# Law and Justice Interim Committee

**68th Montana Legislature**



cNovember 10, 2023

To: Law and Justice Interim Committee
From: Julianne Burkhardt, Staff Attorney
Re: Statutory Review of the Criminal and Civil Commitment Process in Montana

**Background**: The HB 872 Commission was created to make recommendations to Governor Gianforte regarding investments to Montana's behavioral health and developmental disability treatment systems. During a recent meeting, the HB 872 Commission requested the Law and Justice Interim Committee (LJIC) to review potential statutory changes discussed during a panel that included several county attorneys from small and large communities in Montana.

The LJIC requested staff to prepare a statutory review of the current statutes governing criminal and civil commitments to assist in the efforts of the Committee.

## Criminal Commitment Process:

Montana is one of four states that have abolished the insanity defense. Along with Montana, Idaho, Utah, and Kansas have abolished the insanity defense. Alaska's system includes aspects of both approaches. The remaining 45 states, the federal criminal justice system, and the District of Columbia have retained the insanity defense.

**Montana's Statutory Scheme:** Montana's current statutory scheme for mental competency of the accused is found in Title 46, chapter 14, MCA. Part 1 of Title 46, chapter 14, describes the relevance of mental disease or disorder, part 2 provides the procedure when mental disease or disorder is an issue, and part 3 contains the statutes governing the disposition of the defendant.

These statutes come into play when a person is alleged to have committed a crime and the person's mental health or mental state is recognized or raised as an issue. Section 46-14-101, MCA, provides:

> 46-14-101. Mental disease or disorder — purpose — definition. (1) The purpose of this section is to provide a legal standard of mental disease or disorder under which the information gained from examination of the defendant, pursuant to part 2 of this chapter, regarding a defendant's mental condition is applied. The court shall apply this standard:
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> (a) in any determination regarding:
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> (i) a defendant's fitness to proceed and stand trial;

(ii) whether the defendant had, at the time that the offense was committed, a particular state of mind that is an essential element of the offense; and

(b) at sentencing when a defendant has been convicted on a verdict of guilty or a plea of guilty or nolo contendere and claims that at the time of commission of the offense for which the defendant was convicted, the defendant was unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law.

(2) (a) As used in this chapter, "mental disease or disorder" means an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that the person requires care, treatment, and rehabilitation.

(b) The term "mental disease or disorder" does not include but may co-occur with one or more of the following:

(i) an abnormality manifested only by repeated criminal or other antisocial behavior;

(ii) a developmental disability, as defined in 53-20-102;

(iii) drug or alcohol intoxication; or

(iv) drug or alcohol addiction.

As set forth in 46-14-101, MCA, there are three circumstances in which the issue of mental disease or disorder may arise. The first circumstance is a court-ordered evaluation (COE) regarding fitness to proceed and generally is an issue before the trial or plea of the defendant, though COEs can be requested or ordered at any point during the pendency of the criminal case and address the issue of competency. The second circumstance is not guilty but mentally ill (NGMI). This category addresses defendants who, based upon evidence at trial, did not have the requisite intent or mental state required as an element of the criminal offense charged. The third circumstance of guilty but mentally ill encompasses a defendant who is evaluated during the sentencing phase of the case when the defendant argues that at the time the offense was committed, "the defendant was unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law."

**Court Ordered Evaluation**: The authority for fitness to proceed evaluations or COEs is found in 46-14-101(1)(a)(i), MCA. The process for raising the issue of fitness to proceed is found in 46-14-221, MCA. In general terms, after the issue of fitness to proceed has been raised, the court must determine the issue. The defendant must be examined by a "qualified psychiatrist, licensed clinical psychologist, or advanced practice registered nurse," and the examiner must prepare a report of examination containing a description, a diagnosis, and an opinion "as to the capacity of the defendant, because of a mental disease or disorder or developmental disability, to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law." Of course, to the extent the issue of competency, as discussed above, requires an additional or slightly different opinion than expressly required in 46-14-206(1)(e), MCA, competency, remains a threshold issue for a fitness to proceed determination.

If a defendant is deemed unfit to stand trial, the court must "within 90 days of commitment, review the defendant's fitness to proceed". If a defendant remains unfit "and. . . it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed". At this point, assuming the defendant has a mental disorder, the prosecutor is then required to file a civil petition for commitment under Title 53, chapter 21, MCA, and move forward with the petition. 46-14-221(3)(b), MCA. The same procedure is followed for a defendant with a developmental disability.

Pursuant 46-14-221(2)(b), MCA, the facility where the defendant is being held pending evaluation must "develop an individualized treatment plan to assist the defendant to gain fitness to proceed." The treatment plan "may include a physician's prescription of reasonable and appropriate medication that is consistent with accepted medical standards." In other words, defendants being evaluated to determine fitness to proceed may be involuntarily medicated. Section 46-14-221(2)(b) provides:

> If the defendant refuses to comply with the treatment plan, the facility may petition the court for an order requiring compliance. The defendant has a right to a hearing on the petition. The court shall enter into the record a detailed statement of the facts upon which an order is made, and if compliance with the individualized treatment plan is ordered, the court shall also enter into the record specific findings that the state has proved an overriding justification for the order and that the treatment being ordered is medically appropriate.

Of course, the defendant must be afforded due process which is addressed by the hearing requirement.

Section 46-14-222, MCA, addresses the procedure if the defendant's fitness is regained.

> **46-14-222. Proceedings if fitness regained**. When the court, on its own motion or upon the application of the director of the department of public health and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant committed to an appropriate facility of the department of public health and human services.

The situation in which a defendant receives treatment following a determination of unfitness and regains fitness within 90 days, or within a fairly short period of time, is fairly straightforward based on 46-14-221, MCA, and 46-14-222, MCA. However, the case in which a defendant who is determined unfit for trial, whose criminal case is dismissed and who is then

civilly committed, as provided in 46-14-222, MCA, and after a period of years regains fitness is much more complex.

**Not Guilty But Mentally Ill (NGMI)** After a defendant is determined to be competent or fit to stand trial or if competence or fitness was not an issue, the case proceeds to trial. At trial the defendant is limited to arguing "that due to a mental disease or disorder the defendant could not have a particular state of mind that is an essential element of the offense charged." 46-14-301(1), MCA. In other words, when considering the potential criminal mental states of purposely, knowingly, or negligently, the defendant, due to their mental disease or disorder, was unable to form the requisite mental state when the crime was committed. The defendant typically admits to the criminal act but argues they could not form the mental state required as an element of the crime.

When a defendant is successful in arguing that they are not guilty but mentally ill (NGMI), 46-14-301, MCA, provides the procedure for how their case and placement are handled. For serious crimes, they are generally committed to the Department of Public Health and Human Services (DPHHS). However, the period of commitment may not exceed the maximum sentence for the longest potential sentence of the charged offenses. After an NGMI finding, the following occurs:

> Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge — limitation on confinement. (1) When a defendant is found not guilty for the reason that due to a mental disease or disorder the defendant could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with 46-18-112 and 46-18-113, which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at the trial must be considered by the court in making its determination. 46-14-301(1), MCA.

The court is further required to evaluate the nature and seriousness of the offense. If the offense caused a "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage" the court must make a determination with regard to dangerousness. If the court finds that the person is a danger to themself or others, then the person is committed to the DPHHS. 46-14-301(2)(a), MCA. If the charge "did not involve a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court shall release the person." However, the prosecutor may pursue a civil commitment under Title 53, chapter 20 or 21, MCA.

> When a person is committed to the custody of the DPHHS the following must occur:
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> (3) A person committed to the custody of the director of the department of public health and human services must have a hearing within 180 days of confinement to determine the person's present mental condition and whether the person must be

discharged or released or whether the commitment may be extended because the person continues to suffer from a mental disease or disorder that renders the person a danger to the person or others. The hearing must be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the district court in the district in which the person has been placed. The court shall cause notice of the hearing to be served upon the person, the person's counsel, the prosecutor, and the court that originally ordered the commitment. The hearing is a civil proceeding, and the burden is upon the state to prove by clear and convincing evidence that the person may not be safely released because the person continues to suffer from a mental disease or disorder that causes the person to present a substantial risk of:

(a) serious bodily injury or death to the person or others;
(b) an imminent threat of physical injury to the person or others; or
(c) substantial property damage. 46-14-301(3), MCA.

The hearing at this stage is a civil hearing. Assuming the prosecution meets the burden emphasized above, and the judge determines the person presents a substantial risk of harm, they are again committed to the DPHHS for a period of time that cannot exceed the maximum penalty for the most serious of the crimes charged. When the maximum sentence expires, "involuntary civil commitment proceedings may be instituted in the manner provided in Title 53, chapter 21." 46-14-301(4), MCA. If the court rules that the person does not pose a substantial risk of harm or pose a safety risk, the person may be released on appropriate conditions. A person who is committed to the DPHHS under 46-14-301, MCA, must have their status reviewed by a professional person once a year. 46-14-301(5), MCA. The potential discharge or release may also be done on motion of the director of the DPHHS.

**Guilty But Mentally Ill (GBMI):** When a defendant who alleges that they suffer from a mental disease or disorder is later convicted at trial, they may argue at sentencing that when they committed their crimes they were "unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law." 46-14-311, MCA.

If a defendant alleging GBMI is successful, "the sentencing court shall consider any relevant evidence presented at the trial and may also consider the results of the presentence investigation (PSI)." 46-14-311(1), MCA. At this point the sentencing judge may order a "presentence investigation and a report on the investigation." 46-14-311(2), MCA. The PSI ordered in these circumstances must:

[I]nclude a mental evaluation by a person appointed by the director of the department of public health and human services or the director's designee. The evaluation must include an opinion as to whether the defendant suffered from a mental disease or disorder or developmental disability with the effect as described in subsection (1). If the opinion concludes that the defendant did suffer from a mental disease or disorder or developmental disability with the effect as described in subsection (1), the evaluation must also include a recommendation as to the care, custody, and treatment needs of the defendant. 46-14-311(2), MCA.

Thus, if the sentencing judge finds the defendant was "unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law," then any mandatory minimums no longer apply. More importantly,

> [t]he court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate correctional facility, mental health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202, for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). 46-14-312(2), MCA

Finally, if the sentencing judge finds the defendant did not suffer from a mental disease or defect, the defendant is sentenced under the typical process found in Title 46, chapter 18. 46-14-312(1), MCA.

## Civil Commitment Process

Involuntary commitment proceedings are filed by a prosecutor with a district court when a person is alleged to be suffering from a mental disorder unable to meet their basic needs and poses an imminent threat to the person's self or others. 53-21-126, MCA. Section 53-21-126(1), MCA provides:

> **Trial or hearing on petition**. (1) The respondent must be present unless the respondent's presence has been waived as provided in 53-21-119(2), and the respondent must be represented by counsel at all stages of the trial. The trial must be limited to the determination of whether or not the respondent is suffering from a mental disorder and requires commitment. At the trial, the court shall consider all the facts relevant to the issues of whether the respondent is suffering from a mental disorder. If the court determines that the respondent is suffering from a mental disorder, the court shall then determine whether the respondent requires commitment. In determining whether the respondent requires commitment and the appropriate disposition under 53-21-127, *the court shall consider the following:*
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> *(a) whether 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;*
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> *(b) whether the respondent has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others;*
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> *(c) whether, 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; and*

*(d) whether the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, 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.* (Emphasis added).

An involuntary commitment is a civil (not criminal) proceeding. The person may not be held in a jail or correctional facility and they must be detained in the least restrictive environment. 53-21-120, MCA. Only adults may be involuntarily committed to the Montana State Hospital. 53-21-506, MCA. However, a parent or guardian may consent to voluntary treatment of minors by a medical doctor, mental health facility, or mental health professional. 53-21-112, MCA.

**Protective Custody:** A peace officer may take a person into custody when the person:

> [A]ppears to have a mental disorder and to present an imminent danger of death or bodily harm to the person or to others or who appears to have a mental disorder and to be substantially unable to provide for the person's own basic needs of food, clothing, shelter, health, or safety into custody only for sufficient time to contact a professional person for emergency evaluation. 53-21-129(1), MCA.

If possible, under the circumstances, the professional person should be called before taking the person into custody. A "professional person" is defined in 53-21-102(16), MCA and includes a medical doctor, advanced practice registered nurse or physician assistant with a specialty in psychiatric nursing, a psychologist, or other person certified by the department. If the professional person agrees, the person may be detained and treated until the next business day. The professional person completes an initial mental health evaluation. On the next business day, the professional may release the person or file a report with the county attorney indicating the need for treatment. If the county attorney agrees with the professional person and determines probable cause to exist, the county attorney files a petition with the district court and the person may be in an appropriate mental health facility including the Montana State Hospital. 53-21-129(2) through (4), MCA.

**Petition for Commitment:** The requirement of the petition for commitment are provided in 53-21-121, MCA:

> **53-21-121. Petition for commitment — contents of — notice of**. (1) The county attorney, upon the written request of any person having direct knowledge of the facts, may file a petition with the court alleging that there is a person within the county who is suffering from a mental disorder and who requires commitment pursuant to this chapter.
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> *(2) The petition must contain:*

*(a) the name and address of the person requesting the petition and the person's interest in the case;*

*(b) the name of the respondent and, if known, the address, age, sex, marital status, and occupation of the respondent;*

*(c) the purported facts supporting the allegation of mental disorder, including a report by a mental health professional if any, a statement of the disposition sought pursuant to 53-21-127, and the need for commitment;*

*(d) the name and address of every person known or believed to be legally responsible for the care, support, and maintenance of the respondent for whom evaluation is sought;*

*(e) the name and address of the respondent's next of kin to the extent known to the county attorney and the person requesting the petition;*

*(f) the name and address of any person whom the county attorney believes might be willing and able to be appointed as friend of respondent;*

*(g) the name, address, and telephone number of the attorney, if any, who has most recently represented the respondent for whom evaluation is sought; if there is no attorney, there must be a statement as to whether to the best knowledge of the person requesting the petition the respondent for whom evaluation is sought is indigent and unable to afford the services of an attorney;*

*(h) a statement of the rights of the respondent, which must be in conspicuous print and identified by a suitable heading; and*

*(i) the name and address of the mental health facility to which it is proposed that the respondent may be committed, if known.* (Emphasis added).

(3) Notice of the petition must be hand-delivered to the respondent and to the respondent's counsel on or before the initial appearance of the respondent before the judge or justice of the peace. The respondent's counsel shall meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings. Notice of the petition and the order setting the date and time of the hearing and the names of the respondent's counsel, professional person, and friend of respondent must be hand-delivered, mailed, or sent by a facsimile transmission to the person or persons legally responsible for care, support, and maintenance of the respondent, the next of kin identified in the petition, any other person identified by the county attorney as a possible friend of respondent other than the one named as the friend of respondent, the director of the department or the director's designee, and the mental health facility to which the respondent may be committed, if known. The notice may provide, other than as to the respondent and the respondent's counsel, that no further notice will be given unless written request is filed with the clerk of court.

Once the petition is filed and the court issues an order finding probable cause 53-21-122(2)(a), MCA, the person named in the petition (respondent) makes an initial appearance.

**Initial appearance:** The initial appearance is generally held by audio-visual conference. Typically, the judge will assign a public defender and, if available, a “friend of the respondent” (friend). The friend “may be the next of kin, the person's conservator or legal guardian, if any, a

representative of a charitable or religious organization, or any other person appointed by the court." 53-21-122, MCA. During the initial appearance the respondent may stipulate to the commitment or advise that they are contesting the petition and request a hearing. The hearing must be set within 5 days unless the respondent requests additional time. 53-21-122(2)(a), MCA. It is important to note that "if the [respondent] is not capable of making an intentional and knowing decision. . ." the respondent's right, such as the right to counsel and the right to a hearing on the petition "may be waived by the person's counsel and friend of respondent. . . acting together if a record is made of the reasons for the waiver". 53-21-119, MCA. Thus, the respondent's attorney and the friend of the respondent jointly are permitted to waive the respondent's right to a hearing and have the respondent sent to the Montana State Hospital provided such a decision is in the respondent's best interest and, a detailed record is made.

**Respondent's Rights:** The respondent must be advised of their constitutional rights when they are involuntarily detained. 53-21-114, MCA. If they pursue a hearing on their commitment, they are entitled to:

(1) notice of any hearing,
(2) be physically present,
(3) offer evidence and present witnesses (generally through counsel),
(4) receive a copy of the witness list and the addresses of the witnesses who will testify in support of the hearing,
(5) cross-examine witnesses,
(6) remain silent,
(7) view and have copies of all petitions concerning them,
(8) be examined by the professional person of their choosing so long as such a person is willing and reasonably available,
(9) be dressed in their own clothes, to refuse any but lifesaving medications up to 24 hours before the hearing,
(10) voluntarily take necessary medications before the hearing. *See Generally,* Title 53, chapter 21, part 1, MCA.

**Second Mental Health Evaluation:** Following the initial hearing, assuming the respondent did not waive the hearing, the respondent is evaluated for a second time by the professional person. The results of the second evaluation determine if commitment proceedings continue. Section 53-21-123(3), MCA. provides:

> (3) The following action must be taken based on the professional person's findings:
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> (a) If the professional person recommends dismissal, the professional person shall additionally notify counsel and the respondent must be released and the petition dismissed. However, the county attorney may, upon good cause shown, request the court to order an additional, but no more than one, examination by a different professional person for a period of no more than 4 hours.
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> (b) If the professional person recommends diversion from involuntary commitment to short-term inpatient treatment or an option for living in a category D assisted living facility, the court shall suspend the commitment hearing unless

the county attorney or the respondent's attorney objects within 24 hours of receiving notice of the professional person's recommendation.

(c) If the court finds that commitment proceedings should continue, the hearing must be held as scheduled.

Assuming the professional person still believes the person should be involuntarily committed, the petition proceeds to a hearing.

**Contested Hearing:** The hearing must be scheduled within five days of the initial appearance. The five-day period includes weekends and holidays. 53-21-122(2), MCA. The respondent must be present at the hearing unless they waive their presence and the respondent must have counsel. 53-21-126(1), MCA. The respondent may also stipulate to the commitment. If the hearing goes forward, witness testimony regarding whether the respondent has a mental disorder requiring commitment is presented. Potential witnesses include family members, law enforcement, the professional person, or another mental health provider.

The court must consider the following in the determination:

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

(c) whether, 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; and

(d) whether the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, 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. 53-21-126(1)(a) through (d), MCA.

There are three standards of proof used for different kinds of evidence in an involuntary commitment hearing.

(1) Proof beyond a reasonable doubt is required for all physical facts or evidence;
(2) All other evidence must be proven by clear and convincing evidence except;
(3) Whether the respondent suffers from a mental disorder must be proven to a reasonable degree of medical certainty. 53-21-126(2), MCA.

In addition, whether the respondent presents an imminent threat of self-inflicted injury or injury to others must be proven by "by overt acts or omissions, sufficiently recent in time as to be material and relevant as to the respondent's present condition". 53-21-126(2), MCA.

**Disposition:** Following the hearing the court may decide that the respondent is not suffering from a mental disorder requiring commitment. In this case, the respondent is released from custody. Otherwise, the court may issue:

(1) An order suspending commitment proceedings and determining the respondent suffers from a mental disorder, but it is appropriate to send them to a short-term (14 days or less) inpatient treatment program.
(2) An order for community commitment and determining that the respondent suffers from a mental disorder that does not require treatment at the Montana state hospital but can be treated in an appropriate facility in their community. A community commitment may last up to 3 months.
(3) An order for commitment and determining that the respondent is suffering from a mental disorder that requires commitment to the Montana state hospital for up to 3 months. 53-21-127, MCA.

**Involuntary Medication:** Section 53-21-127(6) covering posttrial disposition, MCA states:

> (6) The court *may authorize the chief medical officer of a facility or a physician designated by the court to administer appropriate medication involuntarily if the court finds that involuntary medication is necessary to protect the respondent or the public or to facilitate effective treatment*. Medication may not be involuntarily administered to a patient unless the chief medical officer of the facility or a physician designated by the court approves it prior to the beginning of the involuntary administration and unless, if possible, a medication review committee reviews it prior to the beginning of the involuntary administration or, if prior review is not possible, within 5 working days after the beginning of the involuntary administration. The medication review committee must include at least one person who is not an employee of the facility or program. The patient and the patient's attorney or advocate, if the patient has one, must receive adequate written notice of the date, time, and place of the review and must be allowed to appear and give testimony and evidence. The involuntary administration of medication must be again reviewed by the committee 14 days and 90 days after the beginning of the involuntary administration if medication is still being involuntarily administered. *The mental disabilities board of visitors and the director of the department of public health and human services must be fully informed of the matter within 5 working days after the beginning of the involuntary administration. The director shall report to the governor on an annual basis.*
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> The ability to involuntarily medicate a respondent is tempered by the right to be free from unnecessary and excessive medication covered in 53-21-145, MCA.

**Conclusion:** This explanation of the involuntary commitment process provides a basic understanding of the process. The statutes in Title 53, chapter 21, part 1, MCA, provide additional detail if needed.