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MONTANA'S MENTAL HEALTH COMMITMENT CODE: A DECADE OLD

P. Marcos Sokkappa*

I. INTRODUCTION

Montana's mental health commitment code [hereinafter commitment code] is a decade old.¹ Its language provides numerous procedural safeguards to protect persons who are alleged to be mentally ill.² Both the language and form of these protections, however, have confused lawyers and judges, resulting in such ambiguities as: when may a professional person examine a respondent, when does an emergency detention end and a pretrial detention begin, and when must a respondent be notified of his rights?

In 1984, for the first time since these statutes were enacted, the Montana Supreme Court in *In re Shennum* has recognized the need to clarify them and has demanded adherence to their procedural safeguards. The *Shennum* case involved the involuntary commitment of Alan Rae Shennum to the Montana State Hospital in Warm Springs, Montana. In committing Mr. Shennum, the district court failed to notify him of his legal and constitutional rights before psychiatric examination.³ The court also made no finding of probable cause for the petition at the initial appearance, nor did the court inform Mr. Shennum of his right to a detention hearing.⁴

In attempting to construe the statutes, the Montana Supreme Court acknowledged that "[t]he statutes for the commitment of a seriously mentally ill person do not present a model of intelligibility or clarity."⁵ Stating that "the importance of procedural steps in a commitment case cannot be exaggerated,"⁶ the Montana Supreme Court held that such defects are fatal to the commitment, and ordered Shennum released.⁷

Shennum is the first case decided under the present commitment code in which a district court's commitment decision was re-

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1. 1975 Mont. Laws, ch. 466, § 5.
2. *In re Shennum*, ___ Mont. ___, 684 P.2d 1073 (1984).
3. *Id.* at ___, 684 P.2d at 1079.
4. *Id.* at ___, 684 P.2d at 1077.
5. *Id.* at ___, 684 P.2d at 1076.
6. *Id.* at ___, 684 P.2d at 1078.
7. *Id.* at ___, 684 P.2d at 1080.

versed by the Montana Supreme Court for procedural defects. Ever since the present commitment code took effect a decade ago, however, district courts have been negligent in following the code's procedural safeguards. This negligence has marked nearly every stage of the proceedings, from failing to hold hearings and appoint an attorney in one case,⁸ to not making adequate findings of fact in other cases.⁹

Even if the commitment procedures in Montana are not a model of intelligibility and clarity, judges and lawyers must follow them as closely as possible. This article summarizes the procedures for commitment and reviews proposed changes in the law. It also analyzes the remedies available to a person who has been committed in violation of these procedures. Finally, it surveys some proposed changes to the commitment code.

II. INVOLUNTARY COMMITMENT PROCEDURES

The commitment procedures contained in Title 53, chapter 21 of the Montana Code Annotated can be considered in four parts: pretrial procedures, the commitment hearing, disposition procedures, and procedures for extending commitment. In each of these parts there are specific steps that must be followed by the parties involved in the commitment proceeding.

A. Pretrial

(1) In an emergency,¹⁰ a peace officer may take a person who appears dangerous and seriously mentally ill¹¹ into custody if the

8. *In re Simons*, ___ Mont. ___, 698 P.2d 850 (1985).

9. MONT. R. CIV. P. 52(a) requires findings of fact to be incorporated in a court order when there is no jury trial. See *Stone*, No. 84-71 (Mont. March 2, 1984); *In re Brisbo*, No. 84-183 (Mont. May 22, 1984).

10. Neither the statutes nor any case law has specifically defined an emergency. However, the *Shennum* decision held that because an emergency apparently did not exist when the police let Shennum go the very night he had walked into the Missoula City Hall with a loaded gun, one could not have existed the next day when he came to the police station to claim the gun and was detained. *Shennum*, ___ Mont. at ___, 684 P.2d at 1076.

11. "Seriously mentally ill" is defined as:

suffering from a mental disorder which has resulted in self-inflicted injury or injury to others or the imminent threat thereof or which has deprived the person afflicted of the ability to protect his life or health. For this purpose, injury means physical injury. No person may be involuntarily committed to a mental health facility or detained for evaluation and treatment because he is an epileptic, mentally deficient, mentally retarded, senile, or suffering from a mental disorder unless the condition causes him to be seriously mentally ill within the meaning of this part.

MONT. CODE ANN. § 53-21-102(14) (1983).

officer contacts a professional person¹² before or immediately after detaining the person who appears dangerous and seriously mentally ill.¹³

(2) If the professional person finds that an emergency exists and the person must be detained, the person may be detained until the next business day.¹⁴

(3) On the next business day, the professional person must release the detained person or file his findings of an emergency¹⁵ with the county attorney. The county attorney must then immediately file a petition for commitment¹⁶ in the district court.¹⁷

(4) The same day the petition is filed, the district court judge must find probable cause for the petition.¹⁸

(5) When a district court judge is available on the day the petition is filed, and finds probable cause, the respondent¹⁹ must immediately be brought before the court with counsel.²⁰ (If the judge is not available, skip to number 8, below.)

(6) The judge must advise the respondent of his constitutional rights and his rights under the commitment code at this initial appearance,²¹ and must also advise the respondent of his right to a detention hearing if the county attorney is seeking detention pending trial.²²

(7) The respondent must then either agree or object to probable cause for filing the petition. If he agrees, he will be committed as asked for in the petition. If he objects, the court must schedule

12. "Professional person" is defined as a medical doctor or a person who has been certified as a professional person under MONT. CODE ANN. § 53-21-106. MONT. CODE ANN. § 53-21-102(10) (1983).

13. MONT. CODE ANN. § 53-21-129 (1983).

14. MONT. CODE ANN. § 53-21-129(2) (1983).

15. *Id.* If the professional person does not specifically make a written finding that an emergency exists, the future commitment proceeding may fail. In *Shennum*, the professional person, Dr. Lear, did not make a finding that an emergency existed. The court held that this was a requisite for further detention.

16. The "petition for commitment" is defined in MONT. CODE ANN. § 53-21-121 (1983) and the contents of such a petition are specified therein.

17. MONT. CODE ANN. § 53-21-129(2) (1983).

18. Although the language of the controlling statute uses the word "immediately," its implication is that the judge must find probable cause the same day the petition is filed, as there is no provision for detention otherwise. MONT. CODE ANN. § 53-21-122 (1983).

19. "'Respondent' means a person alleged in a petition filed pursuant to this part to be seriously mentally ill." MONT. CODE ANN. § 53-21-102(12) (1983).

20. MONT. CODE ANN. § 53-21-122(1), (2) (1983).

21. MONT. CODE ANN. § 53-21-122(2); *Shennum*, ___ Mont. at ___, 684 P.2d at 1078.

22. Although the statutes are not clear about when a person must be informed of his right to a detention hearing or when one must be held, the *Shennum* decision provided: "Here Shennum's counsel did not request a detention hearing, but that should be one of the rights which the respondent should be informed of at the time of his first appearance before the court." *Shennum*, ___ Mont. at ___, 684 P.2d at 1078.

a hearing to be held within five days and appoint a professional person to examine the respondent.²³ (Skip to number 12, below.)

(8) If a district court judge is not available on the day the petition is filed, the clerk of court must call a resident judge by phone and read the petition to that judge.²⁴

(9) If the resident judge finds probable cause for the petition, the clerk of court must issue an order appointing counsel for the respondent, appointing a professional person to examine the respondent, and setting a date for hearing to be held within five days.²⁵

(10) On the same day, the respondent must be brought before a justice of the peace, with his counsel, and be notified by the justice of the peace of his constitutional rights, his rights under the commitment code,²⁶ and his right to a detention hearing.²⁷ The justice of the peace must also give the respondent a copy of the clerk's order.²⁸

(11) If other counsel is desired, the judge may then appoint other counsel and a friend of respondent for the hearing on the merits.²⁹

(12) After either step 7 or step 11 is completed, if the respondent is to be detained pending trial the following criteria must be met:³⁰

(a) the county attorney must request detention;³¹

(b) there must be probable cause for detention;³²

(c) counsel for respondent must immediately be notified orally of the detention;³³

(d) counsel can request a detention hearing and have a professional person of respondent's choice examine the respondent;³⁴ and

(e) if the court orders detention, it must be in the least restrictive setting.³⁵

(13) Whether or not the respondent is detained after the initial appearance, the professional person appointed by the court at

23. MONT. CODE ANN. § 53-21-122(2) (1983).

24. MONT. CODE ANN. § 53-21-122(3) (1983).

25. *Id.*

26. *Id.*

27. *Shennum*, ___ Mont. at ___, 684 P.2d at 1078.

28. MONT. CODE ANN. § 53-21-122(3) (1983).

29. *Id.*

30. MONT. CODE ANN. § 53-21-124 (1983).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

the initial appearance must examine the respondent.³⁶

(14) After the examination, the professional person must determine whether the respondent should be released or committed.³⁷

(15) If the professional person recommends release, the respondent must be released and the case dismissed, or the court can order another examination upon the county attorney showing good cause.³⁸ If the professional person recommends commitment, then the matter proceeds to hearing.³⁹

(16) If the respondent desires, he may have an additional professional person of his own choice examine him before the hearing.⁴⁰ If he cannot afford to pay for the evaluation, the county of residence must pay.⁴¹

(17) The respondent can request a jury trial at any time prior to the date set for hearing.⁴² The time limit in which a jury trial must be held is questionable: one statutory section states it must be held in seven days,⁴³ but another section states that it may be held in thirty days if the respondent can be placed in Montana State Hospital pending trial.⁴⁴

B. *The Commitment Hearing*

After these procedures are followed, the matter may be tried on the date set. The commitment hearing is governed by the Montana Rules of Civil Procedure.⁴⁵ There are, however, additional rules of procedure for commitment proceedings, specified in the commitment code. Procedures that must be followed and matters that must be proved at a commitment hearing are:

(1) The respondent cannot waive the right to counsel.⁴⁶ Other than this right, the respondent has a number of procedural rights

36. MONT. CODE ANN. § 53-21-123 (1983). More than one professional person may be appointed. One may examine the respondent and the other one may testify. *In re G.S.*, ___ Mont. ___, 698 P.2d 406 (1985).

37. MONT. CODE ANN. § 53-21-123 (1983).

38. MONT. CODE ANN. § 53-21-123(2)(a) (1983).

39. MONT. CODE ANN. § 53-21-123(2)(b) (1983).

40. MONT. CODE ANN. § 53-21-118(1) (1983). *See also* MONT. CODE ANN. § 53-21-124 (1983).

41. MONT. CODE ANN. § 53-21-118(2) (1983).

42. MONT. CODE ANN. § 53-21-125 (1983).

43. *Id.*

44. MONT. CODE ANN. § 53-21-120(2) (1983).

45. MONT. CODE ANN. § 53-21-126(3) (1983).

46. MONT. CODE ANN. § 53-21-119(1) (1983). This statute reversed prior Montana case law which had held that the respondent was not absolutely entitled to counsel. *See In re Kolocotronis*, 145 Mont. 564, 462 P.2d 977 (1965).

which may be waived,⁴⁷ such as wearing his own clothes to trial and being present at trial.

(2) The trial is limited to the determination of serious mental illness.⁴⁸

(3) The standard of proof in a commitment case is trifurcated:⁴⁹

(a) physical facts must be proved beyond a reasonable doubt;⁵⁰

(b) mental disorders must be proved to a reasonable medical certainty;⁵¹ and

(c) all other matters must be proved by clear and convincing evidence.⁵²

(4) A professional person who was appointed by the court must be present at trial, but the professional person who testifies does not have to be the same one who examined the respondent.⁵³

(5) The written report of this professional person may be attached to the petition, but it may not be used as substantive proof unless admitted into evidence. Nothing that is inadmissible, such

47. The procedural rights are enumerated in the commitment code and are in addition to any constitutional rights. See MONT. CODE ANN. § 53-21-115 (1983).

48. MONT. CODE ANN. § 53-21-126(1) (1983). See *supra* note 11, for the definition of serious mental illness.

49. MONT. CODE ANN. § 53-21-126(2) (1983). The Montana Supreme Court does not agree that the standard of proof is trifurcated. The court has said that it is only bifurcated, requiring part proof beyond a reasonable doubt and part clear and convincing evidence. See *Shennum*, ___ Mont. at ___, 684 P.2d at 1079; *In re N.B.*, ___ Mont. ___, 620 P.2d 1228, 1231 (1980).

50. MONT. CODE ANN. § 53-21-126(2) (1983). In *Shennum* counsel for Shennum had argued that proof beyond a reasonable doubt should be the one and only standard in a commitment case, because commitment involves a deprivation of liberty similar to a criminal proceeding. With two justices dissenting, the Montana Supreme Court rejected this argument. *Shennum*, ___ Mont. at ___, 684 P.2d at 1078-79.

51. MONT. CODE ANN. § 53-21-126(2) (1983). The Montana Supreme Court has said: We interpret the statute's use of "reasonable medical certainty" only as a standard for the medical witness testifying in commitment proceedings. A better statement is that proof of mental disorders to a reasonable medical certainty is sufficient if, considered with all the other evidence in the case, the trier of fact is led to the conclusion that the mental disorder exists by clear and convincing proof. *N.B.*, ___ Mont. at ___, 620 P.2d at 1231, *upheld in Shennum*, ___ Mont. at ___, 684 P.2d at 1079.

52. MONT. CODE ANN. § 53-21-126(2) (1983). The constitutional standard of proof for commitment cases, as provided by the United States Supreme Court, is "clear and convincing" proof. *Addington v. Texas*, 441 U.S. 418 (1979). Thus, the Montana statute, MONT. CODE ANN. § 53-21-126(2) (1983), has been held constitutional by the Montana Supreme Court. See *generally Shennum*, ___ Mont. at ___, 684 P.2d at 1079; *N.B.*, ___ Mont. at ___, 620 P.2d at 1231.

53. MONT. CODE ANN. § 53-21-126(3) (1983). The professional person who conducts the examination does not have to be the same one who testifies. *G.S.*, ___ Mont. ___, 698 P.2d 406. The professional person who appears, however, can testify about anything the client said to him. This is an exception to the physician-patient privileged communications rule. *In re Sonsteng*, 175 Mont. 307, 311-13, 573 P.2d 1149, 1152-53 (1977).

as hearsay, may be entered into evidence simply because it is in the report.⁵⁴

(6) The professional person may testify to the ultimate fact of whether the respondent is seriously mentally ill, but this testimony must be accompanied by other evidence that (a) the respondent suffers from a mental disorder; and (b) the mental disorder has resulted in self-inflicted injury or injury to others or the imminent threat thereof, or it has deprived the person afflicted of the ability to protect his life and health.⁵⁵

(a) "Imminent threat" of injury to self or others must be evidenced by recent and relevant "overt acts."⁵⁶ The "overt act" must be proved beyond a reasonable doubt.⁵⁷

(b) Having "deprived the person afflicted of the ability to protect his life or health" is defined as being unable to care for basic needs such as food, clothing, and shelter.⁵⁸

C. Disposition

After conclusion of the trial to determine serious mental illness, the court must discharge the respondent if no serious mental illness is found.⁵⁹ If serious mental illness is found, the court must hold a dispositional hearing within five days.⁶⁰ In actual practice, however, unless the trial is before a jury, district courts rarely sep-

54. MONT. CODE ANN. § 53-21-126(3) (1983). These reports are similar to a leave to file information in a criminal case. They are not "substantive proof." Therefore, hearsay and other objections to admissibility are not pertinent. However, if they are to be entered into evidence, the inadmissible portions should be deleted. *Sonsteng*, 175 Mont. at 313, 573 P.2d at 1153.

55. MONT. CODE ANN. § 53-21-126(4)(a), (b) (1983).

56. MONT. CODE ANN. § 53-21-126(2) (1983). A number of cases have sought to define "overt act" and "imminent threat." An "imminent threat" is "impending, likely to occur at any moment." *In re F.B.*, ___ Mont. ___, 615 P.2d 867, 869 (1980). An "overt act" is conduct that manifests "a present indication of probable physical injury likely to occur at any moment in the immediate future." *Id.* at ___, 615 P.2d at 869-70. Verbal threats of bodily harm to another are also overt acts. *In re Goedert*, 180 Mont. 484, 487, 591 P.2d 222, 224 (1979). See also *In re C.M.*, 195 Mont. 171, 173-74, 635 P.2d 273, 274 (1981) (mother's threat of bodily harm to son).

57. The likelihood that injury will occur does not have to be proved beyond a reasonable doubt when a threat is made. Only that the threat was made must be proved beyond a reasonable doubt. *F.B.*, ___ Mont. at ___, 615 P.2d at 869. An attempted suicide is also an overt act. *In re A.G.*, ___ Mont. ___, 677 P.2d 592 (1984).

58. See generally *In re R.T.*, ___ Mont. ___, 665 P.2d 789 (1983). The Montana Supreme Court has concurred with the holdings of other state courts that inability to protect life and health means "a condition in which a person is unable to provide for his basic personal needs for food, clothing and shelter as a result of a mental disorder." *R.T.*, ___ Mont. at ___, 665 P.2d at 791.

59. MONT. CODE ANN. § 53-21-127(1) (1983).

60. MONT. CODE ANN. § 53-21-127(2)(a) (1983).

arate the dispositional hearing from the trial.

The types of dispositions the court may order are enumerated in section 53-21-127(2)(a) of the Montana Code Annotated. In its order, the court must comply with the following restrictions: (1) the court must choose the least restrictive alternative;⁶¹ (2) an order of treatment may not be for longer than three months;⁶² and (3) the court must describe what alternatives for placement are available, which ones were investigated, and why the investigated ones were rejected.⁶³ Further, the court record must contain a "detailed statement" of the facts upon which the court found the respondent seriously mentally ill.⁶⁴

The court has the following four options for disposition of the respondent: (1) commit the respondent to a facility⁶⁵ for not more than three months, (2) place the respondent in the care of someone other than an institution, (3) order out-patient therapy, or (4) make any other appropriate order for treatment.⁶⁶ Consistently finding that the disposition is correct if recommended by a professional person, the Montana Supreme Court has never reversed the disposition ordered by a trial judge or found another alternative to be more suitable.⁶⁷

D. Extending Commitment

Because the initial commitment is only for three months,⁶⁸ the commitment code provides for extensions of commitment for persons who remain seriously mentally ill after three months. The procedures for extending a commitment past three months are

61. MONT. CODE ANN. § 53-21-127(2)(c) (1983). Generally, it is proper for the court to follow the professional person's recommendation in determining the least restrictive alternative. See *C.M.*, 195 Mont. at 174-75, 635 P.2d at 275; *Goedert*, 180 Mont. at 488, 591 P.2d at 225.

62. MONT. CODE ANN. § 53-21-127(2)(b) (1983).

63. MONT. CODE ANN. § 53-21-127(2)(c) (1983). See also *In re Brisbo*, No. 84-183 (Mont. May 22, 1984).

64. MONT. CODE ANN. § 53-21-127(2)(c) (1983).

65. MONT. CODE ANN. § 53-21-102(6) (1983):

"[F]acility" means a public hospital or licensed private hospital which is equipped and staffed to provide treatment for persons with mental disorders or a community mental health center or any mental health clinic or treatment center approved by the department. No correctional institution or facility or jail is a mental health facility within the meaning of this part.

66. MONT. CODE ANN. § 53-21-127(2)(a)(i)-(iv) (1983). These four alternatives have also been recognized as the only options open to the court after a determination of serious mental illness. *C.M.*, 195 Mont. at 174-75, 635 P.2d at 275.

67. See *C.M.*, 195 Mont. at 174-75, 635 P.2d at 275; *Goedert*, 180 Mont. at 488, 591 P.2d at 225.

68. MONT. CODE ANN. § 53-21-127(2)(b) (1983).

provided in section 53-21-128 of the Montana Code Annotated. The following outline describes the procedures provided in that section.

(1) Not less than two weeks before the original three-month commitment expires, the professional person in charge of a patient may file a petition for extension of commitment.⁶⁹ The professional person must attach a report to the petition, describing the tests used to evaluate the patient and the course of treatment.⁷⁰

(2) The district court having jurisdiction over the facility in which the respondent is detained must hear the case, unless it orders the venue changed.⁷¹

(3) After the petition is filed, the court must give notice of the filing to the respondent, the respondent's next of kin, the friend of respondent, and the respondent's counsel.⁷²

(4) The judge must order the commitment extended for six months if a hearing is not requested.⁷³ If a hearing is requested by any persons receiving notice, the court must schedule a hearing on a date not more than ten days from receipt of the request.⁷⁴

(5) After a request for hearing is made and a date set, the procedure is the same as an initial three-month commitment action,

69. MONT. CODE ANN. § 53-21-128(1)(a) (1983). The Third Judicial District Court has held that this time limit is technical and has refused to dismiss an action because the time limit was not met. *In re Courser*, DI-83-118 (3d D. for Deer Lodge County, Dec. 3, 1983). In actuality, even if the deadline is not met, the professional person will direct the county attorney in the county in which the facility is located to file another three-month initial commitment. Therefore, this statutory deadline is not effectively enforced.

70. MONT. CODE ANN. § 53-21-128(1)(a) (1983). These reports are similar to a leave to file information in a criminal case. They are not substantive proof; therefore, they can contain hearsay or any otherwise inadmissible statements. *Sonsteng*, 175 Mont. at 311-13, 573 P.2d at 1152.

71. MONT. CODE ANN. § 53-21-128(1)(c) (1983). The Third Judicial District hears most of the cases for extension of commitment, because Montana State Hospital's Warm Springs campus lies in Deer Lodge County, under the Third Judicial District's jurisdiction. This results in the court hearing between 10 and 30 extension of commitment hearings a month. The court normally schedules one day a month to hear these cases, and usually hears them in less than two hours.

72. MONT. CODE ANN. § 53-21-128(1)(b) (1983). There is no time limit specified for the court to give notice of the filing. This presents problems for justifying detention of the respondent pending the trial. In the Third Judicial District, when the petition is filed, the court orders detention until the monthly hearing date. This usually results in detention of the respondent past the expiration of the initial three-month commitment, while he waits for a hearing. The respondent is granted no initial appearance or right to a detention hearing, as he has in the initial commitment.

73. MONT. CODE ANN. § 53-21-128(1)(b) (1983). In the Third Judicial District, the hearings are not requested until four days before the hearing date. This practice has not been challenged.

74. MONT. CODE ANN. § 53-21-128(1)(b) (1983).

except that there is no right to a jury trial.⁷⁵

If a person remains seriously mentally ill after the six-month extension expires, the professional person in charge of the patient may petition for another extension by following these same procedures.⁷⁶ However, the second extension and all subsequent extensions may last for one year.⁷⁷ Thus, there is permanent hospitalization for those who need it, but the hospital, legal counsel, and the district court are forced to review each patient's mental state at least once a year.⁷⁸ In these extension hearings, the court costs and witness fees must be paid by the county that originally committed the person.⁷⁹

IV. VOLUNTARY ADMISSION

The mental health commitment code includes provisions for voluntary admission to mental health facilities.⁸⁰ Stressful situations at home often can be alleviated by voluntarily admitting oneself to a mental health facility. This allows the person to enter a facility for a few days to rest, then request release and return home when ready. Voluntary admission can also be advantageous to one who is in danger of involuntary commitment. If voluntarily admitted, a patient may request release at any time, whereas an involuntary commitment is usually ninety days long.⁸¹

The Montana Supreme Court has yet to determine whether a person may voluntarily admit himself solely to avoid involuntary commitment. Although the commitment code provides that "[n]othing in this part may be construed in any way as limiting the right of any person to make voluntary application for admission at

75. MONT. CODE ANN. § 53-21-128(1)(c) (1983). This is a confusing section because it does not specify which procedures are to be conducted in the same manner as the initial commitment. Clearly, the matter is initiated in a different manner than an original commitment. An original commitment is initiated by a county attorney; an extension is initiated by a professional person. Rather than an initial appearance, there is a request for hearing in an extension proceeding. The Third Judicial District has generally upheld the procedural guarantees to an independent evaluation and those granted in MONT. CODE ANN. § 53-21-115 (1983).

76. MONT. CODE ANN. § 53-21-128(2) (1983).

77. *Id.* There are persons who have remained in Montana State Hospital for long periods. What the statute forces the hospital to do, though, is to review the patient's case every year. This prevents the "backward warehousing" of the patient and forces the hospital to recognize any changes. It also provides the patient with the opportunity to have legal counsel review the case once a year.

78. *Id.*

79. MONT. CODE ANN. § 53-21-128(1)(c) (1983).

80. MONT. CODE ANN. § 53-21-111 (1983).

81. MONT. CODE ANN. § 53-21-127(2)(a)(i) (1983).

any time to any mental health facility or professional person,"⁸² the Attorney General of Montana has issued an opinion to the contrary.⁸³ The opinion mentions that prior to 1977, under the old commitment code, a person could avoid involuntary commitment by voluntary admission.⁸⁴ The attorney general stated that the legislature intended to repeal this provision in 1977 to prevent people from voluntarily admitting themselves to avoid involuntary commitment.⁸⁵

In any event, if a person chooses to admit himself, the following procedures must be followed.

(1) The application for admission must be in writing on a form prescribed by the facility.⁸⁶

(2) The application must be approved by a professional person.⁸⁷

(3) The patient must receive a copy of the application, and a notice of rights within twelve hours of signing the application.⁸⁸

(4) If the person is seeking admission to Montana State Hospital, the applicant must have certification from the professional person or the mental health center regional director that the region cannot provide adequate services, or that the applicant is not able to afford such services.⁸⁹

Although a voluntarily admitted person may request release at any time, the facility has authority to hold that person involuntarily for five days after release is requested in writing.⁹⁰ If the facility decides within five days that it wants to hold the person longer, it must then initiate an involuntary commitment through the county attorney for the county in which it is located,⁹¹ and a voluntary admission may become involuntary in actual practice.

These provisions, however, do not apply to minors. Minors are not permitted to voluntarily commit themselves to the Youth

82. MONT. CODE ANN. § 53-21-111(1) (1983).

83. 37 Op. Att'y Gen. 457 (1978).

84. *Id.* at 499 (citing MONT. REV. CODE, 1947 § 38-1305 (Supp. 1975)) ("The petition shall be dismissed if the respondent accepts voluntary treatment or admission to a mental health facility approved by the professional person conducting the examination.").

85. 37 Op. Att'y Gen. at 459.

86. MONT. CODE ANN. § 53-21-111(1) (1983).

87. *Id.*

88. *Id.*

89. MONT. CODE ANN. § 53-21-111(2) (1983).

90. MONT. CODE ANN. § 53-21-111(3) (1983).

91. MONT. CODE ANN. § 53-21-121(1) (1983). The county of the patient's residence at the time of the voluntary admission must pay the costs of such an involuntary commitment. MONT. CODE ANN. § 53-21-113(1) (1983).

Treatment Center in Billings under the current statutes,⁹² nor may any minor be placed in Montana State Hospital for any reason.⁹³

V. OTHER TYPES OF ADMISSIONS

Voluntary admission and involuntary commitment are the most prevalent types of admissions to mental health facilities in Montana.⁹⁴ However, there are many other methods for admission or commitment to a mental health facility, including such procedures as criminal sentence to a mental health facility.⁹⁵

Another type of admission is through an interinstitutional transfer. One state facility may transfer a person from its facility to a mental health facility for ten days without any hearing.⁹⁶ After ten days, a hearing must be held.⁹⁷

There are also special types of admissions for minors. A minor may be sent to the Youth Treatment Center in Billings if he is found to be a "youth in need of supervision"⁹⁸ or a "delinquent youth"⁹⁹ and is seriously mentally ill.¹⁰⁰

Further, the guardianship statutes,¹⁰¹ the interstate compact on mental health,¹⁰² the alcoholic commitment code,¹⁰³ and the developmental disabilities commitment code¹⁰⁴ also provide procedures to enter a person into the mental health system in Montana. A discussion of these is beyond the scope of this article. However, it should be noted that these procedures provide wide latitude for a county attorney¹⁰⁵ to place a person in the mental health system without following Montana's mental health commitment code. For

92. MONT. CODE ANN. § 53-21-112 (1983).

93. MONT. CODE ANN. § 53-21-506 (1983).

94. In fiscal year 1984, there were 715 admissions to Montana State Hospital at Warm Springs. Three hundred eighty-seven admissions were voluntary; 131 were 90 day involuntary commitments. *Admission Report*, Montana State Hospital Medical Records Department (1984).

95. MONT. CODE ANN. § 46-14-312 (1983).

96. MONT. CODE ANN. § 53-21-130 (1983). The constitutionality of this statute has been unsuccessfully challenged. *M.C. v. Department of Institutions*, ___ Mont. ___, 683 P.2d 956 (1984).

97. MONT. CODE ANN. § 53-21-130 (1983).

98. MONT. CODE ANN. § 41-5-103(13) (1983).

99. MONT. CODE ANN. § 41-5-103(12) (1983).

100. MONT. CODE ANN. §§ 41-5-523(1), (6), 53-21-505, 53-21-507 (1983).

101. MONT. CODE ANN. § 72-5-322 (1983).

102. MONT. CODE ANN. tit. 53, ch. 22 (1983).

103. MONT. CODE ANN. tit. 53, ch. 24 (1983).

104. MONT. CODE ANN. tit. 53, ch. 20 (1983).

105. While social workers, family members, teachers, and psychologists are usually the persons initiating or requesting placement of a person in the mental health system, county attorneys are the first legal professionals to enter the process; they make the decision about how to put the person into the system.

example, the guardianship statute allows a three-day commitment without following the full mental health commitment code procedures.¹⁰⁶ Likewise, the interstate compact allows mental health facilities in Montana to admit people committed in other states, with no hearing in Montana.¹⁰⁷ Thus, if a county attorney really wants to place a person in the mental health system, there are many ways to do it without following the commitment code.

VI. EFFECTIVENESS OF THE COMMITMENT CODE

Does the *Shennum*¹⁰⁸ decision assure that commitment procedures will be followed? While the *Shennum* decision appears to do this, the actual effectiveness of that assurance may be irrelevant. A more relevant question is: will failure to follow the procedures prevent involuntary commitment? The answer is no. Although the *Shennum* decision requires courts to follow proper commitment procedures, it also allows the district court to retry the case if it dismisses the first commitment petition. At the conclusion of the *Shennum* decision, Justice Sheehy stated, "Nothing herein bars further proceedings properly followed in this matter."¹⁰⁹ Thus, if a proceeding is dismissed because statutory procedures were not followed, the county attorney merely needs to initiate a new proceeding.

This part of the *Shennum* decision is consistent with past case law. The first decision that allowed retrial of a commitment case was *Bushman v. District Court*.¹¹⁰ In that case, the Montana Supreme Court granted a writ of habeas corpus, based on procedural defects, to a person who was involuntarily committed, but said that another commitment proceeding could be filed, if desired.¹¹¹

Permitting a retrial of a commitment case, however, seems to create an anomaly. Because a hearing for involuntary commitment requires proof of physical facts, such as injury to another person, a person may be tried on these same facts in these retrials. For instance, a person of questionable mental illness who strikes someone may be retried more than once for that one act of striking out, regardless of whether the person is still aggressive. In any other

106. MONT. CODE ANN. § 72-5-322 (1983).

107. MONT. CODE ANN. § 53-22-101, art. III (1983). In 1983, the author observed that a minor was committed to a mental health facility in Louisiana and later was transferred to Montana State Hospital under the interstate compact. No hearing was provided by the Montana courts.

108. ___ Mont. ___, 684 P.2d 1073 (1984).

109. *Id.* at ___, 684 P.2d at 1080.

110. 153 Mont. 422, 458 P.2d 81 (1969).

111. *Id.*

type of proceeding, filing for retrial of the same case might be an abuse of process¹¹² and the lawyer could be guilty of contempt.¹¹³ Likewise, double jeopardy provisions of the United States¹¹⁴ and the Montana constitutions¹¹⁵ might prevent retrial if the respondent were a criminal, instead of a mentally ill person. Also, since a mental health commitment proceeding is a civil matter, it is arguable that *res judicata* should apply to prevent retrial of commitment cases.¹¹⁶ The Montana Supreme Court, however, has not recognized these theories and has consistently allowed retrial of commitment cases.¹¹⁷ This leaves the *Shennum* decision somewhat hollow; because, if procedures are not followed the first time, the county attorney merely has to file again and proceed properly the second time. Thus, if a county attorney is persistent, the respondent eventually will be committed. Further, allowing retrial provides little incentive for mental health professionals and attorneys to follow proper procedures.

VII. PLANS FOR REVISION

There have been plans for revision of Montana's mental health commitment code. In 1984, the Yellowstone County Attorney's Office proposed new legislation that would have provided for involuntary commitment of persons before they became seriously mentally ill.¹¹⁸ The proposed revisions provided for commitment if a person were "suffering from a mental disorder which has resulted in significant deterioration of an individual's cognitive and volitional function," and if not treated, would result in serious mental illness.¹¹⁹ The proposal sought to overrule the Montana Supreme Court's decision in *In re R.T.*¹²⁰ The *R.T.* decision allows commit-

112. MONT. CODE ANN. § 3-1-502 (1983).

113. MONT. CODE ANN. § 3-1-503 (1983).

114. U.S. CONST. amend. V.

115. MONT. CONST. art. II, § 25. For instance, if a person sets fire to his house and is prosecuted under the criminal statutes for arson and is not given a speedy trial, the action would be dismissed with prejudice, and he could not be retried. See *State v. Larson*, ___ Mont. ___, 623 P.2d 954 (1981). However, if he is proceeded against under the mental health commitment code and he is not given an initial appearance within the statutory time limit, the action will be dismissed without prejudice, and he may be retried on the same facts. See *In re Branstetter*, No. 84-328 (Mont. Aug. 20, 1984).

116. MONT. CODE ANN. § 26-3-201 (1983).

117. See generally *Branstetter*, No. 84-328 (Mont. Aug. 20, 1984); *Shennum*, ___ Mont. ___, 684 P.2d 1073; *Bushman*, 153 Mont. 422, 458 P.2d 81.

118. Letter from Donna Heffington, Deputy County Attorney for Yellowstone County, to Senator Tom Towe (September 3, 1984) (discussing proposed revisions in mental health commitment code).

119. *Id.*

120. *R.T.*, ___ Mont. ___, 665 P.2d 789.

ment only when a person is unable to care for basic personal needs for food, clothing, and shelter.¹²¹ The proposed revisions would have permitted commitment before a person's mental state deteriorated to that point.

Such revisions, however, would not likely survive constitutional scrutiny under the United State Supreme Court's decision in *O'Connor v. Donaldson*,¹²² in which the court held that a person cannot be involuntarily committed unless he is dangerous or unable to survive in freedom by himself or with help.¹²³ Further, a survey of the involuntary commitment statutes in all fifty states and the District of Columbia reveals no state that permits commitment of nondangerous people who can care for themselves.¹²⁴

Although these proposals were defeated by the legislature in 1985,¹²⁵ they are likely to come before the legislature again in 1987. Thus, the future of Montana's commitment code is not certain. Given the current movement by mental health professionals and county attorneys, the code will continue to face major revisions that favor commitment. For example, the Montana Council of Regional Mental Health Boards, Inc. also supported the movement to change Montana's commitment code.¹²⁶ This corporation circulated a questionnaire asking for opinions and suggestions for changes in the current commitment code.¹²⁷ County attorneys, psychiatrists, district judges, sheriffs, mental health professionals, and protective services were all polled through this questionnaire.¹²⁸ Absent from this poll, however, were three significant groups who are affected daily by the commitment laws: public defenders, families of the mentally ill, and mental health system consumers. This left the survey results lopsided toward suggestions to restrict further the liberty of people alleged to be mentally ill. If the code is to be reviewed in a fair light, input from other groups in the commitment process will be necessary, namely, public defenders and consumers.

121. *Id.* at ____, 665 P.2d at 791.

122. 422 U.S. 563 (1975).

123. *Id.* at 576.

124. Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DISABILITY L. REP. 358 (1983).

125. S.B. 376, 49th Leg. (1985).

126. Letter from Dick Hruska, Chairman Legislative Committee, Montana Council of Regional Mental Health Boards, Inc. to Citizens (May 25, 1984) (form letter accompanying questionnaire to see whether mental health commitment code should be revised).

127. *Id.*

128. Survey by Montana Council of Regional Mental Health Boards, Inc., *Montana State Commitment Law Questionnaire Interim Report* (July 31, 1984).

VIII. CONCLUSION

For the first time in ten years, involuntary commitment procedures in Montana are being enforced as a result of the *Shennum* decision. Nevertheless, *Shennum* will not lead to the release of mentally ill people. Because a person can be retried numerous times for mental health commitment, mental health professionals are able to commit people, even if proper procedures were not followed the first time.

More importantly, there is a movement in Montana to commit a broader class of individuals. Legislation to commit nondangerous persons who can care for themselves would create a significant threat to the liberty of Montanans. When the current commitment code was first enacted, the *Montana Law Review* published an article urging lawyers and judges to "exercise continuing vigilance to safeguard the process and the rights of persons subject to commitment."¹²⁹ This call for vigilance must now be echoed, for the liberty of these persons is under attack. At a recent hearing on the proposed revisions to the commitment code, one psychiatrist remarked:

I've just come from a tour of psychiatric institutions in the Soviet Union. And, in their nomenclature, they have another category called "sluggish schizophrenia"—that's how it translates out. It includes just about anything you'd need for any purpose—it really allows for a great deal of flexibility. I hope we don't get to that point.¹³⁰

129. Comment, *Involuntary Commitment of the Mentally Ill*, 38 MONT. L. REV. 307, 325 (1977).

130. Address by George Cloutier, Montana Commitment Law Public Meeting (September 5, 1984).