LEGAL MEMORANDUM

TO: Law and Justice Interim Committee

FROM: David S. Niss, Staff Attorney

DATE: September 14, 2007

RE: Constitutional and Federal Law Requirements for Mental Health Care for Convicted Offenders, Jailed Persons, and Detainees in Montana

## I
## INTRODUCTION

There has been much litigation over the years concerning a government's duty to care for the health, including the mental health, of prisoners in its custody,[1] so much litigation, in fact, that it's now exceedingly clear from reported federal and state judicial opinions that governmental entities operating prisons for persons convicted of criminal offenses are under a constitutionally required duty to provide mental health care to a prisoner with a serious mental illness. This requirement springs from the Eighth Amendment to the U.S. Constitution,[2] and similar language in state constitutions,[3] prohibiting the government from inflicting cruel and unusual punishment upon persons convicted of criminal offenses. Additionally, the duty of a government to provide mental health care to detainees, persons in jails, and those discharged or about to be discharged from confinement, pursuant to the Eighth Amendment and the Due Process Clause of the U.S. Constitution, is a developing area of the law.[4]

Fortunately or unfortunately, Montana courts have not been the source of many judicial opinions on the subject of the application of the Eighth Amendment or the comparable provision in the Montana Constitution to physical or mental health care in Montana

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[1]A short but excellent history of the litigation against state and federal prison systems that established a prisoner's right to mental health care appears in Class Action Litigation in Correctional Psychiatry, Metzner, 30 Journal of the American Academy of Psychiatry and the Law, No. I, p. 19 (2002). In the article, Metzner explains that in 1988, at least one prison in each of 21 states was the subject of a court-certified class action lawsuit involving the provision of mental health services for inmates.

[2]The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[3]See, e.g., Art. II, sec. 22, Mont. Const., that provides: "Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."

[4]See sections II D and II F of this memorandum.

prisons or jails. In fact, research has disclosed only one opinion, Walker v. State, 2003 MT 134, 316 M 103, 68 P3d 872 (2003), dealing materially with this subject. In that case, the Court held that certain disciplinary treatment of a mentally ill prisoner, along with certain living conditions at the Montana State Prison, constituted cruel and unusual punishment in violation of the Montana Constitution. The opinion in Walker is further discussed in section II F of this memorandum.

Because of the lack of judicial opinions from Montana courts on which to rely for guidance regarding constitutionally required mental health care for prisoners in Montana, nearly all of the requirements reviewed in this memorandum come from judicial opinions from other jurisdictions. However, for reasons discussed in section II F of this memorandum, reported judicial opinions from other jurisdictions are highly relevant to the law in Montana and those decisions may even be viewed as either minimal constitutional requirements in this state or even requirements that do not meet the minimal standards contained in the Montana Constitution.

In evaluating an existing or proposed treatment program for convicted individuals who are not free to see their own mental health professional,[5] the question of not only whether the program meets the standards of the Eighth Amendment, but also whether the program meets Montana constitutional standards must be asked.

## II
## DISCUSSION

### A. Eighth Amendment Standard for Mental Health Care in Prisons

In Estelle v. Gamble, 429 U.S. 97 (1976), the United States Supreme Court held that a complaint evidencing "deliberate indifference to serious medical needs" of a prison inmate stated a cause of action under 42 U.S.C. 1983, the federal statue under which most federal constitutional rights may be enforced against a state or political subdivision of a state in state or federal court. Since the Supreme Court's opinion in Estelle, numerous federal appellate courts have applied the holding to mental health care.[6] Some of the earlier cases after Estelle sought to flesh out the definitions of what constituted "deliberate indifference" and what constituted a "serious mental illness".

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[5]Language in some judicial opinions decided under the Eighth Amendment indicate that the standards of the Eighth Amendment for a treatment system apply when the convicted offender is unable to secure mental health care "on his own behalf". See discussion of Wakefield v. Thompson, 177 F.3d 1160 (9th Cir. 1999), infra, at page 5.

[6]See, e.g., Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977), Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995), and Gates v. Cook, 376 F.3d 323 (5th Cir. 2004).

Various courts have arrived at working definitions.[7]

Most importantly, the courts have gradually, through expert testimony used in legal actions challenging penal mental health care practices, adopted working standards for a prison mental health treatment system that comply with the requirements of the Eighth Amendment. One of the more well-known criteria for a constitutional mental health care system was announced in Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), in which the federal District Court held that the following constitute those minimal requirements under the Eighth Amendment:

(1) First, there must be a systematic program for screening and evaluation of inmates in order to identify those who require mental health treatment for a serious mental disorder.

(2) Treatment must entail more than segregation and close supervision of inmates suffering from serious mental disorders.

(3) Treatment requires participation by trained mental health professionals,

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[7]See, e.g., Tillery v. Owens, 719 F. Supp. 1256 (W.D. Pa. 1989), in which the court defined a "serious mental illness" as one "that has caused significant disruption in an inmate's everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself". Also, several federal circuit courts have held that repeated acts of simple negligence may in some instances be used to prove deliberate indifference. See Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977), and Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983). The Supreme Court itself clarified "deliberate indifference" in Farmer v. Brennan, 511 U.S. 825 (1994), holding that deliberate indifference is something like criminal recklessness and that actual knowledge of a prisoner's mental condition may be attributed to prison officials based upon circumstantial evidence.

Cohen, in his book, The Mentally Disordered Inmate and the Law (1998) (hereafter "Cohen"), includes a list of those factors, largely taken from case law, that are indicators of a serious mental disorder. Those factors are:

(1) The diagnostic test is one of medical or psychiatric necessity.

(2) Minor aches, pains, or distress will not establish necessity for treatment.

(3) A desire to achieve rehabilitation from alcohol or drug abuse, or to lose weight to simply look or feel better, will not suffice.

(4) A diagnosis based upon professional judgment and resting on some acceptable diagnosis tool (e.g., DSM-IV) is presumptively valid.

(5) By the same token, a decision by a mental health professional that mental illness is not present is also presumptively valid.

(6) While "mere depression" or behavioral or emotional problems alone do not qualify as serious mental illness, acute depression, paranoid schizophrenia, "nervous collapse" and suicidal tendencies do qualify. (Cohen, p. 4-36)

Regarding the sixth category, Cohen notes that "it is actually the clinician's choice of the diagnostic terminology that will move these cases from no care to discretionary care or to mandated care". (Cohen, p. 4-36) Cohen also notes that most opinions on the subject have not mandated treatment for transsexualism or mental retardation. (Cohen, pp. 4-33 through 4-36)

employed in sufficient numbers to identify and treat, on an individual basis, treatable inmates suffering from serious mental disorders.

(4) Accurate, complete, and confidential records of the mental health treatment process must be maintained.

(5) Administration of behavior-altering drugs in dangerous amounts by dangerous methods or without appropriate supervision or evaluation is an unacceptable method of treatment.

(6) A basic program of identification, treatment, and supervision of prisoners with suicidal tendencies is a necessary component of the mental health treatment system.

Other writers have provided a somewhat larger list of criteria.[8]

B. Scope of the Requirement for Treatment of Convicted Prisoners

A considerable body of case law has developed on each of these standards and others, applied to various institutions or entire penal systems on a case-by-case basis. Those cases make clear that the existence or nonexistence of any of the foregoing six components of a prison mental health treatment system announced in Ruiz is not the only issue that must be considered; the quality, extent, timeliness, and even the location of one or more of the six components set forth above are also issues within the purview of the Eighth Amendment. Thus, the following holdings are examples of cases applying the type of criteria listed above:

(1) Inordinate delays in providing treatment for mental illnesses are prohibited by the Eighth Amendment. Coleman v. Wilson, 912 F. Supp 1282 (E.D. Cal. 1995).

(2) The requirements of the Eighth Amendment also apply to persons sentenced to county or municipal jails and to those facilities. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979); Feliciano v. Colon, 697 F. Supp. 37 (P.R. 1988); Young v. Augusta, 59 F.3d 1160 (11th Cir. 1995); Hamilton v. Morial, (D.La. 1995) (unpublished).

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[8]Cohen adds the additional criteria of (7) adequate physical facilities, expressed often as bed/treatment space, to meet varying treatment needs; (8) a human and clinically sound approach to mechanical restraints; and (9) the absence of brutality toward inmates with mental illness. While the author provides no case citations, it's likely that judicial opinions from some jurisdictions exist in which these additional criteria can be found. (Cohen, p. 4-27) Judicial opinions in other cases have included even lengthier lists of criteria or deficiencies. See, e.g., Cody v. Hillard, 599 F. Supp. 1025 (D.S.D. 1984), Langley v. Coughlin, 715 F. Supp. 522 (S.D.N.Y. 1989), and Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

(3) The requirements of the Eighth Amendment also apply to juveniles and to facilities holding juveniles. Viero v. Bufano, 901 F. Supp. 1387 (N.D. Ill. 1995).

(4) The requirements of the Eighth Amendment also apply to those prisoners being released or soon to be released from confinement, to require the prison or jail to provide some medications upon discharge. Wakefield v. Thompson, 177 F.3d 1160 (9th Cir. 1999). The basis for this holding, as explained in the opinion, is that while an inmate is in custody, the inmate cannot act for himself or herself, but must depend upon the prison staff to provide care for the inmate. Similar reasoning appears in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).

(5) A private health care provider, acting under contract with a state, may be held liable pursuant to 42 U.S.C. 1983 and the Eighth Amendment for violating a state prison inmate's constitutional right to be free from cruel and unusual punishments. Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985); West v. Atkins, 487 U.S. 42 (1988).

C. Other Topics Within the Purview of the Eighth Amendment

The duty to care for mentally ill inmates imposed by the Eighth Amendment has ramifications for the seriously mentally ill and a prison and prison staff throughout a prison system. Some of the aspects of a prison system, as those aspects relate to persons with severe mental illnesses, that are touched by the Eighth Amendment are listed below. A more complete description of how the Eighth Amendment impacts these parts of a prison system can be researched and discussed at a future date, as the Committee reaches the following topics in its study:

(1) substance abuse programs;
(2) effect of isolation or "supermax";
(3) use of bodily restraints or excessive force;
(4) disciplinary proceedings;
(5) mentally retarded offenders;
(6) transfer of inmates to other facilities for treatment (including the extent to which treatment services may be provided "off site"); and
(7) sex offender treatment.

D. The Due Process Clause Requirements for Treatment

The foregoing pages have shown that an inmate in a state prison or local jail who has been convicted of (or plead guilty to) an offense has a constitutional right to treatment for a serious mental illness. More recent cases have established the proposition that

the Due Process Clause of the U.S. Constitution[9] contains a requirement that pretrial detainees, to whom the Eighth Amendment does not apply because there has been no conviction (or plea of guilty), also must be treated for serious mental illnesses to at least the same extent as convicted offenders. Bell v. Wolfish, 441 U.S. 520 (1979); City of Revere v. Mass. General Hospital, 463 U.S. 239 (1983); Thomas v. Kipperman, 846 F.2d 1009 (5th Cir. 1988); Benjamin v. Fraser, 161 F. Supp. 2d 151 (S.D.N.Y. 2001); Woodward v. Correctional Medical Services, 368 F.3d 917 (7th Cir. 2004).

Case law also establishes that the purpose and scope of treatment for mental illness for pretrial detainees under the Due Process Clause is roughly equal to the purpose and scope of treatment of prisoners under the Eighth Amendment. Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981); Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60 (1st Cir. 2002). Therefore, the six-part test for a mental health treatment system used by the court in Ruiz is applicable to a city or county jail used for the detention of pretrial detainees. Thus, for example, in Jones v. Wittenberg, 509 F. Supp. 653 (N.D. Ohio 1980), an inmate challenged the mental health services in the Lucas County, Ohio, jail because of the lack of availability of a jail psychiatrist, among other conditions at the jail. The court held that while other special services were provided, the lack of a psychiatrist was a constitutional violation.

E. Federal Statutory Law

In Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998), the U.S. Supreme Court affirmed an opinion of the Third Circuit Court of Appeals, holding that the Americans With Disabilities Act of 1990 (ADA)[10] applied to state prisons. Thus, in Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), the Ninth Circuit Court of Appeals affirmed a U.S. District Court order holding that the ADA and the Rehabilitation Act of 1973[11] apply to inmates in a state prison system, affirmed findings that the California agency in charge of paroling prisoners from state prisons routinely violated both federal acts by discriminating against disabled persons in making the processes of the parole board insufficiently available to those disabled persons (by, for example, requiring that the hands of a deaf person be shackled during a parole board hearing, prohibiting the person from communicating with the board by sign language) and affirmed injunctive relief against the board to enforce the provisions of the ADA. Whether there are rules

[9]Amendment V to the U.S. Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .".

[10]42 U.S.C. 12101, et seq. Section 42 U.S.C. 12132 prohibits a "public entity" from discriminating against a "qualified individual with a disability".

[11]29 U.S.C. 794. The Rehabilitation Act of 1973 prohibits discrimination against disabled individuals "under any program or activity receiving Federal financial assistance".

or policies of the of the Montana Department of Corrections or any of its subordinate elements, such as the Board of Pardons and Parole, that violate a provision of the ADA or Rehabilitation Act of 1973 is unknown to this writer at this time.

F. Montana Constitutional Law

As mentioned in the introduction to this memorandum, the Montana Supreme Court has barely applied the Montana Constitution to mentally ill inmates of the Montana prison system or county jails. However, in Walker, the one case in which the Court has applied the Montana equivalent of the Eighth Amendment to a mentally ill prisoner in the Montana State Prison,[12] the Court directly held that the requirements of the Montana Constitution are greater than, or in addition to, the requirements of the Eighth Amendment of the U.S. Constitution. Writing for the majority in Walker, Justice Nelson noted that the Montana Supreme Court has in the past read the Montana Constitution as providing greater protection against invasions of privacy than the U.S. Constitution provides. Similarly, the opinion said, the Montana Constitution provides greater protection against cruel and unusual punishment to Mr. Walker. Justice Nelson then wrote that reading the prohibition against cruel and unusual punishment in the Montana Constitution together with the Article II, section 4, language of the Constitution, stating that "the dignity of the human being is inviolable", meant that "we read the dignity provision of the Montana Constitution together with Article II, Section 22 [of the Montana Constitution] to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution".

There are no decisions of the Montana Supreme Court or federal courts, after the Montana Supreme Court's opinion in Walker, that apply this principle (of greater protection from cruel and unusual punishment than the Eighth Amendment provides) in a meaningful way to specific fact situations.[13] Nevertheless, Committee members might

[12]Art. II, sec. 22, Mont. Const., provides: "Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishment inflicted."

[13]Art. II, sec. 22, Mont. Const., has been raised in two cases that reached the Montana Supreme Court, and in one case in federal District Court in Montana, since the decision in Walker, the most substantive of which are Watson v. Montana, No. CV-04-16-H-CSO, 2006 WL 1876891 (D. Mont. 2006), and Quigg v. Slaughter, 2007 MT 76, 336 M 474, 154 P3d 1217 (2007). In Watson, a federal District Court refused to dismiss, on the state's motion for summary judgment, a Montana prison inmate's claim involving allegations of medical care that failed to meet the standards of Art II, sections 4 and 22, even though the Montana Department of Corrections submitted uncontradicted affidavits to the court showing that the plaintiff received appropriate medical care. In Quigg, inmates alleged that the Art. II, sec. 22, proscription against cruel and unusual punishment had been violated because of programmatic differences between the Montana State Prison at Deer Lodge and regional and private prisons in the sate in the areas of mental health care, visitation, exercise, and education. That claim was joined with an allegation that under Art. II, sec. 4, and the Court's opinion in Walker, that the existence of those programmatic differences violated the Montana Constitution. The Supreme Court held that there was no evidence in the record showing that those differences exacerbated the prisoners' mental health condition

expect that in future cases, the Montana Supreme Court will hold that a mental health care system or component of the system that is minimally adequate under the Eighth Amendment in another jurisdiction is not adequate in Montana. Put another way, because of its holding in Walker, the Montana Supreme Court may well hold in the future that the components of a treatment system as required in Ruiz are below the minimum requirements of the Montana Constitution for a mental health treatment system in Montana for persons convicted of offenses. It is also possible that the same rationale and result would apply to the Montana Constitutional requirements that would apply an Eighth Amendment standard to the treatment of pretrial detainees, or other persons in the Montana criminal justice system, that have not yet been convicted.[14]

## III
## CONCLUSION

Beginning in 1976, case law from other jurisdictions has consistently demonstrated that there is a constitutional requirement for mental health treatment in prisons for individuals, both adults and juveniles, convicted of criminal offenses who have a serious mental illness. The law now also requires treatment for individuals, both adults and juveniles, jailed pending trial for an offense. Because Montana has almost no case law on this subject, the parameters of a constitutionally sufficient mental health program for these persons in the criminal justice system must be gleaned from the case law of other jurisdictions applying the Eighth Amendment or the Due Process Clause of the U.S. Constitution or equivalent state constitutional provisions. These opinions demonstrate that there are at least six basic components of a constitutionally sufficient mental health treatment system. However, because of the Montana Supreme Court's holding in Walker, the Montana Supreme Court has strongly indicated that a mental health care system that is minimally constitutionally sufficient in a jurisdiction other than Montana may not be constitutionally sufficient in Montana. Only subsequent opinions of the Montana Supreme Court will further determine exactly what mental health treatment practices in the administration of Montana prisons and jails fall below the higher constitutional standard recognized in the Walker opinion.

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and that those programmatic differences did not rise to the same level as the poor conditions of care at issue in the Walker case.

[14]Like the requirements of Art. II, sec. 22, Mont. Const., when read together with the individual dignity provisions of Art. II, sec. 4, Mont. Const., as those requirements apply to convicted persons, the Montana Supreme Court might hold that the Due Process Clause in Art. II, sec. 17, Mont. Const., when read together with the individual dignity provisions of Art. II, sec. 4, Mont. Const., provides more protection from cruel and unusual punishment for Montanans held in pretrial confinement than does the Due Process Clause of the U.S. Constitution. At this time, there are no opinions of the Montana Supreme Court to this effect.