DEPARTMENT OF
PUBLIC HEALTH &
HUMAN SERVICES

ISSUES RELATED TO FITNESS TO PROCEED
NECESSARY "BIG PICTURE" LEGAL CONCEPTS

Fitness to Proceed
At both the federal and state level, there is a prohibition against trying, convicting, or sentencing any person who is "unfit," meaning that, as a result of mental disease or disorder or developmental disability, the person is unable to understand the proceedings against them or assist in their own defense for so long as the incapacity (mental disease or development disability) endures. A criminal defendant must be "fit to proceed" through all stages of a criminal proceeding.

A defendant must also: 1) be able to appreciate the criminality of his or her actions at the time of an alleged criminal act, and 2) be able to form the particular state of mind that is an essential element of the offense with which they are charged. In other words, it must be determined whether an alleged mental illness is the cause of an act prohibited by the criminal law, or not. Importantly, however, a diagnosis of a mental illness is not the equivalent of a "get-out-of-jail-free card." A person may be afflicted by a mental illness and still be responsible for a criminal act.

How Fitness to Proceed is Determined
Criminal-sphere legal practitioners (the court, prosecutors, and defense counsel) must rely on the scientific, technical, or other specialized knowledge psychiatric professionals have gained through experience, training, and education in diagnosing and treating mental illness in the forensic, or criminal, context. Under Montana law, the diagnosis of a mental illness must be accomplished by a qualified psychiatrist, a licensed clinical psychologist, or an advanced practice registered nurse. This is accomplished through a "fitness evaluation," which is also referred to as a "Court-Ordered Evaluation," or "COE."

These qualified psychiatrists, licensed clinical psychologists, and advanced practice registered nurses may be appointed by the court or hired by either the prosecution or defense to perform a fitness evaluation in the community, or an evaluation may be conducted at the Montana State Hospital's Forensic Mental Health Facility (FMHF), in Galen by qualified DPHHS-employed psychiatric practitioners. There is a severe shortage of individuals possessing the necessary expertise and credentials or who are willing to perform fitness evaluations at the community/county and municipal levels. This shortfall has resulted in the majority of COEs being ordered to be performed at the FMHF by the Department's forensically trained psychiatric practitioners. The Department's psychiatric practitioners also perform numerous other functions related to the psychiatric needs of defendants and other individuals who are housed at FMHF, including addressing clinical needs, writing professionally appropriate reports, and testifying in court proceedings.

Restoration
If, as a result of a COE, a defendant is found fit to proceed, the defendant will be progressed through the criminal process, which typically results in a criminal trial or a plea agreement, and possible sentencing. If a defendant is found to be unfit to proceed, Montana law provides that the court may order the defendant to be "restored to fitness." Orders placing defendants with the Department for treatment and attempted restoration to fitness are internally referred to as "UTPs." This restorative process requires a continuum of assessments and further medical and psychotropic stabilization, typically effectuated through voluntary or involuntary treatment. This may require additional legal processes, but, invariably, restoration consumes significant time, which often delays court processes. The number of court-ordered admissions for COEs and UTPs have significantly outpaced the Department's appropriated resources resulting in extended jail stays for defendants, decompensation of defendants' mental states while they remain unmedicated and untreated in jails, and a backlog of admissions affecting nearly every county.

The clinical and psychiatric processes associated with evaluation of fitness and ordered restoration to fitness are subject to statutory time limitations. In some Montana jurisdictions, courts have considered the timeline associated with restoration to fitness as inviolable and strictly dismiss criminal proceedings. Under current law, this should result in the initiation of civil proceedings for involuntary commitment to the Montana State Hospital (MSH). Some one-time defendants may not be civilly committed and are returned to their communities without their psychiatric issues fully resolved, which leads to repeat or "revolving door" interactions with law enforcement and hospitals, jails, the courts, and criminal processes.

The "required dismissal" interpretation of current statute has pressurized Department resources, both for clinical and psychiatric staff, at both MSH and FMHF, and has demanded a significant expenditure of managerial and legal capital as the Department has faced unproductive contempt proceedings in district courts throughout the state when the Department has been unable to comply with court orders in a timely manner due to resource restrictions.

Current Obstacles
First, as a nonparty to the underlying criminal action, the Department has no control over the number of patients being ordered to FMHF for COEs and UTPs. Second, there are few, if any, community-based stabilization and treatment resources that can currently be leveraged to psychiatrically stabilize defendants and possibly divert them from being placed with Department for COEs and UTPs. Third, the Department has an insufficient number of inpatient beds needed to perform the number of COEs and UTPs that courts are ordering to be performed by the Department. There is also a severe shortage of qualified professionals available to the Department to perform COEs and UTPs.

The bed numbers, alone, are telling. There are 53 inpatient forensic beds located at the FMHF in Galen designated to serve the 56 counties from which a defendant can be ordered for an initial fitness evaluation. Currently, 27 of those beds are filled with individuals who have been sentenced by courts to the Department for having been found GBMI (Guilty But Mentally Ill). This nearly static GBMI population at FMHF occupies beds that should and could be used for COEs and UTPs. The remaining beds, which number, on average, in the mid-20s, are constantly occupied by a rotation of COE and UTP patients, who can currently only be prioritized by the date of their court orders.

While defendants await admission to FMHF, they are rarely medically and psychiatrically treated, often resulting in psychiatric decompensation. This further complicates the work Department must perform once a defendant arrives at FMHF. Even under normal circumstances, without a backlog, delayed admissions, and defendant decompensation, each step of the stabilization, evaluation, and restoration process related to COEs and UTPs would consume time and resources. However, the ongoing deficit of resources necessary to address the overwhelming number of court-ordered admissions to the Department has created a “feedback loop” where wait times and the severity of decompensation continue to increase.

Department Efforts
Current leadership at DPHHS has been working diligently since 2021 to identify and resolve the things it *can* control; i.e., internal process “bottlenecks” and other service-delivery shortcomings that have contributed to delays associated with forensic mental health evaluation and treatment. Leadership and staff have also conducted significant and sustained engagement with outside stakeholders (courts, defense counsel, county attorneys, local government entities, and private health-system representatives) to identify and address procedural and other resource issues that could be resolved through partnerships. The Department has also implemented numerous near-term initiatives through the Behavioral Health System for Future Generations (BHSFG) Commission that was formed after the passage of 2023’s HB 872, which represented an historic investment in the state’s behavioral health continuum of care. The Department has also authored legislation intended to further resolve gaps in the statutory structure governing fitness to proceed and drive community-based solutions.

The Department’s efforts are beginning to bear fruit. However, more must be done. The Department is eager to continue its engagement with the Legislature to further promote a robust continuum of care and create a successful and sustainable behavioral health system for future generations.