MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 8, 2003 at 8:00 A.M., in Room 303 Capitol. **VICE-CHAIRMAN DANIEL McGEE** conducted the hearing on SB 20, SB 19, and SB 18.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 20, 12/17/2002; SB 19, 12/17/2002; SB 18, 12/17/2002; SB 56, 12/17/2002; SB 39, 12/17/2002

HEARING ON SB 20

Sponsor: **SEN. DUANE GRIMES, SD 20, Clancy**

Proponents: **Karla Gray, Chief Justice, Montana Supreme Court**
Harold Blattie, Montana Association of Counties

Opponents: **None.**

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, Clancy, opened by stating this bill, as well as SB 19 and SB 18, are housekeeping bills. Page two of SB 20 contains a list of those court reporters who are exempt from the Montana Procurement Act. This bill adds court reporters to the current list.

Proponents' Testimony:

Karla Gray, Chief Justice of the Montana Supreme Court, supports SB 20. **Chief Justice Gray** stated Senator Grimes is carrying this bill at her request and the request of the District Court Council. **Chief Justice Gray** informed the committee these bills relate to assumption of district court expenses. SB 176 created the district court council. The council consists of **Chief Justice Gray** and four other district court judges. The district court council is proposing these bills as housekeeping bills to tidy up SB 176. **Chief Justice Gray** wanted the committee to be aware at the onset that the district court council does not think it is the responsibility of the council to offer any truly substantive amendments to state assumption. SB 20 is a small bill and merely adds court reporters who are hired as independent contractors to the list of other exceptions from the procurement act. The reason for this is the procurement act essentially states for services in excess of $5,000 you have to go through a competitive bidding process. It is the opinion of the council that the legislature did not intend for court reporters to go through the lengthy competitive bidding process. **Chief Justice Gray** informed the committee that Sheryl Olson for the Department of Administration is also present and is happy to answer questions or testify at the pleasure of the committee. **Chief Justice Gray** feels court reporters fit nicely into the list of other identified exemptions and urged the committee for a do pass recommendation.

Harold Blattie, Montana Association of Counties (MACO), supports SB 20 because it clarifies the area of the contractual relationship between court reporters and the county and state.
Opponents' Testimony: None.

Informational Witnesses: None.

Questions from Committee Members and Responses:

SEN. MICHAEL WHEAT asked **Chief Justice Gray** whether this bill applied to only two court reporters and also whether the other court reporters then were employees of the district court.

Chief Justice Gray responded that she believes the number is two. SB 176 created several options for court reporters, one of which is the status of independent contractor. Another option for court reporters is state employment.

Closing by Sponsor:

SEN. GRIMES closed.

HEARING ON SB 19

Sponsor: SEN. DUANE GRIMES, SD 20, Clancy

Proponents: Karla Gray, Chief Justice, Montana Supreme Court
Harold Blattie, Montana Association of Counties

Opponents: None.

Opening Statement by Sponsor:

SEN. DUANE GRIMES opened by stating SB 19 is also a housekeeping bill. The bill carries a fiscal note indicating no fiscal impact. Sections 1 and 2 of the bill reflect that we are in an electronic age and no longer use carbon copies. Section 3 gets rid of antiquated language about serving at the pleasure of others, and also contains an additional clarification that court reporters can obtain exemption from work comp coverage. Section 4 is other language that comports with language used elsewhere. Section 5 is a clarification on the way funds are reimbursed. Section 6 primarily deletes from code information which is found in personnel administrative rules. Section 7 contains code that is moved from somewhere else. **SEN GRIMES** feels that even though this bill is a cleanup bill, it is nonetheless an important bill.

Proponents' Testimony:

Karla Gray, Chief Justice of the Montana Supreme Court, supports this bill and stated it, too, is a tidy up bill to SB 176. Section 3 just deletes old language referring to the pleasure of the appointing judge. This is old language that has been superceded by the compensation classification plan and personnel policies that SB 176, Section 1, directed the Supreme Court to do. Under those policies, all district court employees are considered regular state employees and there is a disciplinary policy which must be followed before discharge. The independent contractor option for court reporters did not provide them the ability to seek an exemption for having to purchase workers' comp coverage. This exemption will now be provided in Section 4 and will put court reporters on the same footing as other independent contractors in the state of Montana. Section 5 provides for the clerks of the district court to initially pay warrants and then be reimbursed by the state. Currently, the state cannot pay these fees in a timely manner. Section 6 relates to the fact that now there is classification and compensation system that contains job descriptions. This prevents district court judges from going out and appointing as many probation offices as they would like. The only change is Section 7 was taken from another statute and moved into this section because they wanted to retain the language relating to probation officers not being law enforcement officers. Section 8 deletes the old subsection (3), and Section 9 gets rid of the old language and leaves these decisions with the classification and compensation plan and personnel policies.

Harold Blattie, Montana Association of Counties (MACO), supports SB 19. In Section 5, line 16, is the statutory requirement that a juror be paid immediately upon dismissal. This language is what is precipitating the need for the county clerk to pay the jury fee and then being reimbursed by the state. **Mr. Blattie** feels it is not viable to have state warrants being signed by a county officer.

Opponents' Testimony: None.

Informational Witnesses: None.

Questions from Committee Members and Responses:

SEN. JEFF MANGAN questioned what was repealed by the Section 10 repealer.

SEN. GRIMES responded that the section had to do with the qualifications of probation officers, who under the new bill will

be covered under current classification and compensation practices.

SEN. MANGAN questioned how an additional 16 hours of training per probation officer could be added without having a fiscal impact.

Chief Justice Gray responded that this is existing language from another statute, and she believes it is appropriate language. This language is not contained in the current classification and compensation plan, but she felt it was critical to have this language in the code.

Closing by Sponsor:

SEN. GRIMES closed by saying if anyone has anymore questions, he would be glad to answer them.

HEARING ON SB 18

Sponsor: SEN. DUANE GRIMES, SD 20, Clancy

Proponents: Karla Gray, Chief Justice, Montana Supreme Court

Opponents: Bill Kennedy, Yellowstone County Commissioner and First-Vice President of Montana Association of Counties
Harold Blattie, Montana Association of Counties

Opening Statement by Sponsor: SEN. DUANE GRIMES opened by stating the District Court Council (DCC) was appointed the last session to review the cost of youth court proceedings and adult and voluntary commitment proceedings. The legislature will have to decide what are legitimate state costs. **SEN. GRIMES** feels there has been a good check and balance system in place. SB 18 is a housekeeping bill; however, there are some issues in the background. The DCC has generally decided that costs associated with health care, law enforcement, public safety, and prosecutorial services would be executive branch expenses, and the judicial branch would be responsible for costs associated with primarily those things directly related to the court, i.e., the judge, the court staff, appointed counsel, and other materials.

(Tape : 1; Side : B)

The change in SB 18 is primarily on page 4, which is language pulled from other code. The primary issue is clarified on page 5 regarding transportation to a mental health facility. The thing

to keep in mind is what should legitimate county expenses be versus the expenses of the judiciary.

Proponents' Testimony:

Karla Gray, Chief Justice of the Montana Supreme Court, testified that this bill is sponsored by **SEN. GRIMES** at the request of herself and the DCC. This bill is what the council calls the "Section 62 mandate bill." Section 62 of the state assumption bill last session mandated the DCC to review all the costs associated with involuntary commitment proceedings and make a proposal to the legislature this session as to which of those costs were legitimate actual judicial functions and, therefore, would constitute judicial expenses. This bill is the product of that review. The "WHEREAS" clauses are an attempt to list the kinds of costs and functions which are associated with these two kinds of proceedings. Obviously, law enforcement and public health are not district court expenses. The DCC tried to be careful to speak not only just to expenses, but also to functions. Section 62 of last session's bill did not ask the DCC to attempt to determine which agencies or the counties should be paying these costs. Chief Justice Gray stated this is not within the DCC's purview. This bill simply proposes what are appropriate DCC costs associated with involuntary commitments and youth court proceedings. These costs are relatively few and are directly connected to actual district court expenses. The DCC included the compensation for services for appointed counsel for indigent youth as a court expense because that was the pattern followed for all court-appointed indigent defense situations throughout SB 176 passed last session. Section 2 is a cleanup section and has no substance except at the end about the compensation portion as provided in 35-901-4(a)(2). Amended Section 3 refers to the involuntary commitment proceedings and deletes the language referring to transportation to a mental health facility. Also, the DCC is proposing costs associated with testimony during an involuntary commitment proceedings by a professional person acting pursuant to the other statute should be paid by the county. This is already a county of residence expense, and the costs of testimony are an outgrowth of that evaluation. The repealer is due to a section being repealed because it was not looked at during state assumption and is being covered, or not covered, by this bill.

Opponents' Testimony:

Bill Kennedy, Yellowstone County Commissioner and First-Vice President of the Montana Association of Counties (MACO), testified there are some good pieces contained in the proposed legislation relating to the clarification of costs, especially

for the guardian ad litem. In the last legislative session there was a lot of discussion about guardian ad litem expenses. **Mr. Kennedy** would like to address page 5, Section 3. **Chief Justice Gray** is correct that transportation is being provided by counties for pre-commitment costs. There is a requirement that legal counsel must be present with a client at all times to make sure they are properly represented. This has increased costs, but there was not an increase in funding to go with this requirement. **Mr. Kennedy** believes the costs associated with testimony would be costs incurred by the court and the court proceedings which will be directed back to the county. **Mr. Kennedy** believes that transportation costs to a medical facility may be premature because the counties will have a bill to look at transportation, lodging, and other expenses associated with pre-commitment. This is a clarification for the courts, but a money bill for the counties. **Mr. Kennedy** asked the committee to keep that in mind. Currently, alcohol dollars that come to the county are under scrutiny to be pulled back. They have used a portion of this money for transportation to the state hospital. Yellowstone County last year spent $55,000 on transportation costs. **Mr. Kennedy** wonders where the money will come from to pay for these expenses.

Harold Blattie, Assistant Director of the Montana Association of Counties (MACO), stated his opposition to SB 18 is weak. **Mr. Blattie** would like to draw the committee's attention to Section 3-5-901, MCA. This section lays out what are county costs and what are state costs. **Mr. Blattie** stated the problem is that not all costs were gathered up into one category or the other. The Legislature needs to decide who should appropriately be funding these costs. **Mr. Blattie** suggested the committee should use "follow the money" as a guiding light in making this determination. This means if the money for a particular service went from the county through a reduction in its entitlement share, as required under HB 124, to the state for the assumption program, then the responsibility for providing that service should also follow to the state level. If the dollars did not follow and stayed at the county level, then it would be appropriate for the county to be responsible for that function.

Informational Witnesses: None.

Questions from Committee Members and Responses:

SEN. GARY PERRY questioned **Mr. Kennedy** about Section 3, and where on line 22 it says the Sheriff must be allowed the "actual expenses." **SEN. PERRY** wondered what entity would be paying those "actual expenses." **Mr. Kennedy** explained that in Yellowstone

County those costs have not been covered anywhere for years. Commitment costs have skyrocketed but the Sheriff's Department has been unable to pay these costs. Instead, a percentage of alcohol dollars have been used on pre-commitment transportation costs. Pre-commitment costs in Yellowstone County are about $1,000 a day for someone awaiting a court appearance. The person would be staying at Deaconess Hospital if there is a room available. If a room is not available, the client is transported to Warm Springs and then brought back for the hearing. This could be a two-day proceeding, which is expensive. For one client, it was about $4,000 for this person to go back and forth. Transportation may not be a court expense, but it cannot be covered by the county without chiseling away at another budget.

SEN. PERRY followed by inquiring if there was another bill upcoming that would address this issue. **Mr. Kennedy** responded that MACO is in the process of drafting a bill that would look at placing all pre-commitment costs, all transportation costs, and all lodging costs back to the state of Montana.

SEN. JEFF MANGAN asked **Chief Justice Gray** to respond to **Mr. Kennedy's** concerns. **Chief Justice Gray** replied that **Mr. Kennedy** had mentioned indigent defense, and she restated that indigent defense will be reimbursed as was the pattern in SB 176 and is already covered. **Chief Justice Gray** stated the large issue, the transportation issue, is placed by current law on the counties, and this is not something added by SB 18. That phrase has simply just been moved from the first line of subsection (2) to the third line. This bill does not make a change in present law on the subject of transportation costs. It is understood the counties are having funding problems, however pre-commitment expenses in involuntary commitment proceedings, are the direct outgrowth of the county attorney and the county bringing the proceeding. They are not court function expenses. There is no change in present law about the transportation costs to mental health facilities in this bill.

SEN. JEFF MANGAN stated that he feels the court system both locally and at the state level now is grossly underfunded. **SEN. MANGAN** questioned whether the costs of medical and other examinations and treatment of the youth ordered by the court are falling back on the county.

(Tape : 2; Side : A)

Chief Justice Gray responded that treatment costs are not court costs. They are the result of court proceedings, as many things are. The courts are not in the business of treatment. Therefore, those costs are not district court costs.

SEN. MANGAN stated his concern is repealing Section 41-5-111 and the district court is not going to pick up those costs, but we do not have a place on the books that says who is going to pick up those costs. Is there going to be a directive in another statute or do we need to look at that to ensure we are not squabbling over who is responsible for those costs in future sessions.

Chief Justice Gray responded that we are picking up some of the costs as district court costs currently exist in 41-6-511, those being the expenses relating to appointed counsel, etcetera. **Chief Justice Gray** agrees the bill does not say where these costs are going. The reason for this is Section 62 of SB 176 did not direct the DCC to do that. Section 62 of SB 176 directed the DCC to make a proposal as to which costs associated with involuntary commitment proceedings and youth court proceedings are, in our view, actual district court expenses. This would be outside the DCC's purview. This is not what Section 62 of SB 176 directed the DCC to do.

SEN. MANGAN inquired of **Mr. Greg Petesch** as to what happens when a statute is repealed by one bill, but it is not addressed in another bill.

Mr. Petesch replied that in this instance, he believes the responsibility for those costs would lie with the entity or person having custody of the child.

SEN. MICHAEL WHEAT questioned **SEN. GRIMES** whether a fiscal note was being prepared on SB 18. **SEN. GRIMES** replied that he did not believe a fiscal note was being prepared.

SEN. WHEAT asked **Chief Justice Gray** on page 4, line 5, where it references "additional costs," whether these costs are related to the code section which is being proposed to be repealed or whether they are different costs.

Chief Justice Gray responded they are, to a large extent, the costs contained in the section being repealed, with the exception of the treatment and medical costs, which are not really court costs.

SEN. WHEAT then asked **Chief Justice Gray** whether, in her opinion, this language adds additional expenses to the state which would then require a fiscal note.

Chief Justice Gray replied no because they are a different codification of those expenses which were already shown pre-state assumption to be court expenses.

SEN. WHEAT then asked **Chief Justice Gray** if in her opinion this clarifies who is going to pay the costs once 41-5-111 is repealed.

Chief Justice Gray responded affirmatively and stated these expenses are addressed with the exception of the medical-related items that are not actually district court costs.

SEN. WHEAT inquired whether under Section 2 where it references appointment of counsel, will the state be responsible for the costs associated with appointment of counsel by the court.

Chief Justice Gray responded that in the case of indigent persons, appointed counsel will be paid for in the same fashion currently followed as a result of state assumption.

SEN. WHEAT stated that under Section 3, he understands the part that is stricken and the new added language is simply a restatement of what has been taken out. However, **SEN. WHEAT** has concerns with the added language that states "and any cost associated with testimony during an involuntary commitment proceeding by a professional person." **SEN. WHEAT** wanted to know if a district judge appoints a professional person to assist in the evaluation of the person to be committed, whether that would be considered a district court cost to be paid by the state, or a treatment cost to be paid by the county.

Chief Justice Gray responded the DCC does not consider that to be a district court expense. The appointment of a professional person in these proceedings is simply party of the proceeding commenced by the initiating entity. The courts do not usually pay for professional or expert witnesses and evaluators. These are costs of the initiating entity, and they are not court costs, although they are clearly related to court matters.

Closing by Sponsor:

SEN. GRIMES closed by stating some of these issues can be brought up in executive action. This is an opportunity for the Senate Judiciary Committee to go on record on what it believes are or are not appropriate court functions. The coordination with other bills, such as MACO's proposals, can come later on in the process.

HEARING ON SB 56

Sponsor: **SEN. BOB KEENAN, SD 38, Bigfork**

Proponents: **Ed Amberg, State Psychiatric Hospital at Warm Springs**
Al Davis, Montana Health Association, f/k/a the Mental Health Association of Montana
Beda Lovitt, Montana Psychiatric Association

Anita Roessmann, Montana Advocacy Program (MAP)

Opponents: **None.**

Opening Statement by Sponsor:

SEN. BOB KEENAN, SD 38, BIGFORK, opened by stating SB 56 is one of a number of bills that will come before the Committee as a result of the work of HJR 1 Interim Committee which was charged with a study of mental health services oversight as a subcommittee of the Legislative Finance Committee. **SEN. KEENAN** hopes to provide some information "primers" on the public mental health system. Currently, there are situations where people find themselves not guilty but mentally ill, or not guilty by reason of mental disease or defect, who end up with a period of confinement in the state hospital that exceeds the maximum penalty for the crime they were charged had they been serving their sentence in prison. There are not a large number of people this will affect. Currently, there are ten people out of approximately 180 at the state hospital who could be impacted by this legislation. This figure has been constant for the past year. The determination that a person is not guilty by reason of mental disease or defect could result in a longer commitment to the Montana State Hospital than a sentence to the Department of Corrections if the person were found guilty of the crime for which he/she was charged. In some instances, treating professionals have determined a person has reached the maximum benefit of treatment and no longer requires hospitalization, but courts have determined the safety of that person and others is compromised with the release. In that case, the person would remain at the hospital for an indeterminate amount of time. SB 56 was modeled in the HJR 1 subcommittee. That committee studied other states and how they handle this problem. SB 56 is modeled after Utah state law and would limit the period of confinement for a person committed under not guilty, but mentally ill, to no more than the maximum sentence that could be imposed if the person had been found guilty of the crime. The essence of the anticipated change is found on page 3, section 2, part 4.

Proponents' Testimony:

Ed Amberg, Director of the State Psychiatric Hospital at Warm Springs, testified SB 56 will only affect a small number of people. **Mr. Amberg** reiterated there are only ten people at the hospital under this type of commitment status. **EXHIBIT(jus03a01)** This bill is not one that will significantly change this number. Also, it is not expected this bill will save any money or create any expenses. It also will not cause dangerously mentally-ill persons to be placed on the streets. SB 56 does two important things: First, this bill will bring Montana's statute in line with the 1972 U.S. Supreme Court decision in Jackson v. Indiana. In this case the Supreme Court ruled due process requires the nature and the duration of commitment bear some reasonable relation to the purpose for which the individual is committed and people cannot be institutionalized under MI status for a longer period than if they had been convicted of the same crime for which they are charged. Currently, most of the people in the hospital have been charged with serious crimes. **Mr. Amberg** informed the committee that he has seen people stay at the hospital longer on this status than if they had been convicted of a crime and sent to prison. These individuals were seriously mentally ill and were not inappropriately hospitalized.

The second thing this bill does is give the patient and the treating staff a specific target for how long they can expect to be hospitalized. **Mr. Amberg** feels people perform much better when they know the definite rather than the indefinite. Also, patients can be encouraged to be more active in their treatment.

(Tape : 2; Side : B)

Al Davis, representing the Montana Health Association, f/k/a the Mental Health Association of Montana gave the committee an overview of the association and its functions. The association currently has approximately 1,300 members consisting of providers, consumers, professionals, and concerned citizens. Typically, before the session, they meet on a daily basis with four chairs to attempt to come to a consensus on where they stand on particular bills. The association does support HB 56 and urges a do pass by the committee.

Beda Lovitt, representing the Montana Psychiatric Association, informed the committee that she served as legal counsel at Montana State Hospital for seven or eight years and is aware what these cases are about and the difficulties. The psychiatrists would like to underline is giving patients a positive target.

Ms. Lovitt has seen this and is convinced this can work in a positive way and will give patients incentive to participate in treatment so, if appropriate, these individuals can be returned to society.

Anita Roessmann, attorney for the Montana Advocacy Program (MAP), explained that MAP is a private non-profit group that receives federal money for all of its program and provides advocacy services for all kinds of disabilities. Approximately one-quarter of the programs are specifically for people with mental illness. MAP supports HB 56 because it is a good idea to clear up the law and bring Montana's not guilty by reason of mental illness law more in line with what other states are doing and give people who receive the sentence a definite end. **Ms. Roessmann** explained she initially had some confusion over Section 46-14-214(2), the new section that has been added, because the first sentence states the judge shall look at all of the offenses which the person with mental illness has been charged and determine the maximum sentence the defendant could have received. **Ms. Roessmann** is concerned because a person can be charged with multiple offenses for the same conduct, and some of those sentences could result in a number of consecutive sentences being applied. **Ms. Roessmann** is concerned that 20 years for one charge, plus two years for another charge, plus six months for another charge, for a total of 22-1/2 years instead of 20. When **Ms. Roessmann** reads the second sentence it is clear to her that what the statute intends is that the judge looks at the longest sentence for any single charge and that's the sentence the person would get. **Ms. Roessmann** believes there could be some litigation caused brought about by this unclear language. Since there are two ways to read this, **Ms. Roessmann** would like this language clarified.

Opponents' Testimony: None.

Informational Witnesses: None.

Questions from Committee Members and Responses:

SEN. WHEAT questioned **SEN. KEENAN** if when a person is committed and the time runs, and the person, in the opinion of the hospital staff, is still dangerous to themselves or others, whether another hearing can be contemplated if that person's commitment is continued. **SEN. KEENAN** deferred **SEN. WHEAT'S** question to **Mr. Greg Petesch.**

Mr. Petesch responded that under the bill, at the end of the person's period of commitment, civil commitment proceedings can be commenced if it is determined by the professional staff that

they are still a danger to themselves or others. Therefore, it becomes a civil rather than a criminal commitment at that point.

SEN. WHEAT stated that it is his understanding that under this statute what they are trying to accomplish is to make a determination as to how long the person who has been found not guilty by reason of mental defect, how long that commitment is going to be in the state hospital.

Mr. Petesch replied that it is also the purpose of SB 56 to provide parody between a defendant who is found guilty but mentally ill who receives a determinant sentence and parody for the individual who enters the system through the criminal door, but is found not guilty by reason of their mental illness.

SEN. WHEAT proceeded to question **Mr. Petesch** as to the lack of clarity regarding the maximum commitment period.

Mr. Petesch remarked that if there is ambiguity, it could easily be fixed by changing the language in the second sentence to read "the longest sentence from any charged offense" thereby clarifying that if three different crimes are charged, the sentence is for the longest period of any of the offenses.

SEN. WHEAT wondered if **Mr. Petesch** would recommend that amendment be placed in the statute.

Mr. Petesch said he would recommend the amendment if it would help people understand the statute.

SEN. DAN McGEE inquired of **SEN. KEENAN** if this was a fiscally driven issue and solution.

SEN. KEENAN replied in his opinion, it was not.

SEN. McGEE presented a scenario inquiring if you have someone who is not guilty by reason of a mental defect, how will having a termination date be significant to that individual? Will that person still have enough mental capacity to know when they are going to be discharged?

SEN. KEENAN deferred the response to **Mr. Amberg** from the state hospital.

SEN. McGEE then asked **Mr. Amberg** if a person is found not guilty by reason of mental incompetence, then how it can be argued that somehow these same individuals will be able to comprehend and anticipate the end of their sentence, and it will be an incentive for them to recover.

Mr. Amberg answered the range and abilities of the various patients the statute would encompass is quite broad. Therefore, there is no one answer for everybody. Some patients understand the entire process, some patients can only understand the process after recovery, and a handful of individuals may never understand. Generally, people who are institutionalized know when their court hearings are, and this gives them something to look forward to and a way to maintain hope. **Mr. Amberg** feels this is very important from a treatment perspective.

SEN. McGEE noted that in reviewing the list circulated by **Mr. Amberg**, the current residents committed very serious crimes. **SEN. McGEE** stated if his understanding from testimony is correct, some of these people will find comfort and solace in the fact that they may be there the rest of their lives.

Mr. Amberg reiterated that where they will find comfort is in the provisions of the law that allow patients to be discharged earlier if the courts agree, after conducting another hearing, that these individuals can be safely discharged and there are appropriate conditions for aftercare. What that means to an individual long-term is that they need to follow through with a treatment plan and actively participate in order to get discharged sooner. Discharge of any of these individuals would be very carefully considered. **Mr. Amberg** also expressed that having a target is also important to staff.

SEN. AUBYN CURTISS, in reviewing Exhibit 1, wondered how many of these people would be released within a short period of time. **SEN. KEENAN** deferred the question to **Mr. Amberg**.

Mr. Amberg responded that they work on that process with everybody, and each patient is handled separately. **Mr. Amberg** does not believe this statute, if passed, will make any changes in terms of anticipated discharge for other patients. If there are concerns about a person being dangerous and needing continued hospitalization, they would petition to have the stay extended through involuntary commitment proceedings. This is the procedure now for the guilty but mentally-ill patient. **Mr. Amberg** assured the committee that they are very aware of community safety issues.

SEN. CURTISS commented that one of her concerns is public safety and that we have all heard of cases where people are released and repeat similar offenses. **SEN. CURTISS** wondered if the state's liability would increase due to the passage of SB 56.

At the request of **Chairman Grimes**, **Mr. Petesch** responded that this bill does not apply to anyone who is currently at the state

hospital, but rather would apply to people sent there after the bill is in effect, who are found not guilty but mentally ill. The determinate sentence would only apply in those proceedings commenced after this bill becomes law.

CHAIRMAN GRIMES told **Mr. Petesch** that it was his understanding that page 2, lines 18-21, that the court shall determine on the record the charge offense or offenses, so there may be multiple offenses, and then make sure they do not exceed the maximum sentence on any one of the offenses. **CHAIRMAN GRIMES** is trying to rationalize that there may be different mental states for the two different offenses and why you would not consider both as being applicable to incarceration, rather than just one or the other.

Mr. Petesch contended that the person lacks the mental state to be convicted of the crime, and the idea was to have a definite period of confinement for those individuals. If a person was charged with burglary and aggravated assault, for example, the idea behind this was the maximum time period of commitment to the state hospital through the criminal proceeding would be the longest sentence they could have received for the offense charged with the longest possible sentence.

CHAIRMAN GRIMES followed up by inquiring if they were not found to have a mental defect, how would the same offenses be allocated. What does this change between those people who are found to have a mental defect covered by this statute and those that do not, for the same offenses.

Mr. Petesch explained that the distinction is that people who are found guilty are found to have committed a crime. Under our justice system, these people are not able to be found guilty of a crime. If a person is found guilty of a crime, you are sentenced to a definite period of time. If a person is convicted of multiple offenses, you can be sentenced to concurrent or consecutive sentences in the discretion of the judge. **Mr. Petesch** reminded the committee that these people are not convicted of a crime.

(Tape : 3; Side : A)

CHAIRMAN GRIMES then stated that since these people were convicted, they were at one point determined to be fit to proceed.

Mr. Petesch elaborated that these people were not convicted, but rather found not guilty by reason of mental disease or defect.

If a person is found guilty, but mentally ill, you are sentenced under the crime of which you are convicted.

SEN. WHEAT enlarged on **CHAIRMAN GRIMES'** question that in the cases where a jury makes a determination that a person is not guilty, has the defendant been found fit to proceed prior to the trial?

Mr. Petesch replied in normal circumstances, yes.

SEN. WHEAT went further to ask that in that instance, if they do proceed to trial and are found guilty rather than not guilty by reason of mental disease or defect, is the court free to impose a sentence that could run consecutively.

Mr. Petesch replied yes.

SEN. WHEAT then remarked that in order to be clear, when they are found not guilty by reason of mental disease or defect, they have not been convicted of a crime.

Mr. Petesch replied that was correct.

SEN. WHEAT then presented the scenario to **Mr. Amberg** that if SB 56 is passed, and an individual who has been committed and their period of commitment is about to run, what the responsibility of the state hospital is with regard to determining that individual's then-existing mental state.

Mr. Amberg clarified **SEN. WHEAT'S** question and stated that the state hospital's responsibility in determining whether a person should be discharged is a responsibility they take very seriously. Public safety is part of their guiding principles for their organization and their mission. Currently, the hospital is treating approximately 56 forensic patients. There is a process in place to keep patients in the hospital if necessary and that process is used routinely.

SEN. WHEAT explained that he is trying to be clear on this statute and the fact that the legislation creates a date when someone who is convicted of a very serious crime is to be released. What **SEN. WHEAT** does not see in the statute where it states who has the responsibility to determine whether that person is capable of being released. **SEN. WHEAT** is concerned that if an attorney is representing somebody and they are getting close to their conditional date for release, and the hospital does not feel they are ready to be released, it appears a patient or his attorney might be able to challenge the decision in court.

Mr. Amberg conveyed that they anticipate that challenge, and it happens all the time. If it needs to be explicitly stated in the statute that the hospital staff would need to evaluate the individual to determine whether further hospital stay is necessary, **Mr. Amberg** felt that could be achieved. **Mr. Amberg** then remarked that the very last provision of the bill, provision 5, requires a professional annual review. This is due to another Supreme Court decision out of Louisiana which requires annual reviews to determine a finding that they are both dangerous and mentally ill. That has been done each year up until the point of discharge. The law also allows the patient to petition for their discharge. Hospital staff routinely appear in court throughout the state to testify as experts on the need for continued treatment and a patient's ability to discharged safely.

SEN. WHEAT understands that the committed person has the right to have a hearing, generally at any time, but the committee is focusing today on when a patient is to be discharged after they have served their time. **SEN. WHEAT** suggested it would be good public policy for the Legislature, if they are going to set a date for discharge, to set a hearing requirement in the statute to determine that person's mental condition at the time they are to be released.

Mr. Amberg reiterated it is now required by statute, but that is a decision the Legislature can make and they will adhere to that decision.

CHAIRMAN GRIMES invited **Greg Petesch** to respond to this same issue.

Greg Petesch indicated if you look to page 3, lines 6-8, it provides that at the time the definitive period of commitment terminates, civil commitment proceedings may be commenced. This was specifically provided to address this very issue.

SEN. WHEAT reported that he understands the issue of the involuntary civil commitment but would like to know what the institution is supposed to do when the discharge date is there. Should the institution be required to notify the court as to what, in their opinion, the person's mental state is? Then, if a civil proceeding is to be commenced, they have a document to commence that proceeding.

Mr. Petesch responded that is currently what happens for individuals who are guilty but mentally ill, and this provision is added to that section of law. Therefore, **Mr. Petesch** believes the same procedures apply. Also, there are other statutes that

are not amended in this bill that provide for those reviews and notifications.

CHAIRMAN GRIMES is having a conceptual problem understanding why they would not allow for consecutive sentences, or the equivalent, for multiple offenses in the case where a person is not guilty because of mental illness. **SEN. GRIMES** assumes it is because it is no longer a deterrent. By the same token, we are saying if they have a specific date and time when they are going to be discharged from the institution, then that will be helpful to a patient. **SEN. GRIMES** purported this seems contradictory.

Mr. Petesch responded that this appears to be a policy choice. The policy choice of HJ1 Committee, and ultimately the Finance Committee, was to have a specific maximum period of time for these individuals. **Mr. Petesch** reminded the committee that these individuals' liberty interest has been taken away through a proceeding, but unlike everyone else whose liberty interest is taken away through a civil commitment or criminal proceeding, these people can remain without their liberty forever without a finding that they are guilty. This policy choice was made by the committees to set the maximum period of confinement by entering the hospital through the criminal process to that maximum period of time that was the greatest possible for the offenses charged. That was the policy choice.

CHAIRMAN GRIMES redirected to **Ms. Roessmann** stating he does not necessarily want to have unlimited terms. On the other hand, **CHAIRMAN GRIMES** has policy concerns about not allowing for consecutive sentences when there has been a crime. **CHAIRMAN GRIMES** requested **Ms. Roessmann** to speak to this policy choice.

Ms. Roessmann responded that most states have a statute just like this one. When a person is determined by a jury or judge to be not guilty by reason of mental illness, they are not convicted, and there is no plea bargaining. Most criminal incidents are over-charged to give the county attorney bargaining power. Usually, the number of counts are reduced. In not guilty by mental illness case, there is no plea bargaining or conviction. Most states have this statute to take care of the discrepancy between criminal versus not guilty by mental illness. These sentences can be very disproportionate. In addition, there are very few not guilty by mental illness cases in the state of Montana because the Montana Supreme Court made it very difficult for the defense attorney to convince anyone that the person lacked the requisite mental state. Everyone of these persons will go to the state hospital, and these people have a big impact on the forensic ward. If you give someone a sentence that is disproportionate to the crime, you create a feeling of

hopelessness which can, in turn, cause behavior and treatment problems.

SEN. McGEE inquired of **Marty Lambert, Gallatin County Attorney,** whether county attorneys over-charge criminal cases.

Mr. Lambert said that statement was somewhat of a rhetorical flourish and hopes the committee would forgive those remarks. **Mr. Lambert** does not like the term "plea bargain" at all because of the connotation of "bargain." **Mr. Lambert** believes the appropriate term is "negotiation." **Mr. Lambert** stated that if they tried every criminal case in Gallatin County, no civil cases would be tried. Negotiation is a good and proper way of disposing of cases. Secondly, there are cases where policy calls for charging a number of offenses that arise out of one criminal transaction. **Mr. Lambert** feels each criminal transaction and case must be treated individually.

Closing by Sponsor:

SEN. KEENAN closed stating he will get copies of the summary of issues and options prepared by legislative staff to the committee to help with their consideration of SB 56.

HEARING ON SB 39

Sponsor: SEN. DALE MAHLUM, SD 35, MISSOULA

Proponents: Tom Beck, Chief Policy Advisor for Governor Martz
Dave Galt, Montana Department of Transportation
Marty Lambert, Gallatin County Attorney,
Montana County Attorneys' Association
Brenda Nordland, Montana Department of Justice
Bill Muhs, Mothers Against Drunk Drivers (MADD)
Shawn Driscoll, Montana Highway Patrol
Lynda Turner, Mothers' Against Drunk Driving (MADD),
Yellowstone County
Julie Millam, Montana Family Coalition
Susan Good, Montana Anesthesiologists, Orthopedic
Surgeons, and Neurosurgeons
Dennis Iverson, Montana Contractor's Association
Mona Jamison, Boyd Andrew Community Services
Tom Harrison, AAA Mountain West
Alan Recke, Cascade County DUI Task Force
Troy McGee, Chiefs of Police Association
and Montana Police Protective Association,
Don Hargrove, Montana Addictive Services Providers

Karen Oakland, Mothers Against Drunk Driving (MADD), Yellowstone County

Opponents: Mike Fellows, Self
Rick Dean, Self

Opening Statement by Sponsor:

SEN. DALE MAHLUM, SD 35, Missoula, is bringing SB 39 to prohibit the possession of an open container in the passenger section of a vehicle. This bill is mandated by the federal government to maintain the maximum amount of federal aid received for our highways. More importantly, SB 39 is an effort to reduce the tragedy of alcohol related crashes. SB 39 will create a new section in Montana Code Annotated making it a crime for anyone in a passenger area of a motor vehicle to possess an open container of an alcoholic beverage. The bill defines what constitutes an alcoholic beverage, including beer, wine, and other alcohol spirits. The bill also defines what constitutes a motor vehicle and the passenger area of the vehicle. It applies to everyone in the vehicle, not just the driver. It becomes a primary offense, not a secondary offense. SB 39 also defines the area of the highway the violation occurs upon. Vehicles for hire such as taxis, limousines, and buses are excluded. Living rooms of recreational vehicles are also exempt. The maximum penalty is $100 for each violation. Failure to enact this bill would mean the Montana Department of Transportation would have to set aside millions of dollars in federal aid for highway construction for traffic education and safety improvements but not for the construction core needs. The federal requirements are a product of the substantial study of research which has established a direct link to the issue of open container to traffic crashes. This is an additional effort to end the cost of lives lost and the financial consequences that follow the victims and their families in our beloved state of Montana. **SEN. MAHLUM** stated that because of the complexity of the bill, he will be offering an amendment on the bill later on.

Proponents' Testimony:

Mr. Tom Beck, Chief Policy Advisor for Governor Martz, testified that the Governor is in support of trying to reduce the number of alcohol-related traffic accidents. Last year, we had more deaths on our highways than we had the previous year. A good proportion of those deaths were due to alcohol-related accidents. SB 39 is a reasonable bill. The Governor wants to get a safety net over the DUI laws in Montana and give law enforcement some tools to work with. Governor Martz has looked at what other states are doing along this line. The main concern of Governor Martz is the

safety of the people in the state of Montana. **Mr. Beck** submitted a document entitled "Comprehensive Blueprint for the Future, a Living Document" **EXHIBIT(jus03a02)**. **Mr. Beck** stated that there will be some amendments proposed for the bill, but would like to have an opportunity to discuss the proposed amendments with Governor Martz.

(Tape : 3; Side : B)

Mr. Beck believes this is a vital bill for the state and asked the committee, on behalf of Governor Martz, to support this bill.

Dave Galt, Director of the Montana Department of Transportation (DOT), circulated a card containing highway funding statistics **EXHIBIT(jus03a03)**, proposed amendments **EXHIBIT(jus03a04)**, and written testimony **EXHIBIT(jus03a05)** to the committee. **Mr. Galt** testified that first and foremost Montana needs to look at the fact we are the third highest state in the nation when it comes to alcohol-related fatalities. **Mr. Galt** explained that Exhibit 3 explains what we need to do to be in compliance with federal regulations, as well federal funding. **Mr. Galt** explained that if Montana does not pass an open container law, we will be required to transfer $5.6 million from the highway construction account into the highway safety account. Traditionally, highway safety monies are for a variety of things. During the past two years, as Director of the DOT, he and his staff sit down and take the limited amount of funds and make sure they have money to fund the projects that are promised to citizens of the state. Every fall, they have to move money out of the construction program because they are not in compliance with federal law. This means DOT has to cut highway construction projects.

Mr. Galt explained that the word "knowingly" on page 1, line 13, has been deleted to make this absolute liability. This means a person does not have to know they have an open container in their car. Also, they have stricken the "more than one-sixth ounce." This is not required by federal regulation and will cause an issue about measurement and enforcement. Originally, this "one-sixth ounce" was put in to address the concern about having a little bit of beer in an empty can rolling around in the backseat. **Mr. Galt** feels that scenario should be left to law enforcement officers rather than having to implement an extensive measuring system. Also, the .05 percent is in the definition of alcoholic beverage, so it includes the .05 percent, not just more than that amount. On line 15 they struck the language trying to define highway and decided it should just be "the ways of the state open to the public." This language is consistent with the language in the DUI statutes. **Mr. Galt** stated there is an error in the amendment in that "ways of the public" is in the wrong

spot, but he will work with Valencia Lane to get the reference in the right spot.

Marty Lambert, Gallatin County Attorney, representing the Montana County Attorneys' Association, supports SB 39. This bill is somewhat unique and bears close scrutiny because passing this open container bill with the proposed amendments will reflect a paradigm shift and culture change. **Mr. Lambert** requested that there be no mention of arm twisting or blackmailing with regard to the fiscal implications. If this is the right thing to do and wills save lives, the bill should be supported and passed regardless of the fiscal ramifications. This is the best way to start a culture change and paradigm shift. **Mr. Lambert** cautioned the committee on sending mixed messages to the public with regard to the culture we want to change. **Mr. Lambert** supports the amendments, and will have some additional amendments.

Brenda Nordland, Montana Department of Justice, supports SB 39 and heartedly supports the amendments offered by DOT. The amendments will deal with some lingering law enforcement and prosecution issues. The "ways of the state open to the public" will bring SB 39 into conformity with current DUI and per se laws which use the same area requirements to measure whether your activity is criminal or lawful in terms of driving while impaired or with an illegal level of alcohol concentration in your system. **Ms. Nordland** stated the law in the state of Montana will allow you to drink and drive because Montana does not have an open-container law.

Bill Muhs, President, Mothers Against Drunk Drivers (MADD), and a member of the Governor's Task Force on alcohol, tobacco, and other drugs, testified that he was the victim of drunk driving. **Mr. Muhs** believes the bill is a key component in the fight against drunk driving. Montana is one of only five states to not have either an open-container ban or an anti-consumption ban on alcoholic beverages in a motor vehicle. Not having an open-container law can be viewed as condoning drinking and driving. Open-container laws draw one more line to separate the consumption of alcohol from the operation of a vehicle. The presence of open containers in the passenger compartment of an automobile increases the likelihood the driver will drink from those containers and become impaired. In 1983, President Regan recommended that state governments adopt restrictions on open containers and consumption while driving. **Mr. Muhs** warned the committee of sending a mixed message about drinking and driving, especially to Montana's youth. Research on the effects of open-container is limited, but one study shows that a large percentage of people who drive while drunk, also drink while driving. As the severity of motor vehicles increases, the frequency of an

open alcohol container in the vehicle also increases. While open-container laws may be difficult to enforce, so are many other laws. **Mr. Muhs** feels that in order for DUI laws to be effective, the sanctions must be significant, swift, and certain. The open-container law was a recommendation from the Governor's Task Force, as well as a key recommendation of the State of Montana Impaired Driving Assessment Report published in October 2001. **Mr. Muhs** submitted written testimony from Wendy Hamilton, National President of MADD **EXHIBIT(jus03a06)**. **Mr. Muhs** closed by urging the committee to pass the bill because it will save the lives of Montanans.

Shawn Driscoll, Chief of Montana Highway Patrol, testified that the Montana Highway Patrol and Montana Department of Justice support SB 39 with the proposed amendments. Law enforcement had some concerns with minor wording issues which were addressed by **SEN. MAHLUM, Mr. Galt, and Ms. Nordland.**

Lynda Turner, representing Mothers' Against Drunk Driving (MADD) in Yellowstone County, testified about losing her son because of a drunk driver in Wisconsin. **Ms. Turner** told the story about how her son's death impacted her life, and how her association with MADD has helped her deal with the tragedy. **Ms. Turner** was also injured in an automobile accident when she was hit by a drunk driver. **Ms. Turner** stated her Mother's Day will never be the same again.

Julie Millam, Executive Director of Montana Family Coalition, submitted written testimony **EXHIBIT(jus03a07)** depicting an incident in Helena where a deacon from her church was struck by a repeat drunk driver and killed while getting his mail. Ms. Millam stated the drunk driver involved in this accident continues to drive Montana's highways today.

Susan Good, representing Montana Anesthesiologists, Orthopedic Surgeons, and Neurosurgeons, stated that the people she represents see the victims in the emergency rooms, and they support this bill.

Dennis Iverson, representing the Montana Contractor's Association, supports SB 39 for two reasons. First, because it is an important element in the war against drunk driving. Also, they support the bill because of the fiscal impact to highway funds. **Mr. Iverson** believes if this bill is passed, a considerable amount of money will remain in the construction account to make the highway system more safe, effective, and efficient. If the bill is not passed, you will be shifting the money to other less tangible activities.

Mona Jamison, representing Boyd Andrew Community Services, a pre-release and treatment facility in Helena, stands in strong support of the bill. SB 39 is good public policy and will implement the public's perception of what they feel is intuitively right. **Ms. Jamison** defined driving as a privilege granted by the state of Montana to its citizens. Since driving is a privilege and not a right, placing restrictions on the privilege is a proper assertion of the state's police powers and more than reasonable.

Tom Harrison, representing AAA Mountain West, is strongly in favor of SB 39 because of the both philosophical and practical reasons.

(Tape : 4; Side : A)

Alan Recke, representing the Cascade County DUI Task Force, submitted written testimony **EXHIBIT(jus03a08)** and stated he is not a prohibitionist, but he believes open containers have no place in vehicles operating on our highways. **Mr. Recke** stated that many agencies, including Montana's DUI Task Force, have concluded that open-container laws, coupled with .08 BAC and administrative license revocation have considerably reduced the incident of drunk driving. **Mr. Recke** urged the committee to tighten the DUI philosophy in Montana for the benefit of everyone. **Mr. Recke** would like to see the $100 fine increased.

Troy McGee, Helena Chief of Police, representing the Chiefs of Police Association and the Montana Police Protective Association, testified that they are in very, very strong support of this bill.

Don Hargrove, representing the Montana Addictive Services Providers, supports the proposed legislation as being consistent with the overall goal of reducing alcohol addiction and the associated social and fiscal cost to the citizens of Montana.

Karen Oakland, representing Mothers Against Drunk Driving (MADD) in Yellowstone County, reiterated her support for tougher drunk driving laws. **Ms. Oakland** thanked the committee for its support and looks forward to working with the committee on this. **Ms. Oakland** also noted a correction from her prior testimony on SB 13 saying that it was her nephew who was killed by a drunk driver and not her brother-in-law.

Opponents' Testimony:

Mike Fellows objects to the use of force by the federal government and feels we need more state's rights. **Mr. Fellows** wanted to know whether people are going to be arrested for having two empty bottles and a six-pack. **Mr. Fellows** was also concerned whether a designated driver could be charged if there are open containers in the backseat.

Rick Dean feels we have enough laws in place to handle the DUI situation. **Mr. Dean** feels that this would be a slap in the face to people who get designated drivers. **Mr. Dean** feels the demographics of Montana make it different than other places and that there are not enough law enforcement officers as it is.

Questions from Committee Members and Responses:

SEN. McGEE stated that he is absolutely in favor of no open container in a vehicle and has no sympathy for a person who drives under the influence. As **SEN. McGEE** reads the bill, this will be a primary cause for law enforcement to stop a vehicle. Under the proposed amendments, the issue of "knowingly" will be stricken. Since the term "person" is not defined in the bill, **SEN. McGEE** is unclear whether "person" refers to the driver and/or all the other riders in the vehicle. Lines 24 through 26, refer to the cargo area of a sport utility vehicle and includes unsealed alcoholic beverages, under line 8, and it also might include a flask under lines 20 and 11. Considering all these facts, **SEN. McGEE** wondered if he got into a someone's Ford Bronco, and they had a flask in the back end of the vehicle, what will law enforcement going use as evidence to pull that individual over, who is going to be cited, and is someone going to be cited under those conditions.

SEN. MAHLUM answered part of the question in that the bill specifically states the driver, but whoever is in the car or vehicle will be responsible. If a person was in someone else's car and they had a bottle and you were not drinking, it's a matter of discretion for law enforcement. **SEN. MAHLUM** then deferred the question to **Colonel Driscoll**.

SEN. McGEE restated to Colonel Driscoll that he was asking about four issues: Person, the cargo area of an SUV, the issue of unsealed and what that means, and the fact that it is a primary offense so you can stop somebody without a taillight or something, what is going to prompt law enforcement to pull somebody over.

Colonel Driscoll replied that the intent is to address those people who are driving down the road consuming alcohol. That is going to be the intent from an enforcement perspective. Those people who purchase a six pack and they have already consumed three beers out of that six pack as indicated by the fact that there are three full beers, three empty beers, and they are cold, that will be law enforcement's concern. Law enforcement will not be so much concerned with people who are transporting liquor to consume at another location. It will be a matter of discretion for law enforcement. It will be a primary offense if we see someone consuming alcohol as they are driving down the road, otherwise they would just be normal stops for whatever the probable cause was. As is the current case now, it will be up to law enforcement to decide who in the vehicle is attached to an alcoholic beverage.

SEN. McGEE expressed that **Colonel Driscoll** had just touched on a significant issue. Someone is driving down the road and they are not drinking, your officers do not see anyone drinking, but they pull the vehicle over for a taillight, under this bill, do you have probable cause to search that vehicle for an unsealed container.

Colonel Driscoll responded they would not have probable cause and they do not search vehicles without probable cause. Also, there is an in depth process they have to follow when they do search vehicles.

SEN. McGEE asked **Mr. Lambert** how this bill will be implemented as it becomes law. Also, **SEN. McGEE** inquired of **Mr. Lambert** if he would concur that the current language of the bill does not specify "person" as the driver, and therefore, inasmuch as person is not defined in the bill, it could be everyone in the car.

Mr. Lambert agreed that it could be anybody inside the passenger compartment. Upon question from **SEN. McGEE**, **Mr. Lambert** agreed that it would be possible for everyone in the vehicle to be convicted even if they had no knowledge of alcohol in the car.

SEN. McGEE then asked **Mr. Lambert** how he is going to prosecute those individuals under the language of the bill. Rephrased, SEN. McGEE asked how county attorneys would implement the bill.

Mr. Lambert responded that the first line of defense is Colonel Driscoll and Director of Public Safety and County Sheriff, and the people who are on the beat and in the patrol cars for them. **Mr. Lambert** reiterated what **Colonel Driscoll** stated in that there will be training on how to go about enforcing this law. This will be the first line of defense. **Mr. Lambert** stated that if

law enforcement did not see anything or smell anything that would lead them to think there may be alcohol open in the vehicle, they would not pursue a search for alcohol. **Mr. Lambert** continued saying the second line of defense will be the county attorney. The third line of defense would be to convince a judge or jury that a crime was committed. Although **Mr. Lambert** could not guarantee that there could never be a bad arrest, for any type of offense, that those abusive situations, which this law was not meant to address, would occur.

SEN. McGEE then asked **Mr. Galt** if there would be a problem with defining "person" in the bill to be the driver. **Mr. Galt** deferred the question to **Brenda Nordland.**

Brenda Nordland explained that the federal law refers to consumption by the driver, in particular, and possession by any occupant in a vehicle, and there are some exceptions that apply to occupants reflected in the bill. Those exceptions deal with living quarters and vehicles that have been rented with a hired driver.

SEN. McGEE followed up by asking if under the current language, everyone in the car would be cited and why.

Brenda Nordland explained that the concept of possession in the law is the ability to terminate control. The person who has the ability to terminate control of an item is the person who has awareness of the item. Something in the back of a Bronco, no one may ever have the awareness and never had the ability to terminate control. Not every individual would be cited. You have to be able to prove who possesses, and this is a legal standard. Therefore, not everyone would be cited.

SEN. McGEE stated he was confused, and if this bill becomes law, and "person" under this law is intended to be the driver as defined by the person who is in control and possession, the average lay person will not read the law as "person" to be the driver unless "person" is defined as such.

Brenda Nordland offered to work with the committee and others to refine the bill to a level the committee feels comfortable with, both from a law enforcement and prosecutorial standpoint, as well as from an educational and public standpoint. **Ms. Nordland** maintained that there are multiple states which have open-container laws, and this proposed law is eminently doable and we can achieve a law that comports with federal regulations. A driver should not be cited if unbeknownst to the driver a passenger is drinking. A passenger should not be cited just

because they are in the vehicle of a person who happens to have an unlocked glove box containing a flask of bourbon.

SEN. MANGAN inquired of **Mr. Lambert** whether he had additional amendments that would perhaps address **Sen. McGee's** concerns and asked **Mr. Lambert** to discuss what else he would like to see in this bill.

Mr. Lambert replied that they would not address **SEN. McGEE'S** concerns. **Mr. Lambert** suggested eliminating all the language on page 1, line 15, and inserting "way of the state open to the public." This is the language used in DUI enforcement, and there is a good body of case law behind it and prosecutors and defense attorneys understand this concept. This would eliminate the definition of shoulder on page 2. There is really very little change to the amendments which were circulated. **Mr. Lambert** reiterated the amendments would not address the specific concerns of **SEN. McGEE.**

SEN. MANGAN proceeded stating that **Mr. Recke** from the Cascade County DUI Task Force had suggested increasing the amount of the fine and asked **SEN. MAHLUM** to comment about **Mr. Recke's** suggestion.

SEN. MAHLUM responded he had not discussed an increase in the fine with the Department. **SEN. MAHLUM** added this bill will take some work.

(Tape : 4; Side : B)

SEN. MANGAN inquired of **Ms. Nordland** whether the Department of Justice was involved in the drafting of SB 39.

Ms. Nordland responded that she did not draft the bill, but she did provide some assistance.

SEN. MANGAN instructed **Ms. Nordland** to give him a rough idea of what the other laws on open container have for the amount of fines.

Ms. Nordland offered to do additional research on this and provide the information to the committee at a later date.

SEN. JERRY O'NEIL questioned **SEN. MAHLUM** whether this proposed legislation would make it illegal to drink a beer with lunch in a vehicle parked on the side of the road if he were up in the mountains gathering firewood. **SEN. MAHLUM** responded that if he were far enough away from the road, you would be fine.

SEN. O'NEIL stated that the language "ways of the state open to the public" and it might be difficult to get far enough away. **SEN. MAHLUM** remarked that there will be a lot of discretion used.

SEN. O'NEIL questioned whether this bill would be selectively enforced. **SEN. MAHLUM** deferred the question to **Colonel Driscoll.**

Colonel Driscoll explained that if a person is way back in the woods, they probably would not see a highway patrolmen. **Colonel Driscoll** further explained the training and direction provided to officers will be specific to the totality of the situation. The question will be are there people drinking in the vehicle? They will provide training to officers to make sure the enforcement is appropriate. **Colonel Driscoll** stated that they wanted to make sure their enforcement efforts follow the intent of the legislation. If a person is on the highway and a person in the backseat is drinking alcohol, it would be up to the officer to determine whether the person should or should not be cited.

SEN. BRUCE CROMLEY questioned **Mr. Galt** whether the proposed amendments are required by the federal statute. **Mr. Galt** replied that they were not. **SEN. CROMLEY** did not understand the purpose of striking the word "knowingly" and believed the intent of this legislation was to target the person who "knowingly" has an open container in the vehicle. **Mr. Galt** replied the intent of the bill is to eliminate open alcoholic beverages in the readily accessible area of passengers and drivers of automobiles on the state highway. **Mr. Galt** asked if that question could be deferred to **Mr. Lambert.**

Mr. Lambert expounded that DUI is an absolute liability offense in that it does not have to be proven that a person acted purposely, knowingly, or negligently if they drove on a way of the state open to the public. DUI is a *mala prohibitum* crime meaning it is against the law because the legislature says it is. Also, there is no jail time involved and only a $100 fine is imposed. Absolute liability makes the driver responsible for the car and what the people in the car are doing with regard to alcoholic beverage containers. **Mr. Lambert** sees this as a classic absolute liability offense for which a mental state need not be prescribed.

SEN. GARY PERRY supports the intent of this bill and wants to draw out questions which may be brought out later. **Sen. Perry** desired to know some beverages with an alcohol content greater than 0 but less than .5 percent and what level of alcohol content does a beverage need to become an intoxicating beverage. **Sen. Mahlum** deferred the question to **Mr. Galt** who responded the

standard beer is 3.2 percent by volume, wine is 11-14 percent alcohol by volume, and hard liquor is approximately 50 percent alcohol by volume.

SEN. PERRY then questioned **Mr. Galt** whether it was possible that the definition of "ways of the state open to the public" includes the shoulder. **Mr. Galt** stated that they are trying to keep the definition to the road and shoulder of the highway and not include the right-of-way and not include the ditch. They are trying to define the road, the travel lane, and the immediate adjacent shoulder. They chose the definition because they believe it addresses this area and is the standard definition used in DUI law.

SEN. PERRY then questioned whether a clever person could construe "way of the state open to the public" as a state waterway, the banks of a state waterway, or even a boat. **Mr. Galt** deferred the question to **Brenda Nordland.**

Ms. Nordland stated she believes the definition in 61-8-101(1) defines "ways of the state open to the public," and refers to typical highway vehicular traffic and does not extend to waterways. **Ms. Nordland** asked the committee members to stay within the confines of "ways of the state open to the public" within 61-8-101(1).

SEN. PERRY further questioned **SEN. MAHLUM** whether a person "sleeping it off" on the shoulder, could that person be guilty of open container or drunk while driving. **SEN. MAHLUM** deferred the question to **Mr. Lambert.**

Mr. Lambert explained that is what is called "actual physical control of a motor vehicle," and people frequently are convicted under those circumstances. If people have been drinking, we do not want you out there. There is a well-established body of case law that supports this finding. **Mr. Lambert** explained that, therefore, you could be cited for open container under those circumstances.

SEN. PERRY further questioned **SEN. MAHLUM** whether this law would pertain to snowmobiles in West Yellowstone or Red Lodge. **SEN. MAHLUM** deferred the question to **Mr. Galt.**

Mr. Galt stated he was unsure whether this open-container law would apply to snowmobiles in those locations.

SEN. PERRY also inquired of **SEN. MAHLUM** what amount of alcoholic beverage is required in a container to constitute an open

container, and could a bag of empty, crushed beer cans be construed as open containers.

SEN. MAHLUM replied that empty beer cans in a vehicle that are warm cans and the driver has not been drinking, the officer would have to use his discretion and would not issue a citation.

SEN. GERALD PEASE addressed **Colonel Driscoll** and asked whether this bill would enhance racial profiling.

Colonel Driscoll conveyed that the Montana Highway Patrol does not engage in racial profiling and not going to engage in racial profiling. They provide sensitivity training to their officers and racial profiling is not a part of making stops, and is not condoned or tolerated.

CHAIRMAN GRIMES asked **SEN. MAHLUM** to think about the racial profiling issue and whether this could be misused in any way.

SEN. O'NEIL wondered whether it would be cheaper to toss an open container out the window or get caught with an open container.

Colonel Driscoll warned that a person should not consume alcohol while driving down the road, and that is the intent behind the whole legislation.

CHAIRMAN GRIMES inquired of **Ms. Nordland** whether the roadways of the state apply to reservations.

Ms. Nordland responded it does if they are public highways on the reservation. **Ms. Nordland** went on to explain that the sovereign nation has the ability to sit its own standards, and they can choose to have an open-container law or not. In areas where there are cooperative law enforcement agreements, this would apply on a reservation.

(Tape : 5; Side : A)

Closing by Sponsor:

SEN. MAHLUM closed the hearing on SB 39 by stating he understands **SEN. PEASE'S** concerns and will take a look at those. **SEN. MAHLUM** stated he agreed with **Mr. Beck** that this is one of the important bills this session. This bill is a right piece of legislation at the right time. In reality, it is past due. SB 39 needs to be the end of the image of a Montanan driving his pickup down the road, with a gun in the hanger, a blue heeler in the back of his truck, and a beer in his hand.

ADJOURNMENT

Adjournment: 11:36 A.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus03aad)