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Law and Justice Interim Committee

62nd Montana Legislature

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MEMORANDUM

TO: Law and Justice Interim Committee

FROM: David Niss, Staff Attorney

RE: Standards for Emergency Detention and Involuntary Commitment

DATE: August 29, 2011

I
INTRODUCTION

At its meeting on June 21, 2011, the Law and Justice Interim Committee (LJIC) decided to examine the standards for emergency detention and involuntary commitment of individuals who may be suffering from mental illness. This memorandum responds to Ms. Sheri Scurr's request for a legal analysis of emergency detention and involuntary commitment standards by comparing the two standards but discusses the procedure involved only insofar as necessary to address those standards. I have also commented, at the request of Ms. Scurr, on the provisions of House Bill No. 365 (62nd Legislative Session).

II
DISCUSSION

A. Statutory Standards

Section 53-21-129(1), MCA, contains the standard that must be met for an emergency detention of an individual who may be mentally ill, and 53-21-126(4), MCA, contains the standard for civil commitment of a person who may be mentally ill. These subsections provide as follows:

> (1) When an emergency situation exists, a peace officer may take any person who appears to have a mental d

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Exhibit 16

imminent danger of death or bodily harm to the person or to others into custody only for sufficient time to contact a professional person for emergency evaluation. If possible, a professional person should be called prior to taking the person into custody.

(Note that an "emergency situation", for the purposes of 53-21-129(1), MCA, is defined by 53-21-102(7), MCA, as "a situation in which any person is in imminent danger of death or bodily harm from the activity of a person who appears to be suffering from a mental disorder and appears to require commitment".)

(4) The professional person may testify as to the ultimate issue of whether the respondent is suffering from a mental disorder and requires commitment. This testimony is insufficient unless accompanied by evidence from the professional person or others that:

(a) the respondent, because of a mental disorder, is substantially unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety;

(b) the respondent has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others;

(c) because of a mental disorder, there is an imminent threat of injury to the respondent or to others because of the respondent's acts or omissions; or

(d) (i) the respondent's mental disorder:

(A) has resulted in recent acts, omissions, or behaviors that create difficulty in protecting the respondent's life or health;

(B) is treatable, with a reasonable prospect of success;

(C) has resulted in the respondent's refusing or being unable to consent to voluntary admission for treatment; and

(ii) will, if untreated, predictably result in deterioration of the respondent's mental condition to the point at which the respondent will become a danger to self or to others or will be unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety. Predictability may be established by the respondent's relevant medical history.

Additionally, subsection (2) of 53-21-126, MCA, provides that the standard of proof with respect to "physical facts or evidence" in any hearing on a petition for commitment is proof beyond a reasonable doubt. For other matters, the standard of proof is clear and convincing evidence, except that the respondent's mental disorder must be proved to "a reasonable medical certainty". No similar standard of proof exists for the purposes of emergency detention pursuant to 53-21-129(1), MCA.

B. Comparison of Emergency Detention and Involuntary Commitment Statutes

By the text of 53-21-129(1), MCA, and 53-21-126(4), MCA, it's clear that there is a much different standard for emergency detention than there is for involuntary commitment. For emergency detention, 53-21-129(1), MCA, requires only that a person "appear" to have a mental disorder but that the person be in "imminent danger of death or bodily harm", while 53-21-126(4), MCA, requires that the person actually have a mental disorder, in the opinion of the professional person, but that the person suffering from the mental illness need only be, among other alternative reasons for detainment, "substantially" unable to provide for the person's "own basic needs of food, clothing, shelter, health or safety".

Note that the foregoing list of needs appearing in subsections (4)(a) and (4)(d)(ii) is, by use of the word "or", in the alternative. Therefore, if a suspected schizophrenic individual is, because of his mental illness, only unable to find adequate shelter, he may not be involuntarily detained by a peace officer if he is in no danger of self-injury because of that lack of shelter but may be, after the schizophrenia is proven, involuntarily committed to the state hospital even though he is likewise in no danger because of his lack of shelter.

The result of these differing standards is that well-meaning peace officers may sometimes be frustrated that they may not detain an apparently schizophrenic individual who is without adequate shelter but not suffering because of it. However, the Legislature has made the judgment that if that individual is not suffering, then the values of a free and open society require that the individual not be subject to emergency detention pursuant to 53-21-129, MCA (although if definitively determined at a later time to be mentally ill, the same individual may be involuntarily committed).

C. Case Law

For the purposes of this memorandum, I've reviewed opinions of the Montana Supreme Court since the year of enactment of 53-21-129, MCA, (1975) that deal with that statute and that deal with 53-21-126, MCA, for comment by the Court upon the differing standards between those statutes for emergency detention and involuntary commitment. No opinions were found in which the Court commented adversely on the relationship between those two statutes. However, one opinion was found that merits brief mention here. In *In the Matter of the Mental Health of L.R.*, 2010 MT 76, 356 Mont. 20, 231 P.3d 594, the Montana Supreme Court pointed out that 53-21-115(11), MCA, and 53-21-129(2), MCA, were inconsistent in that the former statute allows a respondent to refuse non-life saving medications for up to 24 prior to any hearing but the latter statute allows the respondent to be detained and treated. The Court said:

> These statutes are inconsistent because treatment for a person in an emergency situation under [section] 53-21-129(2), MCA, may include medication, and the time period for such treatment could overlap with the 24 hour period a person may refuse medication under

[section] 53-21-115(11), MCA.

The Court resolved this apparent conflict by holding that because 53-21-115(11), MCA, is a general statute and 53-21-129, MCA, is a specific statute, the more specific statute allowing the respondent to be involuntarily medicated applied to the situation before the Court.[1] This inconsistency does not involve the relationship between 53-21-129, MCA, and 53-21-126, MCA, but may nevertheless warrant the Committee's attention.[2]

D. House Bill No. 365 (62nd Legislative Session)

House Bill No. 365 (missed transmittal deadline for appropriation bills) would have amended 53-21-129, MCA, to allow a peace officer to detain an individual who appears to have a mental disorder if the individual appears "to be substantially unable to provide for the person's own basic needs of food, clothing, shelter, health, or safety". This change would have made the criteria for emergency detention more like the standards for involuntarily commitment (see part B above). However, the bill would have still allowed emergency detention if the person meets that standard only in an "emergency situation", as defined by 53-21-102(7), MCA (see paragraph at bottom of page 1 above). This additional criteria for an emergency detention and the definition of an "emergency situation" are fundamentally incompatible because the definition of "emergency situation" itself contains the requirement for "imminent death or bodily harm". Therefore if an alternative criteria for emergency detention is to be added to subsection (1) of 53-21-129, MCA, any reference to an "emergency situation" in the same subsection must be deleted or the definition of "emergency situation" must be amended.

III
CONCLUSION

The statutory standards for emergency detention and involuntary commitment contained in 53-21-129 and 53-21-126, MCA, respectively, are different in that there is

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[1] See, 1-2-102, MCA.

[2] One other Montana Supreme Court opinion was found that may be of interest to the Committee. In *In the Matter of the Mental Health of A.S.B.*, 2008 MT 82, 342 Mont. 169, 180 P.3d 625, the dissenting opinion by then Chief Justice Karla Gray, citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975), and *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980), noted that she would have held part of 53-21-126, MCA, unconstitutional because it allowed an individual to be involuntarily committed without a finding of imminent danger of injury or death to the individual or anyone else.

a higher standard in some respects for detention than for commitment. This higher standard is likely the result of recognition by the Legislature that emergency detention is the more intrusive of the two procedures, although there appears to be no reason pronounced by the Montana Supreme Court as to why the standards for detention may not be made more like the standards for commitment. There also may be other aspects of the standard for commitment that the Committee may want to address.

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