MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 21, 2003 at 9:00 A.M., in Room 303 Capitol.

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: 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 & Date Posted: SB 218, 1/17/2003
Executive Action: SB 57

HEARING ON SB 218

Sponsor: **SEN. WALTER McNUTT, SD 50, Sidney.**

Proponents: **Gordon Morris, Montana Association of Counties**
Jim Reno, Yellowstone County Commissioner
Beth Brenneman, Legal Director, American Civil Liberties Union of Montana (ACLU)
Anita Roessmann, Montana Advocacy Program (MAP)

Opponents: **None.**

Informational Witnesses:

Karla Gray, Chief Justice, Montana Supreme Court

Opening Statement by Sponsor:

SEN. McNUTT opened the hearing on SB 218 by stating he is sponsoring the bill at the request of the Montana Association of Counties (MACO). The public defenders were not included in last session's SB 176 because there are a variety of mechanisms around the state to handle public defenders, and they really could not get their arms around a uniform system. This bill would have the state assume the administration of the public defender system. **SEN. McNUTT** submitted a Special Report from the Bureau of Justice Statistics, entitled State-Funded Indigent Defense Services, 1999. **EXHIBIT(jus12a01).**

CHAIRMAN GRIMES commented that the Committee may have to place SB 218 in the same subcommittee meeting on SB 134. The subcommittee consists of **SENATORS McGEE, WHEAT, O'NEIL** and **MANGAN.**

Proponents' Testimony:

Gordon Morris, representing MACO, indicated that he worked with **Valencia Lane** in drafting the bill. **Mr. Morris** feels this is a piece of unfinished business and the final piece of the puzzle. MACO endorses having this bill assigned to subcommittee with SB 134.

Mr. Morris stated that a public defense system must be efficient and effective and provide high-quality, conflict-free representation to those charged with crimes who cannot afford to hire an attorney. Poverty is not an excuse to provide less than competent representation. **Mr. Morris** added, not only is poverty not an argument, but neither is the value of a county's mill

level and a county's taxing ability when it comes to providing funding. Section 1 establishes a Public Defender Commission consisting of five members, one district court judge, three attorneys, one of which must have some experience in Native American affairs and culture, and someone from the general public. The appointees are at the direction of the Governor. Section 2 establishes a Chief Public Defender outside of the state classification and pay schedule, it is the case that this individual will be funded from the Department of Administration. Section 3 amends the section of law that provides for the reimbursements for state assumption, SB 176. This removes the public defender portion and places it in its own section and establishes the indigent defense system as a state expense. The Commission was originally viewed as being a combined trial and appellate Commission. Now, it is a standalone Commission, since there already is an Appellate Defender commission and an appellate defender attorney. This will now create a trial component by virtue of the Public Defender Commission and a public defender. The new Section 7 of the bill will create the office of the Chief Public Defender, identifies the procedures for appointment of the Chief Public Defender, and provides for the salary and duties of the Chief Public Defender. **Mr. Morris** stated they were going to start this position at the same salary of a County Attorney in a level 1, 2, or 3 county. **Mr. Morris** thinks this may need to be rethought because that would mean the Chief Public Defender would start at approximately $50,000 a year, and **Mr. Morris** feels that salary would not be adequate. The bill also provides for Deputy Public Defenders and Assistant Public Defenders where needed throughout the state and establishes their terms and duties. The bill also contains a provision for transfer of county employees to become state employees with an effective date of July 1, 2004. This is similar to the transfer mechanism contained in SB 176. **Mr. Morris** really likes Section 12, which deals with the rights to county property currently used by the public defender. This provision gives them the right to the property they are currently using, but when the office furniture or equipment is replaced, it reverts back to the ownership of the county. **Mr. Morris** explained further that all public defender employees, except the Chief public defender, will be subject to the state classification and pay plan. The act will be effective July 1, 2004, with Sections 1 and 10 being effective July 1, 2003.

Jim Reno, Yellowstone County Commissioner, stated it does not matter which county you are in, a person has a constitutional right to defense. The funding has come to the state, and he feels the work should go to the state as well. **Mr. Reno** has concerns about being under qualified to supervise the work of

county attorneys, and feels this supervision should come from the state judicial branch.

Beth Brenneman, Legal Director of the American Civil Liberties Union of Montana (ACLU), stated that in February 2002, the ACLU filed a lawsuit against the state and seven counties for failure to provide constitutionally adequate public defender services. They have identified considerable problems with the current state of affairs. Creating the state public defender system and appointing a Chief Public Defender has great potential in solving many of these problems. Lack of state oversight of the public defender function in the counties and lack of autonomy are two of the biggest problems with the current system. Also, the lack of parody between public defender services and prosecutorial functions is a problem. **Ms. Brenneman** cautioned that the enactment of a state public defender system will not necessarily end the ACLU lawsuit. This will only happen if the system is adequately funded, mandates a certain level of practice, and guarantees parody between the prosecutorial and public defender services. **Ms. Brenneman** feels this bill is a good first step.

Anita Roessmann, representing the Montana Advocacy Program (MAP), supports the bill, but feels it was an oversight not to include people with involuntary commitment proceedings in this bill. **Ms. Roessmann** stated there is an overlap between representation of criminal defendants who cannot afford counsel and representation of people in involuntary commitment proceedings who cannot afford counsel. Representation of these two are very similar.

Opponents' Testimony: None.

Informational Testimony:

Karla Gray, Chief Justice of the Montana Supreme Court, stated neither she nor the Supreme Court have a position on this bill. **Chief Justice Gray** believes conceptually this is a good bill. For clarity, **Chief Justice Gray** explained that the bill does not bring the proposed Public Defender Commission to the judicial branch. The Commission will become attached to the Department of Administration. As a general matter, **Chief Justice Gray** feels the fiscal note for this bill will be huge. The Judicial Branch's budget for overall state assumption is hugely underfunded. With regard to indigent defense, the projected budget as currently structured under state assumption for the next biennium is in excess of $17.5 million. **Chief Justice Gray** offered some additional thoughts based on her experience with state assumption, stating the first thing she noticed is that the bill does not provide the Public Defender Commission with any staff. It is **Chief Justice Gray's** opinion that the Commission

cannot perform its duties without staff. Also, Sections 4 and 5 make the state responsible for indigent defense at all levels of the courts in Montana, including courts of limited jurisdiction. This would be a staggeringly expensive proposition and a huge expansion of the costs of indigent expense. In the new Section 9, it refers to indigent defense "in proceedings in district court" only. **Chief Justice Gray** feels the Committee may want to consider this inconsistency. In addition, **Chief Justice Gray** stated that an annual salary of $50,000 will not attract qualified applicants. It is not realistic to suggest that someone should run a statewide indigent defense program for the same salary as county attorneys from level 1, 2, and 3 counties. Also, there is no mention in the bill as to the level of staffing, office space, furniture, equipment, operating, and travel expenses. These items will be significant and should be considered. **Chief Justice Gray** also would like the Committee to focus on the section of the bill which transfers county employees to state employees. When state assumption was implemented, the state ended up with a $1 million liability for county employees' accumulated sick and vacation leave. Public defender jobs are not jobs that can remain open for long periods of time for vacancy savings purposes, especially in light on the constitutional right to a speedy trial.

(Tape : 1; Side : B)

Questions from Committee Members and Responses:

SEN. DAN McGEE questioned the sponsor, **SEN. McNUTT**, where the funding identified for the bill is currently and why the fiscal note was not presented with the bill.

SEN. McNUTT stated the fiscal note is being prepared, and then re-referred the question as to where the funding is currently to **Mr. Morris.**

Mr. Morris pointed out that this was a question they had addressed prior to drafting the bill. They had discussed this with **Greg Petesch** and that the appropriation would amount to literally a transfer of funds from the Supreme Court, and it would be done under HB 2.

SEN. McGEE confirmed with **Mr. Morris** that current funding for the Public Defender's Office is with the Supreme Court.

Mr. Morris stated that was correct insofar as they are assuming what is being reimbursed to counties for public defender expenses is sufficient to cover all of those expenses. In all likelihood, that is not the case. **Mr. Morris** stated they do not have the

ability to accurately assess what those costs will be, and they are relying on the Supreme Court in that regard.

SEN. McGEE asked, again, currently, how is the Public Defender's Office funded, and how much is it statewide?

Mr. Morris responded that under current law the administration of the public defender services lies at the county level. The county seeks reimbursement from the state by submitting a statement to the Supreme Court. Over the past several years, the reimbursement dollars have fluctuated from $4.5 to $5.5 million. This does not include things as jury fees and witnesses fees, psych exams, and any other court-related expenses that would be incurred in a criminal case.

SEN. McGEE then wanted to know how the Public Defender Commission and the Chief Public Defender position would be funded.

Mr. Morris stated there would be a dollar amount identified as to what it would take to start the program and that dollar amount would be transferred from the Supreme Court variable program to the Department of Administration. What that would be in terms of the total dollar amount remains to be determined. Mr. Morris explained if you look at the numbers for 2003 the variable pod is approximately $7.4 million. This is variable from the standpoint that money is identified in reserve for funding those expenses associated with criminal court cases.

SEN. McGEE re-directed the same questions to **Chief Justice Gray**.

Chief Justice Gray responded to the question by stating that under state assumption for this fiscal year indigent defense costs and many others are partially funded by the state with some fall back responsibilities to the counties. The reason for the fall back responsibilities is that the legislature last session was not all together confident there would be sufficient funds in the variable pot, so in the legislature's wisdom they left some fall back responsibility for the current fiscal year for these variable costs, which includes indigent defense. The current situation, as best as can be predicted, the counties are being reimbursed at only 65 percent of all variable costs because the variable cost pot is no where near enough. In the future, based on the usual assumptions which are made for budgeting purposes and the available information, projected costs for indigent costs alone will be in excess of $17.6 million. This figure is for indigent defense costs alone and does not include any of the other costs that Chief Justice Gray had, earlier in her testimony, suggested the Committee needs to consider in creating a Public Defender Commission. Moreover, Chief Justice Gray has

no idea what the Supreme Court's budget will look like for next year. Chief Justice Gray continued stating it was thought in the last legislative session that some of these costs, like indigent defense, could be controlled by transferring them to the state. She has been asked how she plans to control the cost of indigent defense. Chief Justice Gray wants the Committee to know that she cannot control these costs within the judicial branch, and does not feel they will be controlled under SB 218. Chief Justice Gray believes the costs could be controlled by repealing criminal offenses and thereby reducing the number of criminal offenders, although, admittedly, Chief Justice Gray feels this is not a realistic solution that the people of Montana would support.

SEN. JERRY O'NEIL asked **SEN. McNUTT** whether it was necessary for the Chief Public Defender to be a licensed attorney if he was essentially going to be an administrator. **SEN. O'NEIL** thought hiring someone with a degree in business administration, for example, would keep the cost down.

SEN. McNUTT stated he does not know why the bill says the administrator needs to be an attorney and suggested maybe the subcommittee would like to consider that requirement.

SEN. McGEE asked **Mr. Reno** about the issue of travel expenses. **SEN. McGEE** wondered if making the Public Defender's Office a state entity would increase travel requirements and expenses.

Mr. Reno did not know where the various Public defenders would be stationed. **Mr. Reno's** thoughts are that the state would contract with different individuals throughout the state.

SEN. McGEE asked where in the bill it provided for those contracts and re-referred to anyone who knew the answer.

Mr. Morris stated that the transition provision in Section 11, page 9, speaks to the fact that public defenders and staff who are currently employed by the county would be transferred to state employment. The intent of the bill is that if these people were located in Yellowstone County, they would remain in Yellowstone County and be administered out of Helena by the Chief Public Defender. Yellowstone, Cascade, Gallatin, Missoula, Lewis and Clark, and Flathead Counties all have public defenders on staff. In more rural counties, they have contracts with local attorneys to be available to provide public defense for indigent individuals.

SEN. McGEE wondered if the situation ever arises where a public defender in Billings would represent an indigent individual in Missoula.

Mr. Morris stated this happened in the Barjonah case and there are expenses that will arise under those circumstances.

SEN. BRENT CROMLEY asked **Ms. Roessmann** what the current funding mechanism is for people facing involuntary commitment.

Ms. Roessmann explained that under state assumption the costs for involuntary commitment is being paid by the counties. **Ms. Roessmann** is, however, uncertain if this is the case. **Ms. Roessmann** added that if public defenders are doing involuntary commitment proceedings, it will be more efficient and will reduce costs.

SEN. JEFF MANGAN asked **Mr. Morris** to comment on **Chief Justice Gray's** point that there is an ambiguity as to whether the bill would cover all public defenders, including courts of limited jurisdiction, or only district courts.

Mr. Morris responded that his thought is the bill applies to criminal cases which are often first heard in a court of limited jurisdiction and then moved to district court. **Mr. Morris** stated he would like to take a closer look and see if there is a contradiction and, if there is, get it cleared up.

SEN. MANGAN directed Mr. Morris to determine if there is an ambiguity and then let him know his findings on this issue.

SEN. MANGAN is concerned about grant money obtained by the Public Defender's Office, and whether that money would stay with the county. **SEN. MANGAN** stated this was an issue with SB 176 last session.

Mr. Morris surmised that the grants will follow the program in its migration to the state.

(Tape : 2; Side : A)

SEN. GARY PERRY asked **Chief Justice Gray** of the projected $17.6 million cost, how many cases that would cover.

Chief Justice Gray responded that it would be impossible to project a budget on a per-case cost, because of the difference in the size of cases, plea bargaining, and whether there is a jury trial.

SEN. PERRY thought, for conceptual purposes, that information would be helpful if it could be broken down to an average cost per case and wondered how many indigent people need this service

in the course of a year and how many of those cases are misdemeanors.

Chief Justice Gray followed up by stating she would obtain the number of criminal case filings in the courts of limited jurisdiction last year. **Chief Justice Gray** does not think data is available to ascertain how many of those persons, who faced misdemeanor charges in courts of limited jurisdiction, needed counsel under the indigent provisions.

SEN. PERRY maintained it was his understanding the Supreme Court has been billed costs over the last year and one-half and that the funding is not available to pay those costs and, therefore, they have only paid 65 percent.

Chief Justice Gray explained for this fiscal year, they are paying indigent defense and the other variable costs that came with state assumption at about 65 percent because there was never going to be enough money in the appropriation for fiscal year 2003. The balance of those expenses remain the responsibility of the counties. In the upcoming biennium, the fallback responsibility to the counties is scheduled to disappear. That will mean all the costs will need to be paid by the state.

SEN. MANGAN wanted to know in the Barjonah trial whether the appointed counsel billed Cascade County, the Eighth Judicial District, or the Supreme Court for their services.

Chief Justice Gray stated that the Barjonah trial went on for a number of years and, in fact, there is an appeal pending. Prior to state assumption, **Chief Justice Gray** does not know how a bill was submitted. Under state assumption, bills come directly to the Supreme Court Administrator's office for payment. Presumably, these bills are being paid at 65 percent. The total bill for defense counsel only in the Barjonah is in approximately the $300,000 range.

SEN. MANGAN then recited that currently, under state assumption, there may be a number of appointed non-county employee attorneys appointed by district judges in a number of trials across the state. Under state assumption, those individuals bill directly to the Supreme Court Administrator. Also, local county public defenders who provide services through their offices on a regular basis, and those counties where they have employees who are public defenders, the counties are responsible for asking the Supreme Court for reimbursement for those defense costs.

Chief Justice Gray stated **SEN. MANGAN'S** understanding, generally, was correct.

SEN. O'NEIL wondered if the state was sitting itself up for a lawsuit because they are not properly defending indigent citizens in Montana.

Chief Justice Gray was very cautious in responding that under state assumption passed by the 57th Legislature, and recognizing that **SEN. O'NEIL** did not support that bill, the costs should be covered. They are being covered at 65 percent at the state level because the Legislature had concerns whether there was going to be enough money during the first year that state assumption operated. The other 35 percent is the county's responsibility and, presumably, the counties are meeting those responsibilities.

Chief Justice Gray commented about involuntary commitment proceedings. In SB 18, sponsored by **SEN. GRIMES**, those costs for appointed counsel were added to state assumption costs, because the pattern of SB 176 clearly included appointed counsel situations. **Chief Justice Gray** felt **Ms. Roessmann's** concern deserves consideration because those are indigent defense costs. **Chief Justice Gray** clarified that even though involuntary commitment proceedings are not criminal proceedings, the defendant's liberty can be taken away, so those costs need to be attended to.

Closing by Sponsor:

SEN. McNUTT closed the hearing on SB 218 by stating state assumption of the Public Defender's Office was not covered last session, and is an issue the Legislature needs to get its arms around.

EXECUTIVE ACTION ON SB 57

Motion: **SEN. CROMLEY** moved **SB 57 DO PASS.**

Discussion:

SEN. MIKE WHEAT handed out written testimony from **Ginny Hill, Forensic Psychologist from Montana State Hospital** **EXHIBIT(jus12a02)**, and a listing by state on how each state defines "mental disease or defect." **SEN. WHEAT** thought it would be helpful to hear testimony relating to these matters since the Committee will be changing the definition and standard the courts will rely upon in making this determination.

Ed Amberg, Administrator of State Psychiatric Hospital at Warm Springs, believes this issue is important for future defendants who want to be adjudicated as having a mental disorder. Many states wrestle with this definition. Nationally, with the

assassination attempt of President Reagan, a number of states attempted to revise this area of law because there is a perception that a person who commits and crime and has a mental disorder, gets off if they go to psychiatric hospital. In truth, many of these individuals remain hospitalized under restrictive conditions for a long period of time. Occasionally, a patient will refuse treatment or will be unable to respond to treatment. **Mr. Amberg** submitted a compilation of data on laws in other states which showed Alaska, Idaho, and Arkansas have language which mirrors the proposed language for Montana statutes. **EXHIBIT(jus12a03).**

Upon question from **SEN. WHEAT** about the proposed definition **Ginny Hill, Forensic Psychologist at Montana State Hospital at Warm Springs,** submitted written testimony (see Exhibit 2).

(Tape : 2; Side : B)

Dr. Hill added that a mental illness may explain a person's behavior, but it seldom excuses it.

CHAIRMAN GRIMES asked **Dr. Hill** to explain where the language came from and how much precedent it had behind it.

Dr. Hill explained that the existing language contained in SB 57 first came down from the Montana Supreme Court from the Wooster case. This is a very broad definition and, as best as she can tell, this definition came from the civil commitment statutes in New York state. **Dr. Hill** believes we are applying a civil definition to a criminal matter, and she believes the two should be separate.

CHAIRMAN GRIMES then asked **Dr. Hill** to comment on the language she proposed.

Dr. Hill explained the language she and Mr. Amberg are proposing came from a Consent Decree in a 1995 Ohio case entitled Dunn v. Voinovich. This was an organized effort in the Ohio Corrections system to provide mental health services in a prison environment. This definition seems the best of all the definitions they looked at. These definitions use terms like "significant," "severe," "serious," and "substantial," and this language needs to be in whatever definition is eventually adopted.

Motion: SEN. CROMLEY moved **Amendment SB005701.avl BE ADOPTED.**

Discussion:

SEN. WHEAT stated to **Dr. Hill** that his concern is when he looks at the definition of mental disease or defect arises, it is almost always in the situation where a heinous crime has been committed, and one lane leads to the hospital and one lane leads to prison. **SEN. WHEAT** feels any definition they use should not be so restrictive that people who really need treatment end up in prison. **SEN. WHEAT** asked **Dr. Hill** if she was comfortable that this definition would give enough flexibility to the court so it will ensure people who are going to be committed will end up where they rightfully belong.

Dr. Hill responded that she is comfortable with this definition. **Dr. Hill** expanded that ultimately this is a decision by a jury or judge. She feels very strongly that people with serious mental disease do not need to be in a maximum security cell, which is where they often end up. The definition talks about behavior and judgment, not just loss of contact with reality. **Dr. Hill** has approximately 55 forensic patients at the State Hospital and she has been on the forensic unit for ten years, and she feels this definition would help her to have the most appropriate final outcome for these individuals. While some flexibility is needed, you cannot allow so much flexibility that you have to build more forensic units.

SEN. WHEAT then asked **Ms. Roessmann** what her response to the proposed definition would be, and would it be sufficiently flexible enough, yet restrictive enough, that a person will end up in the appropriate placement.

Ms. Roessmann thinks there is a great deal of flexibility in the definition proposed by the State Hospital. **Ms. Roessmann** explained that the decision to find someone not guilty by reason of mental illness, or to find them guilty but having a mental illness, is a community decision made through the election or selection of judges and juries. Community values are reflected in the verdict. The use of the words "significant" and "substantial" are adjectives, and adjectives are what lawyers litigate over. A significant impairment that will excuse a traffic offense, may not be significant in a murder trial. **Ms. Roessmann** pointed out that the definition being proposed by the State Hospital does something to the Wooster decision. **Ms. Roessmann** explained to the Committee that the Wooster decision had to do with a man who was sent to the State Hospital for the murder of his two little girls. The issue was whether this person had a disorder that required him to stay in a treatment center. The court found he had not been treated sufficiently, so he needed to remain hospitalized. The treating physicians argued

that Wooster had a personality disorder and was not mentally ill. The court adopted a definition stating that you had to have a disorder that required care, treatment, and rehabilitation. The Supreme Court ruled Wooster needed to stay at the State Hospital. Ms. Roessmann went on to explain that what the Committee has done so far is talk about one situation where the forensic definition of mental illness applies, and that is in the sentencing phase when a person maintains they are not guilty by reason of mental illness. However, this definition is also going to be used to decide if a person is fit to proceed. In other words, whether he understands the charges against him and whether he can assist in his defense, and the criminal charges against him should proceed. The definition will also be used to decide if the person had the mens rea, i.e., criminal intent, and then, thirdly, it can be used at the sentencing phase. The Wooster case actually provides a fourth situation where this definition can be used.

SEN. WHEAT then asked **Dr. Hill** if by adopting the proposed definition, we run the risk of Mr. Wooster being put back on the streets.

Dr. Hill responded that is a possibility. She also believes Mr. Wooster will pursue other avenues and appellate courts. This case is kind of an outlier. Mr. Wooster killed his two little children with an axe 24 years ago while in a psychotic state. Mr. Wooster came to the State Hospital on a not guilty by reason of mental disease sentence. Two years after he was at the hospital, Mr. Wooster was no longer psychotic. The 1999 decision Ms. Roessmann referenced occurred when Wooster applied for release. Both physicians who examined Wooster said he had an anti-social personality disorder and, in a round-about way, that is a mental disease and, therefore, Wooster should continue to be hospitalized. If there is a new definition of mental disease, antisocial personality disorder will not likely qualify. **Dr. Hill** also discussed the Fucha case which went to the United States Supreme Court which ruled you cannot hold an individual in a state mental health facility unless they are both mentally ill and dangerous. Mr. Wooster has not been dangerous for 22 years, so is likely Mr. Wooster, at some point in the future, will argue that antisocial behavior is not a mental disease.

SEN. WHEAT commented that the reason Mr. Wooster has not been dangerous for 22 years is because he has not been able to get his hands on an axe.

Dr. Hill responded that Mr. Wooster has had ample opportunity to get an axe for 22 years. He has had full-campus pass, been treated by multiple doctors, been on off-grounds activities with

staff. Certainly, they hope there are not any drugs, alcohol, or axes on campus, but she cannot be certain.

CHAIRMAN GRIMES asked Beta Lovitt to follow up with the issue as to whether there will be an unintended consequence because of the Wooster issue just discussed.

Beta Lovitt responded that under the current law and definition, and under the new proposed definition, both in the bill and the definition proposed by the hospital, there is always a possibility Wooster will appeal and could ultimately be released. **Ms. Lovitt** feels it would be impossible to come up with a definition that will be an absolute guarantee Mr. Wooster will never leave Montana State Hospital. Looking for the perfect statutory language that would apply only to Mr. Wooster is dangerous.

SEN. CROMLEY asked **Ms. Roessmann** whether, in her opinion, the language that a person requires care, treatment, and rehabilitation, will cause trouble in the case of Mr. Wooster.

Ms. Roessmann responded that is the significant language that is missing from the definition being proposed by the State Hospital.

SEN. CROMLEY suggested adding the language to the State Hospital's definition and asked **Ms. Roessmann** if that would be acceptable.

Ms. Roessmann replied adding that language would help narrow the definition. **Ms. Roessmann** reminded the Committee about the discussion about ADHD and whether the definition would include that disorder. **Ms. Roessmann** added that imposing the limitation would give direction to county attorneys and enable them to say this is not a person who needs care, treatment, or rehabilitation at the State Hospital. Perhaps it is a person who simply needs a structured environment such as the state prison.

SEN. O'NEIL asked **Dr. Hill** about changing the language to say "and" capacity to recognize reality rather than "or" capacity to recognize reality and whether that would be too restrictive and would cause people who are mentally ill to go to prison rather than the state hospital.

Dr. Hill stated they discussed the option, but feel it would be too restrictive and would take away the needed flexibility.

SEN. McGEE questioned if under the language in the current bill that says "a disturbance in behavior, feeling, thinking, or judgment," whether PMS qualify.

Dr. Hill feels a good attorney could make that argument.

CHAIRMAN GRIMES asked **Dr. Hill** to discuss the additional language referring to care, treatment, and rehabilitation.

(Tape : 3; Side : A)

Dr. Hill stated this is such a pivotal area, she feels the Committee needs to think about this proposed language.

SEN. McGEE was curious about the phrase "capacity to recognize reality." **SEN. McGEE** feels perception plays a part in reality, and while the truth is reality, it is not always recognized. **SEN. McGEE** feels the adjectives are appropriate, but feels they are arguable in court. **SEN. McGEE** wonders why there needs to be a phrase about recognizing reality, when the behavior is the problem. For instance, a person could think about robbing a bank, but would not be in trouble unless they actually did it. **SEN. McGEE** asked **Dr. Hill** to speak to the phrase "recognize reality," and whether that phrase needs to be defined in the law.

Dr. Hill believes the capacity to recognize reality should be in the bill because these disorders, which most of the time exonerate criminal responsibility, are psychotic disorders and the sine qua non of those psychotic disorders is the person has a disturbance in recognizing reality. These people are irrational, and often respond to hallucinations and delusions. **Dr. Hill** testified this can be a gray area, but people who work in this field will understand the concept of recognizing reality. **Dr. Hill** held that there may be other definitions which will get to severity, but all definitions will be subject to being picked apart.

It occurred to **SEN. McGEE** that a person will be charged with a crime because his behavior is against the law. An impairment of judgment is a mental situation, capacity to recognize reality is a mental situation, but behavior is the action, even though it can be spawned by whatever the mind is thinking. **SEN. McGEE** is struggling with concept that a person could be find not culpable of their crime, because their behavior was affected or because their capacity to recognize was affected, but the fact remains they killed somebody. When anyone kills someone, do they not have a debt to society to pay. We have victims, taxpayers who are going to fund this person's life. The problem is mental processing versus behavioral doing. It is the behavior will determine whether the person has committed a crime.

Dr. Hill asked the Committee to remember that the criminal act requires two prongs, *actus reus* (the forbidden act), and *mens rea*

(guilty mind). When talking about guilty mind, terms like "judgment" and "inability to appreciate reality" come in. **Dr. Hill** agrees that these things can be argued.

SEN. PERRY informed the Committee that Lois Menzies, Legislative Services, did a search and the word "reality" appears 33,000 times in the code although there is no definition. **SEN. PERRY** would like to point out that the Committee should be aware of "virtual reality" in the electronic age. **SEN. PERRY** wanted to know if a crime is committed under the influence of virtual reality, would it fall under this definition.

Dr. Hill stated a psychotic state is a form of virtual reality since a psychotic person has their own way of interpreting things based on hallucinations and delusions which are completely erroneous to what the majority of people in your environment see. People who are acting in a psychotic state, or a virtual reality, they might qualify to be exonerated from their criminal behavior.

Dr. Jeffrey Ritow, a psychologist at the State Hospital for the past 24 years, who has done extensive forensic work for the past 14 years, stated the Committee's questions are very good, but very complex since part of the questions are legal in nature and part are psychiatric. **Dr. Ritow** is not a legal expert, but testified the courts have determined that if a person takes a drug, and because of that drug has distorted reality perceptions and commits a crime, they are responsible. In other words, being under the influence of a drug or alcohol does not relieve you of the responsibility for what you do. The courts have not made a ruling yet as to what would happen if somebody had one a reality altering, virtual reality headset and under that committed a crime. Perhaps the court would go with that precedent that if the person chose to put on the equipment, he was responsible. The courts have ruled that if a person was slipped a drug and did not voluntarily take the drug, then you may have a defense to the behavior you subsequently engaged in.

CHAIRMAN GRIMES stated that **Ms. Lane** is comfortable with the State Hospital's proposed language, with **SEN. CROMLEY'S** proposed changes. **CHAIRMAN GRIMES** asked **Ms. Lane** to respond to **SEN. CROMLEY'S** proposed amendment. **CHAIRMAN GRIMES** stated even though the Committee is still wrestling with the right language, the Committee's intent on the records is crystal clear. The bill will then be further refined in the legislative process.

Ms. Lane clarified **SEN. CROMLEY'S** amendment by stating amendment SB005701.avl would be changed to add "a person's" and then insert after the word "reality" to add "to such an extent that the person requires care, treatment, and rehabilitation." Therefore,

the Committee has qualified the proposed amendment and further narrowed the definition so that impairment is to such an extent that the person requires care, treatment, and rehabilitation. It would have to be determined first that the impairment exists, and second that the impairment exists to the extent that the person requires care, treatment, and rehabilitation. This would add a further restriction and limitation of the definition which is proposed to be adopted.

CHAIRMAN GRIMES then questioned if leaving off the last phrase "to such an extent that the person requires care, treatment, and rehabilitation" then we would be implying that it may or may not.

Ms. Lane stated it would not imply that. **Ms. Lane** has suggested the Committee is adopting a two-point definition. Leaving off the second limitation will result in a broader definition.

CHAIRMAN GRIMES added that by leaving off the definition, they are disallowing it from being used as a yardstick or another measurement tool.

Ms. Lane cautioned that she is not an expert in this area. It is **Ms. Lane's** opinion as a word smith, if a court were to look at the minutes of the meeting and see this language had been considered and not adopted, even though the failure of a legislative act usually cannot be considered as a statement of the intent, the fact the language had been considered and discarded could be construed as meaning the Committee wanted the broader definition.

CHAIRMAN GRIMES then inquired whether **SEN. CROMLEY** was going to modify his amendment to include the narrower language.

SEN. CROMLEY then **withdrew** his motion **SB005701.avl BE ADOPTED.**

SEN. CROMLEY moved the amendment **SB005702.avl EXHIBIT(jus12a04)** as read by **Ms. Lane BE ADOPTED.**

For clarification **Ms. Lane** stated the amendment would include amendment 1, with the additional language, as well as amendments 2 and 3 contained in **SB005701.avl. EXHIBIT(jus12a05)**

CHAIRMAN GRIMES stated **Ms. Lane** was correct.

SEN. O'NEIL asked **Ms. Lane** to read the first amendment in its entirety.

Ms. Lane read: As used in this chapter, mental disease or defect means a substantial disorder of thought or mood that

significantly impairs a person's judgment, behavior, or capacity to recognize reality to such an extent that the person requires care, treatment, and rehabilitation.

SEN. McGEE is concerned about not having a modifier for the words "care, treatment, and rehabilitation." **SEN. McGEE** feels the care could be calling a doctor, the treatment could be an aspirin, and the rehabilitation could be taking an aspirin for the rest of your life. **SEN. McGEE** said he almost wants to add in care, treatment, and rehabilitation at the Montana State Hospital, but he is hesitant.

SEN. WHEAT directed the Committee to the language from Idaho which reflects care and treatment "at a facility." **SEN. WHEAT** feels this would address **SEN. McGEE's** concern.

CHAIRMAN GRIMES noted that Idaho's language omits "rehabilitation" from its language.

SEN. WHEAT stated he was just simply reading the language utilized by Idaho.

CHAIRMAN GRIMES asked **Dr. Hill** whether she had any comments on **SEN. McGEE's** suggested change.

Dr. Hill stated she appreciated the opportunity to grapple with the definition. **Dr. Hill** noted that adding "at Montana State Hospital" would cause trouble with the people who are guilty but mentally ill since once they are done with their treatment and cannot be conditionally released into the community or choose not to cooperate with treatment, they are often transferred to Montana State Prison. Therefore, "facility" would work, but adding "hospital" would not work.

SEN. MANGAN spoke to the amendment saying he likes it as proposed by the State Hospital and **SEN. CROMLEY** and does not want to add anymore to that amendment.

CHAIRMAN GRIMES stated this amendment could be continually worked on and refined if that is what the Committee would like to do. **CHAIRMAN GRIMES** does not want to have this same debate on the floor of the Senate, but the bill could be amended on the floor.

Motion: **SEN. O'NEIL** made a **substitute motion** saying, "as used in this section, mental disease or defect means a substantial disorder of thought or mood that significantly impairs a person's judgment and behavior, and capacity to recognize and adapt to reality and requires care and treatment at a facility.

(Tape : 3; Side : B)

Vote: The **MOTION FAILED** with **SENATORS O'NEIL and MCGEE voting Aye.**

Vote: The motion of **SEN. CROMLEY** that **AMENDMENT SB005702.avl. BE ADOPTED** carried by roll call vote with **SENATORS CURTISS, O'NEIL, and MCGEE voting no.**

Motion: SEN. MANGAN moved **SB 57 DO PASS AS AMENDED.** The motion carried **9-0.**

ADJOURNMENT

Adjournment: 11:30 A.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus12aad)