

## 1 SENATE BILL NO. 459

2 INTRODUCED BY E. FRANKLIN

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT ADVANCED PRACTICE REGISTERED  
5 NURSES WITH A CLINICAL SPECIALTY IN PSYCHIATRIC MENTAL HEALTH NURSING ARE ALLOWED TO  
6 PERFORM EXAMINATIONS AND TO REPORT AND TESTIFY REGARDING A DEFENDANT'S FITNESS TO  
7 PROCEED OR MENTAL CONDITION; AMENDING SECTIONS 46-1-202, 46-14-202, 46-14-204,  
8 46-14-205, 46-14-213, 46-14-302, AND 46-15-323, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE  
9 DATE."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12

13 **Section 1.** Section 46-1-202, MCA, is amended to read:

14 **"46-1-202. Definitions.** As used in this title, unless the context requires otherwise, the following  
15 definitions apply:

16 (1) "Advanced practice registered nurse" means an individual certified as an advanced practice  
17 registered nurse provided for in 37-8-202, with a clinical specialty in psychiatric mental health nursing.

18 ~~(1)~~(2) "Arraignment" means the formal act of calling the defendant into open court to enter a plea  
19 answering a charge.

20 ~~(2)~~(3) "Arrest" means taking a person into custody in the manner authorized by law.

21 ~~(3)~~(4) "Arrest warrant" means a written order from a court directed to a peace officer or to some  
22 other person specifically named commanding that officer or person to arrest another. The term includes  
23 the original warrant of arrest and a copy certified by the issuing court.

24 ~~(4)~~(5) "Bail" means the security given for the primary purpose of ensuring the presence of the  
25 defendant in a pending criminal proceeding.

26 ~~(5)~~(6) "Charge" means a written statement that accuses a person of the commission of an  
27 offense, that is presented to a court, and that is contained in a complaint, information, or indictment.

28 ~~(6)~~(7) "Conviction" means a judgment or sentence entered upon a guilty or nolo contendere plea  
29 or upon a verdict or finding of guilty rendered by a legally constituted jury or by a court of competent  
30 jurisdiction authorized to try the case without a jury.

1           ~~(7)~~(8) "Court" means a place where justice is judicially administered and includes the judge of the  
2 court.

3           ~~(8)~~(9) "Included offense" means an offense that:

4           (a) is established by proof of the same or less than all the facts required to establish the  
5 commission of the offense charged;

6           (b) consists of an attempt to commit the offense charged or to commit an offense otherwise  
7 included in the offense charged; or

8           (c) differs from the offense charged only in the respect that a less serious injury or risk to the  
9 same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

10          ~~(9)~~(10) "Judge" means a person who is vested by law with the power to perform judicial functions.

11          ~~(10)~~(11) "Judgment" means an adjudication by a court that the defendant is guilty or not guilty,  
12 and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court.

13          ~~(11)~~(12) "Make available for examination and reproduction" means to make material and  
14 information that is subject to disclosure available upon request at a designated place during specified  
15 reasonable times and to provide suitable facilities or arrangements for reproducing it. The term does not  
16 mean that the disclosing party is required to make copies at its expense, to deliver the materials or  
17 information to the other party, or to supply the facilities or materials required to carry out tests on  
18 disclosed items. The parties may by mutual consent make other or additional arrangements.

19          ~~(12)~~(13) "New trial" means a reexamination of the issue in the same court before another jury after  
20 a verdict or finding has been rendered.

21          ~~(13)~~(14) "Notice to appear" means a written direction that is issued by a peace officer and that  
22 requests a person to appear before a court at a stated time and place to answer a charge for the alleged  
23 commission of an offense.

24          ~~(14)~~(15) "Offense" means a violation of any penal statute of this state or any ordinance of its  
25 political subdivisions.

26          ~~(15)~~(16) "Parole" means the release to the community of a prisoner by a decision of the board of  
27 pardons and parole prior to the expiration of the prisoner's term subject to conditions imposed by the board  
28 of pardons and parole and the supervision of the department of corrections.

29          ~~(16)~~(17) "Peace officer" means any person who by virtue of the person's office or public  
30 employment is vested by law with a duty to maintain public order and make arrests for offenses while

1 acting within the scope of the person's authority.

2 ~~(17)~~(18) "Persistent felony offender" means an offender who has previously been convicted of a  
3 felony and who is presently being sentenced for a second felony committed on a different occasion than  
4 the first. An offender is considered to have been previously convicted of a felony if:

5 (a) the previous felony conviction was for an offense committed in this state or any other  
6 jurisdiction for which a sentence of imprisonment in excess of 1 year could have been imposed;

7 (b) less than 5 years have elapsed between the commission of the present offense and either:

8 (i) the previous felony conviction; or

9 (ii) the offender's release on parole or otherwise from prison or other commitment imposed as a  
10 result of a previous felony conviction; and

11 (c) the offender has not been pardoned on the ground of innocence and the conviction has not  
12 been set aside at the postconviction hearing.

13 ~~(18)~~(19) "Place of trial" means the geographical location and political subdivision in which the court  
14 that will hear the cause is situated.

15 ~~(19)~~(20) "Preliminary examination" means a hearing before a judge for the purpose of determining  
16 if there is probable cause to believe a felony has been committed by the defendant.

17 ~~(20)~~(21) "Probation" means release by the court without imprisonment of a defendant found guilty  
18 of a crime. The release is subject to the supervision of the department of corrections upon direction of the  
19 court.

20 ~~(24)~~(22) "Prosecutor" means an elected or appointed attorney who is vested by law with the  
21 power to initiate and carry out criminal proceedings on behalf of the state or a political subdivision.

22 ~~(22)~~(23) "Same transaction" means conduct consisting of a series of acts or omissions that are  
23 motivated by:

24 (a) a purpose to accomplish a criminal objective and that are necessary or incidental to the  
25 accomplishment of that objective; or

26 (b) a common purpose or plan that results in the repeated commission of the same offense or  
27 effect upon the same person or the property of the same person.

28 ~~(23)~~(24) "Search warrant" means an order that is:

29 (a) in writing;

30 (b) in the name of the state;

1 (c) signed by a judge;

2 (d) a particular description of the place, object, or person to be searched and the evidence,  
3 contraband, or person to be seized; and

4 (e) directed to a peace officer and commands the peace officer to search for evidence, contraband,  
5 or persons.

6 ~~(24)~~(25) "Sentence" means the judicial disposition of a criminal proceeding upon a plea of guilty  
7 or nolo contendere or upon a verdict or finding of guilty.

8 ~~(25)~~(26) "Statement" means:

9 (a) a writing signed or otherwise adopted or approved by a person;

10 (b) a video or audio recording of a person's communications or a transcript of the communications;

11 and

12 (c) a writing containing a summary of a person's oral communications or admissions.

13 ~~(26)~~(27) "Summons" means a written order issued by the court that commands a person to appear  
14 before a court at a stated time and place to answer a charge for the offense set forth in the order.

15 ~~(27)~~(28) "Superseded notes" means handwritten notes, including field notes, that have been  
16 substantially incorporated into a statement. The notes may not be considered a statement and are not  
17 subject to disclosure except as provided in 46-15-324.

18 ~~(28)~~(29) "Temporary road block" means any structure, device, or means used by a peace officer  
19 for the purpose of controlling all traffic through a point on the highway where all vehicles may be slowed  
20 or stopped.

21 ~~(29)~~(30) "Witness" means a person whose testimony is desired in a proceeding or investigation  
22 by a grand jury or in a criminal action, prosecution, or proceeding.

23 ~~(30)~~(31) "Work product" means legal research, records, correspondence, reports, and memoranda,  
24 both written and oral, to the extent that they contain the opinions, theories, and conclusions of the  
25 prosecutor, defense counsel, or their staff or investigators."

26

27 **Section 2.** Section 46-14-202, MCA, is amended to read:

28 **"46-14-202. Examination of defendant.** (1) If the defendant or the defendant's counsel files a  
29 written motion requesting an examination or if the issue of the defendant's fitness to proceed is raised by  
30 the district court, prosecution, or defense counsel, the district court shall appoint at least one qualified

1 psychiatrist, ~~or~~ licensed clinical psychologist, or advanced practice registered nurse or shall request the  
 2 superintendent of the Montana state hospital to designate at least one qualified psychiatrist, ~~or~~ licensed  
 3 clinical psychologist, ~~which designation~~ or advanced practice registered nurse, who may be or include the  
 4 superintendent, to examine and report upon the defendant's mental condition.

5 (2) The court may order the defendant to be committed to a hospital or other suitable facility for  
 6 the purpose of the examination for a period not exceeding 60 days or a longer period as the court  
 7 determines to be necessary for the purpose and may direct that a qualified psychiatrist, ~~or~~ licensed clinical  
 8 psychologist, or advanced practice registered nurse retained by the defendant be permitted to witness and  
 9 participate in the examination.

10 (3) In the examination, any method may be employed that is accepted by the medical or  
 11 psychological profession for the examination of those alleged to be suffering from mental disease or  
 12 defect.

13 (4) If the defendant is indigent or the examination occurs at the request of the prosecution, the  
 14 cost of the examination must be paid by the county or the state, or both, according to procedures  
 15 established under 3-5-902(1)."

16

17 **Section 3.** Section 46-14-204, MCA, is amended to read:

18 **"46-14-204. Prosecution's right to examination.** (1) When the defense discloses the report of the  
 19 examination to the prosecution or files a notice of the intention to rely on a defense of mental disease or  
 20 defect, the prosecution is entitled to have the defendant examined by a qualified psychiatrist, ~~or~~ licensed  
 21 clinical psychologist, or advanced practice registered nurse.

22 (2) The report of the examination must be disclosed to the defense within 10 days of its receipt  
 23 by the prosecution."

24

25 **Section 4.** Section 46-14-205, MCA, is amended to read:

26 **"46-14-205. Access to defendant for examination.** If either the defendant or the prosecution  
 27 wishes the defendant to be examined by a qualified psychiatrist, ~~or~~ licensed clinical psychologist, or  
 28 advanced practice registered nurse selected by the one proposing the examination in order to determine  
 29 the defendant's fitness to proceed or whether the defendant had, at the time the offense was committed,  
 30 a particular state of mind that is an essential element of the offense, the examiner ~~shall~~ must be permitted

1 to have reasonable access to the defendant for the purpose of the examination."  
2

3 **Section 5.** Section 46-14-213, MCA, is amended to read:

4 **"46-14-213. Psychiatric or psychological testimony upon trial.** (1) Upon trial, any psychiatrist, ~~or~~  
5 licensed clinical psychologist, or advanced practice registered nurse who reported under 46-14-202 or  
6 46-14-206 may be called as a witness by the prosecutor or by the defense. Both the prosecution and the  
7 defense may summon any other qualified psychiatrist, ~~or~~ licensed clinical psychologist, or advanced  
8 practice registered nurse to testify, but ~~no one~~ only a person who has ~~not~~ examined the defendant is  
9 competent to testify to an expert opinion with respect to the mental condition of the defendant, as  
10 distinguished from the validity of the procedure followed by or the general scientific propositions stated  
11 by another witness.

12 (2) When a psychiatrist, ~~or~~ licensed clinical psychologist, or advanced practice registered nurse  
13 who has examined the defendant testifies concerning the defendant's mental condition, the psychiatrist,  
14 ~~or~~ licensed clinical psychologist, or advanced practice registered nurse may make a statement as to the  
15 nature of the examination and the medical or psychological diagnosis of the mental condition of the  
16 defendant. The expert may make any explanation reasonably serving to clarify the expert's examination  
17 and diagnosis, and the expert may be cross-examined as to any matter bearing on the expert's  
18 competency or credibility or the validity of the expert's examination or medical or psychological diagnosis.  
19 A psychiatrist, ~~or~~ licensed clinical psychologist, or advanced practice registered nurse may not offer an  
20 opinion to the jury on the ultimate issue of whether the defendant did or did not have a particular state  
21 of mind that is an element of the offense charged."  
22

23 **Section 6.** Section 46-14-302, MCA, is amended to read:

24 **"46-14-302. Discharge or release upon motion of director.** (1) If the director of the department  
25 of public health and human services believes that a person committed to the director's custody under  
26 46-14-301 may be discharged or released on condition without danger to the person or others because  
27 the person no longer suffers from a mental disease or defect that causes the person to present a  
28 substantial risk of serious bodily injury or death to the person or others, a substantial risk of an imminent  
29 threat of physical injury to the person or others, or a substantial risk of substantial property damage, the  
30 director shall make application for the discharge or release of the person in a report to the district court

1 by which the person was committed unless that court transfers jurisdiction to the court in the district in  
2 which the person has been placed and shall send a copy of the application and report to the prosecutor  
3 of the county from which the person was committed.

4 (2) Either the director of the department of public health and human services or the person may  
5 also make application to the court for discharge or release as part of the person's annual treatment review.

6 (3) The court shall then appoint at least one person who is ~~either~~ a qualified psychiatrist, ~~or~~  
7 licensed clinical psychologist, or advanced practice registered nurse to examine the person and to report  
8 as to the person's mental condition within 60 days or a longer period that the court determines to be  
9 necessary for the purpose. To facilitate the examinations and the proceedings on the examinations, the  
10 court may have the person confined in any mental health facility located near the place where the court  
11 sits that may be designated by the director of the department of public health and human services as  
12 suitable for the temporary detention of persons suffering from mental disease or defect.

13 (4) The committed person or the person's attorney may secure a professional person of the  
14 committed person's choice to examine the committed person and to testify at the hearing. If the person  
15 wishing to secure the testimony of a professional person is unable to do so because of financial reasons,  
16 the court shall appoint an additional professional person to perform the examination. Whenever possible,  
17 the court shall allow the committed person or the person's attorney a reasonable choice of an available  
18 professional person qualified to perform the requested examination. The professional person must be  
19 compensated by the department of public health and human services.

20 (5) If the court is satisfied by the report filed under subsection (1) and the testimony of the  
21 reporting psychiatrist, ~~or~~ licensed clinical psychologist, or advanced practice registered nurse that the  
22 committed person may be discharged or released on condition because the person no longer suffers from  
23 a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or  
24 death to the person or others, a substantial risk of an imminent threat of physical injury to the person or  
25 others, or a substantial risk of substantial property damage, the court shall order the person's discharge.

26 (6) (a) If the court is not satisfied, it shall promptly order a hearing to determine whether the  
27 person may safely be discharged or released on the grounds that the person no longer suffers from a  
28 mental disease or defect that causes the person to present a substantial risk of:

29 (i) serious bodily injury or death to the person or others;

30 (ii) an imminent threat of physical injury to the person or others; or

1 (iii) substantial property damage.

2 (b) A hearing is considered a civil proceeding, and the burden is upon the state to prove by clear  
3 and convincing evidence that the person may not be safely discharged or released because the person  
4 continues to suffer from a mental disease or defect that causes the person to present a substantial risk  
5 of:

6 (i) serious bodily injury or death to the person or others;

7 (ii) an imminent threat of physical injury to the person or others; or

8 (iii) substantial property damage.

9 (c) According to the determination of the court upon the hearing, the committed person must then  
10 be discharged or released on conditions that the court determines to be necessary or must be recommitted  
11 to the custody of the director of the department of public health and human services, subject to discharge  
12 or release only in accordance with the procedures provided in ~~this section and 46-14-303~~ and this  
13 section."

14

15 **Section 7.** Section 46-15-323, MCA, is amended to read:

16 **"46-15-323. Disclosure by defendant.** (1) At any time after the filing in district court of an  
17 indictment or information, the defendant, in connection with the particular crime charged, ~~shall~~ and upon  
18 written request of the prosecutor and approval of the court:

19 (a) shall appear in a lineup;

20 (b) shall speak for identification by witnesses;

21 (c) must be fingerprinted, palm printed, footprinted, or voiceprinted;

22 (d) shall pose for photographs not involving reenactment of an event;

23 (e) shall try on clothing;

24 (f) shall permit the taking of samples of the defendant's hair, blood, saliva, urine, or other specified  
25 materials that do not involve ~~an~~ unreasonable bodily intrusions;

26 (g) shall provide handwriting samples; or

27 (h) shall submit to a reasonable physical or medical inspection; however, the inspection does not  
28 include psychiatric or psychological examination.

29 (2) Within 30 days after the arraignment or at a later time as the court may for good cause permit,  
30 the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce

1 evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force,  
2 or mistaken identity.

3 (3) Within 10 days after receiving a report of the defendant's mental condition from a psychiatrist,  
4 ~~or psychologist, or advanced practice registered nurse~~ or at a later time as the court may for good cause  
5 permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to  
6 introduce evidence at trial of the defense that ~~due to~~ because of a mental disease or defect, the defendant  
7 did not have a particular state of mind that is an essential element of the offense charged.

8 (4) The notice must specify for each defense the names and addresses of the persons, other than  
9 the defendant, whom the defendant may call as witnesses in support of the defense, together with all  
10 written reports or statements made by them, including all reports and statements concerning the results  
11 of physical examinations, scientific tests, experiments, or comparisons, except that the defendant need  
12 not include a privileged report or statement unless the defendant intends to use the privileged report or  
13 statement, or the witness who made it, at trial.

14 (5) Prior to trial, the defendant may, upon motion and showing of good cause, add to the list of  
15 witnesses the names of any additional witnesses and disclose their reports or statements as required by  
16 this section. After the trial commences, no ~~witnesses~~ witness may be called by the defendant in support  
17 of these defenses unless the name of the witness is included on the list and the witness's report or  
18 statement has been disclosed as required by this section, except for good cause shown.

19 (6) Within 30 days after the arraignment or at a later time as the court may for good cause permit,  
20 the defendant shall make available to the prosecutor for testing, examination, or reproduction:

21 (a) the names, addresses, and statements of all persons, other than the defendant, whom the  
22 defendant may call as witnesses in the defense case in chief, together with their statements;

23 (b) the names and addresses of experts whom the defendant may call at trial, together with the  
24 results of their physical examinations, scientific tests, experiments, or comparisons, including all written  
25 reports and statements made by these experts in connection with the particular case; and

26 (c) all papers, documents, photographs, and other tangible objects that the defendant may use  
27 at trial.

28 (7) The defendant's obligation under this section extends to material and information within the  
29 possession or control of the defendant, defense counsel, and defense counsel's staff or investigators.

30 (8) Upon motion of the prosecutor showing that the prosecutor has substantial need in the

1 preparation of the case for additional material or information not otherwise provided for, that the  
2 prosecutor is unable, without undue hardship, to obtain the substantial equivalent by other means, and  
3 that disclosure of the material or information will not violate the defendant's constitutional rights, the  
4 court, in its discretion, may order any person to make the material or information available to the  
5 prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order  
6 if compliance would be unreasonable or oppressive. The defense counsel may not be required to prepare  
7 or disclose summaries of witnesses' testimony."

8

9 NEW SECTION. **Section 8. Effective date.** [This act] is effective on passage and approval.

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