MINUTES OF THE JUDICIARY COMMITTEE
February 8, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown at 7:05 a.m. in room 224A of the capitol building, Helena, Montana. All members were present as was Brenda Desmond, Staff Attorney for the Legislative Council.

EXECUTIVE SESSION

HOUSE BILL 398

REPRESENTATIVE JENSEN moved that this bill be TABLED. The motion was seconded by REPRESENTATIVE ADDY.

This bill provides that a voluntary intoxication or drugged condition is not a defense to any criminal offense and it also clarifies the test for responsibility for conduct.

The motion carried unanimously.

HOUSE BILL 516

This bill provides for county attorney reports to the attorney general on cases involving declined prosecutions or the exclusionary rule; and to provide for an attorney general newsletter on the subject to be sent to county and city attorneys, sheriffs, and police chiefs.

REPRESENTATIVE ADDY moved that this bill DO PASS. REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE ADDY moved that the bill be amended in the title on line 6, by striking "or" and after "exclusionary rule" insert "search and seizure cases", and on line 15, page 1, after "declined" insert "due to the applicability of the exclusionary rule in search and seizure cases", and on page 1, line 17, after "evidence" insert "in search and seizure cases". REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE EUDAILY asked how much time are they going to have the county attorneys spend on this.

REPRESENTATIVE ADDY thought the prosecutors have a pretty good idea where the exlusionary rule applies so he doesn't think there is going to be a lot of time involved and it should only take fifteen minutes to a half hour to write up a summary.

The motion to amend passed with all voting yes except for REPRESENTATIVE EUDAILY.

REPRESENTATIVE ADDY moved that the bill DO PASS AS AMENDED. The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE CURTISS commented that she knows that there has been instances where this has been abused and there is a need to come to grips with this thing, but they have to know what this is going to cost and she felt they are laying a responsibility on the counties and then not giving them money to fund it.

REPRESENTATIVE KEYSER indicated that there was one county attorney in his county with only one staff person and he is absolutely busy to the hilt all the time and he would like to know what it will cost the counties.

REPRESENTATIVE SPAETH advised that he got in touch with his county attorney, who was concerned about how broad this bill was, but he didn't think it would be a big problem; he feels that the exclusionary rule is not a problem of information and training as opposed to the rule itself; he doesn't like the rule and would support efforts to change it.

REPRESENTATIVE RAMIREZ said that he thought the bill does put a burden on the counties; they possibly could get something written up in a half hour, but he thought that was optimistic. He noted how many things this bill requires them to do and indicated that in Yellowstone County, where they have a lot of exclusionary rule cases brought up an awful lot of time and he felt that it was a lot of busy work for nothing.

REPRESENTATIVE JENSEN commented that he was not sure as to how they know how many exclusionary rule prosecutions are declined or how often they are raised.

REPRESENTATIVE RAMIREZ stated that there were hundreds and hundreds of cases filed in Yellowstone County every year; every conceivable defense is raised; this doesn't say with merit, it just says that it has to be raised.

REPRESENTATIVE BERGENE asked where could she go for some solid information and statistics on the use of the exclusionary rule.

REPRESENTATIVE RAMIREZ replied that the county attorney in his county is an excellent county attorney; he has been here fighting to get rid of the exlusionary rule; he would imagine that he could give her a lot of hard information about this and the problems they have. He indicated that there were some cases where the end result was absolutely ridiculous, which included a person who had a garageful of stolen property and they could not convict him because of the exclusionary rule; Harold Hanser could give her some solid information about why he doesn't support the exclusionary rule.

REPRESENTATIVE JENSEN said that he would argue that that was the reason that person's conviction was overturned as there was some difficulty in the search and seizure.

REPRESENTATIVE KEYSER contended that he had more experince than anybody in here with the exclusionary rule and in most instances, an exclusionary rule of one type or another is used by the defense; it is raised because it is a good defense and defense attorneys use it all the time in criminal cases.

REPRESENTATIVE SPAETH moved to amend this bill on page 1, line 16, following "was" by inserting "successfully" and on page 2, line 2 between the words, "the" and "raising", insert "successfully". He indicated that this would definitely cut down the number of cases that this would apply to. REPRESENTATIVE KEYSER seconded the motion.

REPRESENTATIVE RAMIREZ declared that then they would get a distorted view for then you are only taking one part of a problem and gathering statistics for one side and it is going to be one-sided statistics.

REPRESENTATIVE ADDY thought that all the times that the defense is raised and overruled is not what this bill is trying to get at - it is trying to get at what kind of an obstacle is being used. He advised that he only raised the exclusionary rule once and that was in a small malpractice case.

REPRESENTATIVE FARRIS asked what other times besides search and seizure is the exclusionary rule raised.

REPRESENTATIVE KEYSER replied that it mainly is in the confession area - statements and evidence gathered.

A vote was taken on the motion and the motion carried with REPRESENTATIVE RAMIREZ, REPRESENTATIVE CURTISS and REPRESENTATIVE IVERSON voting no.

REPRESENTATIVE ADDY moved that the bill DO PASS AS AMENDED. The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE ADDY said that they need to come to grips with the exclusionary rules (he agrees with that); there are ways that you can replace the rule and still protect the constitutional rights of the innocent; unless they know the magnitude of the problem, they are refusing to come to grips with the problem; if the county attorneys devote one-half hour as to how the exclusionary rule is used, in the end, it will be less work rather than more; and if they want to do one last thing that will survive a constitutional challenge, this is it.

REPRESENTATIVE KEYSER noted that in testimony offered, there were two large studies made on this in other states; both these studies came to basically opposite points of view; and he can see us having the same thing happen. He explained that law enforcement people have to go through training right now and they do discuss the exclusionary rule.

A vote was taken on the DO PASS AS AMENDED motion and it failed with 10 voting no and 8 voting yes. See ROLL CALL VOTE.

REPRESENTATIVE ADDY moved that the vote be reversed. The motion was seconded by REPRESENTATIVE KEYSER. The motion carried unanimously.

HOUSE BILL 555

This bill is referred to as "The Montana Criminal Justice Assistance Act" and provides assistance to state and local agencies for the furtherance and improvement of local law enforcement, courts, criminal prosecution and defense, and adult and juvenile corrections and rehabilitation; and providing that a surcharge be imposed on persons convicted of criminal offenses or forfeiting bond or bail to fund the program.

REPRESENTATIVE DARKO moved that this bill DO PASS. The motion was seconded by REPRESENTATIVE KEYSER.

REPRESENTATIVE JENSEN made a substitute motion that this bill DO NOT PASS. REPRESENTATIVE VELEBER seconded the motion.

REPRESENTATIVE KEYSER moved that they adopt both sets of amendments. See EXHIBIT A and EXHIBIT B. REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE CURTISS asked Mr. Turcott how he felt about the amendments. MR. TURCOTT responded that they do not have a problem with the amendments.

The motion carried unanimously.

REPRESENTATIVE JENSEN commented that if one group gets their hands on a surcharge, it seems to him that it will prompt others to do the same thing and he thought that there would be a problem as there is no relationship to the crime. He felt the philosophy of this bill is wrong.

REPRESENTATIVE CURTISS indicated that they already have training that is working and if they don't pass this bill, it might jeopardize this training.

REPRESENTATIVE JENSEN stated that he agreed with Represenative Curtiss and the training for judges not only occurs within the state, it also occurs outside the state and he advised that the American Bar Association in Reno has a college for judges.

REPRESENTATIVE IVERSON stated that this is crazy - the whole thing creates an incentive to charge higher fees and he thought they should quit talking about it and kill it.

A vote was taken on the DO NOT PASS motion and the motion carried with REPRESENTATIVE DAILY, REPRESENTATIVE ADDY and REPRESENTATIVE DAVE BROWN voting no.

HOUSE BILL 546

This bill provides for the granting of parole by the board of pardons if the population at the Montana State Prison or the Women's Correction Center exceeds design capacity for more than 30 days.

REPRESENTATIVE DAILY moved that this bill DO NOT PASS. The motion was seconded by REPRESENTATIVE RAMIREZ.

REPRESENTATIVE ADDY moved the adoption of the amendments. See EXHIBIT C. REPRESENTATIVE DARKO seconded the motion. REPRESENTATIVE ADDY added to his motion the adoption of a severability clause.

The motion carried unanimously.

REPRESENTATIVE ADDY stated that there is a problem there and they have to face these problems.

REPRESENTATIVE SPAETH commented that the facility only holds so many; when it is full, they have to let some out or quit putting them in; and this puts more pressure on the judges to not put more people in.

REPRESENTATIVE DAILY said that this doesn't mean that anyone would get parole earlier; there are other means to deal with this problem; there are some modular-type jails that could be used for a year or two until they get the prison built; there are other means and they do have contingency plans.

REPRESENTATIVE RAMIREZ contended that this was a nice, easy way out; we shouldn't take an easy way out and the public doesn't want us to take an easy way out and he felt it was a dangerous precedent - let's not build another prison, let's just let people out.

REPRESENTATIVE BERGENE asserted that she just couldn't agree with that; she didn't feel that it was an easy way out at all; she thinks it is something they have to do; and she asked where are the contingency plans and who is going to fund them.

REPRESENTATIVE RAMIREZ said that he knew how Representative Bergene felt about prerelease centers and this takes some of the emphasis away from creating prerelease centers.

REPRESENTATIVE BERGENE responded that they shouldn't get mixed up about how she feels about prerelease centers and how she feels about this; even if there were prerelease centers, they would not be able to relieve this problem that readily; and she thought they would be more anxious to get prerelease centers and she did not see what else they had left.

REPRESENTATIVE SPAETH said that he would have to agree; this is only a two-year bill and it chops off in 1985.

REPRESENTATIVE KEYSER said that if they think this is only going to be a two-year bill, they are just whistling and once you get this concept in motion, you are going to have problems.

REPRESENTATIVE FARRIS said that if the public is offended by this bill and upset by it, they will have to realize that if they want to lock people up and keep them there year after year, they are going to have to take the responsibility of funding these prisons. He contended that the public's response to a new jail in Great Falls was that any hole in the ground would do.

A vote was taken on the DO NOT PASS AS AMENDED and it failed with 11 voting no and 7 voting yes.

REPRESENTATIVE KEYSER moved that they reverse the vote. The motion carried unanimously.

HEARING SESSION

HOUSE BILL 586

REPRESENTATIVE HANNAH, District 67, Billings, said that this bill is the result of an interim study which was done by the task force on corrections and would require the removal of a justice or a judge who fails to impose a criminal sentence in the manner prescribed by law.

There were no proponents and no opponents.

REPRESENTATIVE ADDY noted that this is a constitutional amendment and would require a 2/3 vote of each house. REPRESENTATIVE KEYSER indicated that it would be a 2/3 vote total.

REPRESENTATIVE EUDAILY asked if this would require a statement of intent. REPRESENTATIVE HANNAH responded that he did not know about that, but he would find out.

REPRESENTATIVE JENSEN asked if he had talked with any of the members of the judicial standards commission about this bill. REPRESENTATIVE HANNAH replied that he had not; but he spoke to some of the members of the interim committee that also dealt with that.

REPRESENTATIVE JENSEN asked if he was familiar with a bill that is in the Senate that broadens their authority to discipline judges. REPRESENTATIVE HANNAH answered that there are always bills in the Senate, but he did not know of this one specifically.

REPRESENTATIVE DAILY asked if he knew of any specific instances wherein a judge did not impose a sentence as was required. REPRESENTATIVE HANNAH explained that neither one of the judges who were to appear on behalf of this bill were able to be here today; but the problems deal primarily with things like sentences imposed for convictions when a person is using a dangerous weapon. He informed the committee that he could get the facts to them later.

REPRESENTATIVE KEYSER felt that judges probably shouldn't be treated any differently than any other citizen; if they don't have the right as legislatures to pass laws (and there are laws already passed) to impose sentences, then something is the matter. He thought judges should be accountable for their actions and judges have a kind of sacred standing in the community.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 583

REPRESENTATIVE HANNAH, District 67, Billings, explained that this was another bill which came about as a result of the task force on corrections and this bill would generally revise sentencing laws. He advised that Representative Keedy successfully carried a similar bill on the House floor last session. He gave a brief overview of what the bill would do.

There were no proponents.

KAREN MIKOTA, representing the Montana League of Women Voters, offered testimony in opposition to this bill. See EXHIBIT D.

CATHY CAMPBELL, representing the Montana Association of Churches, read from a prepared statement. See EXHIBIT E. She also presented to the committee a pamphlet entitled "Corrections". See EXHIBIT F.

MARC RACICOT, Prosecution Coordinator for the County Prosecutor Services of the Department of Justice, gave testimony opposing this bill. He gave an example of a woman in Wolf Point, who was convicted, and under this bill this woman would have been sentenced to 120 years under mandatory sentencing. He stated that the position of the prosecutors is that there is a need for some discretion in sentencing and also a need for some guidelines, but they did not feel that mandatory sentencing was the way to go.

STEVE NARDI, an attorney from Kalispell and representing the Montana Trial Lawyers' Association, said that he strongly opposes this bill; they, in the field know that a young boy who steals cigarettes is not the same as a person who breaks into your bedroom at night. He felt the cost of this would be absolutely astronomical.

GARY OVERFELT, an attorney from Billings, Montana, stated that all circumstances should be considered and he felt that a judge has a better grasp of a situation. He gave a statement in opposition to this bill.

WES KRAWCZYK, representing the American Civil Liberties Union of Montana, testified that they need to speak about their families; the state will have to pay for these welfare payments for these families and he thought this bill is one of vindictive justice.

KARLA GRAY, representing the Montana Trial Lawyers' Association, gave a statement in opposition to this bill.

JEFF RENZ, Billings, and representing the American Civil Liberties Union of Montana, said he opposed this bill and the main thing that is missing is an appropriation measure to provide for the people they are going to be putting away.

CURT CHISHOLM, Deputy Director of the Department of Institutions, stated that he was neither a proponent or an opponent of this bill, but it is their responsibility to advise of what impact this bill will have on their department and he indicated that flat sentencing legislation will have a startling impact on the prison population. He said that this bill would make a sentence 4.1 years longer than what is currently being sentenced and he gave some statistics on the impact on the prison system.

There were no further proponents and no further opponents.

REPRESENTATIVE HANNAH said that there are some good parts to this bill; one of the facts that they need to look at is that there are problems that are not being addressed;

there are a large number of people, who feel that justice is not being served and he felt that there is a very real problem. He asked what happens to the victims in these crimes and he mentioned the five-year-old boy who was starved and beaten in Wolf Point and it wouldn't be fair to put his mother in jail - the mother doesn't say anything and doesn't do anything and allows her boy to be beaten to death; and he felt that the answer is no, justice is not being done.

REPRESENTATIVE KEYSER asked if MR. NARDI felt they should take into consideration the cost factor in sentencing. MR. NARDI responded that when you are considering such a massive change, you do have to consider the cost factor.

REPRESENTATIVE ADDY said that MR. NARDI suggested that they are taking away the discretion of the judges and he asked how does that work. MR. NARDI replied that in mandatory minimum sentences, they are bargaining out such things as drug charges and he stated that they are working quite well quite frankly.

REPRESENTATIVE ADDY asked where does the prosecutor generally get his first information concerning the commission of a offense. MR. NARDI responded that this most often comes from the police officers' files.

There were no further questions and the hearing on this bill was closed.

The committee recessed at 9:04 a.m. and reconvened at 9:23 a.m.

HOUSE BILL 382 (Also HOUSE BILL 381 and HOUSE BILL 478)

CHAIRMAN BROWN advised the proponents and opponents of this bill that they would welcome comments on HB 382 and HB 478, which also pertains to the exclusionary rule, at this time.

REPRESENTATIVE HANNAH, District 67, Billings, stated that he was offering three different proposals to solve the

problems associated with the exclusionary rule and they have three pieces of legislation before them. He gave an explanation of this bill, which provides for civil remedies for violation of a persons' constitutional privacy rights or for search and seizure rights. He informed the committee that last session a similar bill passed the House and the Senate; it was vetoed by the governor; the vote was overridden in the House, but it was defeated in the Senate by one vote.

House Bill 381 provides for the adoption of the exclusionary rule exception of reasonable good faith belief in the legality of a search and seizure and House Bill 478 also provided for adopting the exclusionary rule exception of a reasonable good faith belief in the legality of a search and seizure.

MARC RACICOT, Prosecution Coordinator for the County Prosecutor Services, stated that the prosecutors have been working on this since about 1977; it has been an evolutionary process, which hasn't really culminated until now; they have worked during the interim with Judge Keedy and a professor at the law school in Missoula, the sheriffs and the police officers; they have some proposed amendments and they would support HB 381, which they felt was the best way to address the problem.

JOHN SCULLY, representing the Montana Police Protective Association and the Montana Sheriffs and Peace Officers Association, testified that they feel that some remedies by the police officers would still be unconstitutional and that the police officer becomes the scapegoat of the system. He expanded on this. He stated that they could support HB 381 but would oppose HB 478.

BILL WARE, representing the Montana Chiefs' of Police Association, stated that they would support HB 381 for the same reasons as expressed by Mr. Scully.

There were no further proponents.

REPRESENTATIVE ADDY rose in opposition to HB 382, stating he was vehemently opposed to this bill; they are working on parallel legislation and he would hope they will be able to table this bill. He addressed the rules of procedure and the rules of evidence as they pertained to HB 381.

JEFF RENZ, representing the American Civil Liberties Union and himself, offered testimony in opposition to all three bills. See EXHIBIT F.

KAREN MIKOTA, representing the Montana League of Women Voters, gave a statement opposing HB 382. See EXHIBIT G.

STEVE UNGER, representing the American Civil Liberties Union, presented testimony to the committee opposing HB 381. See EXHIBIT H.

STEVE NARDI, representing the Montana Trial Lawyers' Association and himself, stated that he did not think there was a problem with the exclusionary rule; you read about four or five heinous crimes, but that doesn't create a bad problem. He contended there are bad police officers as there are bad attorneys.

GARY OVERFELT, an attorney from Billings, rose in opposition to both HB 381 and HB 382. See EXHIBIT I.

REPRESENTATIVE SCHYE, District 4, Glasgow, entered into the record a letter he received from Emery E. Brelje, from the Glasgow Police Protective Association, which opposed HB 382. See EXHIBIT J.

REPRESENTATIVE HANNAH said that the principle fault of the exclusionary rule is, as it is presently interpreted, that it also punishes a good faith mistake by an honest, conscientious police officer, whose mistake might be an inadvertent one, which could be a wrong date on an affidavit or an incomplete description of a premises that he searched. He offered to the committee a pamphlet entitled, "Legislative Reform of the Exclusionary Rule: The Good Faith Exception. See EXHIBIT K.

REPRESENTATIVE IVERSON commented that it was suggested by most of the opponents concerning HB 381 that the idea of a reasonable good faith exception would violate the fourth amendment to the constitution, suggesting to him that they think the courts are unable to define what "reasonable" might be. MR. RACICOT replied that what may be "reasonable" to you may not be "reasonable" to anyone else. He cited a case wherein there was some question about the smell of burning marijuana being considered probable cause for a search; and virtually every jurisdiction in the nation says that you can rely upon smell as a probable cause; and the supreme court found that the smell of burning marijuana would not be a justifiable basis for their search. He said they were acting in a good faith belief that their actions were in conformity with existing law.

MR. SCULLY concurred that there will be a reasonable standard adopted in case law and he thought the suggestion that the thing the police officers should do is to go out and forget everything they ever learned is not very reasonable and he did not think it was going to seem reasonable to the court either. He indicated that the issue is before the United States Supreme Court and their feeling is why waste this committee's time in a long drawn out battle over this and he felt they should table HB 382 and HB 478 and get on with their job.

REPRESENTATIVE SPAETH said that since this is primarily going to be decided on constitutional principles of the United States Supreme Court and has already been decided by the Montana Supreme Court as a constitutional principle, he wondered what they could do in this committee as far as passing a statute is concerned. MR. SCULLY said that this is before the United States Supreme Court and let them rule and he felt that they didn't want to end up like they did last year as it was a virtual political row.

REPRESENTATIVE SPAETH asked what happens if the United State Supreme Court decides that the exclusionary rule

is alive and well. MR. SCULLY responded that he would think, if you passed HB 381, the bill would be constitutional.

REPRESENTATIVE SPAETH questioned if they would have to litigate that. MR. SCULLY answered that it was suggested that it would become effective, if it was approved by the Supreme Court.

REPRESENTATIVE ADDY commented that they stated how well-trained a law enforcement official needs to be before they can be said to be acting in reasonable good faith. MR. RACICOT replied that if they do something stupid, who is going to call it reasonable. He contended that they are going to have to come up with a standard as to what is reasonable.

REPRESENTATIVE ADDY said that if the inquiry focuses on what the law was yesterday to determine whether the policeman acted in reasonable good faith or not, he asked how is the fourth amendment going to continue to grow or have any vitality at all; are they not going to cease interpreting that constitutional provision in the light of contemporty events; and won't we ask ourselves what was the law back in 1983 when this law was passed and then neglect our view of any law today. MR. RACICOT responded that he did not believe so; in the first place, the rule is not ofconstitutional dimension; the United States Supreme Court says that and our court says that it is a rule of procedure only; and secondly, our court does that all the time - they say that this has been the rule up to this point in time and they realize the exigency of this situation and, therefore, this is what it is going to be.

REPRESENTATIVE ADDY asked if the defendant knew that the law had never been ruled unconstitutional in the past, what incentive would there ever be for him to raise the question of validity of the statute in the present because he knows that it isn't going to do him any good - it will only help the next guy; in other words, there is no incentive for anybody to raise the constitutional question anymore; they are, in effect, imposing a debt here by the court's unprecedented claim. MR. RACICOT

replied that his view is that there are civil rights and there are constitutional rights and they all have rights - that is why they banded together to begin with; he thought the preamble says something about securing our property so they can all enjoy the prosperity of this land; so they all have civil rights; then they have constitutional rights that apply in certain situations where there is a conflict between government and its people. He continued that, in his view, if your perspective is a total concentration on the constitutional rights alone without balancing it with the civil, then your perspective is going to be that this cannot be raised; and they may be doing a disservice.

REPRESENTATIVE ADDY declared that he does want the constitution to live and grow and have vitality in view of the contemporary life rather than freeze at the 1983 level.

REPRESENTATIVE SPAETH asked what happens if the supreme court rules that there is an exception and that exception is the reasonable good faith rule - do they need HB 381. MR. SCULLY replied that his reaction is that they probably would; he thought they could be more restrictive and uphold the total exclusionary rule and Montana can do so too. He stated that he was not firmly convinced of that, but that would be his reaction.

There were no further questions and the hearing on these bills was closed.

EXECUTIVE SESSION

HOUSE BILL 583

REPRESENTATIVE SEIFERT moved that this bill DO NOT PASS. REPRESENTATIVE IVERSON seconded the motion. The motion carried with REPRESENTATIVE DAILY and REPRESENTATIVE HANNAH voting no. REPRESENTATIVE RAMIREZ indicated that he would like to abstain.

HOUSE BILL 358

REPRESENTATIVE JAN BROWN moved that this bill DO PASS AS AMENDED. REPRESENTATIVE BERGENE seconded the motion.

REPRESENTATIVE JAN BROWN moved the adoption of the amendments. See EXHIBIT L. The motion was seconded by REPRESENTATIVE BERGENE. The motion carried unanimously.

REPRESENTATIVE RAMIREZ moved to amend the bill following line 17, insert a new section which says, "Unlawful discrimination for the purpose of this act includes, but is not limited to availability of insurance, but does not include differences in rates, premiums, or benefits based on gender as a generally recognized and actuarial risk classification." REPRESENTATIVE SEIFERT seconded the motion.

REPRESENTATIVE RAMIREZ explained the intent of his amendment.

REPRESENTATIVE FARRIS said that all of Montana is being discriminated against and there has been an insurance company that has been in existence for about 18 years that offers insurance on an equal basis regardless of sex; and they have done very well. She said she opposed this amendment.

REPRESENTATIVE EUDAILY asked if this insurance company operates in one state.

REPRESENTATIVE FARRIS replied that she understood it is national and she advised that there was also a government employees insurance, which, at one time, was not based on actuary genders but it has been changed.

REPRESENTATIVE EUDAILY indicated that he thought the Ramirez amendment will help the situation; he knows that they are not going to get companies to come in here and change their policies just for Montana; without this amendment, you are asking them to do this and they will pay for it through the nose.

REPRESENTATIVE RAMIREZ indicated that it would impose an undue hardship on these insurance companies if they had an effective date of 1984; they did not get very many hard facts as to what the impact would be; it could cost women a lot of money; they do get breaks now, but on the other hand, they are paying more for pension and annuity types of policies because they live longer than men.

REPRESENTATIVE SPAETH asked about a proposed resolution that was to study insurance in general and he wondered if this would be included in that resolution.

REPRESENTATIVE FARRIS declared that they do not need a resolution - these things have been documented already.

REPRESENTATIVE RAMIREZ asked if the insurance company Representative Farris referred to does business in this state. REPRESENTATIVE FARRIS replied that it is not a very big company, but it has been in existence for almost twenty years. She said that there were about twelve people who spoke in favor of this; look at how many people they represent; they were speaking for their groups and some were national groups; and she contended that the discrimination in insurance is well documented and has a long history - the study does not need to be done - all the information is there.

REPRESENTATIVE BERGENE commented that she thought it would have been looked into a long time ago on a national level if there was an equal rights amendment.

REPRESENTATIVE CURTISS said that she believed that there is a task force working on the national level and this is one of the areas they are looking at.

REPRESENTATIVE ADDY declared that cost is a reason to not change now; and he asked how many times has the argument been used by people that they should pass this law as justice is justice and damn the cost.

REPRESENTATIVE DARKO commented that things will cost them more because they are condoning discrimination.

REPRESENTATIVE JENSEN indicated that he opposed the amendment, but he wanted to address the question of a study; he feels that most resolutions are senseless; they take time and don't mean much and study resolutions don't mean anything; and he thought the amendment would cripple this bill.

REPRESENTATIVE KEYSER stated that he would have to support that amendment; they have had 100 some years of risk classification; they do have differences in groups, differences in sex, differences in age, etc., and the development of actuaries in this is quite a process.

REPRESENTATIVE SPAETH said that he was undecided; he has been in touch with his insurance company and the individual he talked to indicated that they would probably not write very many more policies in the state of Montana because Montana was not a very big market for them; and he did not think it was worth rewriting these in Montana as opposed to writing in other states. He commented that he kind of liked Representative Ramirez's amendment.

REPRESENTATIVE CURTISS asked if this would cost women more based on the information they have.

REPRESENTATIVE FARRIS replied that she believes that it will, for sure, cost women more; even if that wasn't necessary in terms of doing business on gender-based rates, the insurance companies would be very angry and find some way to do it as a punishment.

A vote was taken on the amendment and the amendment failed with 12 voting no and 7 voting yes. See ROLL CALL VOTE.

REPRESENTATIVE JAN BROWN moved that the bill DO PASS AS AMENDED. REPRESENTATIVE BERGENE seconded the motion. The motion passed with 15 voting yes and 4 voting no. See ROLL CALL VOTE.

There being no further business, REPRESENTATIVE KEYSER moved that they adjourn. The time was 11:27 a.m.

Dave Brown
DAVE BROWN, Chairman

Alice Omang
Alice Omang, Secretary

STANDING COMMITTEE REPORT (1 of 2)

February 8, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 516

First reading copy (white color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR COUNTY ATTORNEY REPORTS TO THE ATTORNEY GENERAL ON CASES INVOLVING DECLINED PROSECUTIONS OR THE EXCLUSIONARY RULE; AND TO PROVIDE FOR AN ATTORNEY GENERAL NEWSLETTER ON THE SUBJECT TO BE SENT TO COUNTY AND CITY ATTORNEYS, SHERIFFS, AND POLICE CHIEFS."

Respectfully report as follows: That HOUSE Bill No. 516

BE AMENDED AS FOLLOWS:

1. Title, Following line 5.
Strike: "DECLINED PROSECUTIONS OR"
Insert: "SEARCH AND SEIZURE"

2. Page 1, line 15.
Following: "declined"
Insert: "due to the applicability of the exclusionary rule in search and seizure cases"

3. Page 1, line 16.
Following: "was"
Insert: "successfully"

~~DO PASS~~

DAVE BROWN
Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

HOUSE BILL 516
(2 of 2)

February 9, 19 83

4. Page 1, line 17.
Following: "evidence"
Insert: "in search and seizure cases"

5. Page 1, line 24.
Following: "for"
Insert: "successfully"

6. Page 2, line 2.
Following: "to the"
Insert: "successful"

AND AS AMENDED

DO NOT PASS

Dave Brown,
Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 9, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 555

First reading copy (white)
Color

A BILL FOR AN ACT ENTITLED: "THE MONTANA CRIMINAL JUSTICE ASSISTANCE ACT; PROVIDING ASSISTANCE TO STATE AND LOCAL AGENCIES FOR THE FURTHERANCE AND IMPROVEMENT OF LOCAL LAW ENFORCEMENT, COURTS, CRIMINAL PROSECUTION AND DEFENSE, AND ADULT AND JUVENILE CORRECTIONS AND REHABILITATION; AND PROVIDING THAT A SURCHARGE BE IMPOSED ON PERSONS CONVICTED OF CRIMINAL OFFENSES OR FORFEITING BOND OR BAIL TO FUND THE PROGRAM."

Respectfully report as follows: That HOUSE Bill No. 555

BE AMENDED AS FOLLOWS:

1. Title, line 6.
Following: "ASSISTANCE TO"
Delete: "STATE AND"

2. Page 3, line 2.
Following: "remit"
Strike: line 2 through "court judges" on line 11.
Insert: "90% of the funds collected pursuant to (Section 4) during the preceding quarter to the state treasurer for deposit in the criminal justice assistance fund. A local government may retain 10% of funds collected under (Section 4) and (a) deposit one-half in the local general fund and (b) deposit one-half in a special fund"

AND AS AMENDED
DO NOT PASS
~~DO PASS~~

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 8, 19 33

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 546

First ~~reading copy~~ (white)

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE GRANTING OF PAROLE BY THE BOARD OF PARDONS IF THE POPULATION AT THE MONTANA STATE PRISON OR THE WOMEN'S CORRECTION CENTER EXCEEDS DESIGN CAPACITY FOR MORE THAN 30 DAYS; AMENDING SECTION 46-23-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Respectfully report as follows: That HOUSE Bill No. 546

BE AMENDED AS FOLLOWS:

1. Page 2, line 16.
Following: "its"
Strike: "design"
Insert: "maximum"
Following: "capacity of"
Strike: "545"
Insert: "760"

2. Page 2, line 22.
Following: "parole"
Strike: "180"
Insert: "120"

DO PASS

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

HOUSE BILL 546
(2 of 2)

February 8, 1983

1. Page 2, following line 23.
Insert: "(4) Regardless of length of sentence, if the conditions of parole eligibility are met within the initial 12 months of incarceration at Montana State Prison, the provisions of subsection (3) do not apply.

NEW SECTION: Section 2. Termination date. The provisions enacted in (3) and (4) of Section 1 of this act terminate on July 1, 1985.

NEW SECTION: Section 3. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Renumber subsequent section.

AND AS AMENDED
DO PASS

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 8, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 533

First white

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE SENTENCING LAWS; PROVIDING MANDATORY SENTENCES; AMENDING SECTIONS 45-5-102, 45-5-103, 45-5-105, 45-5-201 THROUGH 45-5-204, 45-5-302, THROUGH 45-5-304, 45-5-401, 45-5-502, 45-5-503, 45-5-505, 45-5-603, 45-5-613, 45-5-621, 45-5-625, 45-6-102, 45-6-103, 45-6-204, 45-9-101, 45-9-103, 46-18-101, 46-18-112, 46-18-201, 46-18-222, AND 46-18-223, MCA; REPEALING SECTIONS 46-18-221 AND 46-18-501 THROUGH 46-18-503, MCA; AND PROVIDING AN EFFECTIVE DATE."

Respectfully report as follows: That HOUSE Bill No. 533

DO NOT PASS

XXXXX

DO PASS

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 8, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 358

First reading copy (White Color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROHIBIT DISCRIMINATION ON THE BASIS OF SEX OR MARITAL STATUS IN THE ISSUANCE OR OPERATION OF INSURANCE POLICIES AND RETIREMENT PLANS."

Respectfully report as follows: That HOUSE Bill No. 358

BE AMENDED AS FOLLOWS:

1. Title, line 7.
Following: "PLANS"
Insert: "; AND PROVIDING AN EFFECTIVE DATE"

2. Page 1, following line 21.
Insert: "Section 3. Effective date. This act is effective July 1, 1984."

AND AS AMENDED

DO PASS

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

	Date: 2/8 No: HB 516 Do Pass As Amended	Date: 2/8 No: HB 546 Do Not Pass As Amended	Date: 2/8 No: HB 358 Ramirez Amendment	Date: 2/8 No: HB 358 Do Pass As Amended	Date No:	Date No:	Date: No:
BROWN, Dave	yes	no	no	yes			
ADDY, Kelly	yes	no	no	yes			
BERGENE, Toni	no	no	no	yes			
BROWN, Jan	no	no	no	yes			
CURTISS, Aubyn	no	yes	yes	no			
DAILY, Fritz	yes	yes	no	yes			
DARKO, Paula	no	no	no	yes			
EUDAILY, Ralph	no	yes	yes	no			
FARRIS, Carol	yes	no	no	yes			
HANNAH, Tom	no	yes	yes	yes			
IVERSON, Dennis	no	yes	yes	yes			
JENSEN, James	yes	no	no	yes			
KENNERLY, Roland	no	no	no	yes			
KEYSER, Kerry	no	yes	yes	no			
RAMIREZ, Jack	no	yes	yes	no			
SCHYE, Ted	yes	no	no	yes			
SEIFERT, Carl	___	___	yes	yes			
SPAETH, Gary	yes	no	no	yes			
VELEBER, Dennis	yes	no	no	yes			
	10-no 8-yes	11-no 7-yes	12-no 7-yes	15-yes 4-no			

Exhibit A
2/8/83

BOARD OF CRIME CONTROL
303 NORTH ROBERTS
SCOTT HART BUILDING
HELENA, MONTANA 59601
TELEPHONE NO. 449-3604

HB555

IN REPLY REFER TO:

Amendment to House Bill 555 to Provide Assistance to Local Agencies for the Furtherance and Improvement of Local Law Enforcement.

Section 5, Page 3, lines 2 through 11, delete. Amend to read as follows:

treasurer shall remit 90% of the funds collected pursuant to (section 4) during the preceding quarter to the state treasurer for deposit in the criminal justice assistance fund. A local government may retain 10% of funds collected under (section 4); and

(a) deposit one-half to the local general fund; and

(b) deposit one-half to a special fund to be used for training lower court judges or other lower court improvements.

BOARD OF CRIME CONTROL
303 NORTH ROBERTS
SCOTT HART BUILDING
HELENA, MONTANA 59601
TELEPHONE NO. 449-3604

Exhibit B
HB555
2/8/83

IN REPLY REFER TO:

Amendment to House Bill 555 to Provide Assistance to Local Agencies for the Furtherance and Improvement of Local Law Enforcement.

Page 1, line 6

Delete the words "State and"

Section 7, Page 4, lines 3 through 12, delete. Amend to read as follows:

(3) fund programs and projects which reflect priorities established by local criminal justice agencies to improve the administration and efficiency of Montana's criminal justice system; and award such grants in a manner that ensures against supplanting of local funds;

Section 7, Page 4, line 13

Change (5) to (4)

Section 7, Page 4, line 18

Change (6) to (5)

WITNESS STATEMENT

Name Mike LAVIN Committee On

Address Helena Date

Representing Crime Comm Support ✓

Bill No. HB 555 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Larry Petersen Committee On Judiciary

Address Helena Date

Representing Mt Board of Crime Contn/ Support ✓

Bill No. H.B. 555 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit C
HB 546
2/8/83

Amendments requested before the House Committee on the Judiciary:

That HB 546, introduced bill, be amended as follows:

1. Page 2, line 16
   After the word "its"
   Strike: "design"
   Insert: "maximum"
   After the words "capacity of"
   Strike: "545"
   Insert "760"

2. Page 2, line 22
   After the words "eligible for parole",
   Strike: "180"
   Insert: "120"

3. Page 2, after line 23
   Insert new subsection: "[4] Regardless of length of sentence, if the conditions of parole eligibility are met within the initial 12 months of incarceration at Montana State Prison, the provisions of subsection [3] do not apply."

4. Page 2, after line 25
   Insert new section: "Section 3. Automatic repealer. The provisions created in subsection [3] and [4] of 46-23-201 MCA and of this act shall automatically be repealed on July 1, 1985."

Exhibit D
HB583
2/8/83

WITNESS STATEMENT

Name KAREN MIKOTA Committee On Judiciary

Address 406 North Ewing Date February 8, 1983

Representing League of Women Voters Support

Bill No. HB 583 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. If I had given each of you a copy of this bill, with blanks where the prescribed sentences now stand and asked you to sit alone, to imagine the crime and to fill in an appropriate sentence no two of our copies would be alike.

2. My images of arson, burglary or assault are unique, as are yours. What I find the most offensive of crimes could be of lesser consequence or greater

3. consequence to you.

Initially the court is placed in the position you were with your blank copy. Without the facts, the circumstance and the date justice does not stand a chance

4. The criminal cannot be appropriately punished and more importantly, the victim cannot be adequately compensated.

The role of the legislature is to hear the facts, review the data and discuss the issues. After intense study votes are taken and laws are made
The role of the judiciary is to hear the facts, to review the data and to discuss the issues. After this intense study a judgment is made and a sentence prescribed

HB 583 makes judgments before the study and therefore cannot insure justice.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL ~~HOUSE BILL 583~~ DATE ~~February 8, 1983~~

SPONSOR REPRESENTATIVE HANNAH

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Karen Mikota	Helena	Montana LWV		X
Steve Nardi	Kalispell	Mont. Trial Lawyers		X
[illegible]	[illegible]	[illegible]		
Cathy Campbell	~~MT. Ass'n Chs~~ Helena	Mt. Assn. Churches		X
Karla Gray		MTLA		X
Wes Kanwagle	Helena	A.C.L.U. of Mt.		X
Jeff Renz	Billings	ACLU		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit E
HB 583
2/8/83

Montana Association of Churches

MONTANA RELIGIOUS LEGISLATIVE COALITION • P.O. Box 1708 • Helena, MT 59601

February 8, 1983

WORKING TOGETHER:

American Baptist Churches of the Northwest

American Lutheran Church Rocky Mountain District

Christian Church (Disciples of Christ) in Montana

Episcopal Church Diocese of Montana

Lutheran Church in America Pacific Northwest Synod

Roman Catholic Diocese of Great Falls

Roman Catholic Diocese of Helena

United Church of Christ Montana Conference

United Presbyterian Church Glacier Presbytery

United Methodist Church Yellowstone Conference

United Presbyterian Church Yellowstone Presbytery

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am Cathy Campbell, of Helena, representing the Montana Association of Churches. I am speaking in opposition to House Bill 583.

We have adopted a Corrections position paper in which we specifically support "a sentencing system which permits judges and others within the justice system latitude and discretion in dealing with individual offenders." The judge traditionally is accepted as one, in a non-biased position, who knows the individual circumstances surrounding each case.

The indivudual circumstances in a case may be extremely important. This bill would restrict the consideration of individual circumstances in dealing with a person convicted of a crime. It would tend to blur the distinction between retribution, which accomplishes no public good, and justice, which we seek.

I hope that you will oppose HB 583.

HB 583
2/8/83 Exhibit F

Montana Religious Legislative Coalition
(M.R.L.C.)
P.O. Box 1708
Helena, Montana 59624

MONTANA ASSOCIATION OF CHURCHES
POSITION - 1981

CORRECTIONS

Other M.A.C. Position Papers:
- Environment and Land Use
- Government - Institutions (Us and Them)
- Tax Exemption
- Victims of Crime Compensation
- Released Time for Religious Education
- Welfare and Financial Support
- Legislating Morality
- M.R.L.C. Introduction and History
- Energy and Environment
- Gambling
- Home Health Care
- Funding of Conciliation Courts
- Pre-marital Counseling for Minors
- Pornography
- Capital Punishment
- Traffic Safety

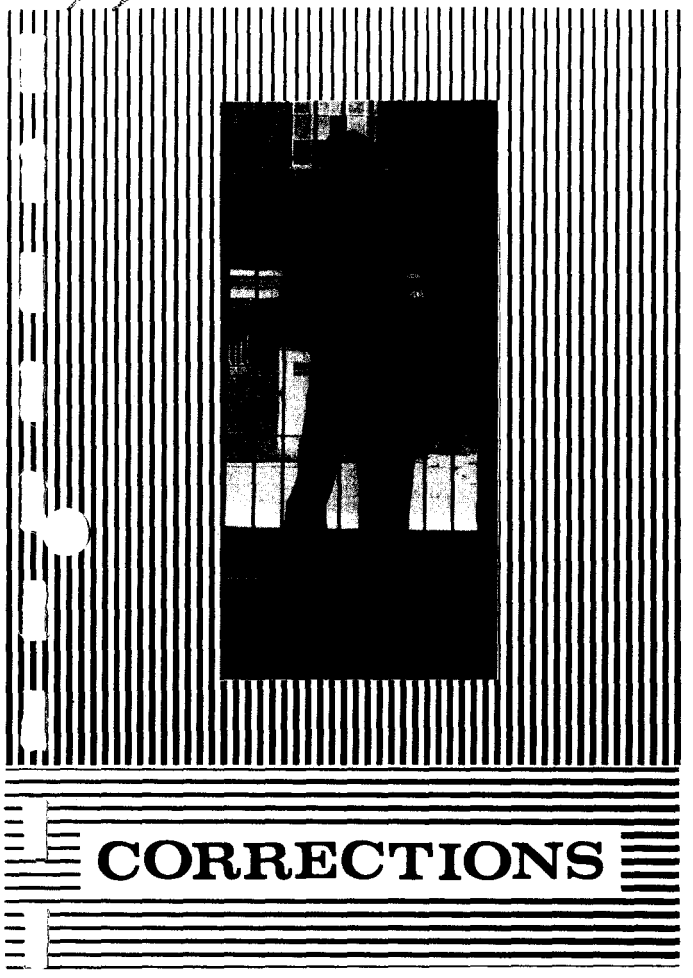
Member Units of the Montana Association of Churches

American Baptist Church
American Lutheran Church
Christian Church (Disciples of Christ)
Episcopal Church, Diocese of Montana
Lutheran Church in America
Roman Catholic Church -
Diocese of Great Falls
Diocese of Helena
United Church of Christ
United Methodist Church
United Presbyterian Church -
The Presbytery of Glacier
The Presbytery of Yellowstone

Single Member Congregations [non-voting)

Christ's Church On The Hill, Great Falls
Holy Trinity Serbian Orthodox Church, Butte

Cover design by Marilyn McKibben, Helena



Montana
Religious Legislative Coalition [MRLC]
Committee of the
Montana Association of Churches
1981

(a)

MONTANA ASSOCIATION OF CHURCHES
Position Paper on
CORRECTIONS

POSITION STATEMENT

The Montana Association of Churches supports:

1. A sentencing system which permits judges and others within the justice system latitude and discretion in dealing with individual offenders;
2. Individualized correctional programs which consider confinement as the least desired alternative, consistent with public safety and the offenders' needs; and
3. More community correction alternatives a resources rather than an increase in the capacity and/or the population of Montana State Prison.

SUPPORTING STATEMENT

The Montana Association of Churches speaks from a Judeo-Christian ethic that echoes a constant theme regarding concern for the captive person. Jesus associates himself with those in prison: "I was in prison, and you came to visit me." As leaders of Christian churches and, as participant in and observers of the justice system in Montana, we speak to the needs of that system.

The judge traditionally is accepted as one, in a non-biased position, who knows the individual circumstances surrounding each case. There are guidelines (ABA standards, National Council on Crime and Delinquincy's *Model Sentencing Act*) which help him/her in the individual decisions.

We favor individualized correctional programs which do not view confinement as the first and best alternative. We agree with the Montana Justice Project *Corrections Report* (1976) that no offender should be subjected to more custody and security than he/she needs. We agree that "the majority of offenders do not pose a substantial threat to society, and can be effectively dealt with in the community through diversied programs (tailing supervision." (p. xv of *Corrections Report)*

We fear a mood which leads to "warehousing prisoners" at Montana State Prison[1] rather than seeking to resolve the problems at the local level. Community correction alternatives allow a "bridging plan" between prisoner, the institution, and the community to occur. They also can afford a better opportunity to focus on the individual's personal and social needs, thus raising the chances of successful rehabilitation. (cf. Montana Department of Institutions *Corrections Alternative Plan* and Inmate Profile Study (1979). A community-based correctional system, in fact, is less expensive and at least as effective as a centralized system.[2]

There is a wide range of concerns in Montana about our criminal justice system. We have isolated a few which we consider can and must be addressed. We believe our position will be an aid to all who want a correctional system that works effectively and humanely.

[1] Montana State Prison was designed for 480. The October 1, 1980, population was 638.

[2] Comparable costs:
Billings Life Skills Training Center $31.65 per day per person (Fiscal Year 1980)
Missoula Life Skills Training Center $24.92 (Fiscal Year 1980)
Montana State Prison $32.51 (Fiscal Year 1979)

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 382 DATE February 8, 1983

SPONSOR REPRESENTATIVE HANNAH

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Chuck O'Reilly	Helena	Mt. Sheriff & Peace Officers		X
Karen Mikota	Helena	Montana LWV		X
Steve Nardi	Kalispell	Mt Trial Lawyers		X
William Blake	Helena	Mt. Chiefs of Police Assn		X
J Duffy	Bozeman	Police Inst & Chiefs		X
Wes Kennedy	Helena	A.C.L.U.		X
Jeff Renz	Billings	ACLU		X
Jim Dundas	THREE FORKS	CEMENT WORKERS #339		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 381 DATE February 8, 1983

SPONSOR HARNAH

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
[illegible] O'Reilly	Helena	Mt. Sheriffs + Chiefs Assn	X	[illegible]
STEVE NARDI	KALISPELL	MT. Trial Lawyers		X
[illegible]	Bzn.	Police Prof. & Peace Ofcrs	X	
[illegible]	Helena	Mt Chiefs of Police Assn	X	
[illegible]	Helena	A.C.L.U.		X
Jeff Renn	Billings	ACLU		X
Jim Dundas	THREE FORKS	CEMENT WORKERS #259		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit E F
HB381, 382, 478
2/8/83

PATTEN & RENZ
ATTORNEYS AT LAW
LOWER LEVEL ONE
FIRST CITIZENS BANK BUILDING
2812 1ST AVENUE NORTH
BILLINGS, MONTANA 59101
(406) 252-6782

JAMES A. PATTEN
JEFFREY T. RENZ

OF COUNSEL
FRED N. DUGAN

To: House Judiciary Committee
From: Jeffrey T. Renz
Re: HB 381; HB 382; HB478.

We have reviewed House Bills 381, 382, and 478, introduced by Rep. Tom Hannah of Billings. It is our opinion, for the reasons that follow, that the Committee should issue an unfavorable report on these three bills.

The Bills Do not Provide an Adequate Civil Remedy. These bills propose to provide a civil remedy to a person whose rights under the Fourth Amendment to the U.S. Constitution have been violated by a law enforcement officer. The remedy, however, is inadequate.

Since Mapp v. Ohio, a civil remedy has been available pursuant to 42 U.S.C. §1983, which provides, "Every person who, under color of any statute ... of any State ... who ... subjects ... any ... person ... to the deprivation of any rights, privileges, or immunities secured by the by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Civil Rights Act provides for more effective remedies than does HB 382. Punitive damages are available under the Civil Rights Act. They are not available under HB 382. Damages for injury to reputation, for emotional injuries, for embarassment, and for outrage are all available under the Civil Rights Act. None of these are available under HB 382, which limits damages to property damages and damages for personal injury.

In summary, it is our opinion that the "civil remedy" provided for by HB 382 will never be employed by the victim of an illegal search. In fact, we would commit malpractice if we proceeded under HB 382 in lieu of the Civil Rights Act of 1871.

Civil Remedies Are No Deterrant To An Illegal Search. Frank Rizzo, the former "law and order" Mayor of Philadelphia and its former police commissioner, recently stated that he supported the "exclusionary rule." It made, he said, for better police work

and for more concientious policemen. That is the very purpose of the exclusionary rule. It is not intended to free the victim of an illegal search, although it does. It is intended to punish the police for conducting an illegal search, to deter them from proceeding in violation of the law.

Justice Murphy examined the civil remedies then available in Wolf v. Colorado, and found them wanting. The same shortcomings apply to the civil remedies available today and especially those provided by HB 382.

Our firm presently represents the victim of an illegal search in a lawsuit brought under 42 U.S.C. .]983. Our client was not a criminal. He was a policeman. He was never convicted of or charged with a crime. He was the victim of two illegal searches, the first without a warrant, the second without probable cause. The searches took place in]979. Our client's case has never been to trial, due to various pre-trial motions filed by the defendants. (Not because of overcrowded court dockets.) In the four years that have passed since our client's rights were violated, the Sheriff who conducted the search has retired and the Undersheriff who participated has taken another job. This particular civil remedy, assuming our client obtains a judgment, will never act as a deterrant to violations of the law by the particular officers involved.

Civil remedies have been considered and found wanting. They have been tried as a deterrant and failed. It is unfortunate, but it is true that, as the Supreme Court said in Mapp v. Ohio, the only alternative to the exclusionary rule is no alternative.

The Proposed Sanctions Against the Police Officer Are Worthless. The proposal to provide sanctions against the police officer, set out in Section]2, is meaningless with the so called good faith exception attached. The good faith exception is nothing more than an incentive for shoddy police work. Illegal searches will always be "in good faith." More important, the "good faith" exception condones and in fact participates in illegal behaviour. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (]96]).

Absent the good faith exception, the action for disciplinary sanctions will be subject to the delays we described above. The sanction will lose its deterrant effect. The action for disciplinary sanctions will be subject to other potential defenses, not the least of which would be a counterclaim for malicious prosecution against the plaintiff bringing the action.

Conclusion. The exclusionary rule may make many people uncomfortable. It may set an occasional accused free. But it is the only method which works to ensure that the law is not broken in order to convict those who break the law.

Exhibit G
HB ~~383~~ 382
2/8/83

WITNESS STATEMENT

Name Karen Mikota Committee On Judiciary

Address 406 N. Ewing, Helena Date Feb 8, 1983

Representing League of Women Voters Support

Bill No HB382 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. The issue in this debate is Does the end justify the means?
HB 382 will not decrease crime, nor rehabilitate prisoners nor bring uniformity to the law.
2. What will the passage of this legislation do?
1. deny our citizens the rights expressly established in our state and national constitutions
3. (a) our right to privacy (b) our right to be secure in our homes, persons + effects
2. force our judges to take an oath to uphold the constitution on
4. one hand and on the other it will ask them to condone constitutional violations by admitting illegally obtained evidence.
3. place the government in the position of a Lawbreaker. If the government chooses not to follow its laws what is to stop the individual from taking the law into his own hands what will protect the constitution from further erosion. If we so easily ignore the 4th amendment will we likewise ignore the ~~5~~ 5th amendment, will it be O.K. to beat a confession out of a suspect. Will we then justify our actions by allowing a lawsuit.
Truth is an admirable goal but not at the price of integrity

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit I
HB 381 & 382
2/8/83

Overfelt Law Firm

ATTORNEYS AT LAW
SUITE 417, PETROLEUM BUILDING
BILLINGS, MONTANA 59101

406 - 252-4088

LEE OVERFELT
GARY OVERFELT

February 7, 1983

MEMORANDUM

TO: HOUSE JUDICIARY COMMITTEE

FROM: GARY OVERFELT

SUBJECT: HB 381 and HB 382

I appear before this Committee to urge that both HB-381 and HB-382 be defeated. There are many arguments, both legal and practical, which mitigate in favor of killing these measures. It is my purpose, however, to focus on the inadequateness of the "good faith" standard which constitutes the basis for both bills.

HB-381

EXCEPTION TO THE EXCLUSIONARY RULE

A. Bill exceeds the scope of Illinois vs. Gates.

Presumably, this legislative measure has its origins in the recent Eighth Circuit Decision of Illinois vs. Gates. Because the United States Supreme Court recently granted certiorari on this case, it is widely believed that the court may recognize a good faith exception to the exclusionary rule.

The facts of the Gates case are of key significance. That case involved the failure of police to corroborate all aspects of an anonymous tip prior to obtaining a warrant. Evidence was suppressed because of this failure. The point to be noted is that the constitutional violations in Gates were of a very minor nature.

If the United States Supreme Court adopts this standard, it will obviously be a significant departure from prior holdings in the area of search and seizure. For this reason, I do not anticipate a broad holding establishing a good faith exception to all searches and seizures. I feel the Gates decision will be limited to the facts of the case and that the good faith exception will be extended, if at all, on a case-by-case basis.

House Judiciary Committee February 7, 1983

Re: HB-381 and HB-382 From: Gary Overfelt

The scope of HB-381 goes far beyond the facts of Gates. Section 2(2) of this measure states that an officer may establish prima facie evidence of good faith if he obtains a warrant prior to the search. It should be noted, however, that under the terms of this measure, all searches and seizures will be governed by the good faith standard, whether or not they were conducted under the auspices of a warrant. Because of this broad application, I foresee a definite conflict between this bill and any good faith exception that may be created as a result of Gates.

B. Good faith standard is overly broad.

Perhaps the most troublesome and insidious defect in this bill is the good faith standard itself. It is the keystone of both HB-381 and HB 382, yet the drafters of these measures have seen fit to give absolutely no guidance as to what this term means. I might point out that I am not alone in my confusion as to the meaning of this term. As the eminent constitutional scholar, Yale Kamisar, recently noted

> "What do we mean by good faith?" Mr. Kamisar asked rhetorically. For example, he asked, should different standards apply to different police officers based on their rank and training?
> 5 National Law Journal, No. 22, Page 5, February 7, 1983

Both of these proposed measures seem to set forth a subjective standard for searches and seizures. I think it is safe to say that a subjective standard is much more difficult to apply than an objective standard such as a reasonable man standard. For that reason, subjective standards are not favored under our system of law.

A good example of the use of the good faith standard can be found in the Uniform Commercial Code. Although still somewhat cumbersome, this standard has been adequate in a commercial setting. I feel there are several reasons for this. First, the term is adequately defined (See Section 30-2-103, MCA.) Secondly, it is easier to determine whether a merchant operates in good faith by observing verifiable acts undertaken by that merchant. Thirdly, and most importantly, there is nothing in the Uniform Commercial Code to suggest that ignorance of the law may form the basis for actions taken in good faith.

Neither HB-381 nor HB-382 contain this type of a safeguard. As was earlier noted, neither of these measures defines the term "good faith". More importantly, as the statute is written, ignorance of Fourth Amendment strictures may apparently form the basis for a claim of good faith. Since an officer can act in bad faith only if he is aware of the rights guaranteed by the Fourth Amendment, passage of this measure would encourage law enforcement officials to forget everything they know about search and seizure law. On the other hand, an officer who takes the time and energy to

thoroughly acquaint himself with constitutional law will be penalized if he makes a mistake.

HB-382

Section 6 of HB-382 provides that a person whose constitutional rights have been violated may recover compensation for property damage and personal injury. It is unclear as to whether one may recover for deprivation of freedom, lost wages or mental anguish. Likewise, there is no indication that one may obtain punitive damages. Unless these types of injuries are covered, it would seem that the remedy is virtually useless.

Another flaw in this measure is its failure to adequately define the basis of liability for the cause of action. Apparently, an intentional violation will be sufficient to sustain a cause of action. However, the statute does not deal with any lessor degrees of culpability. If it is determined that a good faith violation is not actionable, potential plaintiffs would be out of court, in spite of the fact that a violation of constitutional rights has occurred. Therefore, only a standard of strict liability will adequately insure that a plaintiff will be given his day in court. Since the proposed measure does not address this issue, we can only speculate as to the intention of its drafters.

Finally, HB-382 goes into effect in October, while HB-381 is effective immediately. Thus, if both bills are passed, there will be a period during which there will exist no remedy in the state courts.

In the final analysis, HB-382 does not even begin to provide an adequate civil remedy for constitutional violations. In addition, this bill would put a tremendous burden on knowledgeable and dedicated police officers who make an attempt to conduct their activities within the scope of the Fourth Amendment. An officer with good training and a thorough understanding of constitutional law would be subject to immediate dismissal if he makes a mistake. An ignorant police officer could wreck havoc with constitutional guarantees and be absolved with a statement to the effect that he didn't know any better. To promote ignorance and punish excellence is utterly unconscionable. For this reason, I would ask that both these bills be defeated.

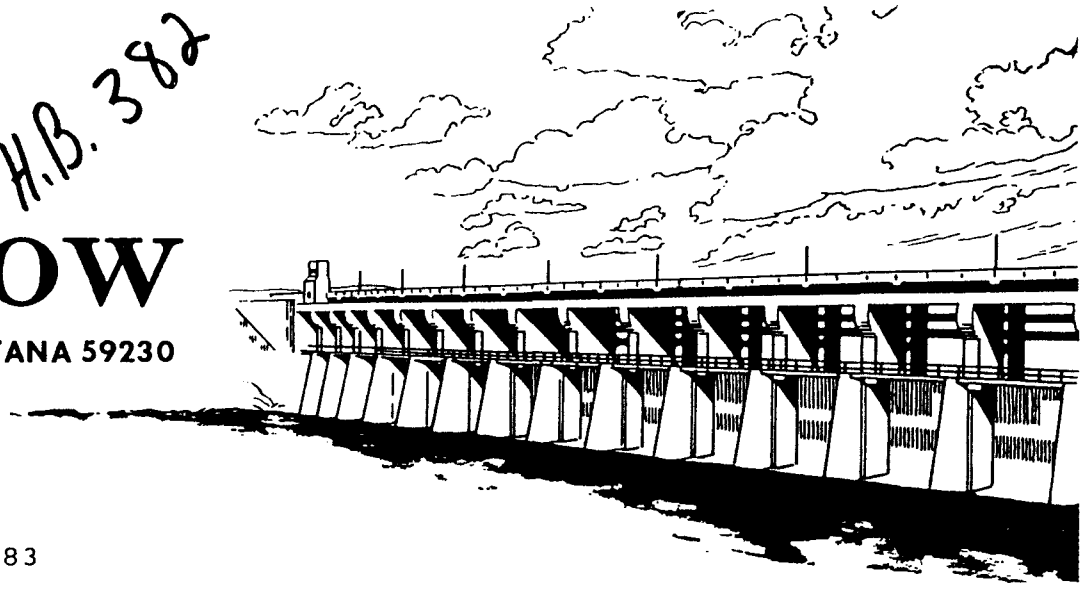
Exhibit J.
HB382
2/8/83

H.B. 382

CITY OF

Glasgow

GLASGOW, MONTANA 59230



February 1, 1983

Representative Ted Schye
House of Representatives
Capitol Station
Helena, Montana 59620

Dear Ted:

By now I imagine that you have become fairly familiar with your new job and surroundings. I hope that you are enjoying your new experiences.

I have received a copy of House Bill #382 that is supposed to be coming up for a Judiciary Committee hearing February 8th. I have been told that you are a member of that committee. I hope that that is true. That bill is the most important one affecting law enforcement that I am aware of.

As I mentioned before, we who work at the Valley County Law Enforcement Center are interested in the movement to repeal MCA 46-13-302, the "exclusionary rule". No one likes to see criminals escape justice because of a technicality, least of all those of us who work so hard to bring them to justice. I assume that the proponents of HB #382 feel the same way and believe that their efforts will result in fewer criminals escaping justice. It won't. If anything, it will result in a fewer number of criminals being arrested and brought to face charges. The reason is section 12, the one that refers to disciplinary action. The penalties are ridiculously excessive. The losses that a law enforcement officer can suffer as a result of a search without sufficient probable cause will be more severe than those suffered by most people arrested for criminal acts in the state of Montana. I personally could not afford the loss of a month's pay. It would ruin me. Our nine man force can't afford such a loss either. What if two or more men were involved and suspended for thirty days?

Exhibit
HB 382
2/6/83

I have been called to defend my actions in making an arrest and search of a defendant in a drug case under 46-13-302, the law to be replaced by HB #382. The defense contended that I lacked probable cause to believe that the defendant possessed marijuana. What constitutes probable cause and what constitutes mere suspicion is a matter of opinion. The judge in that case held that I had sufficent probable cause to make the arrest, search and seizure. He qualified the decision by stating that my experience and training qualified me to make conclusions on the basis of my observations that would not have constituted probable cause to an ordinary citizen or less experienced officer. I am sure that it would not have been at all difficult to find district judges in Montana who would have held a different opinion. The decision to arrest and search was a hair-splitter. I knew it at the time but it was either a matter of taking immediate action or forgetting the whole thing. If House Bill #382 was in effect at that time I probably would have elected to forget the whole thing. I would have had to have been damn sure that I was on safe ground before I bet a month's pay that my search would be upheld. House Bill #382 would be a bomb waiting to destroy the careers of the most dedicated, hardest working officers.

Sure, I read Section 12 (2) that says that even if I commit a violation, if I can also prove by a preponderance of the evidence that I acted in good faith and in the reasonable belief that my conduct comported with existing law, then I will not be suspended or dismissed.

What does that mean? Who do I prove this to, judge or jury? What do I have to do to show that I reasonably believed that my conduct comported with existing law? It all goes back to opinions and beliefs or just as accurately, feelings and attitudes. Meanwhile, who will be paying the bill for this court action in which I try to prove my good faith? If I have to pay for it there will be no point in going through with it. I can still kiss a month's pay good-bye. What about the stress my family and I will go through? They suffer enough so that I can have this job, they don't need more.

Ted, we are human beings. In order to make retirement we have to go at least twenty years and make thousands of arrests, searches and seizures. We make mistakes. Sometimes we look back and say to ourselves "That was stupid, I knew better than that." It is right that a mistake that we make when we are trying to do our best for the people we serve should cost us so much? Don't let good cops look back and think to themselves, "That was a dumb mistake, but the really stupid thing that I did was to get involved in law enforcement in the first place".

Under the present criminal justice system, people who are charged with crimes have ample opportunity to publicly ridicule and humiliate law enforcement officers through their attorneys. They can also sue us in state or Federal courts. They do not need the encouragement provided by HB #382.

Why don't the proponents of HB #382 simply apply the good faith and reasonable belief standard to the existing MCA 46-13-302 to determine whether evidence should be admissable? If a preponderance of the evidence indicates that the officer acted in good faith and in the reasonable belief that his conduct comported with existing law, then the evidence should be held as admissable. If not, then let the evidence be suppressed and let the officer's chief or sheriff discipline the officer.

Everyone else who goes through the criminal justice system has the opportunity for their individual circumstances to be considered and leniency granted where appropriate, but there is no room for that in HB #382. It is arbritary and unfair. The first mistake costs thirty days, no suspended sentence, no time payments.

Please, Ted, fight HB #382 as it is written. We are counting on you.

Sincerely,

Emery E. Brelje

Sgt. Emery E. Brelje
Glasgow Police Protective Assn.

2/8/83 Exhibit K

HB 381, 478, 382

10

impact

Americans for Effective Law Enforcement

LEGISLATIVE REFORM OF THE EXCLUSIONARY RULE: THE GOOD FAITH EXCEPTION

In 1961 the U.S. Supreme Court held, in a 5-to-4 decision, that "illegally seized" evidence was no longer admissible in criminal cases prosecuted by state officials. The ruling was surprising and is not followed in any other country. The principal purpose of the rule is to deter and punish police "misconduct" or disregard of the Fourth Amendment.

No one would seriously urge that police officers should be free to deliberately violate the Constitution in order to secure a conviction, and this aspect of the "Exclusionary Rule" is not really in debate, although some scholars have suggested different methods to deter and punish police misbehavior.

The principal fault of the Exclusionary Rule, as it is presently interpreted, is that it also punishes a **good faith mistake** by an honest and conscientious police officer. The "mistake" might be an inadvertent one, such as the wrong date on the affidavit, or an "incomplete" description of the premises to be searched or the property to be seized.

The Good Faith Exception

In 1980, an en banc federal appeals court was the first to recognize an exception to the Exclusionary Rule. In **United States v. Williams,** the Fifth Circuit said that:

Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7.

The Fifth Circuit noted that the officer's **subjective** beliefs concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure fails the **objective** test of good faith. The police officer's actions must "be based upon articuable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." This language places heavy emphasis on the quantity and quality of police training. Future cases in that circuit will examine the preservice training given recruits, in-service training given seasoned officers, and case law bulletins furnished officers on a periodic basis. There will be a strong incentive to insure that all officers are promptly provided with the latest case law affecting police operations.

The Fifth Circuit was split into the Fifth and Eleventh Circuits in 1981; the **Williams** decision is now the law in both circuits. The Supreme Court declined to review the **Williams** decision, and has yet to express an opinion on the good faith exception in search and seizure cases. Assuming an appropriate factual setting, many scholars believe the Supreme Court will eventually adopt a good faith exception, at least by a 5-to-4 majority. A properly worded statute could narrowly frame the issues.

Americans for Effective Law Enforcement, Inc. (AELE) has been an outspoken proponent for the good faith exception. AELE originally urged its views at the Attorney General's Task Force on Violent Crime hearings in 1981. The Task Force later recommended adoption of the good faith exception.

Following the Task Force recommendation, several U.S. Senators introduced bills which would extend the good faith exception to the other ten federal appeals circuits. The present administration has strongly supported such legislation, and a variety of organizations and witnesses (including AELE) have filed position papers and have testified in support of modification proposals.

On June 2, 1982, the head of the Justice Department's Criminal Division, D. Lowell Jensen, noted that the Exclusionary Rule is not required by the Constitution, but is only a court-ordered remedy to deter police misconduct. The Justice Department points out that no conceivable purpose is served by suppressing evidence which has been seized in good faith. In short, there is no reason to "punish" the police and no deliberate

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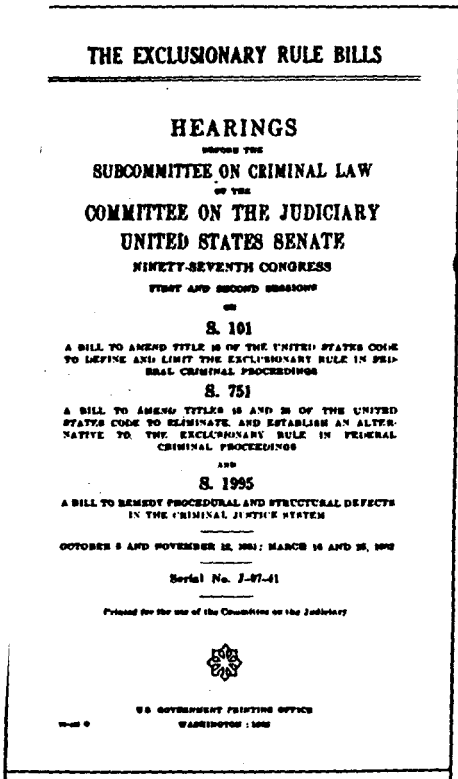

THE EXCLUSIONARY RULE BILLS

HEARINGS

SUBCOMMITTEE ON CRIMINAL LAW

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

S. 101

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO DEFINE AND LIMIT THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

S. 751

A BILL TO AMEND TITLES 18 AND 28 OF THE UNITED STATES CODE TO ELIMINATE, AND ESTABLISH AN ALTERNATIVE TO, THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

S. 1995

A BILL TO REMEDY PROCEDURAL AND STRUCTURAL DEFECTS IN THE CRIMINAL JUSTICE SYSTEM

Serial No. J-97-41

AELE POSITION HEARD IN U.S. SENATE EXCLUSIONARY RULE HEARINGS

Wayne W. Schmidt, AELE Executive Director, testified on March 16, 1982, before the Subcommittee on Criminal Law of the Senate Judiciary Committee. The invitation to present our views came from the chairman, Senator Charles Mathias of Maryland. Several Bills would modify the harsh effects of the evidentiary rule that now prohibits federal courts from considering evidence that has been "illegally" obtained by police or federal agents.

At heart is the so-called "Good Faith Exception" to the rule. The exception was only recently recognized by the federal appeals court that supervises lower level courts in six southern states. Schmidt stated that there is no evidence that officers have abused the good faith test in those states. He pointed to Houston, which averages nearly 100 criminal filings a month. In more than a year, not a single case of police misuse of the good faith exception has been noted. Statistics were also cited for Miami, and again, no police abuse has even been alleged.

The Senate Hearings have recently been printed; the paper-bound book is 837 pages in length. The report contains statements by Committee members of the Senate, testimony of the various witnesses, proposed legislation, prepared statements, supplemental questions and answers transmitted, correspondence, articles and comments received. The report, Serial No. J-97-41, as pictured above, may be obtained from your U.S. Senator.

continued from page 1

misconduct to "deter." The Senate has yet to act on S. 2231, which is the bill currently supported by the administration.

State Response

Colorado was the first state to act, and passed House Bill No. 1493, which recognizes a good faith exception in state prosecutions [Colo. Rev. Stat. §16-3-308 (1981 Session)]. The bill was co-sponsored by 33 representatives and 8 senators; the governor signed the bill into law, and the act took effect on July 1, 1981.

Arizona was the second state to enact a good faith statute, House Bill 2106. What is now Ariz. Rev. Stat. 13-3925 was signed by the governor on April 20, 1982. In June, a nationally advertised conference and seminar on the good faith exception was held in suburban Phoenix. In addition to Arizona registrants, prosecutors from 14 other states attended the discussion sessions. AELE participated in this conference, and began work on a Model State Statute.

Model State Statute

In July 1982, Americans for Effective Law Enforcement proposed a Model State Statute, which is set forth in the box on page 3. Sections A and B closely follow the recent Arizona statute. The remaining sections were drafted to reflect the views of many of the attendants at the Phoenix conference; that such statutes give the courts as much direction and as little discretion as possible.

Good faith is specifically defined. Of particular interest is the section relating to warrantless searches (D-2). The officer must possess, in addition to his subjective belief that he has probable cause, "at least a reasonable suspicion" that the person possesses, or that the premises contains items of an evidentiary nature.

Reasonable suspicion is a standard of proof which has been determined in over five thousand published court opinions. It is the same quantum of proof necessary to justify a temporary detention of an individual under the "stop-and-frisk" doctrine recognized by the Supreme Court in 1968. It is an articulate standard in each state, based on thousands of situations. It is a standard of less than probable cause, but greater than intuition, hunch or a suspicion not premised on objective facts.

Another component of the Model State Statute is a training requirement. It will vary from state to state, and presumably each state training board will continually evaluate local training needs in search and seizure cases.

Constitutional Action Required in Some States

In a few states, like Florida and Louisiana, the Exclusionary Rule is a part of their state constitution. A constitutional amendment will be required in those jurisdictions; such an amendment was narrowly defeated in Florida in 1982, but will be re-introduced later.

In some jurisdictions, the state supreme court has adopted the principle of "independent state grounds" and refuses to admit certain evidence in state prosecutions, although that same evidence is admissible in the federal courts. California is such a jurisdiction, and citizen-supported attempts to end this judicial variance are now pending, through the initiative process.

Public Support for Truth in Evidence

The majority of Americans are law-abiding and are understandably frightened at the rising crime rate. They are dissatisfied with the criminal justice system and are frustrated that criminals are freed due to a "technical" violation of the Fourth Amendment. For example, California Assemblyman Robert Naylor recently polled his constituents in San Mateo County (the peninsula just south of San Francisco). Over 6,000 voters responded to a questionnaire; an overwhelming 80 percent of the respondents felt that evidence of guilt should not be excluded from a trial even if it

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continued from page 2

was not gathered consistent with court-prescribed procedures.

Focus on the Real Issues

Civil libertarians warn of wholesale police abuse of any good faith exception to the Exclusionary Rule. Visions of police harrassment of innocent persons in their homes at 3:00 a.m., however dramatic, are not in issue. The "real" issue is the good faith mistake of a professionally trained officer, or an unnoticed minor error, or the retroactive effect of an overturned court precedent, or even a 3-to-2 decision that a particular law or procedure is "unconstitutional." Defense attorneys, who sometimes constitute the largest group of state legislators, have a vested interest in perpetuating the status quo.

The real goal of criminal justice should be the encouragement of professional law enforcement and to obtain convictions of the guilty. A search for technicalities does not further that end. The good faith exception, however, encourages police professionalism and still punishes intentional misconduct or an indifferent attitude to the rights of society. Good faith legislation is the modification of a rigid rule that in no way affects its principal purpose.

AELE's Position Urged

In his Senate testimony, AELE Executive Director Wayne Schmidt urged "the Congress as well as the courts, to adopt a 'Good Faith Exception' to the exclusionary rule." Minority Senator Dennis DeConcini, an author of one of the Good Faith bills, suggested that Congressional action would signal the states to adopt similar legislation. Perhaps it will be the other way around, which is why AELE has adopted a Model State Statute.

AELE members and supporters will be pleased to hear we have mailed this issue of **Impact** to 7363 state legislators and 530 Members of Congress. Let your representatives and senators know your views.

AELE MODEL STATE STATUTE*

Exclusionary Rule Limitations: Admissibility of evidence obtained as a result of an unlawful search or seizure.

A. If a party in a proceeding, whether civil or criminal, seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. No court shall suppress evidence which is otherwise admissible in a civil or criminal proceeding if the evidence was seized in good faith or as a result of a technical violation.

C. "Evidence" means contraband, instrumentalities or fruits of a crime, or any other evidence which tends to prove a fact in issue.

D. "Good faith" means whenever a peace officer obtains evidence:
   1. Pursuant to a search warrant obtained from a neutral and detached magistrate, which warrant is free from obvious defects other than non-deliberate errors in preparation and the officer reasonably believed the warrant to be valid; or
   2. Pursuant to a warrantless search, when:
      a. The officer reasonably believed he possessed probable cause to make the search, and
      b. The officer, possessed at least a reasonable suspicion that the person or premises searched, possessed or contained items of an evidentiary nature, and
      c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant; or
   3. Pursuant to a search resulting from an arrest, when:
      a. The officer reasonably believed he possessed probable cause to make the arrest, and
      b. The officer reasonably believed there were circumstances excusing the procurement of an arrest warrant, or
      c. The officer procured or executed an invalid arrest warrant he reasonably believed to be valid; or
   4. Pursuant to a statute, local ordinance, judicial precedent or court rule which is later declared unconstitutional or otherwise invalidated; and
   5. The officer has completed a law enforcement academy or other approved prerequisite curriculum and any mandatory subsequent training or instruction in Constitutional law and criminal procedure, where required by the [State Peace Officers' Standards and Training Commission].

E. This section shall not adversely affect the rights of any plaintiff to seek special damages against a peace officer or a governmental entity, provided that the trier of fact in such civil action determines that the officer or entity conducted an unlawful search or seizure.

F. [Appropriate savings and severability clause].

*Adopted by **Americans for Effective Law Enforcement, Inc.** July 14, 1982.

Exhibit L.
HB358
2/8/83

Amend358/BCDII

Proposed amendments to HB 358

1. Title, line 7,
   Following: "PLANS"
   Insert: ";AND PROVIDING AN EFFECTIVE DATE"

2. Page 1, following line 21
   Insert: Section 3. Effective date. This act is effective July 1, 1984.

September 23, 1981

MEMORANDUM IN SUPPORT OF ACLU POSITION
ON EXCLUSIONARY RULE LEGISLATION

Two bills are pending in the Senate that would limit or eliminate the exclusionary rule in federal criminal proceedings -- S. 101 and S. 751. The exclusionary rule holds that papers or things seized or obtained in violation of the Fourth Amendment may not be used as evidence in a criminal proceeding.

S. 101 would eliminate the exclusionary rule in federal criminal proceedings except where a Fourth Amendment violation was "intentional" or "substantial." We submit that this proposed legislation is unconstitutional. Even assuming its constitutionality, S. 101 is ambiguous and uncertain in its reach and would cause severe problems in the criminal justice process.

S. 751 would eliminate the exclusionary rule in federal criminal proceedings entirely and would provide instead a limited damage remedy against the United States and authorize disciplinary action against offending law enforcement personnel. It is our position that this kind of legislation too is beyond Congress' constitutional authority.

A single additional point should be made at outset. Much of the discussion of eliminating

the exclusionary rule takes as a premise that the exclusionary rule has had something to do with the nationwide growth of serious crime. That view was reinforced by the Final Report of the Attorney General's Task Force on Violent Crime (August 17, 1981), which made a modification of the exclusionary rule along the line of what is proposed in S. 101 one of its key recommendations for dealing with the crime problem. To act on the belief that the elimination or modification of the exclusionary rule would give the citizenry reason to feel more secure in their homes or on the streets is to fall victim to a cruel deception.

A study by the General Accounting Office of federal criminal prosecutions revealed that in only 1.3 percent of the 2,084 cases studied was evidence excluded as the result of a Fourth Amendment motion. And exclusionary rule problems were the primary reasons for prosecutorial decisions not to prosecute in only .4 percent of cases analyzed in which a decision was made not to prosecute. Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report No. GGD-79-45) (April 19, 1979).

Elimination or modification of the rule cannot be justified as contributing to more effective law enforcement by reference to these data. No large numbers of guilty men and women are going free as a result of the application of the

exclusionary rule. In these circumstances, the only conceivable law enforcement justification for elimination or modification of the rule is a belief that elimination or modification would allow law enforcement officers to be more effective because they would feel less constrained by the substantive inhibitions of the Fourth Amendment. There is indeed evidence that this would be precisely the effect of eliminating or modifying the rule. (Pp. 14-15, infra.) But we assume that proponents of S. 101 and S. 751 would not embrace that justification. They do not profess to want to weaken substantive Fourth Amendment safeguards. If they did, the forthright way to go about it would be to propose to amend the Fourth Amendment so as, for example, to delete the probable cause requirement for issuing a warrant. There is little doubt that any such weakening of substantive Fourth Amendment guarantees, if forthrightly presented, would be wholly unacceptable to the American people.

I. The Exclusionary Rule Is Required by the Fourth Amendment to the United States Constitution

A. The Supreme Court Has Held that the Exclusionary Rule Is Constitutionally Required and Congress Has No Power To Overrule that Determination

The exclusionary rule was foreshadowed in Boyd v. United States, 116 U.S. 616 (1886), where the Supreme Court analogized the use of illegally obtained evidence against a defendant to compelled self-incrimination prohibited by the

Fifth Amendment. In that case the defendant was charged with the illegal importation of goods. During proceedings characterized by the Supreme Court as civil in form but criminal in nature, the Government sought to show the quantity and value of the goods imported by the defendant and relied on a federal statute to obtain a court order requiring the defendant to produce his invoice for the goods. The Supreme Court held that the Fourth Amendment barred the compulsory production of the defendant's private books and papers.

The rule was definitively written into our basic law in the landmark case of Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court there ordered that evidence obtained in violation of the Fourth Amendment be returned to a defendant charged with using the mails to transport lottery tickets. The Court said that, if materials obtained in violation of the Fourth Amendment could be used against the defendant, the guarantees of the Fourth Amendment "might as well be stricken from the Constitution." Id. at 393. Therefore, the failure of the lower court to return the materials illegally seized in response to the defendant's motion for their return was a violation of the constitutional rights of the accused.

For the next 35 years the rule was applied without question in federal criminal prosecutions. Litigation turned principally not on the existence or desirability of the

exclusionary rule but on the scope of the underlying Fourth Amendment guarantees. See, e.g., Harris v. United States, 331 U.S. 145 (1947); Olmstead v. United States, 277 U.S. 438 (1928); cf. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). On the other hand, those guarantees were not good against state governmental action, and so the question of a federally-dictated exclusionary rule for the states did not arise. In Wolf v. Colorado, 338 U.S. 25 (1949), however, a majority of the Court ruled that the security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, was enforceable against the states by virtue of the Fourteenth Amendment. But the Court declined to require that the exclusionary rule -- which a concurring Justice characterized as a mere federal rule of evidence, id. at 39-40 -- be applied in state prosecutions. The Court's opinion was premised, in large measure, on the assumption that other devices might be employed by the states that would be as effective as the exclusionary rule in deterring Fourth Amendment violations. Id. at 31. The Court even raised but did not purport to answer the question whether Congress has the authority to negate the application of the exclusionary rule in the federal courts or to make it binding upon the states in the exercise of its authority under Section 5 of the Fourteenth Amendment. Id. at 33.

The doctrine of Wolf v. Colorado was short-lived. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court overruled Wolf and extended the application of the exclusionary rule to the states. The Court found that there were no effective deterrents to Fourth Amendment violations by police and other state officers, other than the exclusionary rule.

Since Mapp v. Ohio it has been clear that the exclusionary rule is "an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the states by the Due Process Clause . . . ." 367 U.S. at 651. In short, the rule was held to be dictated by the Fourth Amendment itself and therefore applicable to the states by operation of the Fourteenth Amendment. And this remains the law today. The Supreme Court, following Mapp, continues to require the exclusion of illegally obtained evidence in state criminal proceedings. Apart from its role as expositor of the Constitution, the Supreme Court has no power to enact evidentiary rules for the states. Accordingly, after Mapp v. Ohio, the theory advanced in Wolf that the exclusionary rule is a mere federal rule of evidence or supervisory rule imposed by the Court is no longer tenable. In plain terms, Mapp makes it apparent that the rule is a requirement imposed by the Fourth and Fourteenth Amendments.

Following Mapp, the occasions for the Court's considering the scope of the underlying Fourth Amendment

guarantees have multiplied. Lines are drawn that are difficult to follow, in part because of a close division of the Court in recent years that has produced shifting majorities. See, e.g., Jiminez v. United States, No. 80-817; California v. Riegler, No. 80-1421; Bible v. Louisiana, No. 80-1080 (all filed July 2, 1981). But there is no doubt that, in a criminal prosecution where the prosecution's effort is to lay before the trier of fact as evidence of the guilt of the defendant something seized or otherwise obtained by the authorities from that defendant, the line between admissibility and exclusibility of the thing follows precisely the wavering line that defines whether the authorities have behaved constitutionally in searching for or seizing the thing.

There are, to be sure, Supreme Court decisions of the last few years in which the Court has declined to extend the rule calling for exclusion of illegally obtained evidence to situations other than the proffer of things illegally obtained as substantive evidence in a criminal trial. Neither the holdings nor the statements of the Court in any of these cases disturb the principle set forth in Mapp v. Ohio that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." 367 U.S. at 657. One remark in one of these cases in particular has been seized upon by those who would eliminate or restrict the exclusionary

rule. In United States v. Calandra, 414 U.S. 338, 348 (1974), Mr. Justice Powell, speaking for the Court, said:

> "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

One court has drawn from this comment the unwarranted conclusion that the exclusionary rule no longer has a constitutional status. See United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980). That position cannot be sound. A "judicially created remedy" for a constitutional violation is no less a requirement of the Constitution than the basic constitutional right for which it is a remedy.

If the exclusionary rule is constitutionally required, any attempt by Congress to abridge, restrict or limit it would, of necessity, be beyond the constitutional power of Congress. Congress has no power to alter the commands of the Bill of Rights in their direct application to the federal government. So far as the states are concerned, it has the power, under Section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of" that amendment. But even there the power is to "enforce" and not to restrict or limit. The leading case is Katzenbach v. Morgan, 384 U.S. 641 (1966), where the Court stated:

> "Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction

> and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants no power to restrict, abrogate or dilute these guarantees." Id. at 651, n.10 (emphasis added).

In short, as long as Mapp v. Ohio stands -- as it indisputably still does -- Congress may not act to restrict, abrogate or dilute the exclusionary rule.

B. S. 101 and S. 751 are Fundamentally Inconsistent With the Basic Rationales Upon Which the Exclusionary Rule Is Based

As just demonstrated, the logic of the course of the decisions of the Supreme Court construing and applying the Fourth Amendment compels the conclusion that the exclusionary rule is a constitutional requirement. The constitutional nature of the rule is confirmed by a consideration of the various rationales for it. Three such rationales are evident from a reading of the cases: (1) a "personal rights" rationale, (2) a "judicial integrity" rationale, and (3) a "deterrence" rationale.

1. Personal rights. We have quoted (p. 4, supra) from a passage of Weeks v. United States, 232 U.S. 383 (1914), that is the first and still the best exposition of the exclusionary rule as necessary to protect personal rights. In full the passage reads:

> "If letters and private documents can thus be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against . . . [unreasonable] searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393.

The statement bears paraphrasing for emphasis. The Supreme Court in 1914 thought that to permit introduction of illegally obtained evidence in a criminal proceeding would be tantamount to nullifying the right of the citizen accused of crime to be secure against unreasonable searches and seizures. That theme was, understandably, muted -- ignored, indeed -- when the Court decided Wolf v. Colorado. But it emerged again in Mapp v. Ohio. The Court quoted the passage we have just quoted, adding to it Justice Holmes' remark for the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), that without the exclusionary rule the Fourth Amendment would be a mere "form of words." 367 U.S. at 648.

The "personal right" rationale has no doubt been clouded by the Supreme Court's opinion in United States v. Calandra, 414 U.S. 338 (1974), from which we have quoted above (p. 8), and other cases such as Stone v. Powell, 428 U.S. 465 (1976). It was in explaining the Court's declination to extend the exclusionary rule so far as to forbid the questioning of a grand jury witness on the basis of documents illegally

seized from him that the Court in Calandra remarked that the exclusionary rule is not "a personal constitutional right of the party aggrieved" but "a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect." Id. at 348. The formula has been repeated in other contexts. It seems to mean that there is no constitutional right to have illegally obtained evidence excluded from consideration at all stages of all proceedings in which the victim of the illegal search or seizure is interested. But the right of that victim to have the fruit of such a search or seizure excluded from a criminal proceeding in which he is the defendant has not been affected.

2. Judicial Integrity. In Weeks v. United States, the Court also sounded the theme of the need to maintain the integrity of the courts by refusing to participate in convicting people on the basis of unlawful seizures.

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U.S. at 392.

The theme was echoed and even amplified in Mapp v. Ohio, after having been ignored in Wolf. 367 U.S. at 648, 659-60.

Justice Clark said that the Court's decision gave "to the courts that judicial integrity so necessary in the true administration of justice." Id. at 660.

The judicial integrity rationale, like the personal rights rationale, has been denigrated in some recent Supreme Court opinions. See, e.g., Stone v. Powell, 428 U.S. 465 (1976). It retains at least some of its vitality, however, having been restated in one recent case, United States v. Janis, 428 U.S. 433, 458-59 n.35 (1976), thus:

> "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution . . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of the Fourth Amendment rights . . . [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." See also Dunaway v. New York, 442 U.S. 200, 218 (1979) ("integrity of the courts" mentioned along with deterrence as rationale for exclusion).

That is perhaps a grudging acknowledgment but acknowledgment it is of the proposition that "the courts must not commit or encourage violations of the Constitution."

3. Deterrence. As indicated by the quotations from Janis and from Calandra, the favored modern rationale for the exclusionary rule is that it operates to deter substantive Fourth Amendment violations.

The concept of the exclusionary rule as a deterrent was introduced in Wolf v. Colorado, where the Court said that,

though "the exclusion of evidence may be an effective way of deterring unreasonable searches," it could not conclude that other methods would not be equally as effective. 338 U.S. at 31. The decision in Mapp to overrule Wolf was seemingly induced in major part by a belief on the part of the Court that "other remedies have been worthless and futile." 367 U.S. at 652. And so deterrence was emphasized as the aim of the rule.

At times the deterrence rationale is stated as if it meant that the denial of a wanted conviction for lack of the fruit of an illegal search or seizure amounted to punishment of the arresting or searching police officer and thus would deter him and his colleagues from further Fourth Amendment violations. Justice Rehnquist seemed to have this view of deterrence in mind when he wrote the Court's opinion in Michigan v. Tucker, 417 U.S. 433 (1974). He said that by the refusal to admit evidence gained as a result of conduct by particular officers that has deprived a defendant of a Fourth Amendment right "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused." Id. at 447. But a more realistic view is that the purpose of the rule "is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). Professor Amsterdam has felicitously

expanded upon this terse statement of the Court's. He explained that the exclusionary rule "is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set" but instead deters in the way branding a television set with the social security number of the owner deters by making the set a less attractive object of larceny because of its decreased resale value in the hands of anyone except the branded owner. A television set may still be stolen,

> "[b]ut at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 431-32 (1974).

When the deterrent rationale is so understood, it is clear that law enforcement officers would not have the same incentive to observe the requirements of the Fourth Amendment were there no such rule. To put the case in the terms used by the Court in Janis, where the Court equated judicial integrity with deterrence, to admit the illegally seized evidence would encourage Fourth Amendment violations. Evidence of the truth of this proposition -- which seems nearly self-evident -- is found in Professor Kamisar's account of reaction to Mapp.

> "The heads of several police departments . . . reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written." Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 66 (1978).

He found that one of the most common complaints of the law enforcement officials after Mapp was that the application of the exclusionary rule would require the police to change their policies with respect to searches and seizures -- in short, to observe for the first time the requirements of the Fourth Amendment.

To the extent that the exclusionary rule is regarded as a personal constitutional right of a criminal defendant to have items illegally taken from him suppressed when they are offered in evidence and returned to him, it of course is not subject to abridgment by Congress. And to the extent that the rule is grounded in the judiciary's refusal to be a party to or to encourage a constitutional violation, Congress has no power to overrule the judicial decision not to be such a party. And even if these two bases for the rule are thought to have atrophied as a result of the Supreme Court's decisions of the last several years, the remaining deterrence rationale for the rule, properly understood, is equally inconsistent with congressional action to eliminate or restrict the rule. For

that rationale holds nothing less than that the exclusionary rule alone gives law enforcement officials the incentive to abide by the limitations that the Fourth Amendment places on their conduct. Only if there is such an incentive will the Fourth Amendment be honored. Professor Kamisar's police officials who equated the exclusionary rule with the substantive constitutional proscriptions lend the most eloquent support to that proposition. If there is no exclusionary remedy, the constitutional right will not be observed and for practical purposes there is no such right.

II. The Standards Prescribed by S. 101 Would Impermissibly Curtail the Exclusionary Rule

S. 101 contemplates limiting the exclusionary rule in federal proceedings to cases in which there have been "intentional" or "substantial" violations of the Fourth Amendment. In the same vein, a special federal task force on violent crime named by the Attorney General has very recently recommended that the rule not be applicable if a police officer has acted in the reasonable good faith belief that his action conformed to the Fourth Amendment. Final Report of the Attorney General's Task Force on Violent Crime, Recommendation 40 (August 17, 1981). While individual expressions of some Justices suggest a receptivity to consideration of some such limitation of the exclusionary rule, see, e.g., United States v. Ceccolini, 435 U.S. 268, 281 (1978) (Burger, J. concurring),

nothing in those expressions suggests that Congress rather than the Court itself is free to effect the limitation. And the Court as a whole has not even indicated its own inclination to alter constitutional doctrines, much less a willingness to let Congress define constitutional remedies for its benefit.

The cases that a proponent of S. 101 would cite in support of the constitutional validity of such legislation do not support it. In one line of cases, the Court has refused to apply the exclusionary rule retroactively to law enforcement conduct that occurred before the Court expanded substantive constitutional rights. See, e.g., Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). The rationale of the cases is that the deterrent function of the exclusionary rule is not furthered by application to a case in which a law enforcement officer acted properly -- not just reasonably or in good faith but nevertheless illegally -- on the state of the law as it was when he acted.

In another set of cases, to which we have already adverted, the current Court has tailored the exclusionary rule to its deterrent function by holding that the rule is inapplicable in certain proceedings subsidiary or unrelated to federal or state criminal proceedings. See United States v. Calandra, 414 U.S. 338 (1974) (a witness testifying before a grand jury may not refuse to answer questions on the grounds

that they are based upon illegally obtained evidence); United States v. Janis, 428 U.S. 433 (1976) (illegally seized evidence need not be suppressed in civil proceedings concerning taxes). In these cases, the Court determined simply that the exclusionary rule need not be applied to proceedings such as the grand jury's deliberations or federal civil proceedings in order to "remove the incentive to disregard" the strictures of the Fourth Amendment. The refusal to accept the evidence in a criminal trial accomplishes the removal.

Finally, in another line of cases the Supreme Court has declined to apply the exclusionary rule where the use made of evidence in a criminal proceeding is, on the Court's view, too remote to provide an incentive for disregarding the underlying substantive rules. See, e.g., United States v. Havens, 446 U.S. 620 (1980) (illegally seized evidence may be used to impeach cross-examination testimony growing out of defendant's direct testimony); United States v. Ceccolini, 435 U.S. 268 (1978) (causal connection between police misconduct and introduction of live witness testimony too attenuated to require exclusion of live witness testimony). In these cases also, the Supreme Court has made the judgment that the deterrence of police misconduct would not be increased by application of the exclusionary rule.[1/]

1/ We do not discuss the recent Supreme Court cases on the standing requirements of the Fourth Amendment as these do not bear upon when the exclusionary rule may be applied but rather who may ask to have the rule applied. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978).

These three lines of cases -- (1) refusal to give retroactive effect to the exclusionary rule where substantive constitutional rights change, (2) refusal to extend the exclusionary rule to forums of marginal deterrent value, and (3) refusal to apply the exclusionary rule where the violation is too remote from the use to be made of the evidence -- do not support the drastic curtailment of the exclusionary rule contemplated by S. 101. They indicate rather that the Court has tailored the exclusionary rule to those circumstances where a deterrent function will be served. S. 101, by contrast, would curtail the exclusionary rule without regard to the deterrent function of the rule.

Even if one assumes that the Supreme Court would be inclined to adopt standards for the application of the exclusionary rule such as those contained in S. 101, Congress lacks the authority to do so. The Supreme Court has not adopted the standards set forth in S. 101.[1/] The Court has not invited Congress to change existing Supreme Court doctrine along the lines of S. 101. Enactment of S. 101 would thus constitute an

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1/ This much at least is transparently evident: if S. 101 were current Supreme Court law, enactment of the legislation would be entirely superfluous. It is thus entirely clear that the purpose of S. 101 is to curtail the Supreme Court's application of the exclusionary rule. Senator DeConcini said as much in the introduction of his bill: "It [S. 101] would define and limit application of the exclusionary rule in Federal Courts." 127 Cong. Rec. S 152 (daily ed. Jan. 15, 1981) (emphasis added).

attempt by Congress to restrict a remedy that the Supreme Court has held to be required by the Constitution. S. 101 would also dilute this remedy by allowing the federal district courts to engage in an amorphous balancing act to determine when this remedy is to be available. In the absence of a declaration by the Supreme Court that Congress has the power, we are aware of no Constitutional authority that would allow Congress to restrict directly judicially created remedies mandated by the Constitution. We submit that enactment of S. 101 would constitute a particularly serious challenge to the separation of powers extending far beyond the perimeters of the Fourth Amendment. As previously noted, even under Section 5 of the Fourteenth Amendment, which does give the Congress power to legislate concerning remedies for violations of constitutional rights, the Court has stated that "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (emphasis added).

When S. 101 was introduced, the sponsor invoked several constitutional provisions as sources of authority for congressional action.

> "The Constitution vests Congress with the power to ordain and establish inferior courts, U.S. Constitution, article III, section 1; to make regulations and establish

> exceptions with respect to the appellate jurisdiction of the Supreme Court, U.S. Constitution, article III, section 2; and to make all laws necessary and proper for carrying into execution the powers granted the Federal Government by the Constitution, including those granted the courts, U.S. Constitution, article I, section 8. It is generally conceded that Congress has the power to establish rules for the admissibility of evidence in Federal courts. [Citations omitted]. Congress has recently exercised this authority by passage of the Federal Rules of Evidence, 88 Stat. 1929 (1975)." 127 Cong. Rec. S 153 (daily ed. Jan. 15, 1981).

The specific constitutional provisions that are cited seem, on their face, off the point. As for the congressional power to prescribe rules of evidence, a power that one may fairly concede though no constitutional text can be cited for it, it is enough to say, at the risk of banality, that such a power, like any other congressional power, is exercised in subordination to specific constitutional limitations, including in particular those of the Bill of Rights. That Congress may prescribe rules of evidence does not mean, for example, that it is free to make a criminal defendant a compellable witness in his own trial.

III. S. 751 Is Unconstitutional Because It Eliminates the Exclusionary Rule and Fails to Provide Any Effective Alternative Remedy

S. 751 would eliminate the exclusionary rule entirely and would instead provide a limited damages remedy against the

United States and authorize disciplinary action against offending law enforcement personnel. It thus tries to take advantage of the currently popular deterrent rationale for the exclusionary rule -- and what that rationale may be taken to imply, i.e., that some other remedy might be substituted that would be as good a deterrent. The effort is plausible, but it fails. It fails for several reasons.

First, it ignores the fact that considerations other than deterrence have been thought and, to some extent at least, are still thought to underlie the exclusionary rule. Even if the Supreme Court has so far denigrated the idea that a defendant in a criminal case has a constitutional right not to suffer the admission of evidence illegally seized from him that it may be disregarded -- a proposition that is by no means apparent from the cases -- the Court clearly has not abrogated the doctrine that it and the lower federal courts will not be made parties to constitutional violations by allowing unconstitutionally seized evidence to be introduced into criminal trials. (Pp. 11-12, supra.) The explicit provision of a damages remedy does not affect either the personal rights or the judicial integrity reasons for excluding illegally seized items from criminal trials.

Second, the damages remedy (and the remedy of discipline for misbehaving police officers) are surely the most obvious of the remedies the Court recognized as "worthless and

futile" in Mapp v. Ohio, 367 U.S. 643, 652 (1961). The Court there recited the experience of California, whose highest court had found that "other remedies have completely failed to secure compliance with the constitutional provisions" and therefore adopted the exclusionary rule, id. at 651, and then went on:

> "The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since Wolf." Id. at 652.

The Court might conceivably be persuaded some day that the majority in Mapp was wrong when they spoke of the "obvious futility" of relying on any remedy other than exclusion. The mere explicit provision by Congress of remedies of the very sort that were thus found wanting 20 years ago is not persuasive by itself that the Court should or would reconsider the rule of constitutional law to which it was led, in very considerable part, by its finding that it was futile to depend on such remedies.

Third, any damages remedy is in fact demonstrably inadequate as a deterrent of violations of the Fourth Amendment and, as limited by S. 101, the damages remedy would not approach being adequate. The authorization of disciplinary action adds little or nothing to what we assume is already the law and so

cannot conceivably be regarded as an adequate substitute for the exclusionary rule. We expand on this third point below.

A. The Inadequacy of the S. 751 Damage Remedy

We first discuss the problems intrinsic to any damage remedy for Fourth Amendment violations and then highlight those aspects of the S. 751 damage remedy that make it particularly inadequate.

Any damages remedy for Fourth Amendment violations is bound to be ineffective because of the difficulty of valuing the impairment of the interests the Fourth Amendment is designed to protect. The actual damages that could most easily be calculated are those for physical injuries to person and property flowing from a Fourth Amendment violation. But many searches and seizures clearly prohibited by the Fourth Amendment do not result in bodily injury or destruction of or damage to property. What are the damages to be awarded where a police officer without probable cause, very politely and courteously, proceeds to scrutinize the contents of a briefcase or purse and finds nothing compromising? Absent reasonable or probable cause, such conduct by the law enforcement officer would be in violation of the Fourth Amendment, yet it is hard to conceive of any practical way to calculate damages for such invasions of the right of privacy. How is a jury supposed to put a dollar figure on such an intangible as invasion of privacy? Perhaps the answer is clear: where the

police officer has conducted himself so politely and courteously, no damage is suffered. But if this is the case, then in most cases involving violations of the Fourth Amendment, no damages will be awarded simply because police officers only rarely injure people or damage or destroy property wantonly in the execution of their duties.

The Fourth Amendment does not limit its protection to security from physical invasions of body and property by law enforcement officers or even principally concern itself with such physical harms. On the contrary, the Fourth Amendment speaks of "the right of the people to be secure in their persons, houses, papers and effects." It is quite clear that this emphasis on "the right of the people to be secure" defines a right of privacy that is substantially broader than the bare right to have one's person and possessions left intact. The fact that it is hard to put a dollar figure on what privacy is worth does not mean that privacy is worth nothing. And a damages remedy that does not compensate for invasions of privacy apart from physical injury to body or property will be ineffective in deterring police misconduct that impinges upon the interest in privacy.

Thus, in the absence of extreme police misconduct there is good reason to suppose that the damage awards in most cases would be minimal and, thus, of minimal deterrent value. And, of course, because damage awards would be small, the

incentive to sue would also be minimal, thus further reducing the deterrent value of the damages remedy.

There are other reasons why few damage actions are likely to be brought. Many of those who would be most likely to bring such actions live, at best, in uneasy accommodation with the enforcement officers whom they would be accusing of wrongdoing in any such action. Moreover, if convicted and imprisoned, the prospective Fourth Amendment plaintiff would be in the hands of the authorities -- if not those who violated his rights, then, certainly in the view of the convict, their close colleagues. There is bound to be fear of reprisal. See Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, [1975] Wash. U. L. Q. 621, 692 (1975). Additionally it seems likely that many claimants would be subject to pressures to waive their right to damages in the plea bargaining process.

Professor Amsterdam has described the institutional disincentives for an accused party to pursue a damage remedy against law enforcement officers:

> "Where are the lawyers going to come from to handle these cases for the plaintiffs? Gideon v. Wainwright and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony

> concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?" Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974).

The institutional obstacles to suit under a damage remedy such as S. 751 are not limited to those accused of crimes. Some of the more severe disincentives to sue for violations of the Fourth Amendment are common to both suspects and wholly innocent citizens. Thus, a jury is very unlikely to make a significant damage award to police misconduct victims who are in fact (or by virtue of their position as plaintiffs merely appear to be) criminal suspects. The sympathies of the jury will most likely lie with the law enforcement officers, who were after all engaged in doing their job.

> "A defendant policeman in a section 1983 action may benefit from the image of authority and respectability evoked by his office . . . . On the other hand, the plaintiff's reputation, if not already sullied by a criminal record, may be called into question simply because the case arises from a confrontation with the police. Finally, juries may be prejudiced against some plaintiffs because of their race or unconventional lifestyles." Project, Suing the Police in Federal Court, 88 Yale L. J. 781, 783-84 (1979).

There is no doubt that in this type of litigation, the defendant would seek to introduce evidence of the crimes on account of which the plaintiff was searched and his property seized. No doubt the defendant would seek to introduce evidence of suspicious or unorthodox behavior by the plaintiff. And, indeed, under a damage remedy these would be legitimate issues, as they are relevant to the issue of whether the law enforcement officers had probable cause to conduct the search or seizure. The jury would thus most likely conclude that the plaintiff is a rather unsympathetic sort seeking to harass those charged with crime control.[1/] And, as noted by Professor Amsterdam and others,

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1/ As stated by one commentator:

> "The reasons why the victim of the unconstitutional search and seizure so often loses his suit while the defendant-policeman prevails are numerous. The first and most important reason is that the claimant who has been charged with or convicted of crimes is not likely to evoke the jury's sympathy, particularly after the defendant-policeman explains that he was only trying to protect society. Even if the claimant has not been criminally charged, he will not be a sympathetic figure to the average jury if, as most victims of police illegality, he is part of America's lower class. Second, the jury bias in favor of a policeman often allows the policeman successfully to lie his way to victory by fabricating a story of adherence to constitutional requirements during the search and seizure." Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, [1975] Wash. U. L. Q. 621, 692-93 (1975).

the plaintiff would be up against a team of professional investigators and testifiers, making the practical obstacles to recovery all but insuperable.[1/]

The specific damages provisions of S. 751 exacerbate these inherent difficulties with the damages remedy. Most egregiously, the damages that may be recovered are limited to those for "actual physical personal and . . . actual property damage." Thus, by its very terms S. 751 precludes damage awards for imparment of the principal interest protected by the Fourth Amendment -- the interest in privacy.

Given this limitation on the type of damages that may be recovered, indeed, S. 751 scarcely expands existing

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1/ In Professor Amsterdam's words:

> "Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some resources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police. No, I think we shall have airings of police searches and seizures on suppression motions or not at all." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974).

rights of citizens to be compensated by the United States for abusive practices of its law enforcement officers. Under the Federal Tort Claims Act, one can already sue the United States for assault, battery, false imprisonment, false arrest, and other common law torts resulting in injury to body or property. See 28 U.S.C. §§ 2674 and 2680; Norton v. United States, 581 F.2d 390 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). The only expansion in the availability of damage awards provided by S. 751 is to that segment of cases in which serious injury has been inflicted on a person's body or property in violation of the Fourth Amendment but in a manner that did not involve any recognized intentional or negligent tort of a law enforcement officer. There may be such cases, but it is not easy to hypothesize their facts.

S. 751 exacerbates the problems that are inherent in any damages remedy by capping the permissible award at $25,000 for actual and punitive damages combined. The $25,000 ceiling would deter suit. Twenty-five thousand dollars is not a lot of money for which to gamble the kind of costs (and attorney fees unless the case were taken on a contingent basis) that are associated with suits against the United States in federal court and that would presumably be borne by the plaintiff if he lost.

While S. 751 permits the court to award claimants attorney's fees, and thus superficially appears to provide

incentives for lawyers to represent claimants, these incentives are negligible. Under 28 U.S.C. § 2678, which is expressly applicable to damage claims under S. 751, an attorney may not charge his or her client more than 25 percent of any judgment rendered or more than 20 percent of any settlement. This percentage limit on attorney's fees means that the absolute maximum an attorney may charge is $6,250 in a judgment and $5,000 in a settlement. As damage awards under S. 751 in the vast majority of cases are likely to be below the $25,000 ceiling,[1/] it is clear that many claimants (who are likely to be poor) would have grave difficulties securing the services of able counsel.

B. The Disciplinary Remedy

S. 751 contains a section that provides:

> "An investigative or law enforcement officer who conducts a search or seizure in violation of the United States Constitution shall be subject to appropriate discipline in the discretion of the Federal agency employing such officer, if that agency determines, after notice and hearing, that the officer conducted such search or seizure lacking a good faith belief that such search or seizure was constitutional."

This provision in effect vests discretion in the federal agencies to discipline personnel who commit violations of the Fourth Amendment. To our knowledge, the federal agencies

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1/ One study indicates that the average award in Fourth Amendment suits brought under 42 U.S.C. § 1983 was $5,723. Project, Suing the Police in Federal Court, 88 Yale L. J. 781, 789 (1979).

already have such discretion and thus this provision authorizing disciplinary measures adds nothing new.

IV. The Standards Prescribed By S. 101 Are Inequitable, Unadministrable and Would Undermine the Deterrent Function of the Rule

When the inadequacy of the proffered substitute remedies of S. 751 is laid bare, all that need be said has been said, both as a matter of constitutional law and as a matter of policy. The inadequacy of the S. 751 remedies demonstrates that the bill does not pass constitutional muster and that, in addition, there are the soundest of policy reasons for not enacting it.

Concerning S. 101 a few additional words are appropriate. For even if the question of its constitutionality were closer than it is, there would be independent reasons for not enacting it.

Adoption of the standard set forth in S. 101 -- i.e., the requirement that there be a "substantial" or "intentional" violation of the Fourth Amendment if the exclusionary rule is to be applied -- would preclude application of the rule to cases where the invasion of Fourth Amendment rights, although not intentional, was reckless, grossly negligent, or negligent unless it was "substantial."[1/] As "intentional" and

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1/ A "substantial" violation is further defined in S. 101 by a four-prong test that includes consideration of whether the violation was "reckless." Recklessness is generally con-

(Fn. cont'd)

"substantial" violations of the Fourth Amendment are alternative thresholds for application of the rule under S. 101, we shall first address the two standards separately.

A. The Intentional and Substantial Standards of S. 101 Are Not Calculated to Further the Purpose of Preventing Fourth Amendment Violations

Proponents of S. 101 probably mean to reserve the term of "intentional violation" for those cases where law enforcement officers intend to conduct a search and seizure in violation of the Fourth Amendment or where the search and seizure is based on erroneous and unreasonable factual premises. This meaning of the term "intentional violation" would, under S. 101, severely curtail the exclusionary rule and (not surprisingly) finds no support in the decisions of the Supreme Court.

Restriction of the exclusionary rule to those violations that are a product of a conscious desire to ignore the Fourth Amendment would seriously undermine the deterrent function of the rule. It would remove the incentive of law enforcement officers to educate themselves in Fourth Amendment

(Fn. cont'd)

sidered in criminal and tort law a lower threshold of intentionality than "intentional." Because "recklessness" is but one prong of a four prong test defining substantial, it is evident that some "reckless" violations of the Fourth Amendment may ultimately be deemed not "substantial" and therefore in those cases S. 101 will preclude application of the exclusionary rule.

jurisprudence. It would encourage them to make warrantless searches where they believed that a warrant might be required but were not sure.

There is no doubt that negligent, grossly negligent and reckless violations of the Fourth Amendment can be deterred and that the exclusionary rule can serve its deterrent function in these cases as well as in cases of intentional violations. Faulty though his comprehension of the nature of the deterrent function of the rule may be (p. 13, supra), Justice Rehnquist understood this much when he wrote in Michigan v. Tucker, 417 U.S. 433, 447 (1974), that "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."

To preclude application of the exclusionary rule where the violation is not intentional is to place a premium on a law enforcement officer's ignorance of the Constitution. In effect, then, S. 101 would reward a law enforcement officer's ignorance of the Constitution by precluding application of the exclusionary rule where a nonsubstantial violation is not intentional.[1/] S. 101 would implicitly encourage negligent

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1/ As noted by Professor Kaplan (who is by no means a friend of the exclusionary rule) in connection with a proposed "inadvertence" exception to the exclusionary rule:

> "There are, however, basic problems with such a modification of the rule. It would put a

(Fn. cont'd)

and reckless police conduct in arrest, search and seizure.

Like the "intentional" standard, S. 751's alternative threshold of "substantial" violation is also seriously deficient in its protection of Fourth Amendment rights. S. 101 states:

> "In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including--
>
> (1) the extent to which the violation was reckless,
>
> (2) the extent to which privacy was invaded;
>
> (3) the extent to which exclusion will tend to prevent such violations; and

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(Fn. cont'd)

> premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1044 (1974).

> (4) whether, but for the violation, the things seized would have been discovered; or whether the relationship between the things discovered and the violation is attenuated."

Presumably, this four-part test requires the court to balance each of the four factors in determining whether the violation is substantial and thus whether the exclusionary rule ought to apply. The most striking feature of the "substantial violation" standard (and perhaps its most radical departure from existing Supreme Court doctrine) lies in the fact that it would delegate a whole series of highly speculative factual inquiries to the lower federal courts.[1/] Deciding whether a violation was reckless, deciding to what extent privacy has been invaded, deciding to what extent exclusion would prevent such violations and deciding whether "but for" the violation the things seized would have been discovered each is a highly speculative metaphysical inquiry. Quite apart from the fact that the Supreme Court has not adopted the standards set forth in S. 101, it has neither delegated authority to nor required the lower federal courts to make such fact-oriented inquiries, and we doubt that it would ever do so. The "substantial violation" standard of S. 101 vests almost complete discretion in the

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1/ The high incidence of uncertainty and speculation in the standards set forth in S. 101 is no accident. S. 881, 93d Cong., 1st Sess. (1973), which was a precursor to S. 101 and which contained a similar "substantial" violation threshold for application of the exclusionary rule, was explicitly designed to give the courts greater latitude in decisions on admissibility of evidence.

lower federal courts to make factual decisions on each of the four factors. The "substantial" violation standard even fails to specify the thresholds for each of the four considerations. For instance, in ruling upon the admissibility of evidence does a substantial invasion of privacy counsel exclusion? A direct invasion of privacy? A serious invasion of privacy? A perceptible invasion of privacy? One can ask the same questions about the degree of recklessness required to counsel exclusion under S. 101.

In addition, S. 101 fails to establish who has the burden of proving the (indeterminate) levels for each of the four factors. Moreover, the substantial violation standard vests almost complete discretion in each federal district judge to decide what weights to assign to each of the four prongs. In addition, as the four considerations are hardly fungible, it is not readily apparent how a court should perform the balancing of all four considerations. How does one balance an indeterminate level of recklessness against an undefined degree of invasion of privacy? In its broad grant of authority to the lower federal courts, the "substantial" violation standard leaves each federal district judge free to consider "all of the circumstances." We submit that enactment of the "substantial" violation standard would result in a broad spectrum of differing views on the scope of the exclusionary rule; it certainly would not result in anything close to a recognizable rule of law.

B. S. 101 Would Impair the Efficient Administration of Justice

Quite apart from the fact that the "intentional" and "substantial" violations standard of S. 101 is unintelligible and incapable of being applied in any manner that would even remotely resemble a rule of law, S. 101 would have harmful effects upon the efficient administration of justice. S. 101 would require complicated factual inquiries at suppression hearings. It would require an investigation of the officer's state of mind to determine whether a violation was intentional or reckless. It would require a factual inquiry into the extent to which privacy was invaded. Indeed, S. 101 offers the worst of all possible worlds in terms of judicial administration. First, it would require the courts to disregard 80 years of precedent on the exclusionary rule and to start defining the scope of the rule from scratch. The imponderable factual inquiries required by S. 101 would compound congestion and delay problems in the courts. Massive litigation would result as defense attorneys sought to exclude evidence under S. 101. Ironically, the appellate courts would not be able to provide much guidance to the lower courts because S. 101 prescribes an extremely fact-oriented standard, and the authority of the appellate courts extends only to declaring decisions to admit evidence clearly erroneous as a matter of law. The inability of the appellate courts to give guidance

to the lower federal courts on the interpretation of S. 101 would increase litigation simply because the uncertainties contained in S. 101 will not be dispelled for many years.

Furthermore, S. 101 would direct judicial inquiry away from the substantive requirements of the Fourth Amendment, away from adjudication of the guilt or innocence of the suspect and towards an investigation of the law enforcement officer's state of mind. As a result, the courts would be burdened with yet another fact-finding duty. And the difficulties that the courts would face in resolving the relevant factual issue would be imposing, if not insuperable.[1/] For example, there

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1/ As stated by Professor Kaplan:

> "There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find evidence of the officer's state of mind which would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted

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is no doubt that S. 101 would increase fabrication by law enforcement officers seeking to secure the admission of evidence. What law enforcement officer is likely to give testimony indicating that his invasion of an individual's Fourth Amendment rights was intentional or reckless?

CONCLUSION

Over the years, the exclusionary rule has been subject to criticism by law enforcement officers and by some judges and commentators. S. 101 and S. 751 represent attempts to repair some of the asserted shortcomings of the rule. If enacted, however, neither would repair any such shortcoming, but instead both would strip the exclusionary rule of the value it now has as deterrent and as guardian of constitutional rights and judicial integrity. The exclusionary rule as it stands now is a fairly simple rule to apply. It is readily understandable to police officers and judges. Many of the criticisms leveled at the exclusionary rule concern not the rule but the substantive commands of the Fourth Amendment as these have been interpreted by the Supreme Court.

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> testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1045 (1974).

> "As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention 'All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
>
> It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform.'" Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 67, 73 (1978).

There are those who claim that the exclusionary rule prevents the courts from bringing criminals to justice. Factually, that seems not to be the case in any significant sense. (Pp. 1-3, supra.) Moreover, it is not the exclusionary rule that creates whatever obstacles there are to full enforcement of the criminal law; it is the Fourth Amendment itself -- a constitutional provision that quite consciously makes the work of law enforcement officers more difficult in order that all of us may be free from unreasonable searches and seizures.

COVINGTON & BURLING

WITNESS STATEMENT

Name Jim Dundas

Address THREE FORKS

Representing CEMENT WORKERS #339

Bill No. HB 382

Committee On JUDICIARY ~~HB 382~~

Date ~~FEB 8, 83~~ FEB 8, 83

Support

Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

JUDICIARY

Name Jim Dundas

Committee On ~~HB 381~~

Address Box 673, Three Forks

Date FEB 8, 83

Representing Cement Workers #239

Support

Bill No. HB 381

Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

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