

## **MENTAL COMPETENCY OF THE ACCUSED:**

An Analysis of Statutes Relating to  
Mental Disease or Defect and Criminal Procedure  
or "Forensic" Patients

Prepared for the Legislative Finance Committee HJ1 Subcommittee on Mental Health

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### **Background**

"Forensic", as it relates to persons with mental illness, is not a term found in the Montana Code Annotated (MCA), yet it is a term used often in discussions regarding portions of the Montana State Hospital population. Black's Law Dictionary (5th Ed.) defines "forensic" as "belonging to courts of justice". Forensic medicine is the "application of every branch of medical knowledge to the purposes of the law" and the definition qualifies that "hence its limits are, on the one hand, the requirements of the law, and, on the other, the whole range of medicine". The Montana Legislature is not the only entity to grapple with these issues.

This research analysis will deal with the statutes found at Title 46, chapter 14, MCA, on the mental competency of the accused. These statutes are triggered when a person is alleged to have committed a crime and comes to the attention of the criminal justice system and the person's mental state is recognized as an issue. For the purposes of this analysis, the terms found in the MCA will be used, but the four categories that will be discussed are those considered "forensic" for the purposes of those persons in Montana with mental illness who are a part of the Montana State Hospital population as a result of the processes outlined in statute.

Although these four categories of persons can be considered "forensic", there are distinctions that have to be made in terms of their civil rights. A person in the criminal justice system retains all of the person's civil rights and what is termed a liberty interest, a right to freedom from restraint and other personal liberty, as guaranteed by the Fifth Amendment to the U.S. Constitution and the Fourteenth Amendment, which guarantees due process. This right is also expressed in the Montana Constitution in Article II, section 17. Restraints on these rights may be imposed for punishment following conviction for a crime or for protection of a community or protection of a person from one's own actions, as in civil commitment proceedings, only after a person has received due process. These due processes cannot be taken lightly, and the courts will uphold this liberty interest. Once one has been convicted of a crime following a course of due process, then restraints on certain rights and liberty can be imposed and even then those restraints must be provided for in the Montana Constitution or a judge's sentencing order, as

provided for in law (46-18-801, MCA). If a person is under a court-ordered evaluation, is incompetent to stand trial, or is not guilty by reason of mental disease or defect, the person retains a civil status and has a higher liberty interest and due process must be followed; none of these persons may be incarcerated in a correctional facility or program.

The bulk of the analysis applies to adults or youths who are transferred into the adult criminal justice system. For youths who are subject to the Youth Court Act (Title 41, chapter 5, MCA), a youth may be found to be suffering from a mental disorder as defined in 53-21-102, MCA, and meet the criteria for commitment in 53-21-126(1), MCA. Youths are entitled to all the same rights as adults under 53-21-114 through 53-21-119, MCA, such as being informed of their constitutional rights, all of their procedural rights, the right to be present at hearing or trial, the right to representation by the youth's own attorney, the right to examination by a professional person of the youth's choosing, and the right to waive the youth's rights. The youth who is found to be suffering from a mental disorder and meets the criteria for commitment may not be committed to or sentenced to a state youth correctional facility. If a youth is found to be suffering from a mental disorder and meets the criteria for commitment after placement in a state youth correctional facility, the youth must be moved to a more appropriate placement in response to the youth's mental health needs and consistent with the disposition alternatives available in 53-21-127, MCA (including community commitment). Youths also have an additional right under the Montana Constitution (Article II, section 15) that provides them all the fundamental rights in Article II of the Montana Constitution, unless specifically precluded by laws which **enhance the protection** of persons under 18 years of age.

Legal standards or definitions of mental disease or defect differ from medical standards. There is no statutory definition for mental disease or defect under the criminal procedure statutes; however, 46-14-101, MCA, states that the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial behavior. In *State v. Wooster*, 293 Mont. 195, 974 P.2d 640 (1999), the Montana Supreme Court adopted a definition from New York Criminal Procedure which states that mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment, and rehabilitation. The Montana Supreme Court stated that an "affirmative definition of mental disease or defect will enable district courts to reliably and appropriately distinguish the legal conclusion of mental disease or defect from the often confusing and inconsistent medical findings that concern an acquittee's mental condition". They believed the definition complemented the exclusion in 46-14-101, MCA.

This circumstance allows the court to interpret mental disease or defect in the context of the statutory requirements regarding the defendant's ability to understand the proceedings, aid in the defendant's own defense, and the defendant's appreciation of the criminality of the defendant's act and also, in the context of the elements of the offense, the defendant's state of mind, whether the defendant suffers from a mental disorder, the nature of the mental condition, the willingness to be examined, and whether the person suffers from a mental disease or defect that causes the person to be a substantial risk or danger

that is statutorily outlined. This differs from a medical definition or diagnosis of seriously mentally ill or the statutory definition in Title 53 of "mental disorder", which means any organic, mental, or emotional impairment that has substantial adverse effects on an individual's cognitive or volitional functions. The term does not include addiction to drugs or alcohol, drug or alcohol intoxication, mental retardation, or epilepsy (53-21-102, MCA). The court does not have to hold to any medical necessity or maximum medical improvement standard, but it may find the existence of a mental condition and the type of risk a person may present as sufficient for certain findings.

### **1st category: Court-ordered evaluation**

If a person, "as a result of a mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense", the person cannot "be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures" (46-14-103, MCA). Therefore, an examination is required. Often referred to as a "court-ordered evaluation" or COE, the statutory reference is to "examination of the defendant". This is the first category of "forensic" patients at the Montana State Hospital.

### **Fitness to proceed**

The defense may request an examination or, if the issue of fitness to proceed is raised by the district court, prosecution, or defense, then the district court shall appoint at least one qualified psychiatrist, licensed clinical psychologist, or advanced practice registered nurse or request the Montana State Hospital to designate a similar professional to examine and report on the defendant's mental condition. The court MAY order a defendant to be committed to a hospital or other suitable facility for the purposes of examination for a period not exceeding 60 days or a longer period if the court determines it to be necessary. Most hospitals or other suitable facilities do not have the capacity to hold someone for this length of time, so if a person requires long-term hospitalization, the Montana State Hospital likely will be where the evaluation takes place. The defense may retain a qualified psychiatrist, licensed clinical psychologist, or advanced practice registered nurse (APRN)<sup>1</sup> to witness and participate in the examination (46-14-202, MCA).

An examination assists the court in the determination of a defendant's fitness to proceed. The person's fitness to proceed is determined by the court who receives the report of the examination. The court may accept the report or, if the report is contested, hold a hearing (46-14-221 and 46-14-222, MCA).

If a person is found fit to proceed, the criminal justice proceedings go forward and a defendant may be found guilty, not guilty, not guilty by reason of a mental disease or defect, or guilty but having suffered

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<sup>1</sup>APRN was inserted in 2001, APRNs must have a clinical specialty in psychiatric mental health nursing to be within their scope of practice.

from a mental disease or defect at the time of the commission of the offense. Under the first category, the defendant will be sentenced under the standard criminal sentencing statutes found in Title 46, chapter 18, MCA. The latter two categories will be discussed below as a part of Title 46, chapter 14, MCA, and would be considered "forensic".

### **2nd category: Unfit to proceed or incompetent to stand trial**

A person may be found "unfit to proceed", at which time the proceedings are suspended and the person is committed by the court to "an appropriate institution" of the Department of Public Health and Human Services (DPHHS) (46-14-221, MCA). This is the second category of "forensic" patient. An individualized treatment plan must be developed, and if the defendant refuses to comply, an order requiring compliance may be sought. The defendant has a right to a hearing, and the court must provide a detailed statement of the facts upon which an order is made, specific findings that the state has provided an overriding justification, and that the treatment is medically appropriate. (The Committee may wish to explore how this may be related to involuntary medication in 53-21-127(6), MCA.)

Within 90 days, the defendant's fitness to proceed is reexamined and if the defendant is still unfit to proceed and it does not appear that the defendant will regain fitness in the foreseeable future, the criminal proceeding **must be dismissed** and the prosecutor must petition the court accordingly pursuant to the statutes for civil commitment proceedings as a person with developmental disabilities under Title 53, chapter 20, MCA, or for civil commitment proceedings under the mental illness statutes in Title 53, chapter 21, MCA.

At this time, under those proceedings in Title 53, MCA, a person would have the same status as others committed similarly and would not be considered "forensic". However, if the court determines that the defendant has regained fitness to proceed, a proceeding must be resumed by refiling of charges at the motion of the court, DPHHS, the prosecution, or defense counsel. The court may determine that too much time has elapsed and may **dismiss the charge and discharge the defendant** (back to civilian status) or commit the person according to the mental illness civil commitment statutes (46-14-222, MCA) under Title 53, chapter 21, MCA. If the charges are dismissed and the person is committed pursuant to Title 53, chapter 21, MCA, the person has the same status as others committed through Title 53, chapter 21, MCA, and would no longer be considered "forensic".

After being found fit to proceed, a person may be found not guilty and discharged from detention or, if the person is found guilty of a felony and not suffering from a mental disease or defect, sentenced under the criminal procedure statutes found in Title 46, chapter 18, MCA, which would involve probation or incarceration with the Department of Corrections (prison, prerelease, etc.). If a person is fit to proceed, the person may still suffer from a mental disease or defect and may be found not guilty by reason of mental disease or defect or be found guilty and suffering from mental disease or defect. (These latter two categories are considered "forensic".)

Except under limited circumstances, a person is not guilty of an offense unless, with respect to each element in statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely (45-2-103, MCA). Evidence that a person suffered from a mental disease or defect is admissible to prove that the defendant did not have a state of mind that is an element of the offense (46-14-102, MCA), but existence of a mental disease or defect in a person does not necessarily preclude a person from acting knowingly or purposefully (State v. Byers, 261 Mont. 17, 861 P.2d 860 (1993)).

If a person is not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged (46-14-301, MCA), a presentence investigation is ordered (as in a traditional criminal sentencing), although an investigation into the present mental condition must also be included. The nature of the offense is also evaluated in order to determine the appropriate disposition. If the person's offense did not involve substantial risk of serious bodily injury or death, actual bodily injury, or property damage, the court shall release the defendant and the prosecutor may petition the court under Title 53, chapter 20 or 21, MCA (civil commitment for developmental disability or mental illness, respectively).

### **3rd category: Not guilty because of mental disease or defect**

The third category of "forensic" patient is a person found to be not guilty because of mental disease or defect if the nature of the offense involves a substantial risk of serious bodily injury or death, actual injury, or substantial property damage (in general a level of dangerousness to the defendant or to others). The defendant may be committed to DPHHS to be placed in an appropriate mental health facility for custody, care, and treatment (46-14-301, MCA). (If the defendant is developmentally disabled, those statutes will apply.) The person is "not guilty", but because of the entrance into the criminal justice system and because of a determination regarding the level of dangerousness, the person is temporarily in a unique judicial status. Within 180 days of confinement, a hearing must be held to determine the person's mental condition and whether the person must be discharged, released, or have the commitment extended because of a level of substantial risk or dangerousness to self or others.

The hearing is a **civil hearing** and is held in the jurisdiction from which the person was initially committed unless transferred to the jurisdiction where the person has been placed. The burden is on the state to prove by clear and convincing evidence<sup>2</sup> that the person may not be safely released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, imminent threat of physical injury to the person or to others, or substantial property damage. This is the crux of the difference--it is

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<sup>2</sup> The clear and convincing standard is the intermediate tier of evidence, generally meaning more than a preponderance of the evidence, or a standard of proof beyond a reasonable or well-founded doubt, but not to the same level of certainty that is required in a criminal case. (Black's Law Dictionary, 5th ed.) A 1993 amendment (Ch. 396) raised the evidentiary standard to clear and convincing evidence from a preponderance of the evidence.

the level of dangerousness due to the mental disease or defect rather than any treatment standard such as medical necessity or maximum medical improvement that the court uses to determine whether the commitment is appropriate.

Depending on the determination of the court, the person may be discharged, released on the conditions of the court, or committed to the Director of DPHHS for custody, care, and treatment in an appropriate mental health facility (46-14-301, MCA). If the person remains in custody, a professional person must conduct an annual review. The Director of DPHHS may petition the court that has jurisdiction if the Director believes that the person may be released without danger to the person or to others because the person no longer suffers from a mental disease or defect that presents substantial risk. An examination, hearing, and determination by the court will occur and result in discharge or a continued commitment. The proceeding is a civil proceeding, and the state still has the burden to prove by clear and convincing evidence that the person may not be safely discharged. A person may make application for discharge or release as part of the annual review, but the person must have been committed for at least 6 months and may not apply less than 1 year from the date of any preceding hearing. This commitment may persist for a very long time if the conditions do not change. The Committee could ask about the process Montana State Hospital follows to ensure that patients in this status are reviewed annually and how the person's risk is evaluated because of the person's liberty interest and right to due process. This may also be a category to discuss the length of stay to determine if they are longer than the other categories and if changes are desired in statute, placement, or standards.

If a person is released on certain conditions (46-14-304, MCA), that "conditional" release may be revoked for a violation of the conditions and a determination that a substantial risk of harm or injury exists due to the mental disease or defect. There is no specified time for which a conditional release is specified from the front end when granted, yet the court may only retain jurisdiction for up to 5 years. This differs from the standard conditional release under 53-21-182 or 53-21-183, MCA, for which extensions are allowed for no longer than 2 years beyond the expiration of the commitment order (53-21-198, MCA). Section 53-21-184, MCA, states: "The release and discharge provisions of this part [Title 53, part 21, MCA] shall not apply to any patient held upon an order of court or judge in a proceeding arising out of a criminal act."

A person who was found not guilty by reason of lack of mental state who is discharged or one who has exceeded 5 years on a conditional release would be subject to the civil commitment proceedings under Title 53, chapter 21, MCA, and no longer be considered a "forensic" patient.

#### **4th category: Guilty and suffering from mental disease or defect**

A person who is competent to stand trial and is found guilty and not suffering from a mental disease or defect would be sentenced under Title 46, chapter 18, MCA, for the appropriate criminal offense. The sentencing of person who was convicted of an offense by either a verdict of guilty or a plea of guilty or

nolo contendere but found to be suffering from a mental disease or defect is somewhat different and is the fourth category of "forensic" patient. The authority of the court is the same as authorized under Title 46, chapter 18, MCA, if the treatment of the individual and the protection of the public are provided for. However, any mandatory minimums do not apply. The defendant must be sentenced to be committed to the custody of the Director of DPHHS for placement in an appropriate **correctional or mental health** facility for an indefinite period of time NOT to exceed the maximum term of imprisonment as applied in Title 46, chapter 18, MCA. Once the period of commitment expires or the defendant is discharged from custody and further supervision, the person may be subject to civil commitment proceedings under Title 53, chapter 21, MCA, but only if the standards for civil commitment apply (46-14-312, MCA).

### **Other issues**

The following issues have been raised by legislative staff and representatives of the Board of Visitors and the Department of Corrections in various venues.

### **Inter-institutional transfers**

There is another category of "forensic" patient at the Montana State Hospital--offenders from a Department of Corrections facility that need the services that the state hospital has to offer. Under 53-30-106(2) and (3), MCA, the Department of Corrections may contract with the federal government, other states, or the commissioners of counties or with other public and private corporations for certain or selected inmates if adequate or suitable programs are available. Historically, prior to 1995, the Montana State Hospital and the state correctional facilities were administered under the same department and inter-institutional transfers have always been made. The Department of Corrections transfers inmates to the Montana State Hospital, and statute provides that a placement in a mental health facility in excess of 10 days must be performed according to the procedures for voluntary admission or involuntary commitment (53-21-130, MCA).

However, the Montana State Hospital or administrators at DPHHS do not transfer any persons to the Department of Corrections, although certain statutes imply that a correctional facility may be an appropriate placement for a defendant upon a conviction of that defendant who is suffering from a mental disease or defect (46-14-312(2), MCA). Prerelease centers have also been mentioned as a possibility. Prerelease centers are private, nonprofit organizations that contract with the Department of Corrections and some counties to provide beds and programs for certain inmates placed by the Department of Corrections or counties with local approval. DPHHS could also explore the possibility of contracting for beds with a prerelease organization that could provide appropriate services for appropriate persons.

The reasons that alternative placements have not been developed and the impediments to the Montana State Hospital for alternative placement of the various categories of forensic patients should be explored with the caveat that only persons found guilty of a crime could be held in a correctional facility.<sup>3</sup>

## Appeals

The issue was raised that persons sentenced under 46-14-312, MCA, do not have the same right to appeal as others who are convicted of a criminal offense. There appear to be two areas for which clarification or statutory change may be appropriate.

Section 46-14-312(3) and (4), MCA, allows for the Director of DPHHS or the defendant whose sentence has been imposed under subsection (2) (guilty but mentally ill) to petition the court for review of the sentence upon certain conditions certified by a professional person, and the court may make any order not inconsistent with its original sentencing authority except that the length of confinement or supervision must be equal to the original sentence. The status must be reviewed by a professional person each year (due process).

Under general civil commitment proceedings, 53-21-131, MCA, provides for an appeal procedure to the Montana Supreme Court for an order for short-term evaluation and treatment or long-term commitments. Although 53-21-184, MCA, states that release and discharge provisions of Title 53, chapter 21, part 1, shall not apply to any patient held upon an order of court or judge in a proceeding arising out of a criminal act (forensic patients), a question could arise as to whether this applies to the appeal provision as forensic patients do receive an order for short-term evaluation or treatment or long-term commitment. Section 53-21-114(2), MCA, states that every respondent subject to an order for short-term treatment or long-term care and treatment must be advised in writing of the right to appeal the order by the court at the conclusion of any hearing. The applicability of this section to forensic patients may need to be further explored and clarified.

Sections 46-18-901 through 46-18-903, MCA, apply to appellate review of legal sentences, more commonly known as "sentence review", before the Sentence Review Board that is administered by the Supreme Court. The application for review is limited to "any person sentenced to a term of 1 year or more in the state prison". Persons sentenced under 46-14-312, MCA (guilty but mentally ill), are sentenced to the custody of the Director of DPHHS. A sentence review may result in an increase or decrease of the criminal penalty or in a different sentence being imposed. Although "the authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for", it appears that the persons sentenced

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<sup>3</sup> 53-1-209, MCA, was enacted in 2001 (Ch. 165) and states that the "former forensic unit at Warm Springs is the property of the department of corrections, and the building may only be used only for treatment of inmates with chemical dependency or other **mental** or physical health-related problems." (emphasis added)

under 46-14-312, MCA (guilty but mentally ill), do not have the same right to the Sentence Review Board, but a right to review by the sentencing court, which requires a professional person to certify that certain conditions exist. Also, the review under 46-14-312, MCA, does not allow for any change in length of the sentence, whereas a sentence review may result in an increase in, decrease in, or change to a sentence.

Persons convicted of a crime have access to clemency provisions under Title 46, chapter 23, part 3, MCA, and this applies to persons convicted under Title 46, chapter 14, MCA. Also Title 46, chapter 20, MCA, regarding appeals applies to "review in all criminal cases" and also applies to persons found guilty (convicted) but mentally ill. Also, Title 46, chapter 21, MCA, provides for postconviction hearings and chapter 22 provides for habeas corpus proceedings, which should both be available to persons convicted under 46-14-312, MCA.

### **Inappropriate admissions**

In any discussion regarding "inappropriate admissions", a clarification should be sought as to why an admission is considered inappropriate. As illustrated in this analysis, there are differing legal and medical standards, and they are all in a context of standards that involve state policy and fiscal restraints. An admission may be appropriate legally as the sentencing court has the authority to interpret the statutes and to find a person guilty, accept a plea or a plea bargain, and base their decision as to a person's mental condition on the testimony of professionals. The Montana State Hospital may not believe that the admission is medically appropriate, but that is a different concept.

A clarification of the role of the Montana State Hospital with regard to persons who have been committed there following "forensic" proceedings may be in order. The role can be in conflict with the expectations of the administration or with the policy and statutory obligations under which the Montana State Hospital must operate. State institutions are traditionally the placement of last resort for persons who must be institutionalized as determined by the court, and if the Montana State Hospital is no longer that place, then it is the state's responsibility to provide an appropriate placement. Other persons for whom a decision must be made regarding the "appropriateness" of admission to the state hospital may include persons who do not consent to treatment, but are a danger to themselves or others, or those persons needing long-term court-ordered evaluations if they present a danger to themselves or society. Policy, fiscal, and statutory obligations direct what the role is and how an institution must operate. Statute may allow these differing interpretations, and the Legislature may need to make some policy choices and be more explicit in statute.

Section 53-21-601, MCA, outlines the location and primary function of the Montana State Hospital. This section has been amended six times in the decade of the 1990s, and the hospital's role in regards to forensic patients is not explicit. As the new hospital was built and the former forensic unit, the Xanthopoulos Building, was given to the Department of Corrections, the changes to statute do not

reflect a responsibility to evaluation or long-term care of forensic patients, yet the court still has the authority to order forensic evaluations at and commitments to the Montana State Hospital.

(2) (a) The Montana State Hospital is a mental health facility, as defined in 53-21-102, of the Department of Public Health and Human Services for the care and treatment of mentally ill persons.

(b) The role of Montana State Hospital is to provide intensive inpatient psychiatric services, including those services necessary for transition to community care, as components in a comprehensive continuum of publicly and privately provided programs that emphasize treatment in the least restrictive environment.

(c) The mission of Montana State Hospital is to stabilize persons with severe mental illness and to return them to the community as soon as possible if adequate community-based support services are available.

(3) The department shall adopt rules to manage the state hospital patient population in a manner that will ensure emergency access to services, protect public and individual safety, provide active treatment, implement effective discharge planning, and ensure access to appropriate community-based services.

## **Parole**

A mental health parole has been raised as a possibility. It should be clear that this is only available to those persons who have been convicted of a crime, the fourth category consisting of individuals who are guilty but mentally ill. A person who has not been convicted of a crime may not be subject to conditions that may be unconstitutional. A 1978 court opinion (*In re application of Zion v. Xanthopoulos*, 178 Mont. 468, 585 P.2d 1084 (1978)) allowed that some form of overseeing by the parole division may be acceptable in order to balance the competing interests of the person and the public, but the imposition of probation conditions having the tone or effect of being punitive is expressly disapproved. There is no mention of probation or parole under Title 46, chapter 14, MCA, and the various liberty interest, civil rights, and due process concerns would apply here. Further legal analysis regarding the appropriateness of and the use of the terms and conditions of probation or parole is advised.

Just as this Committee has tried to deal with the effects of the lack of training and expertise in law enforcement and the courts regarding mental illness, that limitation on availability of information and training with respect to mental illness would also need to be explored regarding the existing knowledge of and whether training related to mental illness is provided to the staff and the five citizen members of the Board of Pardons and Parole (2-15-2302, MCA) and to the probation and parole officers who are administered under the Department of Corrections (Title 46, chapter 23, part 10, MCA). There is currently a section on medical parole that may be useful to investigate, 46-23-210, MCA.

## **Forensic patient being billed for and paying for their own care**

There has been a suggestion that forensic patients should be required to pay for their care on the same basis as those in on a civil commitment. There are statutes that allow for any "resident" who receives treatment at the Montana State Hospital to be billed for costs of care (Title 53, chapter 1, part 4, MCA.) Impediments to DPHHS for instituting this should be identified by the agency and any proposals should be developed for the Committee to consider. The interaction of the state, court, and a county's responsibilities in context of the person's civil rights, responsibilities, and ability to pay must be reviewed, especially in light of the state assumption of district court costs (Ch. 585, L. 2001). As part of that legislation, the district court council is directed to address any inequities in disbursements of district court expenses for involuntary commitment proceedings and youth court proceedings and is required to present to the 58th legislature a proposal to enumerate specific expenses of those proceedings that are recommended to be designated as district court expenses in 3-5-901, MCA.

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