MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **VICE CHAIRMAN DUANE GRIMES**, on March 9, 2001 at 9:02 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: Sen. Lorents Grosfield, Chairman (R)

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 201, HB 331, HB 359, 2/28/2001
Executive Action: HB 201, HB 224, HB 331, HB 402

HEARING ON HB 331

Sponsor: **REP. BILL EGGERS, HD 6, CROW AGENCY**

Proponents: **Pam Bucy, Assistant Attorney General**
Vickie Turner, representing self
Brett Lund, Detective with Billings Police Department
Troy McGee, MT Chiefs of Police Association
Ed Eaton, AARP
Jimmy Weg, Department of Justice

Opponents: **None**

Opening Statement by Sponsor:

REP. BILL EGGERS, HD 6, CROW AGENCY, opened on HB 331, a theft of identity bill, which addressed a gap in the law. At the present time, there was not a law that covered the computer-age theft of identity, which was described as date of birth, address, telephone number, drivers' license number, social security number, or other federal identification numbers as well as place of employment. He said the bill created a new crime and was in response to a growing national problem stemming from the computer age. He noted that a television program, *Front Line*, stated there were over 1.5 million people in the U.S. victimized in some fashion with regard to theft of their identity. He spoke to several people about the bill; bank tellers and people at the drivers' license office, and they thought the bill was a good idea. They saw people mis-representing themselves at the bank in cashing checks. At the drivers' license bureau, they saw people applying for a duplicate license as a result of loss or stolen property. He noted this legislation was brought forth because theft of identity didn't squarely fall under current fraud or criminal theft laws, allowing a jury to acquit. He wanted to ensure that when this crime was committed, it could be prosecuted in an appropriate manner with the jury applying the appropriate law to the facts. He pointed out that it had a two-tiered sentencing. It followed other felony statutes with a $1000 threshold. If the thief had no economic benefits, or was less than $1000, then the fine could not exceed $1000. He defined no economic benefit as retaliation, business sabotage, or business competition. The economic benefit would be such things as using a credit card to purchase products or something that caused the thief to gain financial advantage. He compared this crime to a crime of rape; a crime that went unreported due to embarrassment. He did not expect a flood of cases, but with the severe penalty and a few key cases, the word would be out that this was something that should not be done.

Proponents' Testimony:

Pam Bucy, Assistant Attorney General, handed out her arguments in **EXHIBIT(jus54a01)** and also presented a letter from a Helena Police Department detective on the issue, **EXHIBIT(jus54a02)**.

Vickie Turner, representing self, provided her testimony in writing, **EXHIBIT(jus54a03)**.

Brett Lund, Detective with Billings Police Department, noted the primary investigations he conducted were in reference to fraud and white-collar crimes. He said the agency received two or three reports of fraud every day. He reiterated these were the ones reported, but felt there were more that went unreported. He relayed an anecdote about assisting in a arrest of drugs, but also in the room was a request for a new social security card for another person not associated with the group. He was going to investigate the situation to see if a living person currently held that number and if any of that person's identity had already been compromised. He said it was not unusual to find an out-of state person's identity being used in Montana. He said this legislation would give law enforcement an added tool, which was desperately needed for this type of crime.

Troy McGee, MT Chiefs of Police Association, indicated they were in support of the bill.

Ed Eaton, AARP, said in their concern with similar fraud, they felt it was a good bill and urged consideration.

Jimmy Weg, Department of Justice, said he investigated computer crime. He brought a few samples of software packages that were available for creating fake IDs and such, **EXHIBIT(jus54a04)**. He said identification was easily created through various software packages. Most packages included the ability to print personal checks. Therefore, it was easy for someone to use a check to create checks the thief could use without the account holder's knowledge. He said the frequency of reporting computer crimes (forgery, false identification) was increasing and it was a problem.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN noted that on line 13, financial information was not listed. He said credit could refer to that, but it might

not. He wanted to know why financial information was not included. **REP. EGGERS** said it was a good observation. He suggested amending the bill to include it because it went along with the intent of the bill.

SEN. HALLIGAN re-referred to **Pam Bucy** asking if bank records should also be included. **Pam Bucy, Assistant Attorney General,** said that phrase could be added. She over-looked it because she was looking at the gain.

SEN. JERRY O'NEIL asked if there were many culprits and if they were currently prosecuted. **Jimmy Weg, Department of Justice,** replied they were actively investigating a few cases and tracing the information. He said it was a lengthy task because the culprits' computers were networked and routed through several states. They had to obtain permission from the various states in order to investigate.

SEN. O'NEIL further questioned if people were already prosecuted without the bill. **Mr. Weg** replied no prosecutions had been initiated.

SEN. O'NEIL questioned if they would be able to initiate prosecution. **Mr. Weg** said he believed so.

SEN. O'NEIL continued by questioning if it could be done under existing law. **Mr. Weg** replied he couldn't say because the cases were in development. He said those matters would be decided by the county attorney. **Ms. Bucy** stepped in to answer. She said counties were prosecuting the crime, but they were attempting to fit them into theft statutes. There was not a proper fraud statute. She said the theft statute didn't work, especially in cases of no economic gain. She said it was difficult to explain to the jury how to perform their job in identity theft cases. She said cases had been prosecuted, but not as effectively as they could be. She reiterated that these were new cases.

SEN. O'NEIL relayed a story about a constituent who provided an incorrect social security number when he got a drivers' license. He didn't know if it was on purpose, or by accident, but the person had been using that incorrect number for years. He thought the constituent would have to pay a $1000 fine. He wanted to know if that was the case. **Ms. Bucy** responded a fine would not be assessed because there was more than one element. The prosecutor would have to prove he used another person's number without their consent for an unlawful purpose.

SEN. O'NEIL questioned if using a wrong social security number was an unlawful purpose in itself. **Ms. Bucy** responded not under this particular statute.

SEN. O'NEIL asked where in the statute it wasn't an offense. He thought it was a federal crime. **Ms. Bucy** said it might be a federal law to use an incorrect social security number, but it did not violate this statute. The person would have to purposely or knowingly obtain personal identifying information belonging to someone else and use that information for an unlawful purpose without the other person's consent. She said those were the elements of the identity theft statute.

SEN. O'NEIL still didn't understand how that wouldn't violate this statute. **Ms. Bucy** said that in the facts given, the person did not use the number for an unlawful purpose. He merely got a drivers' license.

VICE CHAIRMAN DUANE GRIMES directed his question to the computer crime investigator. He wanted to know if there were current statistics compiled from the counties where these types of crimes were being prosecuted. **Mr. Weg** said the department had just started investigating these types of crimes. He said they did keep statistics, but they had not initiated prosecution on the investigations.

VICE CHAIRMAN GRIMES commented that the issue pertained to a number of discussions within the assembly, so any statistics or information would be valuable.

Closing by Sponsor:

REP. EGGERS, closed on HB 331 by addressing **SEN. O'NEIL's** concerns. On line 12 of page 1, it clarified the intent of the user of the information. He felt that the person referred to in the situation unintentionally used a number that was different than his own. He thought the person probably didn't know who the social security number belonged to, he merely inverted or mixed-up the numbers. In proving theft of identity, it would have to be proven that the perpetrator used a social security number of a specific person to take advantage of that individual. He didn't think that could be proven in the scenario presented. That was the reason it was not covered by this statute. He reiterated it was a good bill and urged passage to the full Senate.

{Tape : 1; Side : B}

HEARING ON HB 201

Sponsor: **REP. BOB DAVIES, HD 27, BOZEMAN**

Proponents: **Lee Wiser, representing self**
Marty Lambert, Gallatin County Attorney
Joe Mazurek, representing self
Pam Bucy, Assistant Attorney General

Opponents: **None**

Opening Statement by Sponsor:

REP. BOB DAVIES, HD 27, BOZEMAN, opened on HB 201. He said the bill dealt with embezzlement, a serious problem that was virtually unknown. He felt when an embezzlement occurred, the victim tried to keep it quiet because the amounts of money were generally large and there could be repercussions to the business. He said in 1982, while he was running for U.S. Congress, he turned over his property management business to another person. He was gone for about a year and lost $50,000 from his trust account. He said the worst part was that the money belonged to his clients. He took the position that since it was his business, he would stand good for the loss. However, he wasn't in the position to pay it outright. Over the years, he paid back a good portion that was not covered by the thief. He said he was sued by one of the clients for $400,000 in punitive damages. It was not a pleasant experience. As far as the thief, he felt a deferred prosecution agreement had been worked out with the county attorney. However, he received only about $600 in restitution. The county attorney said he wouldn't prosecute to get the other part because too much time had elapsed. The statute of limitations had not run out, but it was still not prosecuted. **REP. DAVIES** did not bring this legislation because of his situation, but because a constituent also was a victim of embezzlement. The intent was to provide an enhanced penalty for this theft because it was an onerous act on the part of the thief. The thief betrayed a position of trust. He felt that very often, the crime went undetected because the embezzler was able to hide it for a decent length of time. He mentioned that the enhanced penalty was stricken in the House. Therefore, the bill was reduced to a definition. He attempted to put it back on, but it was denied. He spoke with some who had opposed it and drafted new amendments to address their concerns, **EXHIBIT(jus54a05)**. The threshold was set at $10,000. The penalty was not less than a one year sentence. He called attention to the last line of the amendment and said the word, "must" could be changed to "shall" during executive action.

Proponents' Testimony:

Lee Wiser, representing self, introduced himself as a business owner in Bozeman, but he lived in Billings. He said the embezzlement affected small, large, and governmental businesses. He noted the he could rally people to support a cause, but it was nearly impossible to get anyone who had been embezzled to appear. He felt the reasons were either fear of public speaking or humiliation over the incident. He thought that if a person committed robbery, there was a penalty. However, for embezzlement, which could extract more money than numerous armed robberies, there was little deterrent for the premeditated act. He reported on his encounter with embezzlement saying his books were a mere $0.11 off. He knew they were off, but wasn't going to take the time to find those missing cents. While he was away on vacation for about a month and a half, another business quit paying the bills to build up money. They told the bank that they had run out of checks and asked for counter checks. The bank gave the counter checks without question. They fired the receptionist telling **Mr. Wiser** that she had quit. The bounced checks were blamed on the receptionist. He was able to figure out the counter check scheme to understand what had happened. He noted that if someone grabbed a beehive and shook it, the person would get stung. He asked it to be the same if someone grabbed another person's piggy bank and shook it. He said the person who embezzled against him also concurrently embezzled $40,000 from someone else. He felt it was time Montana put a stop to the one growth industry it did not need. The headlines were letting people know that embezzlement did not have much of a penalty. He urged consideration of the amendment to let people know there was a penalty.

Marty Lambert, Gallatin County Attorney, said he had prosecuted in the last three years, five separate cases where restitution of approximately $1.2 million was ordered. These cases involved bookkeepers stealing from businesses. They stole from Montana State University and the welfare department of Gallatin County. That was taxpayer money. Private businesses had also been stolen from. He felt it was a good thing to emphasize the serious nature of the crime. It was devastating. He spoke about the relationship nature of the crime and how that affected the person who had trusted another. As to the under-reporting of the crime, he felt it was grossly under-reported. He gave the example of the woman who stole from the welfare department. Prior to that, she stole $50,000 from a Great Falls law firm, but that was never reported. He said the people who did this crime would steal again if they weren't dealt with. Another example involved a $310,000 restitution settlement. This example involved fidelity insurance with a $20,000 limit on the policy. The company wanted some of the cash back. In order to recover it, the insurance company required the matter be reported to the police. That was the only reason that crime was reported. He noted he liked the original

language of the bill. He said there were always exceptions to mandatory minimums. Under extreme mental or emotional distress, the court could find mitigation such that the mandatory minimum as outlined in the bill would not apply. He didn't think the legislature could tie the courts hands with regard to the mandatory minimums. With a threshold of $10,000, that was acceptable. He addressed the last amendment. He didn't think it could be demanded that the courts revoke suspended or deferred imposition of sentences. He felt the appropriate verb was "may be order". He felt there would be difficulties with District Judges if they didn't have discretion. He supported the bill because this was a serious crime.

Joe Mazurek, representing self, supported the bill and the amendment by **REP. DAVIES.** He worked with a business client who had been victimized by a trusted employee. The embezzler was professionally licensed and had high standing in the organization. Through research he discovered the sentencing patterns in embezzlement cases around the state generally involved financial employees who had taken substantial amounts of money, but generally did not suffer jail time. He was struck by the impact of the embezzlement on the organization. It shook not only the manager and owner of the business, but the co-workers who often times were utilized by the person who committed the offense. They felt like victims themselves. Following conviction, if the repayment plan was lower than what a state bank would give and no jail time, it undermined the organization as well. He said the perpetrator was generally a white-collar worker who if they were not in that position, and were writing bad checks, they would probably go to Montana State Prison. It undermined confidence in the judicial system and it rattled the very structure of an organization. He was not generally supportive of mandatory sentences. It set a high threshold and it targeted a crime that was often committed by people of means who then avoided a sentence of jail. With the threshold of $10,000 and the removal of sentencing in appropriate circumstances, it was a good bill.

Pam Bucy, Assistant Attorney General, supported the bill. In talking to and responding to victims of these types of crimes, law enforcement, and county attorneys across the state, Montana needed to improve its white-collar crime laws. She said it was difficult to fit these specific crimes into generic theft statutes. It was even more difficult to explain to victims and juries how these crimes fit into the generic theft statutes. This bill was good.

Opponents' Testimony:
None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL clarified that embezzlers were currently brought to court. The bill would continue that, but he asked how it would improve the present law used for embezzlers. **Joe Mazurek, representing self,** replied the bill established a mandatory minimum sentence in cases of embezzlement where the stolen amount was above $10,000. Presently, there was not a mandatory minimum and it was at the discretion of the trial judge. He said it was a sentencing issue more than a prosecution issue.

SEN. O'NEIL asked if the current embezzling statute could be amended to include the sentence. **Mr. Mazurek** said in effect, the bill did amend the sentencing statute for embezzlements.

SEN. MIKE HALLIGAN inquired about partnerships so that the embezzlement included everything, including partnerships. There were many limited liability companies. He wanted to make sure that the statute covered personal property as well as money. He wanted to know if partners were part of the statutory definition. **Marty Lambert, Gallatin County Attorney,** said it was broad. In 45-2-101 the general definition statute said property was very broad. To get more specific, they would have to look at the Limited Liability Partnership Act and sub-chapter S, corporations. The law relating to each entity would have to be reviewed. He was currently involved in a case regarding theft from shareholders; a corporation. He said there was not any Supreme Court law on it currently. Another case said stealing could not occur from a joint account/jointly owned property, but a person could steal from partnership property if any percentage or any part was entitled to someone else. Most of the concerns would be covered and some of it would have to be fleshed out through case law. Trying to incorporate those things in this bill would be quite involved.

Mr. Mazurek corrected his answer to **SEN. O'NEIL.** He said the bill did create an offense with embezzlement within the existing theft statute in addition to the sentencing enhancement, mandatory minimum. In his first answer, he only referred to the sentencing portion. It did create a specific offense in the statute of embezzlement and separate sentencing.

{Tape : 2; Side : A}

VICE CHAIRMAN DUANE GRIMES questioned that the relationship was between employees and employers. He wanted to know if that was the intent rather than partners or contractees. **Mr. Lambert**

said looking at the bill, it could be argued that it was property intrusted to the person. Under those circumstances, the attorney could pick the statute that said the thief purposely or knowingly obtained or exerted unauthorized control over property of the owner and not rely on embezzlement. There were two different approaches to cover theft of partnership property.

VICE CHAIRMAN GRIMES looked at theft of another versus theft of property in this section of code and wondered if amending anything in was necessary. **Mr. Lambert** said he would be willing to be present during the executive session.

VICE CHAIRMAN GRIMES questioned the amendment. He understood the arguments for having the threshold, but if someone was embezzling and were at $8000, he wondered if the owner could be tempted to wait longer for the threshold to be met. **REP. DAVIES** said in his own case, it took two months to find what had happened. The books were complex enough to not allow for an accurate dollar figure. He felt the scenario was an unlikely situation. He also believed the response would be to make it stop, not to prolong it. In his case, once he began going through the books, the embezzler stole another $11,000. He felt that the nature of the crime was complicated enough to make the scenario unlikely.

Closing by Sponsor:

REP. DAVIES closed on HB 201. He noted that these criminals were considered non-violent and they walked. However, because the amounts were so great, it was justified to have an enhanced penalty in the statute. In many cases, it would prove to be a good deterrent. Often times, a jail sentence would be devastating to them. He said **SEN. HALLIGAN** agreed to carry the bill if it came out.

HEARING ON HB 359

Sponsor: **REP. PAUL CLARK, HD 72, TROUT CREEK**

Proponents: **Michelle Griffin, Montana State Crime Lab**
Winnie Ore, Department of Corrections
John Connor, Department of Justice

Opponents: **Scott Crichton, Executive Director of American Civil Liberties Union**

Opening Statement by Sponsor:

REP. PAUL CLARK, HD 72, TROUT CREEK, opened on HB 359, a bill intended to expand the DNA database. He said it was not at the

request of the Department of Justice, but a bill that came about from his own research. Information regarding the expansion of the DNA database noted that the database helped solve difficult crimes, especially rape cases. Seven states already had expanded the DNA database to include all felonies. Montana currently had a database that included sex crimes and violent felonies. Further research, including a visit to the crime lab, made him a believer that with additional information, the state could solve more crimes, protect more victims, and save a lot of money (in terms of the costs of investigations). He mentioned the handout: Benefits of Expanding the Criminal DNA database, **EXHIBIT(jus54a06).** He noted that half of all those committing violent crimes had a history of committing non-violent crimes. He felt this spoke to the evolution of criminal activity. It didn't start with committing murder as the first criminal activity. Rather, there was a long history of criminal activity; especially in the areas of rape. He found that between 40 to 50% of rapists had a non-violent criminal history that included burglary. He tried to find out the reason for the correlation. Evidently, frequently, rapes were crimes of opportunity. They could occur because a burglar would enter a house to find the lone occupant was a woman. In that situation, the burglar might not have been caught for a violent felony, and yet he could have been picked up and prosecuted for a number of non-violent or non-sex crimes. Therefore, he would not be entered in the DNA database. It also occurred to him that the opportunist rapist, under current statutes with the five-year statute on limitations for rape, could commit four rapes in 15 years. If the rapist ever did get caught for the fourth one, the person could be prosecuted as a first time offender. Another purpose of the bill was to prevent crimes. According to a National Institute of Justice study, the average rapist committed 8 to 12 sexual assaults. When considering that half of all violent criminals had prior convictions for a non-violent crime, it became evident that expanding DNA requirements to all convicted felons would significantly impact the number and frequency of rapes and other repeat violent crimes in the country. DNA and the database was nothing more than technological fingerprinting, using the abilities of today that were not available 50 years ago. He argued most people accepted fingerprinting as a part of the criminal justice system. DNA fingerprinting was extremely accurate. The third purpose of the bill was to exonerate the innocent. It was not just a bill to ensure more convictions. He noted the number of people on death row exonerated through DNA analysis. Lastly, the purpose of the bill was to decrease the cost of long, tedious, expensive investigations. According to the study by the U.S. Department of Justice, rape was the costliest crime in America. Victim costs totaled $127 billion dollars. He felt the state investigation department would say it was one of the costliest investigations they had to do also. If they did a

rape investigation, but never found the suspect and another rape occurred, then one investigation solved in a timely fashion would justify the entire fiscal note on the bill. He stated a few findings in other parts of the country that reiterated his point about the nature of criminals progressing in severity level of crime. He noted he profoundly supported the rights of victims. This was one of three bills regarding sexual assault passed out of the House Judiciary Committee to address these issues. He pointed out the opponents could argue the intrusive nature of having a database. These were felons who flagrantly disregarded the law. For those who obeyed the law, they had rights to be protected. However, felons were a different story. He also provided two other handouts: DNA Testing Aids the Search for Truth article, **EXHIBIT(jus54a07)**; and a proposed amendment to HB 359, **EXHIBIT(jus54a08)**.

Proponents' Testimony:

Michelle Griffin, Montana State Crime Lab, said as a DNA analyst, her duties were to examine physical evidence for the presence of biological fluid, then determine who that biological fluid came from through DNA analysis. The database was useful because many cases lacked a suspect. If a DNA profile matched a convicted offender's DNA profile (a hit), then the lab could assist investigators in their cases. She said there were about 2100 samples in the convicted offenders database. Basically, the DNA profile was put into a secured computer system database. The system was connected to the FBI database. The paperwork and everything followed their requirements in order for the system to go nationwide. However, Montana was not connected nationally, but she anticipated connection to it this spring. Trends of other states who had lessor offenses included on the databases had provided encouraging results. Many hits that other states received were for individuals with lessor charges. The evidentiary samples had a high rate of matching individuals with lessor offenses. The State Crime Lab supported the bill because of the positive results from the other states.

Winnie Ore, Department of Corrections, said she represented Director Bill Slaughter. The Department of Corrections supported the bill and urged passage.

John Connor, Department of Justice, said the Department discussed pursuing this same issue, but relating only to burglary. In deference to **REP. CLARK's** bill, they felt this bill made more sense, so they withdrew their request. They felt it could carry out the functions that the bill provided for without any additional cost to the department. It would also utilize existing

personnel. He noted that **Ms. Griffith** would be the one to answer any questions related to the details.

Opponents' Testimony:

Scott Crichton, Executive Director of the American Civil Liberties Union, acknowledged he understood **REP. CLARK's** statement about people objecting to databases. He didn't have a problem with adults being included, it did help prosecutors. However, he was concerned with section 2, which dealt with youth. He reminded the committee that there were two different systems; adult and juvenile. The juvenile system had a predicate that people changed and the indiscretions of youth were often remedied with maturity. Hence, the expungement of juvenile records at the age of 18. He wanted to know the advantage of taking a DNA sample from a juvenile and putting it into the database from which it would have to be retracted. He urged consideration of the implications for juveniles. He noted that the House Judiciary committee did not discuss this portion of the bill, so it should be reviewed. As far as he could tell, 41-5-1502 was the due process of the youth court, but it was not broader than that. Therefore, a youth writing a bad check could be required to provide a DNA sample.

Questions from Committee Members and Responses:

SEN. RIC HOLDEN said that prior concerns of the committee dealt with the D.U.I. issue as it related to a felony offense and also the collection of the data on a county basis and its impact to the counties. He asked how the legislation would affect D.U.I. convictions and the felonies. Also check writing felonies. **John Connor, Department of Justice**, clarified the question saying the bill dealt only with felony offenses. Therefore, if it were a D.U.I. felony conviction, then the legislation would apply. The process by which samples were collected used an oral swab. It was a simple process accomplished using materials provided by the Crime Lab to local law enforcement. County involvement would be to mail the swab back to the lab. The cost would be something attributable to personnel costs in terms of taking the swab. He felt that would be negligible.

SEN. HOLDEN thought the ACLU brought up good points with regard to a person's privacy in some instances. The ACLU also was correct year's ago when the procedure was first started. He was cautious as to how far it should be taken. At the time, good public policy legislation was passed putting DNA databases into place. However, now it went further. He wanted an opinion regarding putting someone's DNA on record who had written a bad check. **Mr. Connor** said he subscribed to the point **REP. CLARK** made

about non-violent offenders maturing into violent ones. He said he had spent 25 years in the criminal justice system as a public defender and as a prosecutor. In that time, he witnessed people who engaged in crime mature from non-violent offenders into violent ones. He felt it made more practical sense that if a database existed, then it ought to cover all felony offenders because it was as much an advantage to the innocent as it was to the guilty. If the database was partial, then it didn't help the innocent any more than it helped to convict the guilty. Something that went across the board provided protection for the innocent as well as the guilty. He thought the ACLU had a good point in respect to the juvenile offenders. When he asked **Ms. Griffin** about that, she indicated the lab might have some problem dealing with the expungement of juvenile records. If **REP. CLARK** had no objections to removing that part of the bill, the Department of Justice wouldn't object either.

{Tape : 2; Side : B}

SEN. JERRY O'NEIL questioned when a youth's felony conviction was expunged from their record at 18, but their DNA was still in the database, would anyone be able to tell anything about the person other than their identity. Would someone know what the person was charged with? **Mr. Connor** thought the bill in section 4 addressed that kind of situation. When a juvenile committed a crime if committed by an adult would be a felony, then the juvenile was prosecuted by a delinquency petition that alleged it would be a felony. Under the bill as written, the DNA sample would be taken. When the youth turned 18, then the bill provided for the expungement of that record.

SEN. O'NEIL furthered if the bill didn't expunge the DNA sample, but the record was expunged, would anyone be able to tell from the DNA database what the felony was. **Mr. Connor** replied the database only provided the DNA profile. The only thing the database could be used for would be to compare the DNA profile against evidence that was developed in another crime. The evidence alone would not disclose a person's criminal history.

SEN. O'NEIL questioned if the database itself would indicate the person had ever been convicted of any crime. Were there other people in the DNA database other than felons. **Mr. Connor** said no, not in Montana.

SEN. O'NEIL clarified if the conviction couldn't be determined or if there were no others besides felons in the database. He re-referred to the DNA analyst from the Crime Lab. **Michelle Griffin, Montana State Crime Lab**, said it couldn't be determined if the person was convicted of a crime. The database included a person's

name, social security number, a DNA identifying number, and the agency that the person's sample came from. That was the only information kept regarding the individual of the sample. When evidentiary samples were run against the people in the database, the Crime Lab contacted the department in charge of the evidentiary sample as to a possible suspect. She clarified there was a Montana suspect database and that was used for Montana only. It was based on people who were not convicted, but were suspects or charged.

SEN. O'NEIL questioned if it was a Montana suspect DNA database, or a Montana suspect database that did not include DNA. **Ms. Griffin** replied it was a DNA database for Montana suspects. There were two other databases; 1) missing person's, 2) convicted offender database connected with the FBI. The Montana database was the state's only. The Lab could run evidentiary samples against that database.

VICE CHAIRMAN DUANE GRIMES asked the sponsor to respond to the opponents concerns over the lower-end felonies in youth and the implications of that. **REP. CLARK** said he was approached by the ACLU regarding the juvenile issue that morning. He felt the juvenile issue was a policy decision. Frankly, he didn't realize it could also be a technical problem for the crime lab to expunge the records and possibly require a lot of time on their part. Therefore, if the committee considered the issue and concluded it would be better to leave juveniles out of it, he would not oppose that and would concur with the amendment.

VICE CHAIRMAN GRIMES furthered if he would intend for the sexual offense or violent youth to be included or excluded. **REP. CLARK** replied he subscribed to **Mr. Connor's** theory that if a violent youth was involved in sexual assault or rape and other violent crimes, the chances of that continuing were greater than for a youth with no history of violent crime. He said he worked to rehabilitate kids and with chemically dependent kids. However, he did not work with very many violent offenders. He argued it did not help society or the state to say, "these are just kids". He said compassion and positive rehabilitative efforts on the part of juveniles needed to be exercised while at the same time, enabling could not occur. He hoped that juveniles would know that this information was taken, just like a fingerprint, and they would think about that before they continued on their crime spree.

VICE CHAIRMAN GRIMES questioned the amendment, **exhibit (8)**. **REP. CLARK** said it came from the department of Justice. He concurred with the amendment. He believed in cutting costs. The fiscal note covered the cost of the kits and their

administration. There was an earlier fiscal note that had the Department of Corrections money involved. In support of the bill, they withdrew their fiscal need. They would absorb it into their budget. The fiscal note was not based on the amendment. If the amendment was adopted, he intended to decrease the fiscal note even further.

VICE CHAIRMAN GRIMES asked if **Mr. Connor** had seen the amendment. **Mr. Connor** said no because **Ms. Bucy** prepared it. He felt he could provide some history and why it was proposed. There were a couple of large agency law enforcement offices that were concerned with the amount of time it would take officers to collect, package, and send in the samples. They felt that even though it was not a cost factor in terms of the actual material involved, it would be a personnel cost factor. Therefore, in deference to their concerns, the Department of Justice prepared the amendment.

VICE CHAIRMAN GRIMES asked if the funds would then be considered earmarked. He also asked if it was Constitutional to charge fees. **Mr. Connor** said the amendment was prepared from existing statutory language relating to sex offenders.

Closing by Sponsor:

REP. CLARK closed on HB 359. He said it was a policy decision in terms of adults and a separate policy issue in relation to juveniles. He felt the legislation was cost effective, saving the state money. He mentioned it passed the House Judiciary unanimously with only two opposing votes on the House Floor. He felt it had broad support. In regard to the question of the degree of the felony, i.e. cashing a bad check, he argued that low risk people were put on record with their fingerprints, and were not differentiated between high and low risk. He said it was only one step further than fingerprinting and more conclusive. He said the amendment would further reduce the cost to local communities. It would be well worth the money spent.

EXECUTIVE ACTION ON HB 331

SEN. STEVE DOHERTY said looking at **SEN. HALLIGAN's** point, if "financial or medical information" was added to the end of line 13, it would address that concern.

VICE CHAIRMAN DUANE GRIMES said **Valencia Lane, Legislative Staffer,** had already drawn one up that had almost that exact language in the same place.

Motion: **SEN. DOHERTY** moved that **HB 331 BE AMENDED TO INCLUDE "FINANCIAL" AT THE BEGINNING OF LINE 14.**

Discussion: None

Vote: Motion **to adopt amendment carried 8-0, SEN. LORENTS GROSFIELD** excused.

Motion: SEN. DOHERTY moved that **HB 331 BE CONCURRED IN AS AMENDED.**

Discussion:

VICE CHAIRMAN GRIMES noted that this had other implications for issues in the Judiciary committee. He hoped they would get an idea of how frequent it was.

Vote: Motion that **HB 331 be concurred in carried 8-0, SEN. GROSFIELD** excused. **SEN. DOHERTY** would carry the bill on the Senate Floor.

EXECUTIVE ACTION ON HB 402

Motion/Vote: SEN. GRIMES moved **HB 402 be removed from the table. Motion carried 8-0.**

Motion/Vote: SEN. HALLIGAN moved that **HB 402 BE CONCURRED IN. Motion carried 8-0, SEN. GROSFIELD** excused. **SEN. DUANE GRIMES** would carry the bill on the Senate Floor.

EXECUTIVE ACTION ON HB 201

Motion: SEN. HALLIGAN moved that **AMENDMENT HB020101.AVL, EXHIBIT (5), BE ADOPTED.**

Discussion:

SEN. MIKE HALLIGAN said there could be an adjustment to the amendment.

Valencia Lane, Legislative Staffer, said the County Attorney from Gallatin County was concerned about the last sentence of the amendment. She wasn't clear whether that sentence should be deleted or whether he wanted it amended.

SEN. RIC HOLDEN said it was clear to him that he wanted the word, "must" changed to the word, "may". The sponsor wanted the word, "must" changed to the word, "shall". It would be the committee's discretion to determine the wording. He supported the amendment but wanted the word changed to "may".

SEN. HALLIGAN agreed with that. He was wondering the validity of that sentence. The Court, under existing law, would have that ability. It would be redundant.

SEN. HOLDEN felt it did set it out by keeping it in. He wanted to keep the last sentence.

VICE CHAIRMAN DUANE GRIMES asked **SEN. HALLIGAN** to clarify his amendment in regard to the last line.

SEN. HALLIGAN agreed that "must" should be struck and the word, "may" inserted.

SEN. JERRY O'NEIL said he liked the amendment, but it was getting close to putting someone in jail for failure to pay a debt. It was against the Constitution. Changing it to "may" probably absolved the committee of that problem.

VICE CHAIRMAN GRIMES informed the committee that **Mr. Connor** mentioned to him that they were a little off-base in calling a mandatory minimum. There were other statutes that allowed this to be deferred or waived by the courts. It was not an absolute minimum.

SEN. O'NEIL questioned if the word remained "must", then changing the language was not needed.

VICE CHAIRMAN GRIMES said the word needed to be changed anyway, but in regard to the paragraph in its entirety, there was other discretion in regard to other penalties. The last line still needed to be changed.

Vote: Motion to **adopt HB 201 amendment carried 8-0, SEN. GROSFIELD** excused.

Motion: **SEN. HALLIGAN** moved that **HB 201 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. HALLIGAN addressed the concern that this was getting close to putting someone in jail for a debt. He argued the person had committed a crime, and there was a huge difference between someone owing a debt and someone who had stolen something to get into the criminal system. They were then required to pay the price for the crime.

VICE CHAIRMAN GRIMES was concerned that contract employees or contractees would also be included with the additional language.

However, he didn't know that the bill covered the situation of a partnership. In Montana there were many people working together, but not within a strict employer/employee relationship. He asked for clarification.

{Tape : 3; Side : A}

SEN. STEVE DOHERTY said words in line 18 covered that. If partnership agreements were written, then they would be covered. Even if a written partnership agreement did not exist, he thought the standard would be unauthorized control. If one of the partners decided to take the money, then it would be unauthorized control over the funds even though they had a right to those partnership funds. He thought it would cover the question when individuals had a right to funds, but taking all the funds in violation of the partnership agreement, even if not in writing, would subject them to this law and these punishments.

VICE CHAIRMAN GRIMES withdrew his suggestion.

SEN. O'NEIL questioned amending part (a) on line 18 to include "the owner" instead of "the employer", or even to include "the owner or the employer".

VICE CHAIRMAN GRIMES said by putting "owner" in, it got into other areas and could present technical problems.

SEN. HALLIGAN said they were wanting to tie the embezzlement directly to an employer. If "owner" was used, then it got into the scenario of neighbors borrowing goods and not returning them. It returned to the theft statutes, which were already covered. He argued they did not want to get into the "owner" stuff because it went way beyond embezzlement.

VICE CHAIRMAN GRIMES said it was an intriguing idea, but not for this bill. He said they looked up "property", but it was very broad.

SEN. HALLIGAN said the definition of property included real (personal) property as well as intangible property.

SEN. O'NEIL asked if putting another clause regarding intangible property of the owner would eliminate the neighbor's tricycle or lawnmower.

SEN. HALLIGAN replied the whole intent of the bill was to deal with embezzlement, so "owner" was just too broad. The employer relationship was needed because it involved trusting another

person and that's why the penalties were so extreme. "Owner" took it beyond embezzlement.

SEN. O'NEIL asked if embezzlement by its nature involved intangible property rather than tangible property.

SEN. HALLIGAN said it wasn't necessarily the case in terms of the definition, but yes. He argued the definition was broad enough to include real property.

VICE CHAIRMAN GRIMES said he looked up the definition to make sure it included the word, "money", and it did.

Vote: Motion that **HB 201 be concurred in as amended carried 8-0, SEN. GROSFIELD excused. SEN. HALLIGAN** would carry the bill on the Senate Floor.

EXECUTIVE ACTION ON HB 224

Motion: **SEN. HALLIGAN** moved **AMENDMENTS HB022406.AVL, EXHIBIT(jus54a09).**

Discussion:

SEN. HALLIGAN said number 4 of the amendments struck sections 1-3 in entirety. Therefore, nothing was in the bill except section 4. The part left in the bill stated it was discretionary for the facilities to include this program in addition to other programs. He asked **Dave Ohler** what a structured program between incarcerated parents and their children meant. **Mr. Ohler** responded that the facility could structure it (set it up) as to who would qualify to participate in the program. If the inmate didn't qualify, then they might not be able to have as much access to their children. He said some restrictions, such as a sexual offender not allowed to participate, were still left in the bill. It also put age limits on the child. It was totally discretionary and did not touch the rights of inmates.

SEN. JERRY O'NEIL asked if the prison already had this right under existing law.

SEN. HALLIGAN said the prisons did already have this right. However, this bill recognized the prison's awareness of the importance of family support structures in rehabilitating inmates. It encouraged them to look outside the box to put this type of program together when they did it. It established that the legislature was interested in having facilities do these programs. It provided a nudge.

SEN. RIC HOLDEN supported the amendment, but in no way supported the bill. He maintained his objections that there was no doubt that the ACLU would demand equality for both sexes, and if these programs were not provided for both sexes, they would sue. Therefore, the regional programs would have to do this. He argued it was not a good bill to advance.

Vote: Motion to **adopt amendments to HB 224 carried 8-0, SEN. LORENTS GROSFIELD** excused.

Motion: **SEN. HALLIGAN** moved that **HB 224 BE CONCURRED IN AS AMENDED.**

Discussion:

VICE CHAIRMAN GRIMES questioned that since it was so discretionary, if the facility did have a structured program, would it mean that all other facilities needed to have one too?

SEN. HALLIGAN replied the ACLU could sue with or without this bill, if women were being treated differently than men. There wouldn't be a rational basis for that because families were important to both. It would provide an impetus to develop programs that fit the need. Since the facilities were privately contracted and privately owned, they wouldn't be able to tell them what to do. Facilities could provide guidelines and the policies they used to another facility. The purpose of regional facilities was to ensure inmates had closer contact with families and could get out sooner to return to work to pay taxes. He didn't feel they would be forced onto regional prisons because they were separate from the Women's facility.

Substitute Motion: **SEN. O'NEIL** made a substitute motion **TO AMEND HB 224** to clarify it applied to those inmates who were likely to be the custodial parent after release.

Discussion:

SEN. O'NEIL said the purpose of his amendment was to avoid giving a right to someone who was not going to be a parent after release from prison.

VICE CHAIRMAN GRIMES asked if **Ms. Lane** had a structure for that amendment.

Valencia Lane, Legislative Staffer, said the language of this proposed amendment could be found in the original bill on lines 15 and 16. In order to make things clear, the committee did amend the bill, but it wasn't signed. Therefore, those amendments

should be removed because they didn't apply with the current amendments.

SEN. HALLIGAN clarified that the intent was to exclude most men from this family integration program.

SEN. O'NEIL replied his intent was to exclude most parents who were not going to be the primary custodial parent of a child after they got out of prison.

SEN. HALLIGAN said in many cases divorce was served to the person incarcerated, and therefore most likely would not be determined to be the residential care-giving parent under any circumstances. He argued there would not be an order in place for a judge to file something while the person was incarcerated. He didn't think it would work for 90% of the men in prison.

SEN. O'NEIL said it wouldn't work for 90% of the men there and he didn't want it to. He wanted it to work for the children who would be parented by these parents getting out of prison.

SEN. HOLDEN said language like that was critical to the bill because without it, it was setting up an avenue for someone else to sue the state. He said inmates dreamt this sort of thing up every day and provided the example of the temperature of a toilet seat lawsuit from 1995. He said an incarcerated person could see that the legislature said the person was entitled to some sort of structured programming with children. He said that person may never have custody of the child, but the bill allowed the person to sue. He said this language was needed and **SEN. GROSFIELD** had addressed it also. He argued they needed to address only the parents who had an opportunity for any custodial right of the child after release to participate in any structured program.

SEN. HALLIGAN didn't know how the language would work. He argued there would be no court order that would say what the amendment called for. Therefore, the amendment automatically excluded everyone from the program. He said it was completely arbitrary to have the facility counselor determine the matter.

SEN. O'NEIL asked if **SEN. HALLIGAN** had any other way to determine who would be the custodial parent after release.

SEN. HALLIGAN replied no and that's why a structured program allowed the facility to look at eligible candidates.

SEN. O'NEIL asked who were "they".

SEN. HALLIGAN clarified it was the prison counselors who knew who was in "good time", who was working well with the prison, and they observed the inmates currently to see who was eligible for the parenting skills programs.

SEN. O'NEIL said he was amenable to changing it to prison counselors rather than a court.

Ms. Lane offered that the language on lines 15 and 16 including an amendment that the committee previously attached could be put into the bill on line 13. To clarify who would make the determination, it could say "as determined by. . . "

SEN. O'NEIL said that was fine, but questioned a missing phrase.

Ms. Lane clarified where it would begin and where it would end.

SEN. O'NEIL suggested they say, "as determined by the prison counselors" to clarify who would determine it.

Ms. Lane said there had to be a phrase currently in statute that she could use.

VICE CHAIRMAN GRIMES liked some concepts, but felt time was needed to look at it more closely.

SEN. HOLDEN acknowledged **SEN. HALLIGAN's** argument and said that was just the point; judges would not give those people custodial rights because they were not good role models. However, by putting the bill into statute, it provided inmates another means to sue the state.

VICE CHAIRMAN GRIMES asked **Ms. Lane** to summarize the concept amendment.

Ms. Lane said the sentence would read, "in addition to any other inmate program operated at a state prison, the Department of Corrections may conduct a prison families integration program for any inmate who was a parent of a young child and was the custodial care-giving parent of the young child before incarceration and was likely to be the custodial care-giving parent of the young child after incarceration, as determined by . . . (the managers of the institution). She would find the proper words for the managers part.

Vote: Motion to **adopt SEN. O'NEIL's amendment carried 7-1 with Halligan voting no.**

Substitute Motion/Vote: **SEN. HOLDEN** made a substitute motion that **HB 224 BE TABLED. Substitute motion failed 4-4 with Bishop, Holden, McNutt, and Grimes voting aye.**

VICE CHAIRMAN GRIMES said they would hold the vote open for **SEN. GROSFIELD's** vote.

ADJOURNMENT

Adjournment: 11:20 A.M.

_____
SEN. DUANE GRIMES, Vice Chairman

_____
ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus54aad)