRED IN AS AMENDED.**

Vote: The **MOTION CARRIED UNANIMOUSLY.**

EXECUTIVE ACTION ON HB 352

{Tape: 1; Side: a; Approx. Time Count: 8:26; Comments: .}

Amendments: hb035201.avl - **EXHIBIT 3**

Motion: **SEN. DOHERTY MOVED HB 352 BE AMENDED.**

Discussion:

SEN. DOHERTY would add the word "reasonably" before unforeseeable. The language would then be "The owner is not liable for injuries or damage arising out of the use of the property while the property is possessed by another if the misuse or use was reasonably unforeseeable.

CHAIRMAN CRIPPEN asked the meaning of "reasonably unforeseeable".

SEN. DOHERTY stated that would be the standard by which the person would figure out the amount of care which is necessary to prevent negligence. If there is theft, the sponsor felt that automatically broke the causation chain. If someone is irresponsible and it was reasonably foreseeable that a certain result would occur as a result of their irresponsibility they potentially could be held liable. "Reasonably unforeseeable" would be a negligence standard. **SEN. GROSFIELD'S** amendment would be either above or below.

SEN. WALTER MCNUTT stated that if property is stolen, either amendment could cause mischief. He felt the amendments would say that it is okay to steal. Stealing is illegal.

SEN. DOHERTY explained that there is a doctrine called an attractive nuisance. The person who has a swimming pool and makes an effort to keep children out so they are not injured, is reasonable and prudent. A construction company which stores dynamite has a higher degree of responsibility to lock the area where the blasting caps are stored than he would for his guns. The construction company which stores dynamite in packages which

say "dynamite" and it is then stolen by children and someone is injured, the fact that the company kept a dangerous substance out in the open should not absolve them of liability. Stealing should break the chain of causation.

CHAIRMAN CRIPPEN felt that would be mixing negligence with gross negligence.

SEN. DOHERTY stated that depended on the circumstance. If this was stored on a ranch away from people and a trespasser found it, as long as there was a closed door that would meet the reasonable standard. If this was stored on the west edge of Great Falls next to Valley View subdivision where there are numerous children, this would not be a reasonable thing to do.

SEN. MCNUTT felt that the cowboys should be able to keep their rifles. He felt that stealing is against the law.

CHAIRMAN CRIPPEN stated that the bill as written is a no standard bill. The amendments would add degrees of negligence. **SEN. DOHERTY's** amendment would be ordinary negligence while **SEN. GROSFIELD's** amendment would be gross negligence.

SEN. DOHERTY stated that the Supreme Court decision did not subject anyone to anything that they haven't been subjected to before. If someone steals his gun and commits a crime, he doesn't think he could be held negligent. Where does his personal responsibility to the rest of society begin? This bill states that once theft occurs, he would be totally immunized.

SEN. HALLIGAN stated that this should be left with weapons only. Why should this be left up to every other piece of personal property?

SEN. BARTLETT stated that the bill reached a lot further than the intent of the sponsors. The concern that the sponsors had was also a concern which the Supreme Court acknowledged would arise in stating that they were not saying what they thought the popular interpretation of their opinion would say that they were saying.

{Tape: 1; Side: b; Approx. Time Count: 8:48; Comments: .}

SEN. BARTLETT explained that the statutes define negligence as a want of the attention that a prudent man would ordinarily give in acting in his own concerns. There is no definition of gross negligence. Do we want to say that the people of this state do not owe each other a want of the attention that a prudent man would ordinarily give when acting in his own concerns?

CHAIRMAN CRIPPEN expressed that gross negligence may not be defined by statute, but certainly was defined by case law.

SEN. BARTLETT commented that the majority opinion stated that the care required is always reasonable care. This standard never varies, but the care which it is reasonable to require varies with the danger involved in the act and is proportionate to it. The greater the danger, the greater the care which must be exercised. When you have a loaded firearm, there is a greater danger than if you have a rock.

SEN. DOHERTY withdrew his motion to amend.

Amendment: hb035202.avl - **EXHIBIT 4**

Motion: **SEN. DOHERTY** moved **SEN. GROSFIELD's** amendment.

Vote: The **MOTION CARRIED** with **SEN. SHARON ESTRADA** and **SEN. MCNUTT** voting no.

Discussion:

SEN. BARTLETT was puzzled with the sentence dealing with real property. She questioned why it was in the bill? This stated that the owner of real property which is criminally misused by another without the owner's knowledge, is not liable for injury or damage arising out of the misuse.

SEN. MCNUTT clarified that someone could trespass into someone's home, break into the liquor cabinet, and then leave and get into a car wreck.

SEN. DOHERTY stated that breaking a rule or regulation by itself was negligence per se. You then have to figure out if the negligence caused the accident. By adding the wording "gross negligence" we would not block out negligence per se.

SEN. GROSFIELD questioned that other than attractive nuisance, what could lines 22 and 23 apply to?

CHAIRMAN CRIPPEN stated that a liquor cabinet in someone's house would not be an attractive nuisance. A swimming pool could be an attractive nuisance. There is a common law rule on attractive nuisance. The landowner has an obligation not to provide an attractive nuisance. We do not want to eliminate that because it has very little to do with theft.

SEN. DOHERTY questioned what the standard would be for holding a landowner liable in the recreational context?

SEN. GROSFIELD felt that statute stated that an owner who grants permission to use property for recreational purposes is not liable for an injury which arises during the use or as a result of the use.

SEN. AL BISHOP questioned whether the theft would get him off the hook?

SEN. HALLIGAN felt that this would affect the doctrine of attractive nuisance. This takes in way too much. The bill should have focused on a weapon and not include all real property, personal property, etc. The intent is unclear.

SEN. GROSFIELD questioned if under current law there was a criminal misuse of real property, would there be any liability for the owner?

Ms. Lane suggested the amendment state that this section does not affect or amend the common law doctrines of negligence per se or attractive nuisance.

Motion: **SEN. HALLIGAN MOVED HB 352 BE FURTHER AMENDED.**

Vote: The **MOTION CARRIED UNANIMOUSLY.**

Motion: **SEN. GROSFIELD MOVED HB 352 BE CONCURRED IN AS AMENDED.**

Vote: The **MOTION CARRIED** with **SEN. BARTLETT, SEN. HALLIGAN,** and **SEN. DOHERTY** voting no.

HEARING ON HB 44

{Tape: 1; Side: b; Approx. Time Count: 9:07; Comments: .}

Sponsor: **REP. CHARLES DEVANEY, HD 97, Plentywood**

Proponents: **Lois Adams, Department of Corrections**

Opponents: **None**

Opening Statement by Sponsor:

REP. CHARLES DEVANEY, HD 97, Plentywood, introduced HB 44. In Montana State Prison and the Women's Correctional Facility there are criminal actions going on with prison checking accounts. What happens is a person who is selling drugs will tell a prospective buyer that since they both have an account on the outside, all that needs to be done is to transfer "x" number of dollars from your account through a third party or directly into my account and once I receive confirmation of the transaction, I will give you the drugs or whatever commodity they are trading. The other account is the in-system account. A group may approach an inmate and say that they promise not to pump you anymore, if you will transfer "x" number of dollars from your account to my account. House Bill 44 states that an inmate, while in the correctional facility - either Montana State Prison or the Women's Correctional Facility - will maintain their checking account in the in-system account procedure. They cannot accumulate, without Department approval, any amount of money in excess of $200. Should they accumulate more and the Department does not feel it is proper for them to have that much money, the Department has the authority to take funds in excess of $200 and

apply them to restitution which the inmate may owe or to the cost of his incarceration. The Department will allow an individual to accumulate more money for a productive purpose such as the purpose of buying tools if he plans to be a mechanic when he is released. Regarding accounts which are in commercial banks and savings institutions, when an inmate enters either of the institutions, he shall make full disclosure to the Department of any accounts on the outside. An authorization then needs to be signed which allows the Department to have access to review the records of those particular accounts he owns. Should he not make full disclosure or refuse to sign the authorization, he would be guilty of an offense under 45-7-302 - the perjury statute. The fiscal note is not correct. Page 1, line 22 and 23, states that the Department has the authorization to charge each inmate account $2 per transaction. That would provide for the $247,000 income to the Department. An amendment was added in the House Judiciary Committee and was among other amendments and did not go on the bill. He asked the Senate Judiciary Committee to add the amendment. This would strike the $2 per transaction charge and insert a $3 per month administration charge per account. Their estimate of the fiscal note would be $51,000 per year which would cover the cost of administrating the in-system checking account system.

Proponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 9:13; Comments: .}

Lois Adams, Department of Corrections, stated the purpose of the bill is to require the inmates to use the inmate trust account system any time money goes in or out of the prison. This does not affect the regional prison or pre-release people. The reason for this is the contraband within the prison they are trying to stop. The two institution systems handle the inmates' accounts through the resident account system. A balance in excess of $200 may be forfeited for restitution or incarceration. There has been concern that child support be paid first. Child support is handled through the Child Support Enforcement Division and would be taken out before any of this from the inmate's income. If someone on the outside has an account with an inmate it will affect that account. That person would need to allow the prison officials to look into the account. The contraband comes into the prison and the money exchanges hands on the outside. Inmate A tells inmate B to put money in his wife's account and when she tells her husband that the money is in the account then the transaction inside will take place. Some high profile inmates may have professional practices, ranches and homes. They can be excepted out. They do not want to know about legitimate business deals. Copies of the record are confidential criminal justice information. There are approximately 1340 inmates in the men's system and 80 in the women's system.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 9:17; Comments: .}

SEN. DOHERTY, referring to the out of institution accounts, asked what happened if the inmate refused to sign the release? Is that a crime?

Ms. Adams stated that would be failure to disclose information which is an offense under 45-7-302.

SEN. DOHERTY felt a release connotates a voluntary act. If it is a crime not to do a voluntary act, is that creating an additional sentence above and beyond the sentence imposed by the court? He wanted to avoid claims of double jeopardy.

Ms. Adams stated there would be a penalty under 45-7-302.

Dave Ohler, Department of Corrections, stated this is something separate from the crime. This is an obligation the legislature gives the inmate to disclose this information. He made an analogy to the sex offender registration bill. If they don't register it is a criminal offense.

SEN. DOHERTY asked if this would drive the inmates accounts out of the institution?

Ms. Adams stated that when inmates are paid, the money simply goes on credit to the resident account system. Anyone who has a job would have an account. All the canteen transactions are through the resident account system

SEN. GROSFIELD asked if inmates are currently charged a fee?

Ms. Adams stated they do have accounts for the inmates now and they are managed by the resident account system. Each inmate who comes into the prison has his own account. The $3 a month fee would be new. It would be a way for them to pay for contracted programming time.

SEN. GROSFIELD stated that the Department needed $27,000 but planned to raise $51,000. Why is this way more than needed?

Ms. Adams felt this was one way to get a drop into the bucket for their requested budget.

SEN. GROSFIELD was concerned about double jeopardy. In addition to whatever sentence they were serving, now they would have to disclose everything they own. He understood the child support, restitution, and cost of incarceration, but was concerned about the inmates being forced to sign something in addition.

Ms. Adams felt that inmates gave up a number of rights during their term of incarceration. The majority of inmates do not have

large financial transactions either before, during or after their incarceration. When they see $300 a month continually going out to a certain account and then $300 a month going into another inmate's outside account, they can put that together. **Mike Micu** can see the money going, but once it gets out of the institution, he has no right and no way to look at those accounts.

SEN. GROSFIELD asked if the Department was requiring that they get any money out of the accounts?

Ms. Adams stated that page 1 talked about the inmate account within the prison and excess funds within that account could be taken by the Department for use in restitution or cost of care. The second part is an inmate who would have an account at an outside bank in concert with her husband. When **Mr. Micu** sees what appears to be illegal financial activity, he then can call the outside bank with a copy of the release and ask the bank for all the inmate's bank statements for the past year or so. They could then go down and go through the bank records. They could see the checks. They could see where that inmate's husband had written a check to another inmate's husband.

SEN. GROSFIELD felt that this would be monitoring someone's records who had not committed any crime, was not in prison or under a sentence.

SEN. DOHERTY said the inmate could always change their joint tenancy account to a solo account. At that point, the Department couldn't get any information.

Ms. Adams stated this would simply be one tool their investigators could use. An inmate would have to trust someone enough not to have their name on the account in order for this other type of transaction to go on.

SEN. HALLIGAN asked why regional jails should be excluded?

Ms. Adams stated they were not computerized with the regional facilities and would not be able to handle the accounts. Regional facilities are not as open and there isn't the capability of the contraband to be passed around as there is at the Montana State Prison and the Women's Correctional Facility.

SEN. ESTRADA asked how they arrived at the $200 figure?

Mike Micu, Investigator for Department of Corrections, stated that figure was arrived at to allow the inmates to purchase TVs and stereos.

SEN. ESTRADA asked if royalty checks went into their account, would that be applied to their incarceration?

Mr. Micu stated they would have that referred to an outside bank.

Ms. Adams stated that if they had it come into the prison, they could take that out of their resident account system. If it is in their outside account, they do not touch it.

SEN. GROSFIELD asked if payment for incarceration had to be a part of their sentence before it would be invoked?

Ms. Adams stated that they have the statutory authority to invoke payment for incarceration, but no one is doing it. There have been inmates who earn up to $20,000 a year on crafts and hobbies. The taxpayers should not have to pay the cost of incarceration for that inmate.

SEN. GROSFIELD stated that the Department had that ability since 91 or 93. He questioned why that hadn't been used.

Ms. Adams stated her above figure would apply to less than 5% of the inmates. The rest of the inmates work for $1.10 a day.

SEN. ESTRADA stated it didn't matter if only one or two individuals were making $20,000, the Department should still be going after that money.

Mr. Ohler stated that they want authorization to take that excess money from an inmate's account. They are asking for additional FTEs in HB 2 to handle the accounting function of accomplishing that. They would like to charge inmates for access fees to medical care.

SEN. BARTLETT questioned when, in the Department's discretion, would the excess not be forfeited?

Ms. Adams stated there are inmates close to getting out and need money to set themselves up for a job. They may accumulate money for family purposes. The Department does not want to take their money away for legitimate purposes.

SEN. BARTLETT asked if the Department would set up rules for this?

Ms. Adams felt this would be handled at the discretion of the warden. Within the institutions the warden knows what is going on.

SEN. BARTLETT stated she would like restitution to the specific victim of the inmate's crime as a higher priority for this money than payment for their cost of incarceration.

CHAIRMAN CRIPPEN asked why this would not apply to private prisons?

Ms. Adams stated they did not have the computer setup necessary to accomplish this in private prisons. If a private prison wants to set up an account and the legislature wants to enforce this on

the private prison, something could be handled in that matter in the future.

CHAIRMAN CRIPPEN stated the reason for the bill was to stop contraband within the prison and also provide money for incarceration. He asked if the prison was unable to find contraband any other way?

Mr. Micu felt that was one of their tools. In the last two years there has been an excess of $70,000 transferred on inmate bank accounts on the outside. This is from one inmate to another inmate in their outside banks. He believes this dealt with drugs.

CHAIRMAN CRIPPEN stated that selling drugs is a crime. Wouldn't a wife who had a joint bank account with her husband, who was an inmate and involved with buying or selling drugs, be an accomplice? She may not have any choice in the matter.

Ms. Adams explained there would have to be a thorough investigation, all the criminal charges made, all the proof entered. A wife of an inmate who had no knowledge would have her day in court to show that she didn't have any knowledge. If inmate "x" is putting $300 a month in my account, it would be a red flag to me that something is wrong.

CHAIRMAN CRIPPEN had concerns that the person may not have a choice. He asked if the release would be binding on a third party that might be injured when the information was divulged.

Ms. Adams said the release would be binding on the bank to give them the information. If there was a joint account, the release would allow for looking into that person's account.

CHAIRMEN CRIPPEN questioned the situation wherein information found by the Department being divulged in a negligent manner to the harm of a third party who had an interest in the bank account and the person was harmed by that, would this release protect the Department?

Ms. Adams explained the release was not protecting the Department. It gives the Department license to go into the bank account. The information gathered is confidential criminal justice information. The only way it could be disseminated is by court order or to other law enforcement agencies. If illegal activity was going on, **Mr. Micu** would take it to the county involved.

CHAIRMAN CRIPPEN asked what would be done if a person's bank account were below $36.

Ms. Adams explained there was an indigency clause for their resident accounts.

SEN. GROSFIELD commented that the purpose of the bill was to give the Department better ability to investigate contraband issues. He wondered what types of substances were brought in and how readily available it would be?

Mr. Micu stated that the urinalyses drugs indicate the drug of choice is marijuana. There are also barbiturates and methamphetamines. There is very little cocaine and PCP. They are seeing an increase in LSD usage. Everything you see on the street is available in the prison. Three fluid ounces of liquid LSD would trip every man, woman and child in the State of Montana at least one time. That is a third of a can of Pepsi. They have become more aggressive in searching visiting inmates and their visitors. A lot of items have been recovered. Their UAs indicate 13.8% of the 883 urine test conducted from July 1 to February 3 contained THC. There is a policy in place to provide for random and suspicion tests.

SEN. DOHERTY did not agree that there is no way to make a private prison responsible to enforce the laws of Montana. If it hasn't been done contractually, who wrote the contracts? There should be a stipulation that in any private prison situation the contractor should have to abide by the laws of Montana. Would the Department object to an amendment to this bill which would require the Department to contractually require that any private prison either handled the in-system accounts in the same manner or paid the state to do it?

Ms. Adams clarified that they do not want to stop that at all. They only have the capability to do this with their institutions. The amendment would be fine as long as it is recognized that the Department of Corrections cannot use the resident account system to accomplish applying it across the board. The authority for the cost of incarceration for the inmates comes from the sentencing judge. That is 46-18-201.

Closing by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 10:02; Comments: .}

REP. DEVANEY felt the proposed amendments would strengthen the bill. He ended up with the bill because he is the only banker in this legislature. When you have joint ownership of an account, the form signed at the bank states that either person has the total authority to do anything they wish with that account. If either one of the parties fouls up, the sheriff can take all the money out of the account. When you have a joint account, the other party can give any authorization with that account.

HEARING ON HB 65

Sponsor: **REP. WILLIAM T. "RED" MENEHAN, HD 57, Anaconda**

Proponents: **John Connor, Montana County Attorneys Association**
Vicki Fraser, Montana County Attorney Associations

Opponents: **None**

Opening Statement by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 10:02; Comments: .}

REP. WILLIAM T. "RED" MENEHAN, HD 57, Anaconda, introduced HB 65. This bill involved negligent vehicular assault which results in serious bodily injury. If you punch someone, that could be assault. If they lost their eye, there would be a further extension of the law and that is what this bill would accomplish. When someone is at fault in a car accident and there is a serious injury, the person causing the accident, being under the influence of alcohol, would cause this bill to go into effect. Now this is a misdemeanor and the injured person could be left crippled for life.

Proponents' Testimony:

{Tape: 2; Side: a; Approx. Time Count: 10:05; Comments: .}

John Connor, Montana County Attorneys Association, spoke in favor of HB 65. He was asked to appear by the Ravalli County Attorney, George Corn, to point out the importance of this bill. The problem arises all too frequently wherein a DUI occurs and someone suffers a serious injury but there isn't any way to deal with it between convicting a person of DUI on one hand or on the other hand negligent homicide if the victim dies. This would create an interim penalty for serious bodily injury. He presented a handout, **EXHIBIT 5.** Mr. Corn prosecuted a case entitled State v. Lambert in which a nine time DUI offender drove the wrong way down Highway 93 and collided with a woman and three children. No one was killed but they all suffered serious injuries. He charged the defendant with criminal endangerment, a felony, for knowingly engaging in conduct which creates a substantial risk of death. The defendant was convicted. The conviction was overturned on appeal. The Supreme Court held that the jury was improperly instructed on the definition of knowingly because all the alternatives in the statute had been given to the jury. The court said that the state had the obligation of proving that the defendant knew it was highly probable that he would run into the car when he got into his car. That is virtually impossible. Criminal endangerment is not available to prosecutors. This bill would require the proof that the defendant was under the influence of alcohol, that he drove in a negligent manner, and that he caused serious bodily injury. They would not have to prove that when he got into the car he was

going to cause a specific injury. The court, in its dissent, noted that this person also had 36 serious driving violations in addition to the 9 DUIs. An amendment was put on in the House which mandates a suspended sentence and requires that the crime and restitution be imposed. That amendment may have been precipitated by the fact that the fiscal note states that all offenses charged under this would be the more serious subsection (3) offenses. That is not correct. The fiscal note presumes that they would be that way because all of the offenses would include risk of death. That is not the case. All negligent vehicular assault cases do not result in or cause serious bodily injury. This bill, in its amended form, is better than what is available now.

Vicki Fraser, Montana County Attorney Associations, stated that last year a driver impaired by alcohol, hit a vehicle which contained two 16 year old girls. Both of the girls were severely injured at the time of the accident. This was so tragic that the officers had to take turns dealing with the event on the scene because the occurrence was so horrendous. Both the girls were hospitalized and their office was faced with the problem of how to charge for this crime. They had two choices, either a DUI misdemeanor or a negligent vehicular assault which was another misdemeanor. The public rang the phones off the hook. They could not find a statute which justly fit the crime. One of the girls did die, and they charged one count of negligent homicide and one count, for the girl who survived, of negligent vehicular assault. The girl who survived has gone through quite lengthy rehabilitation. The crime was a felony but they could only charge a misdemeanor. They need to appropriately charge the crime. If it is only bodily injury, then it is a misdemeanor. If it is serious bodily injury, they want to be able to impose a higher penalty. The fiscal note is high.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 2; Side: a; Approx. Time Count: 10:13; Comments: .}

SEN. BISHOP asked about operating a vehicle in a negligent manner without being under the influence of anything?

Mr. Connor stated that if no one was injured, the charge would be careless or reckless driving. Under existing law if someone was injured, they could attempt to charge assault if they thought the behavior was deliberate. The bill was drawn to involve the use of alcohol in a negligent endangerment situation. Criminal endangerment does not require the use of alcohol.

SEN. BISHOP questioned the reason for differentiating between bodily injury and serious bodily injury. He felt one driver would be lucky and the other person drew a bad card. For exactly

the same conduct, there are different consequences in that one is charged with a misdemeanor and the other with a felony.

Mr. Connor stated that if a person decides to take a course of action which could result in either a serious injury or a less serious injury, they are still making a conscious decision to take that course of conduct. In DUI cases people who are repeat offenders are so drunk that they do not even track with where they are. At that point of irresponsibility, the extent of injury is academic. They have assumed the behavior which allows them to be put in the position to kill someone.

SEN. MCNUTT posed the situation where someone driving 110 mph seriously injured someone, but didn't kill them, what would the charge be?

Mr. Connor answered they could charge them with negligent endangerment, 45-5-208, which is engaging in conduct that creates a substantial risk of death or serious bodily injury. That is a misdemeanor with a $1000 fine.

SEN. GROSFIELD asked if restitution would be covered by a liability insurance policy?

Mr. Connor explained that the criminal law places primary responsibility for the payment of restitution on the defendant. Victims can get reimbursement from the Board of Crime Control. He did not know how this related to insurance.

SEN. GROSFIELD referred to the House amendment which stated that the judge shall suspend . . . He questioned the use of the word "shall" instead of "may".

REP. MENEHAN stated they looked at the fiscal note and thought it would be a burden to the taxpayer in the prison system.

SEN. GROSFIELD asked the sponsor if the word "shall" could be changed to "may".

REP. MENEHAN stated he would have no problem with that.

SEN. REINY JABS questioned why this couldn't include people who were not intoxicated?

REP. MENEHAN stated the problem arose due to intoxication.

<u>Closing by Sponsor</u>:

REP. MENEHAN closed on HB 65.

HEARING ON HB 339

Sponsor: REP. BILL CAREY, HD 67, Missoula

Proponents: Brenda Nordlund, Department of Justice
Harold Hanser, Chairman of State DUI Task Force
Charles Brooks, DUI Task Force
Mike Ruppert, Executive Director of the Boyd Andrew Chemical Dependency Care Center
Troy McGee, Helena Chief of Police
Kathy McGowen, MASP
Pat Saindon, Administrator of Transportation Planning Division, Dept. of Transportation

Opponents: None

Opening Statement by Sponsor:

{Tape: 2; Side: b; Approx. Time Count: 10:30; Comments: .}

REP. BILL CAREY, HD 67, Missoula, introduced HB 339. Under the current law, the penalty structure for minors in possession and for .02 alcohol concentration offenses are inconsistent and confusing. They are costly to administer and difficult for everyone involved to understand. The license suspension occurs upon a second offense for those under age 18, whether or not the offender was driving at the time. Upon a third offense for someone under 18, and for those 18 and over, only about second and third offense, if the offender was driving at the time. For those under age 18 under the current law, the suspension time period runs from 60 days to a license revocation of up to one year or until age 18. For those 18 and over, the suspension timeframes are 60 days for second offense driving and 120 days for third offense driving. The penalty structures under HB 339, with just two exceptions, apply across the board to offenders of all ages. Section 1(5)(a) requires that the person shall comply with the alcohol information course and alcohol and drug treatment provisions in 61-8-704. The offender is not eligible for a probationary license during the period of suspension. This will be in line with the federal law.

Proponents' Testimony:

{Tape: 2; Side: b; Approx. Time Count: 10:33

Brenda Nordlund, Department of Justice, presented her written testimony, **EXHIBIT 6.** Many minor in possession (MIP) violators are individuals who are driving and in actual physical control of the automobile at the time of the offense. The MIP was chosen as the ticket of choice to write because it was easier to prove. Under the .02 violation you have to be able to prove alcohol concentration in excess of .02. That means a test. For communities that have portable breath testers, that may or may not be available. The way the implied consent law was written,

there was no compulsion for a person who was arrested under an .02 violation to submit to an intoxilizer. PBT test results were not admissible. This bill will make the .02 offense a meaningful and distinct offense for violators. She presented two handouts, **EXHIBIT 7,** the pink sheet, clearly illustrates how difficult the current law is to administer. They have one FTE dedicated to MIP violations. The blue sheet, **EXHIBIT 8**, shows how this bill would change that situation. On an .02 violation, they would no longer have to figure out the birth date to determine whether or not a license suspension is appropriate. The first instance that an individual violates this law and is convicted, they would be given a 90 day drivers license suspension, no right to a probationary license, a fine determined by the court of jurisdiction, which would be between $100 and $500, and they would be compelled to submit to the ACT course and alcohol and drug treatment, if chemically dependent. Repeat violations would include incarceration for up to 10 days or 60 days if the offender is over the age of 18. Kids who combine alcohol and driving are kids who can develop the lifestyle which leads to the impaired driver. The line between .02 and .10, the adult BAC, can be reached very easily.

Harold Hanser, Chairman of State DUI Task Force, spoke in favor of HB 339. It is essential that the penalties be brought into line to provide a deterrent to conduct which can be a disaster for the drinking driver. The message is that you cannot drink and drive.

Charles Brooks, DUI Task Force, spoke in favor of HB 339. He presented a letter from Gladys Vance, Cascade County, Justice of the Peace, **EXHIBIT 9.**

Mike Ruppert, Executive Director of the Boyd Andrew Chemical Dependency Care Center, spoke in favor of HB 339. They provide the ACT course which all DUI offenders attend. They perform assessments on DUI offenders and refer them to treatment.

{Tape: 3; Side: a; Approx. Time Count: 10:27; Comments: .}

Troy McGee, Helena Chief of Police, rose in support of HB 339.

Kathy McGowen, MASP, stated this bill adds the proper balance between treatment and penalty.

Pat Saindon, Administrator of Transportation Planning Division, Department of Transportation, stated that Congress passed a bill known as the national highway system bill. This bill also eliminated a national speed limit. Buried in this bill was the requirement that would withhold certain federal highway funds which go to the states if they did not enforce zero tolerance laws. House Bill 339 adds the penalty section and would place Montana in compliance with this law. This bill also allows Montana to qualify for some separate provisions for drinking and driving incentive grants. Without the zero tolerance laws, by

October of 1998 the State of Montana would lose 5% of its federal funds which would be approximately $5.4 million. In October of 1999 that would go up to 10%.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 3; Side: a; Approx. Time Count: 10:50; Comments: .}

SEN. BISHOP asked how much alcohol it would take to raise the blood alcohol content in an average person to .02?

Ms. Nordlund stated one drink would be all it would take.

SEN. GROSFIELD, referring to the zero tolerance level in the federal act, asked if that stated .02 for youthful drivers.

Ms. Nordlund explained that states have the option of either using a .02 alcohol tolerance or a .00 alcohol tolerance. Anything in excess of .02 is out of compliance under the FCRs as they were recently adopted.

Closing by Sponsor:

REP. CAREY stated this is a tough, but reasonable, bill. It will impact young people in a way that will get their attention and should preclude a number of terrible automobile accidents resulting in deaths and injuries caused by older drunk drivers.

EXECUTIVE ACTION ON HB 65

Motion: **SEN. GROSFIELD MOVED TO AMEND HB 65.**

Discussion:

SEN. GROSFIELD explained that on line 22 he would like to strike "shall" and insert "may". **REP. MENAHAN** did not have any problem with that amendment.
vote: The **MOTION CARRIED unanimously.**

CHAIRMAN CRIPPEN questioned how insurance would cover under 46-18-241?

SEN. HALLIGAN answered that covered conditions of restitution.

Rus Hill, MTLA, commented that insurance cannot cover criminal acts. This is defined as a negligent act.

Motion: **SEN. JABS MOVED HB 65 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. GROSFIELD commented that a drunk driver who had liability insurance and caused an accident, under this bill, would be committing a criminal act. Have we precluded the victim from getting restitution because we have now made it a criminal act and the insurance company would not have to pay?

Mr. Hill stated that comes down to the issue of a negligent criminal act. There is a victim's coalition group in Oregon which opposes making sexual abuse by psychiatrists a criminal act because they want the insurance for treatment for their people. If it were a criminal act, the insurance would not have to pay.

Ms. Nordlund felt that intentional criminal acts are excluded from insurance policies. DUI may not fall under that because a DUI is an absolute liability offense. It doesn't make any difference if you are purposely, knowingly or negligently operating a vehicle while under the influence of alcohol or drugs. You are liable under the law.

SEN. DOHERTY stated if you had liability insurance in this instance, the first claim would be a civil claim. The court could order restitution. If the damages were $10,000 and there was a $25,000 limit, the insurance company would deny coverage without question. They would argue they are ordered to pay for damages, but not restitution. The fight would be between the negligent party and their insurance company.

Vote: The **MOTION CARRIED** on voice vote with **SEN. BISHOP** voting no.

EXECUTIVE ACTION ON HB 68

{Tape: 3; Side: a; Approx. Time Count: 11:10; Comments: .}

Amendments: hboo6802.avl - **EXHIBIT 10**

Motion: **SEN. HALLIGAN MOVED TO AMEND HB 68.**

Discussion:

Amendment no. 2 would strike the house amendment. It is confusing to say that you are exempting someone from negligence.

SEN. BARTLETT asked how medical malpractice would stand in this bill? She thought that might be covered by the additional language on lines 20 and 21 which is all in caps. The House Committee narrowed it to liability that occurs as a result of negligence.

Mr. Ohler stated the only physician on staff would be the prison psychiatrist.

SEN. HALLIGAN withdrew amendment no. 2, but left in amendments 1 and 3.

Vote: The **MOTION CARRIED UNANIMOUSLY.**

Motion: **SEN. ESTRADA MOVED HB 68 BE CONCURRED IN AS AMENDED.**

SEN. HALLIGAN stated he is aware of suits which are civil rights violations. He is not aware of any abuse of lawsuits for negligence. He does not see a need for the bill.

SEN. GROSFIELD stated the bill as introduced was broad enough to go to civil rights.

Mr. Ohler stated he understood the concern was if the state, through legislation, could affect the availability of the federal remedy in a 1983 action. The answer is no. They wanted to narrow the forums which are available to inmates to the one which they can affect. They do have complaints brought by inmates alleging negligence. Congress has passed the Prison Litigation Reform Act which makes it more difficult for inmates to file 1983 actions in federal courts so they are now filing them in state courts.

SEN. GROSFIELD asked the types of negligent actions for which lawsuits are being brought?

Mr. Ohler stated they have had actions for negligent failure to train the prison records department to calculate good time. They have had complaints about classification issues.

SEN. BARTLETT stated the bill is addressed to immunity. It states that the state or any other political subdivision of the state is not liable in tort action for damages suffered as a result of negligence on the part of the state or a political subdivision of the state. This is saying that it is alright to be a little bit negligent. Don't reach the level of gross negligence, because we can't protect you there. In an opinion which stemmed from the riot the judge wrote, "The court is keenly aware of the fact that summary judgment is generally not an appropriate avenue for a determination of liability in negligence cases. It is a rare negligence case where there are no genuine issues of material fact. However, the court believes that this case is the exception to the rule. The court concludes that the evidence is overwhelming that the state's breach of their duty to safely operate the maximum security unit directly contributed to the riot and the resulting damages and injuries."

{Tape: 3; Side: b; Approx. Time Count: 11:35; Comments: .}

What were the injuries? Doors shut, inmates moved, officers trained, systems installed, do not sound like gross negligence. This is simple negligence. Rick Day commented that he shouldn't have to pay some inmate for emotional distress because he had to

watch other inmates commit crimes in the prison. She asked what the injuries were that had been suffered in the above case. She was told the following: five were dead; one had his throat slashed from ear to ear but somehow lived; one was beaten up and is the inmate who managed to get into the foyer which caused the warden to end the riots. They knew there were serious injuries going on and they had to act. If this bill had been in place when the riot occurred, it may have foreclosed claims by inmates who were killed.

Vote: The **MOTION FAILED** on roll call vote.

Motion: **SEN. BARTLETT MOVED HB 68 BE TABLED.**

Vote: The **MOTION FAILED** on roll call vote.

EXECUTIVE ACTION ON HB 325

{Tape: 3; Side: b; Approx. Time Count: 11:40; Comments: .}

Motion: **SEN. ESTRADA MOVED HB 325 BE CONCURRED IN.**

Discussion:

SEN. GROSFIELD commented that line 18 stated "as provided by law" but there isn't any current law. It would be up to the legislature to provide a law. The legislature could say that meant a petition of five or five thousand people. The format could be simple or restrictive. He did not want it to be easy to impanel a grand jury.

SEN. DOHERTY stated the current system allows for the impaneling of a grand jury if the district judge wants a grand jury. There wasn't one instance since the 1972 Constitution where the proponents were able to articulate a case where a district judge refused to impanel a grand jury when it would have been entirely appropriate. There is an avenue to obtain redress. If we had a series of instances where district judges in Montana had refused to impanel grand juries and this was running rampant throughout the land, he would look at this differently. Our system works for anyone. Grand juries are in secret. Rules of evidence do not apply. Any district attorney who can't get an indictment out of a grand jury is probably an incompetent district attorney.

SEN. ESTRADA asked if a grand jury's responsibility would be the same as an advisory council?

SEN. HALLIGAN answered they could investigate and indict.

SEN. JABS asked if he could ask for a grand jury?

SEN. DOHERTY explained that if any citizen wanted to have a grand jury convened, they could request that it be done.

SEN. ESTRADA asked why the Freemen in Jordan could not get a grand jury?

SEN. DOHERTY clarified they did not want a grand jury convened by a state district judge and the county attorney. They wanted to convene their own grand jury for which they were all indicted.

Substitute Motion: **SEN. BISHOP MOVED TO TABLE HB 325.**

He didn't feel there was any need for this bill.

SEN. HALLIGAN supported the motion to table. He would want at least 25% of the registered voters in this petition.

Vote: The **MOTION CARRIED** with **SEN. ESTRADA** voting no.

EXECUTIVE ACTION ON HB 339

{Tape: 3; Side: b; Approx. Time Count: 11:50; Comments: .}

Motion: **SEN. HALLIGAN MOVED HB 339 BE CONCURRED IN.**

Discussion: **SEN. GROSFIELD** stated that the federal rules for truck drivers would be .04 so that might be a place where impairment begins.

Ms. Nordlund felt that would be correct. Your ability to handle a multi-task function like driving, begins to be diminished at an alcohol concentration of .04. It may happen earlier for an inexperienced drinker.

SEN. BARTLETT reminded the committee that **SEN. NELSON** would have a problem with this bill because in her area there are a number of kids in this age bracket who need to drive to work and/or school. A single DUI would put them out of a job.

SEN. MCNUTT stated that as a business owner he makes allowances for his employees. They give them a ride to work, get them to treatment and try to work with them.

SEN. DOHERTY asked if the probationary license was changed, would federal funds be jeopardized.

Ms. Nordlund stated this would jeopardize the incentive monies across the board. In terms OF THE FEDERAL AID AND HIGHWAY DOLLARS, AS LONG AS LICENSE REVOCATIONS AND/OR SUSPENSIONS ARE authorized for any violation of the state's zero tolerance law, they would be in compliance for purposes of highway construction dollars. They absolutely must change for those over 18 because our current law does not provide for any license suspension on the first offense. You can soften the suspension or revocation without jeopardizing the federal aid and highway dollars.

SEN. HALLIGAN withdrew his motion.

ADJOURNMENT

Adjournment: The meeting adjourned at 11:50 a.m.

SEN. BRUCE D. CRIPPEN, Chairman

JUDY KEINTZ, Secretary

BDC/JJK