MINUTES

MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on March 24, 2005 at 9:08 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Mike Wheat, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Jeff Mangan (D)
Sen. Dan McGee (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted:
Executive Action: HJ 15, HB 40, HB 280, HB 91, HB 98, HB 222

EXECUTIVE ACTION ON HJ 15

Motion: SEN. CROMLEY moved that HJ 15 BE CONCURRED IN.

Discussion: SEN. O'NEIL asked what was going to happen if they found that minorities were participating in more crimes than non-minorities. He further asked if that meant they were not going to incarcerate the minorities at a greater rate than non-minorities, even though they had a greater rate of committing crimes.

SEN. CROMLEY responded the sentence in question did not relate to numbers rather it relates to whether or not the minorities are treated differently. He went on to say that regardless of the numbers, it was stating that all persons within the criminal justice system will be treated alike and not to their detriment simply because of their race.

SEN. CURTISS asked **SEN. PEASE** to explain what use had been made of the earlier report and what the Resolution would accomplish that had not already been done. **SEN. PEASE** replied the resolution was trying to address the disproportionate numbers to see why there was such a high rate of incarceration for Native Americans. He then talked about the percentage of Native Americans living off of the reservations and the high percentage of those individuals being incarcerated.

SEN. CURTISS asked if the statistics were used in any way to provide legislation that would address some of the concerns. She went on to say they could study problems, however, if it did not provide guidance for some action, what was the value of the study.

Motion: SEN. MANGAN moved to strike the word "determine" on Page 2, Line 5.

SEN. MANGAN explained his proposed conceptual amendment.

CHAIRMAN WHEAT asked **Ms. Lane** if she had understood the conceptual amendment. **Ms. Lane** replied that she had.

Discussion: SEN. MCGEE stated he felt there were basic fundamental cultural issues and significant environmental issues that address why there appears to be a disparate number of the Indian population in the prison system. He went on to say that he did not believe it had anything to do with how the courts or attorneys were processing the cases. He continued saying they could study the problem but he did not think they would study the difference in cultures between the Indians and the white man that

are part of the reason people act the way they do. He concluded saying the amendment was fine, however, he did not feel it was necessary.

SEN. PEASE reminded the Committee there was a disproportionate amount of minorities being incarcerated. He went on to say it was true the Native Americans were brought up differently. He further stated he felt there was real concern with the incarceration percentages for minorities, especially in the youth courts. He concluded stating he felt the study could be a very good tool to help solve the problem.

CHAIRMAN WHEAT asked **SEN. PEASE** if he had a preference as to which interim committee would deal with the issue. **SEN. PEASE** replied he would like to see it studied by the State and Tribal Relations Committee.

Vote: Motion that the CONCEPTUAL AMENDMENT TO HJ 15 BE ADOPTED carried 11-1 by voice vote with SEN. MCGEE voting no.

Motion: SEN. CROMLEY moved that HJ 15 BE CONCURRED IN AS AMENDED.

Discussion: SEN. O'NEIL stated he felt they should also report the results of the study to the Indian Nations in Montana, the Bureau of Indian Affairs and also to Montana's U.S. Congressmen. He suggested the language be added on Page 2, Lines 13 and 14.

SEN. PEASE stated that he felt the proposed amendment was a very good idea.

Motion: SEN. O'NEIL moved that THE CONCEPTUAL AMENDMENT BE ADOPTED.

CHAIRMAN WHEAT asked **Ms. Lane** if she understood the proposed amendment. **Ms. Lane** clarified where the amendment would be inserted and the language to be used.

SEN. PEASE stated that they needed to remember the Little Shell Band needed to be notified as well.

Vote: Motion that THE CONCEPTUAL AMENDMENT BE ADOPTED carried 12-0 by voice vote.

Motion: SEN. CROMLEY moved that HJ 15 BE CONCURRED IN AS AMENDED.

Discussion: SEN. PERRY expressed his support for HJ 15.

CHAIRMAN WHEAT indicated he agreed with **SEN. PERRY.** He further stated that there definitely was a problem, it needed to be addressed, and it needs something to be done about it.

SEN. PEASE stated that maybe the resolution should go to the Law and Justice Interim Committee where it could go to a Subcommittee for study.

SEN. MOSS spoke in support of HJ 15.

Vote: Motion that HJ 15 BE CONCURRED IN AS AMENDED carried 11-1 by voice vote with SEN. MCGEE voting no.

SEN. PEASE will carry HJ 15 on the floor of the Senate.

{Tape: 1; Side: A; Approx. Time Counter: 0 - 24.9}

EXECUTIVE ACTION ON HB 40

Motion: SEN. SHOCKLEY moved that HB 40 BE CONCURRED IN.

Amendment HB004003.avl was distributed to the Committee and is attached as Exhibit 1.

EXHIBIT(jus65a01)

Valencia Lane stated the amendment had been requested by the Department of Justice and explained the purpose of the amendment. She then reminded the Committee they had already adopted HB004002.avl and re-explained that amendment.

Motion: SEN. WHEAT moved that AMENDMENT NO. HB004003.AVL BE ADOPTED.

Discussion:

SEN. O'NEIL asked **Ms. Lane** if the amendment would apply to a civil penalty for false statement on taxes, but would not on a criminal penalty. **Ms. Lane** replied there were already provisions in the civil laws under Title 39, Chapter 71 dealing with Workers' Comp, Title; Title 15 and 16 with tax laws and under National Resources and Conservation Acts under Title 77. Therefore, it was felt exempting those from this particular penalty was appropriate.

SEN. SHOCKLEY left the meeting.

Vote: Motion that AMENDMENT NO. HB004003.AVL BE ADOPTED carried unanimously by voice vote, with SEN. SHOCKLEY voting aye by proxy.

Motion/Vote: SEN. WHEAT moved that HB 40 BE CONCURRED IN AS AMENDED. Motion carried unanimously by voice vote, with SEN. SHOCKLEY voting aye by proxy.

SEN. CROMLEY will carry HB 40 on the floor of the Senate.

{Tape: 1; Side: B; Approx. Time Counter: 0 - 5.3}

EXECUTIVE ACTION ON HB 280

Motion: SEN. MANGAN moved that HB 280 BE CONCURRED IN.

Discussion: Amendment No. HB028001.avl was distributed to the Committee and is attached as Exhibit 2.

EXHIBIT(jus65a02)

Motion: SEN. WHEAT moved that AMENDMENT HB028001.AVL BE ADOPTED.

Discussion:

Valencia Lane explained the intent of the amendments.

CHAIRMAN WHEAT explained the reason the amendment had been brought forward.

SEN. MANGAN indicated he was going to oppose the amendments. He went on to say he felt the amendments would dramatically change the reason for the bill.

SEN. MCGEE stated that 1 and 3 did not bother him, however, 2 did and explained why. He suggested segregating 2 from the amendment.

SEN. CROMLEY asked either **SEN. SHOCKLEY** or **SEN. ELLINGSON** if a person involved in a misdemeanor, going for arraignment, would have counsel. **SEN. SHOCKLEY** responded that arraignment was when the individuals were arrested on Saturday night, brought to court on Monday morning, allowed to only plea not guilty, and then provided with an opportunity to hire an attorney if they so desired.

CHAIRMAN WHEAT stated it was his understanding that an arraignment was when the individual was brought before the Judge, the charges were read to them and at that point in time counsel would be appointed, if the individual was unable to obtain counsel of his/her own.

SEN. CROMLEY responded that if that was the case he saw a problem with paragraph 1 of the amendment because of the requirement that the individual would have to sign the agreement in the presence of an attorney.

SEN. SHOCKLEY stated that an arraignment was simply the reading of the charges and entry of a plea. **SEN. SHOCKLEY** continued saying he did not believe the emphasis should be on what was most convenient for the county or the state. He went on to say that if the system was going to mean anything you cannot treat the offenders like they were nothing but a piece of wood. He added the offender needed to be treated like an individual or the person would not feel as if they had been treated fairly.

SEN. O'NEIL stated he did not feel the bill would apply to arraignments. He then asked about the waiver that needed to be signed and if an individual had more than one counsel, would all of the individuals counsel have to be present. **CHAIRMAN WHEAT** responded that only one of the individuals counsel would need to be present.

SEN. LASLOVICH referred to a fax he had received from District Court Judge Wayne Phillips in response to the amendments. He went on to say that the fax indicated the district court judges were opposed to the amendments. He added that he would oppose the amendments.

SEN. PERRY asked **SEN. MCGEE** about SB 146 and whether or not in the bill a defendant can waive his right to counsel. **SEN. MCGEE** responded that it was not part of the bill.

CHAIRMAN WHEAT added that a defendant could waive his right to counsel. He went on to say in some instances the court overrules the waiver of counsel and appoints counsel anyway.

{Tape: 1; Side: B; Approx. Time Counter: 5.3 - 22.5}

SEN. PERRY remarked on the amendments making it mandatory that defendants have counsel.

CHAIRMAN WHEAT responded to **SEN. PERRY'S** concerns.

SEN. PERRY pointed out the three amendments were making the assumption there would absolutely be counsel. **CHAIRMAN WHEAT** responded that a defendant would have the right to refuse counsel.

SEN. PERRY further addressed his concerns with the amendments.

SEN. CROMLEY stated he agreed with **SEN. PERRY** that the amendments required the presence of counsel. He further talked about possibly amending the amendments.

SEN. ELLINGSON stated as he understood the amendment counsel would have to be present if they were going to use the audio/visual communication. He further stated he would be uncomfortable having any defendant appear before a Judge using the audio/visual communication without being represented by counsel.

SEN. CROMLEY expressed his concern regarding persons being required to have counsel prior to their first appearance when that is the time where most individuals would be appointed counsel.

SEN. ELLINGSON expressed further concerns with the amendment and his fear that they could be infringing upon the individual's first amendment rights.

SEN. SHOCKLEY indicated that he did not feel paragraph 1 of the amendment would work and explained his reasons.

SEN. O'NEIL talked about his concerns regarding the amendment.

Motion/Vote: **SEN. MCGEE CALLED THE QUESTION ON AMENDMENT NO. HB028001.AVL. Motion failed 5-7 by roll call vote with SEN. ELLINGSON, SEN. MOSS, SEN. PEASE, SEN. SHOCKLEY, and SEN. WHEAT voting aye.**

CHAIRMAN WHEAT stated they were back on HB 280.

Discussion: **SEN. SHOCKLEY** indicated he felt it was too impersonal. He went on to say when a person is sentenced he should be in the same room as the Judge, looking him in the eye. He concluded stating he would vote against HB 280.

SEN. O'NEIL asked if the bill would apply to someone that was sent to Warm Springs for evaluation or not. **CHAIRMAN WHEAT** replied in most instances persons sent to Warm Springs would not be coming back to the court for sentencing, they would being coming back to court for a hearing on the reasons for being sent

to Warm Springs in the first place. **SEN. O'NEIL** and **CHAIRMAN WHEAT** discussed the intent of the bill further.

SEN. LASLOVICH expressed his support for HB 280.

SEN. SHOCKLEY stated his objection to the bill.

SEN. ELLINGSON indicated he would oppose the bill because of the language on Page 4, Section 4 which allows for the absence of the defendant at the time of sentencing.

SEN. MCGEE stated he felt the defendants rights were protected under HB 280. He added he would vote in favor of HB 280.

SEN. CROMLEY asked if there were any other proponents present at the hearing other than the representative from the Attorney General's Office. **CHAIRMAN WHEAT** responded "No."

SEN. PERRY talked about his concerns with regard to HB 280.

SEN. MANGAN clarified for the Committee how the audio/visual communication system works with regard to its use in the courtroom.

SEN. O'NEIL stated he would vote for the bill, however, he did have concerns.

Vote: Motion that HB 280 BE CONCURRED IN carried 7-5 by voice vote with SEN. CROMLEY, SEN. CURTISS, SEN. ELLINGSON, SEN. PERRY, and SEN. SHOCKLEY voting no.

SEN. MANGAN will carry HB 280 on the floor of the Senate.

{Tape: 2; Side: A; Approx. Time Counter: 0 - 22}

EXECUTIVE ACTION ON HB 91

WHEAT moved that HB 91 BE CONCURRED IN.

Discussion: **CHAIRMAN WHEAT** asked **SEN. PERRY** to explain the difference between HB 91 and SB 80. He went on to say the only difference he noticed was that in SB 80 a violation of the section was not a criminal offense. In HB 91 it indicates that a violation of the section by a passenger would not be charged against the passenger's driving record.

SEN. PERRY stated the big difference was the reference to what the insurance companies were calling the masking text that hid the offense from the insurance companies and prevented them from using the offense for purposes of rating the individual. He went on to say he felt this masking text was a good thing and helped the bill pass.

CHAIRMAN WHEAT stated he would like to see both SB 80 and HB 91 pass.

SEN. SHOCKLEY responded, because there were two bills SB 80 did not have as good of a chance to pass. He then moved to table HB 91.

Motion/Vote: SEN. SHOCKLEY moved that HB 91 BE TABLED. Motion carried 8-4 by roll call vote with SEN. CROMLEY, SEN. ELLINGSON, SEN. MOSS, and SEN. WHEAT voting no.

{Tape: 2; Side: A; Approx. Time Counter: 22 - 28}

EXECUTIVE ACTION ON HB 98

Motion: SEN. MANGAN moved to remove HB 98 from the Table.

Discussion: SEN. SHOCKLEY stated even though he had been beaten up in the newspapers over his vote on HB 98 he had no intention of changing his vote. He went on to say he felt it was a bad idea and explained further why he could not support the bill.

SEN. O'NEIL stated he would continue to vote no on HB 98 because of an individual's right not to incriminate themself.

SEN. CROMLEY indicated that he had concerns regarding multiple DUIs. He added that HB 98 was addressing first time DUI offenders and he did not feel that this was where the emphasis needed to be placed.

SEN. ELLINGSON stated he would vote to take HB 98 off of the table and explained why. He then talked about an amendment he would propose should HB 98 be taken off of the table.

SEN. MANGAN stated there were things that could be done with the bill to make it better. He added he felt it was worth having further discussion on HB 98.

Vote: Motion to TAKE HB 98 OFF OF THE TABLE failed 6-6 by roll call vote with SEN. CROMLEY, SEN. ELLINGSON, SEN. MANGAN, SEN. MOSS, SEN. PEASE, and SEN. WHEAT voting aye.

{Tape: 2; Side: B; Approx. Time Counter: 0 - 8.5}

EXECUTIVE ACTION ON HB 730

Motion: SEN. CURTISS moved that HB 730 BE CONCURRED IN.

Discussion: SEN. SHOCKLEY asked if HB 730 was **REP. LANGE'S** bill. **CHAIRMAN WHEAT** responded that it was.

SEN. SHOCKLEY indicated that there were some amendments for HB 703 and he was also supposed to speak with **SEN. WILLIAMS** regarding a compromise, therefore, he would like to put HB 730 off to another day, so long as **SEN. CURTISS** would agree.

SEN. CURTISS stated she was afraid they might run out of time and she did not want the bill to fall through the cracks.

CHAIRMAN WHEAT stated that HB 730 would be the first bill they would deal with on March 29, 2005, therefore, everyone needed to be ready to proceed.

{Tape: 2; Side: B; Approx. Time Counter: 8.5 - 10.3}

EXECUTIVE ACTION ON HB 222

Motion: SEN. MCGEE moved that HB 222 BE CONCURRED IN.

An amendment to HB 222 was distributed to the Committee and is attached as Exhibit 3.

EXHIBIT(jus65a03)

Motion: SEN. MCGEE moved that AMENDMENT NO. HB022201.AVL BE ADOPTED.

Discussion: SEN. MCGEE explained the amendment to the Committee.

SEN. ELLINGSON indicated he would not vote for the amendment or the bill. He then talked about the meaning of negligence and what constitutes being negligent.

SEN. MCGEE referred to Lines 26 and 27 on Page 1 and discussed the definitions provided.

SEN. MANGAN indicated he would like to segregate the two paragraphs of the amendment.

Motion: **SEN. MCGEE** moved NUMBER 2 of AMENDMENT NO. HB022201.AVL.

Discussion: **SEN. LASLOVICH** asked **SEN. MCGEE** why they were inserting the language, "resulting from an incident ... that involves...", why not say "a traumatic condition means an acute condition that involves a significant risk of death or has a substantial likelihood of precipitating medical complications or permanent disability". **SEN. MCGEE** asked the Committee if they would permit **Mr. Ebsery** to respond to **SEN. LASLOVICH'S** question.

Mr. Ebsery, Billings St. Vincent's and other hospitals, explained this amendment was written to be as inclusive as possible to define what an acute condition would be and what would be considered a traumatic condition.

SEN. LASLOVICH indicated that he liked (a) and (b) of paragraph number 2 of the amendment but not all of the other language.

SEN. MCGEE proposed amending the language in paragraph 2 of Amendment No. HB022201.avl to read "means an acute condition resulting from an incident that:", then strike the next three lines. He continued saying paragraph 2 of Amendment No. HB022201.avl would read as follows: "For purposes of this section traumatic condition means an acute condition resulting from an incident that: (a) involves a significant risk of death or (b) has a substantial likelihood ..."

Valencia Lane explained the best way to amend the amendment.

Motion: **SEN. MCGEE moved that AMENDMENT NO. HB022201.AVL BE AMENDED as discussed.**

Discussion: **SEN. O'NEIL** expressed some concerns with what would and would not be considered a traumatic condition.

{Tape: 2; Side: B; Approx. Time Counter: 10.3 - 26}

SEN. O'NEIL, SEN. MCGEE and **CHAIRMAN WHEAT** discussed the liability of a doctor should a patient die, the remedy for recovery and the cap on the amount of recovery should a lawsuit be brought forth and the doctor be found negligent. They further discussed the types of conditions which would be covered under HB 222.

Motion/Vote: SEN. MANGAN CALLED THE QUESTION ON AMENDMENT NO. HB022201.AVL AS AMENDED. Motion carried 9-3 by voice vote with SEN. CROMLEY, SEN. ELLINGSON, and SEN. WHEAT voting no.

Motion: SEN. MCGEE moved that HB 222 BE CONCURRED IN AS AMENDED.

Motion: SEN. MCGEE moved that PARAGRAPH 1 OF AMENDMENT HB022201.AVL BE ADOPTED.

Discussion: SEN. ELLINGSON indicated he would vote against the amendment because of the fact it focuses on medical liability insurance.

SEN. CROMLEY expressed his objections to the amendment.

SEN. O'NEIL talked about his concerns with the bill.

CHAIRMAN WHEAT stated he would resist the amendment and explained his reasons for doing so.

SEN. MCGEE asked the Committee to vote in favor of the amendment.

Vote: Motion that AMENDMENT NO. HB022201.AVL BE ADOPTED failed 5-7 by roll call vote with SEN. CURTISS, SEN. LASLOVICH, SEN. MCGEE, SEN. O'NEIL, and SEN. PERRY voting aye.

CHAIRMAN WHEAT reminded the Committee they were back on the bill as originally amended.

SEN. ELLINGSON reiterated that he would be voting against the bill and provided the Committee with an example.

SEN. MANGAN indicated his support for HB 222 because of the compelling testimony he had heard.

SEN. SHOCKLEY stated they were not just talking about the $100,000.00 cap.

SEN. CROMLEY talked about his personal experiences with access to emergency rooms and emergency room treatment. He continued saying he was upset with the attempt to put a valuation on every possible type of injury and provided some examples. He concluded saying he would be voting against the bill.

SEN. PERRY expressed his support for HB 222 and responded to comments made by Committee members.

SEN. LASLOVICH stated his views on the idea that premiums for medical malpractice insurance were rising as a result of attorneys taking cases to court and winning large settlements. He then talked about the testimony from the experts with regard to the rising costs for medical malpractice insurance.

{Tape: 3; Side: A; Approx. Time Counter: 0 - 30.2}

SEN. MOSS talked about the testimony they had heard at the hearing on HB 222. She went on to say that because of this testimony she would not be supporting the bill at this time.

SEN. SHOCKLEY said the difference between $250,000.00 and $100,000.00 was not going to make any difference in the premium rates for medical malpractice insurance.

CHAIRMAN WHEAT expressed his views on HB 222 and indicated he could not support the bill. He provided the Committee with information from a report out of Texas with regard to the issue of the costs of medical malpractice insurance. He went on to say the crisis was caused by the insurance companies, not the patients and not the attorneys. He further stated they needed to do something to help the doctors. He concluded saying he could not support HB 222.

Vote: Motion that HB 222 BE CONCURRED IN AS AMENDED failed 4-8 by roll call vote with SEN. LASLOVICH, SEN. MANGAN, SEN. MCGEE, and SEN. PERRY voting aye.

Motion/Vote: SEN. WHEAT moved that HB 222 BE TABLED AND THE VOTE REVERSED. Motion failed unanimously.

{Tape: 3; Side: B; Approx. Time Counter: 0 - 14}

ADJOURNMENT

Adjournment: 11:30 A.M.

_____
SEN. MIKE WHEAT, Chairman

_____
MARI PREWETT, Secretary

MW/mp

Additional Exhibits:

EXHIBIT(jus65aad0.PDF)