MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **VICE CHAIRMAN DANIEL McGEE**, on February 21, 2003 at 8:00 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 438, 2/19/2003; SB 439, 2/19/2003
Executive Action: SB 438; SB 439

HEARING ON SB 438

Sponsor: **Sen. Bob Depratu, SD 40, Whitefish.**

Proponents: **None.**

Opponents: **None.**

Opening Statement by Sponsor:

SEN. DEPRATU is bringing SB 438 at the request of a couple of attorneys who have run into problem with powers of attorney. About three years ago, there was a Supreme Court ruling which affected powers of attorney saying unless it was initialed on line "n" it restricted their powers. This bill will ensure everything listed is applicable to the power of attorney upon signature regardless of whether there is a signature on line "n."

Proponents' Testimony: **None.**

Opponents' Testimony: **None.**

Questions from Committee Members and Responses:

SEN. MIKE WHEAT inquired who the attorneys were who requested the bill.

SEN. DEPRATU responded one attorney was **John Dudis** and the other was **Paul Johnson.**

SEN. WHEAT wondered if **Mr. Dudis** and **Ms. Johnson** had submitted letters stating why they wanted the change.

SEN. DEPRATU explained they did not submit letters since they originally planned on attending.

SEN. AUBYN CURTISS asked if the power of attorney was a standardized form and the intent was to make it conform to those powers of attorney forms used in other states.

SEN. DEPRATU replied it was his understanding SB 438 will make powers of attorney conform with those used in other states. It is further his understanding that when the Supreme Court ruling was issued, everyone had been operating under the assumption that all items were covered. The ruling made it clear all items were not covered, and this bill will bring Montana back in line.

SEN. CURTISS stated the power of attorney looks similar to one executed in the state of Washington, and she is not familiar with the forms used in Montana.

Closing by Sponsor:

SEN. DEPRATU closed the hearing on SB 438.

HEARING ON SB 439

Sponsor: **Sen. Duane Grimes, SD 20, Clancy.**

Proponents: **John Connor, Department of Justice,**

Opponents: **None.**

Informational Witnesses:

Rhonda Schaffer, Fiscal Bureau Chief, Department of Corrections,

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, Clancy, opened by stating SB 439 primarily does three things. First, it will make ingestion constitute possession. There are diversified views throughout the state on this issue. Probable cause is still required for a warrant to be issued. The second change increases the penalties for methamphetamine. **SEN. GRIMES** quoted from a Great Falls Tribune article where a county drug detective stated that between 80 and 90 percent of the crimes committed are linked to meth. The article also spoke to the increase of traveling meth labs. **SEN. GRIMES** stated meth is now pervasive throughout the entire state, and he feels the penalties for this drug, in particular, should be increased. Lastly, SB 439 will address meth labs located in motor vehicles. The operation of meth labs in motor vehicles has made enforcement very difficult. **SEN. GRIMES** opined that someone who gets caught with a meth lab in a motor vehicle should be prosecuted with intent to distribute. Unintended effects of this legislation will include some fiscal impact, as well as it could cause people to manufacture meth more in their homes or apartments rather than a motor vehicle. **SEN. GRIMES** submitted literature from the Internet entitled "*Methamphetamine Frequently Asked Questions*," **EXHIBIT(jus39a01),** and "*Manufacturing of Methamphetamine*," **EXHIBIT(jus39a02).**

SEN. GRIMES stated he has been searching for a way to make people think twice when they are thinking about manufacturing meth in a mobile lab. Sting operations occur every night in every

community. **SEN. GRIMES** has knowledge of a few residences in Helena where sting operations have been set up. Many times, these operations are unsuccessful because of the mobility of this kind of manufacturing activity. Making ingestion constitute possession is a critical issue for prosecutors and law enforcement.

Proponents' Testimony:

John Connor, representing the Department of Justice, worked with **SEN. GRIMES** and **Valencia Lane** on the language that appears on page 1, line 16, where the word "knowingly" is inserted. This inserts a mental state, where none existed before. **Mr. Connor** stated there is confusion among prosecutors as to whether criminal possession is an absolute liability offense, which is one in which the state is not required to prove a mental state. The Commission comments to this section reflect that possession, by definition, includes the knowing control of something for long enough to terminate control. The Supreme Court in 1988 stated criminal possession of dangerous drugs is not an absolute liability offense and a mental state must be proven. Placing the word "knowingly" in the statute will avoid the confusion which seems to consistently occur. There is also confusion by prosecutors as to whether a person can be charged with possession of a substance by virtue of the fact that it appears in the blood stream. The language on lines 16 and 17 is based on language used in MIP statutes and whether you can charge a person based upon alcohol in the bloodstream. This language will make it clear that if you have meth in your system, you can be charged with possession. Because meth is not a crime by virtue of the degree to which it is detected, even a small amount will constitute a crime. **Mr. Connor** is not a drug prosecutor but believes because they so often see methamphetamine use directly or indirectly related to other crimes, it is an obvious problem. Statistics indicated in 1999, there were 16 methamphetamine labs discovered at a taxpayer expense of $98,000. In 2002, there were 122 labs dismantled at a cost of $1,005,000. Labs are also showing up in motels, and the risk of explosion and danger to those guests at the motel is extreme. On another piece of legislation sponsored by **REP. PARKER**, testimony was given by the Director of the Department of Corrections that there is a very small percentage of people who are in prison just for possession. Penalty enhancement will help get probationary control over a person in an effort to treat the problem. The only way to treat methamphetamine addiction is through behavior modification. In addition, methamphetamine addiction creates many physical disabilities in people. At the women's prison in Billings, 80 percent of the inmates were meth users and now suffer horrible

problems with their teeth, and this is just one of the ugly little realities with meth use.

Opponents' Testimony: None.

Informational Witnesses' Testimony:

Rhonda Schaffer, Fiscal Bureau Chief, Department of Corrections, is currently working on the fiscal note for SB 439. **Ms. Shaffer** appeared before the Committee solely to bring a few numbers to the table. **Ms. Shaffer's** understanding is that if a urinalysis is given and it comes back positive for methamphetamine, there will be a revocation on pending new charges, which the average length of stay is approximately 16.1 months, plus an additional five years will be added on. The average length of stay for a new conviction on a non-violent crime is 28.7 months. Adding those two numbers together totals 1,344 days per offender. The average cost per inmate per day for county jails is $53.99. That will result in $72,000 per inmate if convicted. There were 731 technical violations last year. It is hard to determine which of these were for actual possession because many times there are plea bargains.

Questions from Committee Members and Responses:

SEN. WHEAT's understanding is that this bill will give law enforcement the ability to get a blood test or urine sample so they can test for methamphetamine. **Mr. Connor** did not see that as being the primary purpose of the bill and stated people on probation can be routinely tested as a condition of their probation. These individuals can have their probation revoked if they test positive for any drug if it is a condition of their probation. Ingestion as a criminal offense will have to be proven beyond a reasonable doubt. That is not the required degree of proof for revocation of probation.

SEN. WHEAT asked if this will give law enforcement a better handle in obtaining a search warrant.

Mr. Connor stated a blood sample will give law enforcement probable cause to proceed.

(Tape : 1; Side : B)

SEN. WHEAT asked if this bill will give law enforcement the tool to obtain a blood or urine sample and, if a person tests positive, they can then be charged with possession.

Mr. Connor agreed and stated that was his understanding of what this bill would accomplish.

SEN. WHEAT stated the bill adds a new section to 45-9-103, criminal possession with intent to distribute, and asked **Mr. Connor** to explain how the new section will enforce law enforcement.

Mr. Connor's understanding of the intent of the provision is to acknowledge or recognize the fact that those people who manufacture meth for profit are mobile. This makes it more difficult to arrest these people. Subsection (b) is intended to address the issue of mobility and make it clear that when meth is manufactured in a car, they are distributing meth, not necessarily possessing methamphetamine.

SEN. WHEAT sensed that criminal possession with intent to distribute is a harsher crime than possession. It looks to him that criminal enhancement of possession is even more severe than the existing penalty for criminal possession with intent to distribute.

Mr. Connor agreed stating it is more severe and it is a policy approach by **SEN. GRIMES** to acknowledge the dangerousness of this substance. This will not mean a convicted person will do five years. It says not less than five years, but this is not a mandatory minimum in the sense that you cannot get probation. In 46-18-205 delineates those particular crimes for which you cannot get a suspended or deferred sentence. Section 45-9-1024 is one of those delineated subsections, but -1026 is not, so the sentence could be suspended or deferred at the discretion of the court.

SEN. JEFF MANGAN stated dealers and manufacturers are becoming more and more creative in their operations. **SEN. MANGAN** was concerned with the definition of motor vehicle in SB 439 because he feels it does not apply to travel trailers and other recreational vehicles that could be used to house a lab.

SEN. GRIMES thought this was a good suggestion since it was his intent to target mobile labs. **SEN. GRIMES** clarified that the penalty is found on lines 20-22 which is not more than 20 years. This is a significant increase in the penalty for someone who is manufacturing methamphetamine in a mobile unit.

SEN. DAN McGEE suggested putting a period after the word "methamphetamine," and further suggested there is no need to qualify where the drug is being manufactured.

SEN. GRIMES expounded that most people who manufacture meth are users. They manufacture their own drug and then sell off enough to continue to manufacture the drug for themselves. Having a meth lab in a motor vehicle implies the person has an intent to distribute. **SEN. GRIMES** feels casting a net which is too broad could classify anyone who possesses the drug as a dealer. Fiscally, this could have a huge impact.

Mr. Connor certainly agrees with **SEN. GRIMES** about the fiscal impact on the Department of Corrections.

SEN. McGEE asked if law enforcement has determined that people who are manufacturing methamphetamine, most of time, are doing it not only for their own use but also for sale and distribution.

Mr. Connor replied that has been his experience.

SEN. McGEE asked why not make "produces and manufacturers" have the presumption of distribution and sale.

Mr. Connor stated that is a good point, and it is a policy matter. It is better to dedicate resources to the problem up front and save money down the road.

SEN. McGEE feels the problem with the wording right now is it requires a long litany of things that methamphetamine could be manufactured in - boats, canoes, campers, etc.

SEN. WHEAT clarified the issue by stating the crime of criminal possession with intent to distribute is charged, the prosecutor is going to have to come in with sufficient evidence to show intent to distribute.

Mr. Connor stated that is correct, but if the Legislature says that distribution is embodied in the manufacture, then that is what the court would say because that is the legislative intent.

SEN. WHEAT then stated for a person to be charged with the crime of producing or manufacturing methamphetamine, they have to be caught and, as such, they have the intent to distribute. It is not just possessing it, they have to be caught. This would, in **SEN. WHEAT's** analysis, have some level of keeping down the number of people who would go to prison, because mere possession is not going to qualify as possession with intent to distribute.

Mr. Connor agreed with **SEN. WHEAT's** analysis.

SEN. JERRY O'NEIL inquired what would happen if someone unknowingly took methamphetamine.

Mr. Connor responded that a person has to knowingly possess and the state has to prove the mental state.

SEN. O'NEIL asked if making the possession of marijuana such a horrendous crime with such a large penalty increased methamphetamine use.

Mr. Connor apologized and stated he did not have the expertise to answer that question.

SEN. CURTISS asked if the vehicles referenced on line 16 are subject to forfeiture in other drug statutes.

Mr. Connor replied the vehicles are subject to forfeiture under Title 44, but nobody would want them because of potential health hazards. These vehicles are toxic and could never be decontaminated for resale.

SEN. CURTISS stated even though these vehicles have no monetary value, **SEN. CURTISS** wondered what the worth would be if they were classified as junk vehicles and disposed of accordingly.

Mr. Connor did not know, but replied he could check into it.

SEN. BRENT CROMLEY asked if it would make sense to insert on page 2, line 16, producing or manufacturing in terms of a specific quantity.

Mr. Connor stated that was used in the marijuana statutes where possession in excess of 60 grams was presumed to be intent to sell.

SEN. CROMLEY asked if it would make sense to insert an amount with methamphetamine possession that would trigger a presumption of intent to distribute.

Mr. Connor stated it would be a reasonable consideration, but is unsure what the amount would be. **Mr. Connor** offered to inquire of drug agents what a reasonable amount may be that would indicate intent to distribute.

SEN. CROMLEY asked about how methamphetamine is ingested. The handout indicates it is smoked, snorted, injected, or ingested orally. **SEN. CROMLEY** asked if there were other methods of ingestion.

Mr. Connor replied the two most common ways are by smoking and intravenous injection. Methamphetamine is amenable to any method of ingestion depending on how it is manufactured.

SEN. CROMLEY then asked if Section 1 were passed, how the penalty provided in that section would compare with the penalty for sale of the drug.

Mr. Connor replied the term of years penalty is less, but the fine is more. In addition, taking the profit out of the possession end is the rationale for increasing the monetary penalty. The maximum penalty for possession under subsection (6) as proposed is less than the maximum penalty for sale.

SEN. WHEAT asked if it would be better if, rather than referring to ingestion, refer to methamphetamine in any measurable concentration in the blood stream. This would help move away from the concept of ingestion and focus on blood concentration.

SEN. WHEAT is looking at this from a prosecutor's point of view in asking what are the elements of the crime. If there is something in there that would help the defense, it will be more difficult to get a conviction. The evidence prosecutors will need is evidence of methamphetamine in the bloodstream.

Mr. Connor agreed that the term "ingestion" may be limiting and also agreed it may be better to use a measurable amount of methamphetamine in the bloodstream.

SEN. GARY PERRY stated in reviewing Exhibits 1 and 2, he noticed that it says treatment is highly cost effective and is about one-tenth of the cost of incarceration.

Mr. Connor replied that he could not say if that was an accurate statement.

SEN. PERRY asked if there were statistics available as to the age brackets of usage and stated Exhibit 1, which is an online survey, indicates 24 percent of the users are under the age of 18.

Mr. Connor stated he would check with the Board of Crime Control to see if statistics are available.

(Tape : 2; Side : A)

SEN. PERRY stated if they are to assume 24 percent are under the age of 18, then some of those users will be grade school and high school age. Incarceration and high fines are not feasible for this age bracket. **SEN. PERRY** asked if there were any award programs available for turning in dealers.

Mr. Connor is not aware of any programs, but agreed he would get further information.

Closing by Sponsor:

SEN. GRIMES stated there are additional statistics on percentages of students who are using meth or other stimulates. The Prevention Needs Assessment survey in 2002 indicated 2.8 percent of the student population used methamphetamine. **SEN. GRIMES** directed the Committee to Exhibit 1 which gives the monetary value of methamphetamine for certain amounts. In response to the questions about treatment, SEN. GRIMES stated there is another bill coming forward which will create a comprehensive meth treatment system in the state. Great Falls will be heading up the central region of the proposed plan. They are hoping tobacco settlement monies or tobacco taxes will provide funding for this bill. **SEN. GRIMES** feels meth trafficking and production are different from other jobs because they are dangerous from start to finish. Everything **SEN. GRIMES** has seen indicates if a person is cooking meth, they are using it, and they are distributing it. SEN. GRIMES does not oppose making producers or manufacturers of meth guilty of intent to distribute, but he is worried about the fiscal impact. For every dollar put into treatment, there are studies that show you save seven dollars in social costs. Regarding the fines, **SEN. GRIMES'** intention is that the penalty on line 6 be a stronger penalty than that provided on line 3. However, **SEN. GRIMES** did agree there is a good chance the penalties will not be paid anyway. Generally, **SEN. GRIMES** is in favor of using blood concentration instead of ingestion, but cautioned that meth travels through the blood very fast and will be out of a person's system within a day. **SEN. GRIMES** would not want to diminish a prosecutor's opportunity to use ingestion, and he is worried about unintended consequences.

SEN. GRIMES stated everyday there are articles about meth being manufactured in a mobile unit making it very difficult for law enforcement officers. Rural areas are popular sites for production because strong odors are produced during manufacturing. Montana is popular for mobile meth production because it is so rural.

EXECUTIVE ACTION ON SB 438

Motion: **SEN. McGEE** moved **SB 438 DO PASS.**

Discussion:

SEN. WHEAT explained the power of attorney is a standardized form contained in the statute, and the bill simply amends the form in the statute.

SEN. CROMLEY agreed with **SEN. WHEAT's** analysis.

SEN. PERRY asked who the attorney-in-fact is as referenced in the bill.

SEN. WHEAT responded it is whoever you are giving the power of attorney to.

Vote: **SEN. McGEE's** motion **SB 438 DO PASS carried UNANIMOUSLY.**

EXECUTIVE ACTION ON SB 439

Motion: **SEN. McGEE** moved **SB 439 DO PASS.**

Discussion:

SEN. CROMLEY is concerned about the meaning of the word "ingestion" and feels it may be too specific. Therefore, he proposed a friendly amendment that would mean any form of consumption, including inhalation, injection, and ingestion. In addition, he proposed making a change on page 2, line 4, where "ingestion" would refer back to the definition on page 1.

SEN. WHEAT felt the reality is that testimony will be needed that ingestion has occurred, because it does not relate to a concentration in the bloodstream evidenced by a blood test. From a prosecutor's perspective, he feels snorting or injecting are physical observations of conduct, as opposed to a concentration in the bloodstream. **SEN. WHEAT** feels a prosecutor will run into trouble if he has to rely on a physical observation of the act.

SEN. CROMLEY stated his amendment goes only to the fact that he believes the word "ingestion" means to eat, and he believes meth is primarily used by inhalation or injection. He disagrees with **SEN. WHEAT** stating people will be willing to testify as to whether they saw someone ingesting meth.

SEN. McGEE stated it seems to him that if methamphetamine goes out of a person's system quickly, that two weeks later, someone might be able to testify they observed someone injecting meth, but by that time there would not be any proof detected in the bloodstream. Therefore, he suggested using a combination of terms and saying all these means of consumption and/or blood levels.

Ms. Lane gave the Committee members **SEN. CROMLEY's** proposed amendment for consideration. **EXHIBIT(jus39a03).**

SEN. PERRY stated that on Exhibit 3 where it says possession includes consumption by any means and evidenced by any measured amount. **SEN. PERRY** read in Exhibit 1 there can be a measurable amount of meth as described by a doctor.

SEN. McGEE felt all this would go away if a person had a legitimate prescription for methamphetamine from a doctor.

SEN. O'NEIL stated methamphetamine is not the only drug they are trying to stop but also the Legislature needs to think about other drugs that will follow.

SEN. GRIMES stated that everything he has heard indicates that when there is a methamphetamine epidemic like this, it is followed closely by club drugs such as ecstacy.

SEN. O'NEIL wonders if they are pushing the balloon in one place, only to make it pop out worse in another place.

SEN. WHEAT feels this issue will deal with a very small amount of people who get caught up in the prosecutorial net. In most cases, people who get caught will get caught with the substance. Therefore, we need to think about how to help the prosecutor. **SEN. WHEAT** likes Exhibit 3 which provides for consumption, as well as concentration in the blood.

Motion: **SEN. WHEAT** moved the amendment proposed by **Exhibit 3 BE ADOPTED.**

Discussion:

SEN. O'NEIL inquired about the different classifications of drugs and thought maybe they should comprehensively include whatever class of drugs methamphetamine falls in.

SEN. GRIMES explained that drug classes are for prescription drugs. The prescription drug that would be included is Ephedrine.

SEN. CROMLEY asked if someone could be found guilty solely on testimony and absent a measured amount being detected.

(Tape : 2; Side : B)

Ms. Lane suggested saying limiting the language to evidence only of blood analysis you may exclude other kinds of evidence. She suggested wording it "possession also includes consumption by any means, as may be evidenced, etc."

SEN. WHEAT suggested placing a comma after "mean" and then say "or evidence of a concentration of methamphetamine in the blood."

SEN. McGEE agreed and suggested using "and/or."

SEN. WHEAT explained that from a prosecutorial point of view, "or" is exclusionary and you have to prove one or the other. Use of the word "and" means you have to prove everything. Therefore, using "and/or" would mean a prosecutor would have to prove both in every case.

SEN. GRIMES suggested using "possession also means consumption by any means." **SEN. WHEAT** agreed with that suggestion.

Ms. Lane also suggested "consumption by any means. Consumption may be evidence by, or may be proved by evidence of, any measured amount or detected presence of meth in the person at the time test as shown by an analysis of the person's blood."

SEN. GRIMES reminded the Committee the original intent and language of the statute it speaks to criminal possession and he is afraid that without linking it to meth, they may diminish opportunities for prosecutors when there is possession, but not consumption.

SEN. WHEAT expanded suggesting adding language to say "possession of methamphetamine may also be proved by".

SEN. CROMLEY did not feel this language is needed because if it is detected in the blood, it has been consumed.

SEN. WHEAT agreed and felt the prosecutor still has the ability to get either a blood test or urinalysis, if necessary.

Motion: **SEN. WHEAT** moved an amendment which will read "if the drug is methamphetamine, possession also includes consumption by any means."

Discussion:

SEN. O'NEIL asked if the amendment would include LSD.

SEN. WHEAT responded it would include methamphetamine only.

Vote: **SEN. WHEAT's** proposed amendment **carried UNANIMOUSLY.**

As a point of clarification, **SEN. CROMLEY** stated that change will also be made on page 2, line 4, and in the title.

Discussion:

In discussing page 2, lines 4 through 6, **SEN. GRIMES** claimed he was open to any amendments, and he is sensitive to problems of law enforcement.

SEN. WHEAT appreciates **SEN. GRIMES'** effort, but does not feel this language helps the bill and he suggested removing the language.

Motion: **SEN. WHEAT** moved striking the language contained on page 2, lines 4 through 6.

Discussion:

For clarification, **SEN. GRIMES** stated the penalties would fall back to those provided in subsection (5).

Vote: The motion of **SEN. WHEAT** to strike the language on page 2, lines 4 through 6, **carried UNANIMOUSLY.**

Motion: **SEN. McGEE** moved to amend page 2, line 16, to place a period after "methamphetamine" and strike the remainder of the sentence.

Discussion:

SEN. GRIMES clarified that someone would commit the offense of intending to distribute if they possess with the intent to distribute or if they produce or manufacture meth.

SEN. WHEAT agrees with this amendment and feels it ought to be the intent of this Committee and this Legislature since this is an absolute proliferation and crisis in Montana communities.

Vote: SEN. McGEE's amendment **carried UNANIMOUSLY.**

Note: Amendment **SB043901.avl** was delivered to the Committee Secretary later that day. **EXHIBIT(jus39a04).**

Motion: SEN. McGEE moved **SB 439 DO PASS AS AMENDED.**

Discussion:

SEN. O'NEIL stated he would be voting against the bill, giving his blessing to those who vote for it. Although he feels this is a good try, he does not feel it will work and the fiscal note is too high.

SEN. GERALD PEASE commented he feels the bill is good legislation, and Montana Reservations are plagued by methamphetamine use.

Vote: SEN. McGEE'S motion that **SB 439 DO PASS AS AMENDED carried 8-1** with **SEN. O'NEIL voting no** and **SEN. MANGAN voting by proxy.**

EXECUTIVE ACTION ON SB 37

Motion: SEN. CROMLEY moved **SB 37 DO PASS.**

Discussion:

Ms. Lane explained the amendment **SB003704.avl, EXHIBIT(jus39a05),** is essentially a substitute bill. Instruction No. 3 says to strike everything after the enacting clause and the language provided in the amendment would essentially become the bill.

Motion: SEN. CROMLEY moved **amendment SB003704.avl BE ADOPTED.**

Discussion:

SEN. McGEE asked if .10 will automatically become .08 if the other bill passes.

Ms. Lane stated it will require a coordination instruction at some point, and she hopes the .08 will contain an instruction to the Code Commissioner. In addition, the new subsection (2) is an increase in reinstatement fees.

SEN. GRIMES explained subsection (2) says once a person completes their suspension and probation, this is how much it will cost the offender to get his license back.

Ms. Lane explained this new subsection (3) reflects other substantive changes in the bill.

SEN. McGEE asked about on page 4, under section (i), the concentration is .16 and current law is 18 percent. The .16 will be reflective of the new bill. **SEN. McGEE** feels .12 may be more appropriate.

SEN. WHEAT's recollection is that the current law is .18. He feels if someone is driving with .16 or greater and they can actually drive the vehicle, they are probably a seasoned drinker. He feels the Committee may want to consider lowering that level.

SEN. GRIMES asked **Brenda Nordland** for rationale for using a .12.

Ms. Nordland reminded the Committee that .18 was placed in the law based on anecdotal testimony that the average or median BAC, if a test was administered, was .17. Therefore, .18 was determined to be the threshold for interlock.

SEN. WHEAT feels at .18 a person is not just impaired, but significantly intoxicated.

SEN. CROMLEY preferred to leave the amount at .16. Making this change may cause some people to vote against the bill. The language is discretionary for the judge under .16.

SEN. McGEE conceded but stated he would like to address this is issue later.

Ms. Lane informed the Committee 61-8-714 and 722 there are references to the same .16 giving the judge the authority to make the recommendation for an interlock. Amendments would have to be made to these sections as well.

SEN. GRIMES' understanding is that if these people are picked up for DUI there would be a hard suspension of the driver's license.

(Tape : 3; Side : A)

Ms. Nordland assumed **SEN. GRIMES** was referring to 61-5-208, and stated for each offense, second and subsequent, and for each of those instances, the first year would be a hard revocation. The sentence that says "a restrictive probationary license may not be issued during the one year period of revocation," effects the

hard revocation. These conditions only occur if there is a conviction. That is the starting point for driver's license sanction. This is at the tail-end of the business and, the matter has been decided by a judge or jury or the offender has plead.

SEN. McGEE stated in subsection (c) at the top of page 5 that the language be amended to reflect five years to life. In Billings there was a man who received his 11th DUI. Under those circumstances, the court should have the ability to tell the offender that he has lost his privilege of using the highways.

SEN. O'NEIL asked if the guy with 11 DUIs had a license when he was picked up for the 11th DUI.

SEN. McGEE could not answer that question.

Ms. Lane pointed out on page 5, at the end of (c), **Ms. Lane** explained she struck a sentence because it did not fit in with what she was doing. The sentence deals with the requirement of chemical dependency or education course treatment, or both. **Ms. Lane** would like direction from the Committee as to what they would like to do with this language.

SEN. GRIMES stated he would like to change the one-year period to a five-year period and reinsert the language.

SEN. WHEAT feels if someone has not completed treatment within a five-year period, then they are not entitled to get their license back, ever.

SEN. McGEE agreed only if the court has sentenced the offender to treatment. If the court has not, and it is still the 11th DUI, he would like to court to be able to say no way.

Ms. Nordland stated this is a critical sentence from licensing and treatment vantage points. Her recommendation was that the period of revocation, be it the one year in subsection (b) or the five years in subsection (c) passes and treatment has not been completed, then the license revocation remains in effect until the course, treatment, or both are completed. This has been a critical gatekeeper for treatment officials in the past for those individuals who are motivated to come back into lawful driving. Therefore, as long as the bill reflects both the (b) and (c) periods, it will be fine and it will not cause a major change in driver's licensing or treatment provisions.

SEN. GRIMES asked **Ms. Lane** to put the stricken language back in.

Ms. Nordland suggested if the revocation period proposed under subsection (b) or (c) has passed, but the treatment has not been completed, then the license revocation remains in effect until the treatment is completed.

Regarding interlock usage, **Ms. Lane** explained this language used to apply to first offense when the court had the discretion to order an interlock for first offense. The language now applies to all offenses when devices are required.

In addressing refusal to blow, for first offense DUI, an offender will not get their license suspended and will have a 12-month interlock. **SEN. GRIMES** was concerned about someone refusing to take a breathalyser, and their driving privileges are suspended, will there be a downstream effect and wanted to know if that person would be allowed on the road until the case is decided by a judge or jury.

Ms. Nordland explained if an offender does not blow, the license is seized at the time of refusal and mailed to the Department. It is an immediate action. It is only those who choose to file and action in district court under Section 61-8-403, the due process right to challenge, who can ask the judge for a stay during the pendency of the district court action. The county attorney or city attorney has the ability to resist the stay, and the determination as to whether the driver's license suspension is going to be stayed while the judge hears that matter is left up to the judge. There is a percentage that do not challenge their refusals and sit out the dance for six months or one year.

SEN. GRIMES would like to encourage the judge not to dismiss this flippantly.

Ms. Nordland explained this is not the section which gives the judge direction. Section 61-8-403 sets forth the court's jurisdiction. The legislature would have to decide how they want to guide a district court judge in making this determination. The section the Committee is currently discussing gives direction to the Department of Justice, law enforcement, and the offender regarding a particular incident, the refusal, and what will happen when the Department of Justice receives notice of the refusal.

SEN. GRIMES does not want offenders refusing to blow because they believe they can hire an attorney, go to court, and get off. **SEN. GRIMES** feels that these driver's license hard suspensions will be a significant deterrence to refusal to blow.

SEN. McGEE asked what happens out on the highway when an officer stops a driver for DUI.

Ms. Nordland explained when there is a change to the implied consent law, then a complied consent advisory is issued. This advisory will deal only with the consequences of refusal because it is by legislative grace you have given a driver the right to refuse a blood or alcohol test. The advisory will not talk about the other side of the equation, which is what happens if you blow or submit to a blood test.

SEN. WHEAT confirmed that the driver is informed that the results of the test will be used as evidence against them in prosecution.

Ms. Nordland agreed stating either the results of the test, or the refusal, will be used against them.

Ms. Lane explained that subsections (9) and (10) on page 10 will provide for an increase in fines and imprisonment terms in the DUI and per se violations for first, second, and third violations.

SEN. PERRY asked about the use of the term "parallel" instead of "concurrent."

Ms. Lane explained that "parallel" was in existing language, and agreed it should read "concurrent."

SEN. McGEE stated there is no minimum community service requirement specified.

Ms. Lane agreed and stated it is at the court's discretion.

SEN. O'NEIL asked if there was a conflict between language on page 10, under section (4)(a), it says the court "may" restrict and (4)(b), where it says "shall" restrict.

Ms. Lane explained that is where you find the mandatory over .16 and the discretionary under .16.

SEN. McGEE asked if it is appropriate to put coordination language in this bill as well as the .08 bill.

Ms. Lane thought that was a good idea, and also directed the Committee to notice there is a repealer for Section 61-8-442, the discretionary on a first offense for the judge to order an interlock device. This section is unnecessary at this point, and the language is now used in other places in the code.

SEN. O'NEIL questioned the placement of a comma on page 12 and felt it made the sentence read that the facility will be made available by another unit of local government rather than the contract.

SEN. PERRY agreed with **SEN. O'NEIL** and feels it should read "by, or under contract with, the county or other unit of local government".

Ms. Lane reminded the Committee that the editors who reviewed this language consider themselves to be comma experts, but she believes the language could be written either way.

SEN. WHEAT feels he would like to read the new language front to back and also would like the bill reviewed by **Ms. Nordland** and **Mr. Reardon.**

SEN. GRIMES agreed, but wanted to get to the amendments as well.

SEN. McGEE called on **Mr. Reardon,** who stated in looking at page 11, under 61-8-722, on the second and third convictions, reminded the Committee the federal minimums for second conviction have a jail time minimum of five days, and ten days for third convictions. Those time frames were originally included in HB 195.

SEN. McGEE explained those days were inadvertently not included on the spreadsheet.

(Tape : 3; Side : B)

SEN. GRIMES told **Mr. Reardon** the Committee would adjust those times accordingly and asked **Mr. Reardon** to clarify the times for the Committee.

Mr. Reardon explained they were imposed in HB 195, which called for a minimum of five days for a second offense, and ten days for a third offense. In the subcommittee's discussions, those minimums were increased to seven days for the second offense and thirty days for the third offense.

SEN. GRIMES stated Section 61-8-715 is the per se penalties which will more than likely take place if an offender blows. This could potentially provide a firm per se violation that could potentially be charged instead of DUI and could have a lesser offense.

Ms. Nordland stated if a person agrees to submit to a breath or blood test which give quantitative evidence as to their alcohol level at a certain point in time, could they be charged or convicted of a BAC under the per se statute. The answer to that question is yes. The per se statute contains a slightly different penalty structure, and it would be a lesser offense.

SEN. GRIMES stated this is federal law, and the Committee cannot differentiate and make a lesser offense for a per se violation, except on the first offense.

Mr. Reardon explained the federal minimums are not applicable for first offense DUI and only apply to the repeat offenders.

SEN. McGEE suggested having no 24-hour requirement for first offense, five days for the second offense, and ten days for the third. This will make the option to blow more appealing.

SEN. GRIMES stated it is important not to create disincentives to blow. These proposed changes will make the per se penalties less than for a DUI.

SEN. GRIMES asked **Ms. Nordland** if law enforcement could provide a driver with the positive ramifications to agreeing to take a breathalyser.

Ms. Nordland replied that conversation could occur, but it would cause them to litigate for years over the content of the advisory. If defense counsel do not agree with each and every word contained in the advisory, it will become a subject of dispute. She would like the Committee to be clear about their expectation in an advisory. **Ms. Nordland** stated some states publish the entire advisory in their code, but she would not recommend doing that. Adding this into the advisory, will increase its length. This is not a problem in detention centers and booking facilities, but it is a problem on the roadside.

SEN. McGEE wondered if there was a very brief outline form that could be included as another section in the bill and would represent what an officer would read to a driver. **SEN. McGEE** feels if the language were explicit in the Code, it would not be subject to a large amount of litigation.

SEN. WHEAT agreed with **Ms. Nordland** and feels it would be too long. **SEN. WHEAT** feels the Committee needs to be practical and should not make it unduly complicated for law enforcement.

Ms. Lane inquired about a coordination instruction for .08 if that bill passes. **Ms. Lane** asked if the Committee wanted to

change .18 to .16 regardless, and **SEN. McGEE** responded that was correct.

Vote: **SEN. CROMLEY's** motion that **amendment SB003704.avl BE ADOPTED carried UNANIMOUSLY.**

Motion: **SEN. McGEE** moved that on page 5, subsection (c), changing the language to refer to five years to life.

Discussion:

SEN. WHEAT would like somebody to have the opportunity and ability, upon completion of treatment, to come back and get their license.

SEN. O'NEIL asked if a license is suspended for life, could the individual get a probationary license upon the condition that they have an interlock.

SEN. CROMLEY stated the language is still in the law that after the first two years, they can get a restrictive probationary license. He wonders if the term "life" has a meaning.

Ms. Lane suggested defining "life" with a number of years, such as 25 or 30 years.

SEN. McGEE wondered about stating "for a period of five years or more" and leaving it open-ended.

Ms. Lane feels the Committee should be concerned about vagueness and should be definite.

Ms. Nordland answered the issue by stating if their intent is to allow a judge discretion in terms of the length of a driver's license suspension beyond a mandated five-year revocation in (c), she suggested looking 61-8-731, the felony offender statute, and give discretion to the district judge, because the statute they are about to amend is the one that administers the license suspensions, and they have no business doing a discretionary suspension. This authority needs to be given to the judge in the sentencing statute.

SEN. GRIMES stated 61-8-731 is not in the bill before the Committee, so that would have to be a separate amendment.

Motion: **SEN. McGEE** withdrew his motion to amend.

Ms. Lane summarized the Committee's work and went through the amendments proposed by the Committee, saying on page 5, keeping

the lines currently stricken at the end of (c) and making them apply to suspensions under (b) and (c). In addition, on page 10 and 11, change the word "parallel" to "concurrent" or some other appropriate word. On page 11, subsection (c), change it to read a minimum of five days and in subsection (3) the minimum will be 10 days. In addition, **Ms. Lane** will ask the editors if commas are needed around the phrase "or a contract with," on page 12, line 2. She will also look at the need for a coordination instruction. Also, the Committee discussed amending 61-8-403, but did not make a final decision.

Motion: **SEN. McGEE** moved **Amendment SB003702.avl BE ADOPTED.** **EXHIBIT(jus39a06).**

Discussion:

SEN. GRIMES explained this amendment does primarily two things. First, on the first page, on the first offense, it states if an offender does not get another DUI within three years, at any BAC level, then the offense will be expunged from the driver's record. It also states the arresting officer shall advise the driver of the provisions of this section. **SEN. GRIMES** is questioning whether they would want to do this no matter what a person's BAC level is. He feels this is a positive incentive for a person to clean up their act.

SEN. CROMLEY likes the idea, but wonders if they need to have it go to five years to be consistent.

SEN. GRIMES agreed to change it from three years until five years, but does feel it will take away from the carrot they are offering.

Ms. Nordland added this is a policy decision and directed the Committee to the current language and feels they would want to start the time from the incident and not the conviction date. Therefore, she suggested on the last line of (a), stating "prior to the incident or three years subsequent to the incident." She suggested the Committee would want to go from the date a person agreed to be tested. The actual conviction date would lie at some point in the future.

SEN. GRIMES asked if making it five years is an incentive enough to advise an offender of this option, or if it would just complicate the procedure too much.

Ms. Nordland replied she was not comfortable responding to **SEN. GRIMES'** question.

(Tape : 4; Side : A)

SEN. WHEAT stated they are trying to encourage first-time offenders that if they get their act together and stop drinking and driving, somewhere down the road, they can clear this off of their driving record. Once a person gets a second DUI, the party is over. Personally, **SEN. WHEAT** does not care if it is three years or five years. If a person is really interested in changing, it does not matter if it is three years or five years, since their real interest is in getting a handle on a drinking problem, not whether they are going to clear their record. Therefore, a person would not necessarily need to be advised of this option at the time of the arrest.

SEN. McGEE feels three years is too brief a period of time and there is a potential for conflict.

Motion: **SEN. GRIMES** amended his motion to reflect five years instead of three years, and also striking the word "conviction" and replacing it with "incident" in **SB003702.avl**. Also, he proposed striking subsection (b).

SEN. GRIMES asked **Diana Koon, representing the Montana Tavern Association,** about having the Department of Corrections report to the Department of Revenue on a monthly basis the name of any person sentenced under the felony offenders section for purposes of maintaining a list. The list will contain the names of all fourth offense felony offenders. A store owner, retail licensee, or any employee of a store manager or licensee may refuse to sell any alcoholic beverage to a person whose name appears on a monthly advisory list. This refusal is entirely discretionary and there will be no liability on the part of the store owner.

Ms. Koon, as a former employee of the Department of Revenue, believes that for more up-to-date businesses this would be a good tool. However, not all small businesses have access to the web.

SEN. GRIMES thought this idea could still work by sending out the list to taverns and stores by mail, if money could be found to fund the mailing.

SEN. McGEE suggested having the Department of Corrections publish the information to *The Tavern Times*.

SEN. O'NEIL stated it seems to him that if the store owner or tavern owners sells alcohol to someone who is on the list as a fourth-time felony offender, if that person is involved in an accident, there may still be a cause of action against the store owner.

SEN. GRIMES as researched this concept, and he was told liability would only exist if checking the list and refusing to serve or sell alcohol to a fourth-time offender is made mandatory.

SEN. McGEE feels with or without the list, there is already a potential for store owners or tavern owners to be named in a lawsuit.

SEN. WHEAT added that if it was not obvious the person was intoxicated at the time he purchased the alcohol, the liquor store or tavern would not be held liable. Foreseeability would need to exist on behalf of the retailer.

SEN. GRIMES stated he would delete this provision from the bill if the tavern owners had problems with it being included.

SEN. O'NEIL asked **SEN. WHEAT** if a fourth-time DUI offender came into a store and bought alcohol, whether there would be a high probability the customer was going to drink and drive.

SEN. WHEAT responded if the person knew the person purchasing alcohol was a felony DUI offender, he would start making a connection, but it would not be automatic.

SEN. CROMLEY disagreed and asked **Mark Staples** how he feels about the issue of liability.

Mr. Staples responded that adding language stating a person's acts or omissions with regard to the list maintained pursuant to subsection (7) may not be used as evidence in any civil action, would take away the specter that this is inviting civil lawsuits.

SEN. WHEAT stated granting immunity to anyone selling alcohol, maintaining and circulating a list of fourth-time offenders would not be a problem.

Mr. Staples did not feel a broad-based immunity would be the appropriate term, but that merely selling alcohol to someone on that list would not create a civil liability to the store owner.

SEN. WHEAT was not comfortable with this because it creates another set of problems in and of itself. There is nothing to prevent a store owner or bartender from selling alcohol to fourth-time DUI offenders since they would have absolutely no liability. **SEN. WHEAT** would rather not have the list at all then to grant immunity and would rather post the list in conspicuous public places.

SEN. GRIMES stated once the list is developed, they need to afford some protection the store and tavern owners and, at the same time, get them on board with what could be a very effective methodology.

SEN. WHEAT appreciates the effort, but is not sure it has been thought out completely enough to be placed in statute.

SEN. GRIMES asked **Mr. Staples** if he is comfortable with the Committee proceeding with this provision.

Mr. Staples felt **SEN. WHEAT's** comments were on point. He is attempting to help solve the problem. On the other hand, what are the odds the store owner will even know who the person is and will check everyone's I.D. to see if they are on the list. **Mr. Staples** feels liability to the store owner rests with serving the visibly intoxicated. **Mr. Staples** again repeated his suggested language to alleviate liability on behalf of the store or tavern owner.

SEN. McGEE asked if it would be practical to publish the list in the newspapers. DUI is such a pervasive problem throughout the state, and it affects not just the offender, but potentially can affect every person driving up and down the highway.

SEN. GRIMES expressed that his intention was to give the bartender an additional tool in refusing to serve someone. Bartenders know most of their customers, and they could be incredible allies.

SEN. WHEAT feels **Mr. Staples** proposed amendment will defeat the purpose if you tell the bartenders they are immune.

SEN. O'NEIL reminded the Committee there is an Internet site that has sexual offenders on it and suggested adding information relating to fourth-time felony offenders to a website. This way, people who want to look at the website can. In addition, this would not create any liability for bartenders because there would not be a mandate to look at the website.

SEN. CROMLEY asked **Mr. Staples** if a bartender read a name in the paper of someone receiving their fourth DUI and the person came into a bar and was not under the influence, could the bartender refuse to serve them a drink.

Mr. Staples replied it is an age-old debate and many discrimination lawsuits have emanated from refusal to serve. This list would give the bartender an additional defense from discrimination suits because a bartender could claim the risk in

serving the person outweighed the risk of a lawsuit. Mr. Staples feels signs that say, "We reserve the right to refuse service to anyone for any reason," have no legal bearing.

SEN. GRIMES notified the Committee that the amendment also provides on page 2 a more punitive approach to refusal to blow. He expounded saying currently there is a six-month hard suspension on a first offense refusal to blow. The amendment would raise that and provide for a one-year hard suspension for refusal to blow on a first offense. For second and subsequent offenses, there would be a two-year hard suspension if a person refused to blow.

SEN. O'NEIL would like the person to have a choice between blood and breath tests.

SEN. GRIMES stated the amendment would apply to both blood and breath tests. The law provides the officer has the choice of which test to administer.

Motion: At the request of **SEN. CROMLEY, SEN. GRIMES** segregated the instructions contained in **amendment SB003702.avl.**

Vote: **SEN. GRIMES'** motion **TO ADOPT** revisions to Sections 61-8-402 and 61-8-409, Instructions 1 and 2, of the revised **amendment SB003702.avl** carried **UNANIMOUSLY.**

(Tape : 4; Side : B)

Vote: **SEN. GRIMES'** motion **TO ADOPT** revisions to Section 61-8-731, Instructions 3 and 4, of the revised **amendment SB003702.avl FAILED** with **Senators Grimes voting aye.**

Discussion:

SEN. McGEE felt **SEN. O'NEIL's** suggestion about using a website is a good idea. **SEN.** WHEAT agreed stating he thought the idea about circulating a list to tavern and store owners was too nebulous.

SEN. CROMLEY professed he is not big on using a list because he felt it would create fiscal problems with keeping the list up to date.

SEN. O'NEIL suggested authorizing the Department of Corrections to create and maintain a website at its discretion.

EXECUTIVE ACTION ON SB 439

SEN. O'NEIL requested the Committee Secretary to change his vote on SB 439 from "no" to "yes."

ADJOURNMENT

Adjournment: 11:23 A.M.

_____
SEN. DANIEL McGEE, Vice Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus39aad)