MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on January 22, 1993, at 10:10 a.m.

ROLL CALL

Members Present:
Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. John Harp (R)
Sen. Tom Towe (D)

Members Excused: Sen. Crippen, Sen. Halligan, Sen. Rye

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

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

Committee Business Summary:

Hearing:	SB 108
	SB 125
	SB 109
Executive Action:	NONE

HEARING ON SB 108

Opening Statement by Sponsor:
Senator Gage, District 5, said SB 108 revises the laws relating to criminal justice information, allowing the Department of Justice to use juveniles' fingerprints and photographs for investigative purposes. SB 108 allows the department to assign audits of criminal history record information systems for compliance with the law to subagencies that control criminal justice information. This will allow the department to charge for costs associated with records requests.

Proponents' Testimony:
Peter Funk, Department of Justice, said that SB 108 is a cleanup bill, except for the provision to retain juvenile fingerprints. Section 1 of SB 108 deals with the retention of juvenile fingerprints. At the present time, juvenile fingerprints are allowed to be retained only in the judicial district in which the fingerprints were taken. There is not a statewide repository for juvenile prints. In the youth court act, juvenile fingerprints can only be taken for offenses, which if committed by an adult, would be a felony offense, or under an authorization of a search warrant issued by the youth court judge. All fingerprints retained by the law enforcement service division are under the Criminal Justice Information Act, which categorizes this as confidential criminal information. Giving the department the authority to retain these prints, means they may only be released to criminal justice agencies or by specific order of the district court. Other provisions that currently exist will be protected to serve both the needs of law enforcement, who are concerned about having the state wide repository for these things, as well as the interest of the juveniles in the state by keeping the prints protected. 30% of property crime is committed by juveniles in this state. Currently there is nowhere to turn for local investigations to investigate crimes if they do have a print.

Mr. Funk said the language in section 2 includes the current restriction. The restriction says that anyone on the state level who is involved with criminal history record information should not audit other state and local entities who also run the system. The law enforcement services division is prohibited by that sentence from going out to local county sheriff's offices and city police departments to make sure they protect and disseminate criminal justice information properly. It also prohibits the experts from doing audits. There are no staff within the Department of Justice who understand criminal history record information systems and there is no funding to train someone to do these audits. At the present time, the audits are not often conducted. A lot of information is received, but is not checked to make sure that it is accurate. The proposal is a recognition that there are no others within the state that have the expertise to conduct the audits. Funding is not available to create a separate audit bureau to do this function. Because the records do have importance for people throughout the state, we suggest that the Law Enforcement Service Division be allowed the statutory authority to do the audit.

Mr. Funk said section 3 of the act is designed to be a cost recovery mechanism. The language to be eliminated says that whenever anyone comes in for criminal record information the agency has the ability to charge for labor and materials associated with machine produced copies. The proposal is to charge for costs associated with record requests. Users of the system would be charged for the cost of the system and not for photocopy costs.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Towe asked Mr. Funk why the Justice Department needs the fingerprints and photographs of juveniles. Mr. Funk said that fingerprints and photographs are currently retained in the judicial districts of this state. Mr. Funk said as a local investigator, you would have to go to the individual judicial district which retained the fingerprints. If the prints are in another judicial district, local investigators would be unable to access those juvenile prints.

Senator Towe told Mr. Funk that was the intent in the original bill. Mr. Funk said if the legislative position is that the law enforcement investigators should not have access to juvenile prints, then the proposal should be amended out of the statute. Mr. Funk told the Committee that Mr. Joyce could address the concerns of law enforcement in terms of the escalation of the amount of juvenile crimes that are being committed. Juveniles are committing more and more crime in Montana which is why the amendment is proposed.

Senator Towe asked Mr. Funk if by allowing the fingerprints to be put in the Department of Justice, on the computer, if everyone would have immediate access to them. Mr. Funk said yes.

Senator Towe asked Mr. Funk asked why SB 108 should be changed. Mr. Funk said the reason was the increase in crime involving juveniles.

Senator Towe asked Mr. Funk who the would conduct the audits. Mr. Funk said that the State Law Enforcement Division would conduct the audits. The State Law Enforcement Division is prohibited under current law from doing these audits.

Senator Towe asked Mr. Funk asked what agency the State Law Enforcement Division belongs to. Mr. Funk said the Department of Justice.

Senator Towe asked Mr. Funk if the Department of Justice could conduct audits under the present law. Mr. Funk said that the Department of Justice could conduct audits, but the State Law Enforcement Division could not.

Senator Towe asked Mr. Funk about who in the Department of Justice is not in the State Law Enforcement Division. Mr. Funk said there are eight divisions, all of which are subagencies. The agencies do not have control of the audits. The problem is that the prohibition applies to the people who know the system. There are no staff who know how to audit criminal record

information systems statewide, except for the State Law Enforcement Services Division. Under the current language, the State Law Enforcement Services Division is prohibited from auditing other entities that are involved with the system. The keeper of the records should not be conducting the auditing functions. The current financial situation dictates that if the systems are going to be audited by anyone, they need to be audited by that division. If that division remains prohibited from doing conducting the audits, then there will be no audits.

Senator Towe asked Mr. Joyce about contact between the Law Enforcement Service Division and local agencies. Walter Joyce, Manager of Criminal History Records for the State of Montana, told the Committee that they retain the criminal records for Montana. Records are kept of fingerprints, so when juveniles are arrested there is a tracking system. Mr. Joyce said they want to check to make sure that the information is correct, accurate, and that the agencies are following the regulations.

Sen. Towe asked Mr. Joyce about his position with the local agencies. Mr. Joyce said the Law Enforcement Service Division would work with the local agencies on the auditing and discrepancies in the auditing. If discrepancies were found, the Law Enforcement Service Division would work with the agencies to resolve the problems before they become worse.

Sen. Towe asked Mr. Joyce about the provisions for destroying records. Mr. Joyce said the reason for the system is to make sure the law is followed and everyone is trained to do so.

Senator Bartlett asked Mr. Joyce who is doing the audits. Mr. Joyce said no one is auditing the fingerprints.

Senator Bartlett asked Mr. Joyce who would have record checks done. Mr. Joyce said employers and private individuals would want to have the record prints.

Senator Bartlett asked Mr. Joyce if there would be charges to law enforcement agencies to have records printed. Mr. Joyce said they would have no charge.

Senator Towe asked Mr. Joyce about the dissemination of juvenile fingerprint and photograph records. Mr. Joyce said the fingerprints of juveniles would be put in the AVIS system. The AVIS system enables prints to be part of a data base to search for like fingerprints to come up with a suspect in a crime. Mr. Joyce said there is no intent of disseminating criminal information.
Mr. Joyce said criminal history of juveniles is very well protected.

Senator Towe asked if the AVIS system is limited to fingerprints. Mr. Joyce said yes. There is not a name entered into the system, only a number that is assigned.

Senator Towe asked Mr. Joyce about photographs. Mr. Joyce said photographs are not in the Law Enforcement Service Division system. If photographs are taken, they would be found at the individual agency.

Closing by Sponsor:
Senator Gage said the whole area of law enforcement has grown considerably with technology and the availability of information. The information given to the Board of Crime Control is that fingerprint matches to be made from other states for Montana and Montana is making matches for other states. Senator Gage said this is an effective system, and juvenile crimes are increasing in Montana. This system would identify an individual who had committed a crime, and is thus justified.

HEARING ON SB 125

Opening Statement by Sponsor:
Senator Van Valkenburg, District 30, told the Committee SB 125 is a cleanup bill with respect to the work of the Criminal Procedure Commission to make changes in the Criminal Procedure Code after adoption in the last legislative session. One of the problems that resulted is with respect to the relationships between lower and district courts and the references in the Criminal Procedure Code to the two different courts. SB 125 would correct that legislation. There was a problem dealing with the requirement of disclosure of informants which has been clarified in SB 125. Senator Van Valkenburg said that additional amendments may be needed. There is concern from the Magistrates Association about the requirement for submission of complaints under oath. Mr. John Conner, of the Department of Justice, who is a member of the Criminal Procedure Commission will give background on the provisions that are proposed to be changed in SB 125. Randi Hood, a public defender in the Lewis and Clark County, is also here to testify before the Committee.

Proponents' Testimony:
John Conner, Attorney General's Office, is a member of the Criminal Procedure Commission which is responsible for the creation of SB 125. SB 125 cleans up provisions which were not workable, where mistakes were made in codification, and where the commission was responsible for bad drafting. New language is added with respect to the disclosure of informants, because it was left out of the statute in the last session. This language in SB 125 is identical to the original bill before the last legislative session. There was a problem with respect to the District Court Reimbursement Fund. When the 1991 bill became law, the language allowing reimbursement for the District Court Fund was left out. An amendment is proposed to cure a problem that occurred, not as part of this bill, but in the codification of another law that the legislature passed in the 1991 session.

Under the current law, in order to have a presentence investigation there has to be an evaluation of an offender and a recommendation as to treatment for all felony offenses. That was not the intent of the bill. The language on lines 19 through 22 should be stricken and inserted on top of page 50 after misdemeanor to read, "if the defendant is convicted of an offense under 45-5-502 etc, the investigation must include an evaluation of the defendant and a recommendation of treatment." The amendment that appears on page 53, lines 7 through line 9, allows suspending the sentence in some cases for longer than the actual sentence itself. Mr. Funk said that legally a sentence can not be suspended for longer than the law would allow for a sentance to be imposed. A deferred sentence could be suspended, because a sentence is not being imposed. Mr. Funk said that amendment could cause legal problems if it remains.

Randi Hood, Chief Public Defender for Lewis and Clark County, supports the changes to the Criminal Procedure Act. Ms. Hood said that to allow a suspended sentence of greater than a maximum sentence for an offense is not legally permissible.

Craig Hoppe, Montana Magistrates Association, support SB 125 as amended. Mr. Hoppe told the Committee about amendments to clarify SB 125. Section 14, page 18, strike the word "complaint" and insert "sworn complaint." Page 20, subsection 3, line 13, insert the word "sworn" in front of peace officer, and in front of "by a person", insert "or on oath by a person."
Mr. Hoppe said all criminal actions are supposed to begin with a sworn complaint. Police officers are sworn in the state of Montana. Inserting sworn would relieve the officers of an obligation to swear to each individual ticket that he writes. With the changes Mr. Hoppe recommends SB 125 DO PASS.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Blaylock asked Senator Van Valkenburg whether he had objections to the amendments. Senator Van Valkenburg said yes, concerning the issue of suspension of a sentence for a period longer then the sentence can be imposed. Senator Van Valkenburg suggested an amendment. Senator Van Valkenburg gave an example if the amendment is not passed. In the case of a DUI first offense, the maximum sentence is 60 days. An adequate treatment program cannot be put in place for someone and then know they are going to abide by the reasonable terms of probation. In the course of determining whether the offender would obey the terms of probation, a threat of a potential jail sentence would be held over their heads. A DUI first offense requires offenders to participate in treatment programs. At the end of the expiration of 60 days there is no way of knowing if the offender is going to keep out of trouble in the future. Senator Van Valkenburg told

the Committee an alternative would be to require every crime be punishable for six months in the county jail. Senator Van Valkenburg said the changes the Magistrate Association has proposed may be contrary to case law. When a peace officer files a complaint it charges under oath. Senator Van Valkenburg said the Committee needs to talk about how to deal with the practical requirement of having the complaint sworn under oath. Senator Van Valkenburg agrees with Mr. Conners charge about the presentence investigation. That change gives the court the ability to order a presentence investigation on other offenders rather than just sex offenders.

Senator Towe asked Senator Van Valkenburg about the suspended sentence. Senator Van Valkenburg said if the legislature gives the courts the authority to suspend the execution of a sentence for a period longer than the sentence might be imposed, the question is, is it a violation of due process of law under the constitution.

Senator Towe asked Senator Van Valkenburg about the suspension if parole was violated. Senator Van Valkenburg said the judge would decide whether an offender would get credit from the beginning of the suspended sentence or start the day the violation took place.

Senator Towe asked Randi Hood to comment on the same question. Ms. Hood disagrees with Senator Van Valkenburg. Ms. Hood told the Committee a suspended sentence is a sentence in which the judge has sentenced the defendant to a term of imprisonment, in jail or in prison, and then suspended the execution of that sentence. Criminal laws are established for the length of time a judge may sentence someone to jail or prison. During the period of a suspension, if a defendant violates the terms of the suspension, a petition is filed and the court has the ability to remove the suspension and imprison that person for the terms of the suspension.

Senator Towe asked Ms. Hood if on the last day of a suspended sentence if a sentence could be revoked. Ms. Hood said yes. The judge has the discretion of giving credit for the time served on the suspension and could do it for a lesser time.

Senator Towe asked Ms. Hood if her statement was inconsistent with her previous statement. Ms. Hood told the Committee that if a suspended sentence for disorderly conduct is violated after a judge has suspended a sentence for six months, the judge would only send the offender to jail for 10 days. SB 125 is saying that a judge could put a hold on an offender for six months and the law on disorderly conduct does not provide for that.

Senator Towe asked Ms. Hood about maximum sentences. If a sentence is for five years, then on the last day of the suspension he could not extend the suspension longer than the amount of time by statute he had authority to sentence, could he

then make him serve the full five years. Ms. Hood said that a revocation could be filed on the last day. It has to be filed during the period of suspension.

Senator Towe asked Ms. Hood what authority the judge would have upon revocation. Ms. Hood said the judge could remove the suspension.

Senator Towe asked Ms. Hood if the judge has authority beyond what the statute authorizes. Ms. Hood said that the judge can not sentence a person beyond the maximum penalty. The judge is limited to the time that was suspended.

Mr. Conner commented on the suspended and deferred sentences. Mr. Conner said there are two different ways to sentence a defendant without a jail term. One is to suspend or defer a sentence. When a court gives a defendant a deferred imposition of sentence, the court can wait to impose the sentence during that five year time to see how the defendant does. If the defendant does well, the defendant can ask the charge be removed from the record. If the defendant does not do well during the period of deferment, the court could sentence the defendant up to the maximum allowed by the law to the sentence. The court imposes a sentence at the time of a suspended sentence. During the suspended time, if a defendant behaves, the sentence would expire. If a defendant gets into trouble, the court has the authority to sentence a defendant to the maximum sentence. The court could sentence the defendant to jail for the remaining period of the sentence, or sentence the defendant to the maximum sentence starting at the time of the violation. Mr. Conner is concerned that this may not be legal and will do some research on the subject.

Senator Towe asked Mr. Conner about his concern regarding the suspended sentence. Mr. Conner said his concern is if a judge sentences a defendant to a certain amount of time in jail, then suspends the sentence on the condition that the defendant behaves, the defendant could go to jail if the conditions were violated.

Senator Van Valkenburg told the Committee that it is a problem with DUI first offenses. The legislature has said that courts may not defer the imposition of a sentence in DUI first offenses. DUI is a serious problem and if there is a way to deal with DUI offenses, then the problem may go away.

Chair Yellowtail asked if we could deal with the DUI first offense in the framework of SB 125 to permit deferred sentences in those cases.

Senator Towe suggested Randi Hood, John Conner, and Senator Van Valkenburg work on an amendment dealing with DUI first offenses.

Senator Blaylock asked about the mandatory sentencing of DUI

first offenses. Senator Towe said you cannot defer imposition on a DUI offense. Senator Van Valkenburg said the maximum sentence on a first offense DUI is six months. Senator Van Valkenburg said there is a maximum sentence of six months for other offenses, so DUI first offenses should have a maximum sentence of six months also.

Chair Yellowtail said if we set a maximum sentence of six months for DUI first offense, the legislature is accomplishing the purpose of being able to impose the condition on the sentence, as well as having that person engage in a treatment program.

Senator Grosfield said that would only relate to DUI.

Chair Yellowtail said misdemeanors would be left. Senator Grosfield said the six months Senator Van Valkenburg has in SB 125 is an arbitrary number. Senator Grosfield said that would mean that a defendant could be sentenced for ten days, but would have to be good for six months. Senator Grosfield said that is getting beyond the intent of the legislature. If the Committee would raise the maximum on first offense DUI, that would solve the problem. Senator Towe agreed.

Chair Yellowtail asked the proponents of SB 125 to consider the issues and suggest something to the legislature. Chair Yellowtail said the case of the misdemeanor ten day sentence had merit, if the condition was satisfactory completion of a treatment program that extends beyond the ten day maximum sentence.

Closing by Sponsor:
Senator Van Valkenburg closed.

HEARING ON SB 109

Opening Statement by Sponsor:
Senator Doherty, District 20, said SB 109 has in its title "an act expanding the definition of serious bodily injury in criminal law." Senator Doherty told the Committee the title should be more appropriately "clarified." The first fourteen pages of the bill clarifies certain language. Page 14 is the definition of serious bodily injury. SB 109 would tie down a time factor to make sure the person responsible for the injury is charged with the consequences of the act at the time of injury and not for any intervening actions.

Proponents' Testimony:
John Conner, Montana County Attorneys Association, said SB 109 was suggested by professors at the law school, who teach criminal law and procedure, to cure a problem that has existed in criminal law, since the Criminal Code in 1973. SB 109 proposes to amend

language to alleviate gender biased and grammatical problems. The substance of SB 125 is in subsection 59, page 14. The definition of serious bodily injury has been a source of problem for prosecutors and courts. The intent of the code, when it was drafted, was to define crime in an objective term. Outside factors should not bear upon issues of guilt or innocence, it should be the act of the defendant. Under this definition, it is possible to violate the principle by making guilt or innocence depend upon acts that occur after the time of the omission of the offense. For example, if a victim received appropriate medical treatment which may have substantitially lessened the risk of death, serious impairment, or disfigurement. SB 109 seeks to make it clear that risk of death, substantial risk of serious impairment or protracted loss are to be determined at the time injuries occur, when the defendant commits the act for which he is charged. Mr. Conner asked the Committee to give SB 109 consideration with a DO PASS recommendation.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Grosfield asked Mr. Conner about the substantial risk of serious mental illness or impairment. Mr. Conner said that language has been part of the law since 1973. Serious mental illness relates to situations where one might suffer injuries which develop into serious mental illness, like emotional distress that becomes progressively worse over time. Clarifying the definition, one could argue that the injury would be less severe when incurred and became more severe. In that instance, it would work for the defendant, rather than the prosecution. This amendment clarifies the language so there is not a question of injury. Mr. Connor said that if injury is caused to someone, and it results in serious mental illness, then it ought to be a criminal act that results in severe penalties.

Senator Towe commented on the meaning of serious permanent disfigurement. If someone is brandishing a knife and nicks a person in the ear, but leaves no permanent injury, he would be guilty of a substantial risk of serious permanent disfigurement. At the present time, serious bodily injury means a risk of death, or causing serious bodily disfigurement. Unless the person with the knife has actually disfigured someone, he is not guilty. SB 109 would make him guilty just by brandishing the knife because a substantial risk has been created.

Mr. Conner said that was not the intention of SB 109, however it may need to be clarified. Mr. Conner does not feel it would be a problem in criminal law. When a person is threatening someone with a knife, they would not be charged for causing serious bodily injury unless injuries were sustained. Mr. Conner suggested the language be struck and insert, "these injuries, or

this risk, or this disfigurement, shall be determined at the time the injury occurs." Senator Towe agreed.

Valencia Lane agreed that Senator Grosfield and Senator Towe had a legitimate concern on how the language was drafted. Ms. Lane suggested a sentence to say, "the injury will be determined at the time of the injury."

Chair Yellowtail said the Committee understands the intent of SB 109, but would like Mr. Conner to work with Ms. Lane on the amendments to SB 109.

Closing by Sponsor:
Senator Doherty closed.

ADJOURNMENT

Adjournment: 11:48 a.m.

Wm Yellowtail
BILL YELLOWTAIL, Chair

Rebecca Court
REBECCA COURT, Secretary

BY/rc

ROLL CALL

SENATE COMMITTEE Judiciary DATE 1-22-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen			X
Senator Grosfield	X		
Senator Halligan			X
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye			X

FC8

Attach to each day's minutes

DATE 1-22-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: S.B. 108 - S.B 109
S.B. 125-

Name	Representing	Bill No.	Check One Support	Oppose
RANDI HOOD	SELF	125	✓	
John Connor	MT County Attys Assn	109		
"	Crim Proced. Comm	125		
CRAIG L HOPPE	MT MAGISTRATES ASSN	125	✓	
Peter Funk	Dept. of Justice	108		
David Hall	City of Helena + COMMISSION ON STATE LIMITED JURISDICTION	125	✓	
Gregory G Mohr	Montana Magistrates Assn	125	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F10