

What specific shortcomings in the Montana Code Annotated could be resolved to address the current issues the state is facing regarding the forensic evaluation and commitment of mentally ill defendants and create a more robust behavioral health system for the future?¹

1) the Code does not require district courts, prosecutors, or defense counsel to consider FMHF's (Galen's) real-time occupancy or other bed limitations prior to ordering a defendant be placed at FMHF;

2) the Code's cost-allocation provisions for payment of (COE) initial fitness evaluations disincentivizes having fitness evaluations done in the community by local qualified psychiatrists, a licensed clinical psychologist, or an advanced practice registered nurses;

- Who pays?
 - Mont. Code Ann. § 46-14-202(4)(a) clearly establishes a payment system where generally, the party requesting a fitness evaluation through a community provider, in the community, pays for that evaluation UNLESS the examination is performed by an employee of the department of public health and human services. This incentivizes courts, prosecution, and the defense to jointly request the examination be performed at FMHF. This, in turn, increases the evaluation backlog.
 - Prosecutors have an independent right to a "rebuttal" evaluation (Mont. Code Ann. § 46-14-204), however, County Attorneys' Office are not adequately funded to pay for the number of evaluations they would need to request to handle dubious claims of lack of fitness currently being raised by defendants. This, too, redirects evaluations to FMHF.

3) the Code currently does not address a major cause of delay in fitness evaluations at FMHF, which is a defendant's stabilization needs due to chemical dependency and/or medical and psychotropic medication compliance prior to an initial fitness evaluation;

- County Sheriffs and Jail commanders cannot administer certain medications and are barred from administering psychotropic medications, even if the defendant consents (due to licensure and cost considerations);

4) the Code currently only addresses involuntary medication in the civil context (Mont. Code Ann., Title 53). Despite significant overlap of the constitutional issues underpinning both

¹ Please note that the list of identified statutory shortcomings contained herein is not a final or comprehensive list. Rather, the numbered points are those highlighted by current circumstances and the ongoing operational concerns of stakeholders from across the judiciary, county and local government, and the Department of Public Health and Human Services.

processes, the standard for ordering involuntary medication in the forensic/fitness context is very high and often requires a lengthy and costly pleading and hearing process vs the civil involuntary commitment process;

- i.e., the civil process requires only a court order to a chief medical officer of a facility or a physician designated by the court ... if the court finds that involuntary medication is necessary to protect the (patient) or the public or to facilitate effective treatment, whereas the forensic process requires a time-consuming and costly hearing under *Sell v. U.S.*, or the review of an IMRB (Involuntary Medical Review Board). Other states have addressed this by allowing involuntary medication in the forensic context to be ordered based on a standard more like Montana's civil standard.

5) the Code currently contains timelines for initial fitness (COE) evaluations and "restoration" evaluations (UTP) of 60 and 90 days, respectively, that do not necessarily align with the time required to stabilize, treat, and conduct an appropriate psychiatric evaluation of a defendant alleging they lack fitness to proceed to trial in a criminal matter.

- Any failure to complete the court-ordered work associated with this stabilization, treatment, and evaluation of defendants within the statutorily-fixed timelines can result, and has resulted, in dismissal of criminal charges and release of individuals into the community without having received adequate psychiatric care.