

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0191

IN THE MATTER OF:

M.Q.,

Respondent and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable John C. Brown, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
JAMES REAVIS
Assistant Appellate Defender
Office of the Public Defender
Appellate Defender Division
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147
jreavis@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARTIN D. LAMBERT
Gallatin County Attorney
BRADLEY D. BOWEN
Deputy County Attorney
1709 W. College
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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INTRODUCTION

On February 14, 2018 at 2:00 p.m., the district court started a trial to determine whether M.Q. should be involuntarily committed. (2/14/18 Tr. [“Tr.”] at 3; Doc. 28.) M.Q.’s counsel, Alexander Jacobi, objected to having any trial take place because M.Q. was not in court. (Tr. 2.) M.Q. sat at Hope House, Gallatin County’s short-term mental health detention center. (Doc. 27; Tr. 5.) M.Q. had refused to cooperate with Gallatin County’s transport procedures, which utilize handcuffs, shackles, and a belly belt. (Tr. 26, 28.)

Jacobi had just met with M.Q. at Hope House prior to court. (Tr. 35, 51, Doc. 29 at 1.) He wanted to avoid a “frightening, Orwellian almost” encounter of committing M.Q. without her personal appearance or being able to consult with her first. (Tr. 59-60.) Jacobi said “we have a serious problem as to [M.Q.’s] absence.” (Tr. 58.) Jacobi was in the courtroom while M.Q. sat inside Hope House and he couldn’t talk to her. (Tr. 1, 4.) He could picture the confusion M.Q. would have of a commitment being passed down as she sat in Hope House, only to then see officers arrive, place her into the back of a police vehicle, and drive

her away. (Tr. 58.) “I think that’s something we need to avoid.” (Tr. 58.)

Jacobi asked the district court to continue its ruling on the commitment. (Tr. 59.) If the next hearing could be over two-way video instead, Jacobi would go up to Hope House, sit next to M.Q., and try to explain to her why they were on the video. (Tr. 59-60.) “[B]ut I don’t think a ruling is appropriate today.” (Tr. 60.)

The district court did not allow Jacobi to meet with M.Q. and ruled that M.Q. had waived her right to be physically present and ordered her involuntary commitment. (Tr. 66-67, 79-80.) Police officers came into Hope House and transported M.Q. to Montana State Hospital. (Doc. 30 at 2.) M.Q. never had the chance to consult with Jacobi about why she did not want to be shackled up and transported to court. M.Q. did not attend her own trial over her attorney’s objection.

STATEMENT OF THE ISSUE

Did the district court violate M.Q.’s statutory and due process rights when it conducted a trial outside of her presence over her attorney’s objection not to proceed until M.Q. had an opportunity to express her wishes concerning physical presence through her attorney?

STATEMENT OF THE CASE AND FACTS

M.Q. has been diagnosed with Bipolar I disorder with manic episodes for several years. (Tr. 35-36, 39, 42.) M.Q.'s neighbors complained that she was being loud and disruptive, so police arrived and brought her to a hospital emergency room at about 1:15 a.m. on February 10, 2018. (Tr. 9, 12; Doc. 23, Ex. A.) The hospital stated that M.Q. presented "homicidal ideation" and placed her into physical restraints for over seven hours. (Tr. 9, 16, 20.)

Gina Temple, a mental health worker who is not a certified professional person, arrived at the hospital at about 8:30 a.m. to conduct a mental health evaluation. (Tr. 8-9, 20.) M.Q. had blood on her clothing that originated from her period and she refused offers from hospital staff to change into paper scrubs. (Tr. 13.) M.Q. talked about wanting to hurt other people with a screwdriver. (Tr. 12.) M.Q. told Temple she was having auditory hallucinations and was pretty agitated. (Tr. 13.) Temple sought authorization for emergency detention at Hope House. (Tr. 15.)

M.Q. appeared over video for an initial hearing on Monday, February 12. (Doc. 26.) Alexander Jacobi, M.Q.'s appointed attorney,

sat at M.Q.'s side at Hope House as the proceeding began. (Doc. 25; 2/12/18 Tr. 1.) Jacobi told the district court that he had advised M.Q. of her rights but had not had a chance to discuss the factual allegations in the petition, so M.Q. would not be making any stipulations at this point. (2/12/18 Tr. 2.) M.Q. then volunteered "I plead no contest in trial," but the district court followed counsel's representations that a trial was appropriate. (2/12/18 Tr. 2-3.)

M.Q. asked if this meant that she had to stay in the holding side of Hope House or if she could move to the voluntary side. (2/12/18 Tr. 3.) The district court told M.Q. that she would have to stay in emergency detention until the hearing occurred. (2/12/18 Tr. 3.) M.Q. became upset and said "I'm very sad. This was not right." (2/12/18 Tr. 3-4.)

At the conclusion of the initial hearing, the district court told M.Q. "Ma'am, I just want to say, so I will get to meet you in person on Wednesday afternoon at two p.m. for the hearing, okay?" (2/12/18 Tr. 11.) M.Q. replied, "Okay, sir. It will be a pleasure meeting you." (2/12/18 Tr. 11.)

Shannon Maroney, who is a certified professional person,

conducted M.Q.'s second evaluation on February 14, 2018 at 11:20 a.m., which lasted about an hour. (Doc. 29; Tr. 31-32, 35.) Jacobi was present during the second evaluation. (Doc. 29; Tr. 51.)

Maroney's evaluation ended at about 12:20 p.m. (Doc. 29; Tr. 35.) There is no indication that Maroney continued to stick around at Hope House, rather a few hours passed between her evaluation and her later testimony. (See Tr. 34.) Maroney's report contains no commentary from M.Q. about the upcoming 2:00 p.m. hearing. (Doc. 29.) There is also no indication in the record that Jacobi remained at Hope House after Maroney's interview wrapped up.

At 1:10 or 1:15 p.m. Deputy Obadiah Rouse arrived at Hope House to transport M.Q. to the courthouse. (Tr. 4, 25.) The Gallatin County Sheriff's Department has a policy of using shackles and handcuffs to transport mentally ill people to and from court. (Tr. 26.) The shackles are attached together using a belt that is wrapped around the stomach, which is referred to as a "belly belt". (Tr. 28.)¹

¹ Gallatin County's restraint practices of the mentally ill were previously reviewed in *Matter of J.J.*, 2018 MT 184, ¶¶ 6, 24, 392 Mont. 192, 422 P.3d 699; see also DA 16-0407, Brief of Appellant at 4, June 6, 2017 ("Counsel explained that the handcuffs were irritating to J.J. and that they hurt his wrists. J.J. added 'It's disrespectful since I have not broken the law.'").

When Deputy Rouse arrived M.Q. was distracted because Hope House staff were trying to convince her to sign a piece of paper releasing her property, which M.Q. did not want to do. (Tr. 25.) Staff eventually got her to sign the release. (Tr. 25-26.) Deputy Rouse then tried to put M.Q. into restraints. (Tr. 25-26.)

M.Q. did not want to go with Deputy Rouse. (Tr. 26.) She did not want to go under Deputy Rouse's conditions of having shackles and handcuffs on her. (Tr. 26.) Deputy Rouse told M.Q. he had to put them on her. (Tr. 26.) Deputy Rouse brought out the handcuffs and the belly belt. (Tr. 28.) In response, M.Q. put her hands into her pockets. (Tr. 28.) In Deputy Rouse's experience, this is a signal that a person does not want to have restraints put on. (Tr. 28.)

Deputy Rouse found M.Q.'s behavior to be non-compliant and assertive, but not aggressive. (Tr. 26.) M.Q. said she remembered the last time she had a hearing and it didn't quite go the way she was expecting it. (Tr. 26.) M.Q. also complained that she had been here before—possibly referring to the involuntary side of Hope House—and didn't want to do this. (Tr. 26-27.) Deputy Rouse told M.Q. that “all we have to do is get out of this door and then we can go to the Court.” (Tr.

27.) M.Q. tried to find other subjects to talk about with Deputy Rouse. (Tr. 27.)

Deputy Rouse concluded that he would not be able to take M.Q. out of Hope House without being physical with her. (Tr. 26.) Deputy Rouse called Deputy Mark Hernandez and told him that she's decompensating, she's about to lose it, and if he has to put her into restraints to take her to court she will fight. (Tr. 5.) Deputy Rouse did not transport M.Q. to the courthouse. (Tr. 28.)

M.Q.'s second hearing—her trial—began at 2:00 p.m. (Doc. 28.) Jacobi and Maroney had left Hope House and were now in the courtroom, but M.Q. was not. (Tr. 1, 33.) Deputy Hernandez told the district court: "She has not cooperated. She does not want to come to Court and Deputy Rouse said if he has to force her she will fight and it's not worth a fight, so." (Tr. 1.)

The State asked that M.Q.'s presence be waived pursuant to Mont. Code Ann. § 53-21-119 and that the State would call Deputy Hernandez and Maroney to testify about the basis to waive. (Tr. 2.) Jacobi responded, "Your Honor, the waiver of presence is an active waiver. It's not just her mere absence that allows for it. It would require myself, a

friend, and I believe, [M.Q.] to waive, so we object.” (Tr. 2.)

The district court ordered that the trial would start without M.Q.’s presence. (Tr. 2.) The court asked the State to put on its testimony. (Tr. 2.) The district court said after it heard the testimony, it would rule as to both the question of whether the hearing could be completed without M.Q.’s presence and whether there is a basis for her involuntary commitment. (Tr. 2.) The State then asked if they could first try a quick call to see if she would be willing to appear by video from Hope House. (Tr. 2-3.) The district court agreed with the idea and took a brief recess. (Tr. 3.)

What happened next is not on the record. There is no statement in the record that M.Q. affirmatively refused to appear in court by video.

After the recess, the district court went back on the record and said, “So, you know what, counsel, let’s just go ahead . . . at this point, technically what I’m doing is I’m starting the hearing without her presence. The State has the right to present testimony and evidence to support the Court’s waiver of her presence so you can blend that into the regular case on the involuntary commitment.” (Tr. 3.) The case

proceeded to trial without M.Q. (Tr. 3.)

Neither party moved to exclude witnesses, so Maroney sat in the courtroom and listened to the testimonies of Deputy Hernandez, Temple, and Deputy Rouse. (*See* Tr. 33.) Deputy Hernandez—who never drove up to Hope House—testified that he asked Deputy Rouse to ask M.Q. if she was willing to do video. (Tr. 4-5.) M.Q. did not respond to Deputy Rouse. (Tr. 5.)² On cross, Deputy Hernandez admitted he did not hear an affirmative waiver from M.Q. that she did not want to be in the courtroom. (Tr. 6.)

After Deputy Hernandez stepped down, the district court said, “All right. I think that based upon that testimony I don’t know if I can find that she is competent to voluntarily waive her presence and I think I will consider the waiver issue. I would ask that the State now present, go ahead and proceed with the testimony regarding the involuntary commitment and based upon, I want to hear from Ms. Maroney her opinion about the situation and basically, you can blend that case into the information for the commitment part of the case.” (Tr. 6-7.)

² Deputy Hernandez also testified that M.Q. was “unwilling” to do video, but his answer changed only after the State asked a suggestive follow-up question when Deputy Hernandez initially testified that M.Q. “did not respond” to Deputy Rouse about the video question. (*See* Tr. 5.)

The State called Deputy Rouse, who had since left Hope House and arrived at court. (Tr. 24-25.) In response to the State's question "So, is it fair to say she verbally declined to come?" Deputy Rouse said yes. (Tr. 27.) Deputy Rouse did not articulate why M.Q. declined transport, except when she stated that she didn't want to be shackled and handcuffed, and when she complained that the last hearing didn't quite go the way she expected it. (Tr. 26.) M.Q. never responded directly about her willingness to appear by video. (Tr. 27.)

The State asked Maroney to provide an opinion based on the testimony she had just heard from the officers. (Tr. 33.) Maroney postulated that she believed M.Q. had an awareness of today's hearing and she appeared to understand the options her attorney had reviewed with her regarding the outcome of the hearing. (Tr. 33-34.) Maroney said she would determine that M.Q. was knowingly refusing to attend, based upon the testimony she had just heard in court. (Tr. 33-34.)

Maroney testified that if officers used force to bring M.Q. to court, such an action would put M.Q. in a significant amount of distress and would likely increase her symptoms. (Tr. 34.) Jacobi did not dispute that. (Tr. 62.)

Maroney also provided testimony about the involuntary commitment. Maroney reviewed multiple reports and concluded that M.Q. does not present an imminent risk of bodily harm to herself or others. (Tr. 32-33, 43-44.) Maroney believed that M.Q. should still be committed because she was not able to meet her basic needs. (Tr. 44.) M.Q. had quite confused and disorganized thinking with significant paranoia that prevented her from eating food. (Tr. 37-38, 44, 49, 52.) M.Q. used showers and towels inappropriately to clean herself, and she did not take her most recently scheduled medication in early February. (Tr. 36, 42-43, 45.)

M.Q. did take her medication at the Hope House; however, she had disagreements about what the proper dosage should be and she refused to take an increased dose when staff offered. (Tr. 45-46.) M.Q. expressed a desire to return home and she agreed to take whatever medication she was prescribed. (Tr. 41, 51, 56.) Maroney recommended an involuntary commitment to Montana State Hospital due to M.Q.'s lack of insight into her mental illness. (Tr. 46-47.)

The State, having now presented testimony as to both the waiver and the involuntary commitment itself, rested. (*See* Tr. 56-57.) Jacobi

rose for argument. (Tr. 58.)

Jacobi reminded the district court that Title 53 and the involuntary commitment statutes controlled. (Tr. 58.) Citing to *In re Mental Health of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485, Jacobi said the statutes were “meant to be read strictly and strictly construed and we have a serious problem here as to [M.Q.’s] absence. It has not been waived.” (Tr. 58.) “I don’t believe that she has orally waived her right to be here. I don’t think this Court has made a finding that would allow for her presence to be excused.” (Tr. 61.)

Jacobi argued that it was not proper—at this time—to set forth a ruling without M.Q.’s presence. (Tr. 59.) To avoid a “frightening, Orwellian almost” commitment, Jacobi asked the district court continue the ruling until a time when she could come to court. (Tr. 59-60.)

Jacobi offered that he could go up to Hope House himself, authorize a video appearance, and sit next to M.Q. and try to explain to her why everyone was on the video and what was occurring. (Tr. 59-60.) “[B]ut I don’t think a ruling is appropriate today.” (Tr. 60.)

Jacobi also told the district court that M.Q. had made a request for a community commitment instead of Montana State Hospital. (Tr.

59.) If the ruling was continued and if the district court was going to find for a commitment, then the court should expect that Jacobi and M.Q. would be making a request for a “community step down,” but Jacobi was loath to accept even that more favorable ruling without M.Q.’s presence. (Tr. 59.)

The district court asked Jacobi if M.Q. was competent to waive her presence at the hearing today. (Tr. 61.) Jacobi told the court that there is a procedure that must be followed for her presence to be waived. (Tr. 61-62.) If M.Q. was not competent, Jacobi explained, the waiver procedure would have to be at his request, which had not happened here. (Tr. 61-62.)

The district court stated its decision was controlled by Mont. Code Ann. § 53-21-119(2). (Tr. 63-64.) The district court acknowledged that subsection (2) required the consent of the respondent’s attorney as well as the friend, and the language was not disjunctive from the rest of the statute. (Tr. 64-65.) Nonetheless, the district court proceeded to examine other parts of subsection (2) and concluded that M.Q. had waived her presence because the act of handcuffing and transport against her will would be likely to seriously adversely affect her mental

condition. (Tr. 65-67.)

The district court found that M.Q. “has voluntarily expressed a desire to waive her presence at the hearing, both in person or to appear by video.” (Tr. 66.) The district court also said that M.Q.’s waiver was based on her past interactions with the court:

From past experience, she believed she would again be committed. I believe I committed her once before to the Montana State Hospital. My file goes back to 2012. So, because of her past interactions with the Court, [M.Q.] does not wish to participate today. That’s my main ground for proceeding with [M.Q.] not being present in the Courtroom.

(Tr. 67.)

However, the district court’s file contains no record of a prior commitment to Montana State Hospital. (*See* Docs. 1-22.) Over the years M.Q. has been subjected to four emergency detentions, two of which are reflected in older court documents in this record. (Tr. 12; Docs. 1, 12.) In 2012, the district court ordered a community commitment. (Doc. 11.) In 2017, the district court accepted a 14-day diversion option, which was successful. (Docs. 18, 22.) Descriptions of M.Q.’s other two emergency detentions are not detailed in the record, but they may have been the two admissions in 2011 when M.Q. was just beginning to receive services. (*See* Doc. 1 at 2; Tr. 35.) M.Q. denied

that she had ever been to Montana State Hospital. (Tr. 39.)³

Without addressing Jacobi's request to continue the proceedings, the district court concluded that the least restrictive placement for M.Q. would be an involuntary commitment to Montana State Hospital for up to 90 days. (Tr. 79.)

Police officers came into Hope House and transported M.Q. to Montana State Hospital. (Doc. 30 at 2.) M.Q. filed a timely appeal. (Docs. 30, 34.)

STANDARD OF REVIEW

Due process and right to counsel issues in civil commitment proceedings are subject to plenary review. *Matter of J.S.*, 2017 MT 214, ¶ 9, 388 Mont. 397, 401 P.3d 197 (overruling *K.G.F.* on some, but not all grounds); *Matter of S.D.*, 2018 MT 176, ¶ 8, 392 Mont. 116, 422 P.3d 122. "We require strict adherence to the involuntary commitment statutory scheme, considering the utmost importance of the rights at stake." *S.D.*, ¶ 8.

Even though M.Q. has been released from Montana State

³ M.Q. had been committed to Idaho State Hospital back in 2003 as a young adult. (See Doc. 12 at 2.)

Hospital, an appeal from an order of involuntary commitment is not moot despite her release, since these issues are capable of repetition and the matter would otherwise escape review. *In re R.F.*, 2013 MT 59, ¶ 18, 369 Mont. 236, 296 P.3d 1189.

SUMMARY OF THE ARGUMENT

A respondent's presence at their own trial can only be waived by strict adherence to the involuntary commitment waiver statute, Mont. Code Ann. § 53-21-119. The statute anticipates counsel's involvement throughout the waiver process. Before a respondent can waive their rights, the district court must conduct a diligent inquiry and make findings that the respondent is capable of making an intentional and knowing decision to waive their rights. For a respondent to be able to express their desire to waive, the respondent must be able to have a consultation or discussion about the waiver with their attorney. A district court cannot conduct a diligent inquiry when it does not allow the respondent to speak about the waiver to the court through their attorney.

When M.Q. did not appear in court for her 2:00 p.m. trial, all respondent counsel Jacobi had to go on was that M.Q. did not want to

be transported in handcuffs and shackles. Jacobi had just met with M.Q. an hour before the hearing and had no indication she would be refusing transport. Given his recent contact with her, Jacobi objected to any waiver of M.Q.'s presence and explained that the procedure of Mont. Code Ann. § 53-21-119 had to be followed. Jacobi asked the district court to continue its ruling so that he could return to Hope House and consult with M.Q.

The district court plowed forward with the hearing, not giving Jacobi a day—or even an hour—to allow him to talk to his client and figure out what was going on. The district court conducted M.Q.'s trial without her and committed her, violating her due process rights. The district court erroneously misinterpreted Mont. Code Ann. § 53-21-119. M.Q.'s commitment must be reversed and remanded for dismissal.

ARGUMENT

The district court erroneously interpreted Mont. Code Ann. § 53-21-119, violating M.Q.'s right to due process.

Rushing to go forward with the scheduled commitment hearing, the district court never gave M.Q. a chance to consult with Jacobi about why she declined transport to court.

Trial courts have a duty to safeguard the rights of respondents at every stage of the involuntary commitment proceeding. *In re L.K.-S.*, 2011 MT 21, ¶ 15, 359 Mont. 191, 247 P.3d 1100. These rights include the basic protections of due process: to offer evidence, to cross-examine witnesses, to be represented by counsel, and to be present at any hearing. Mont. Code Ann. § 53-21-115; *In re A.M.*, 2014 MT 221, ¶ 10, 376 Mont. 226, 332 P.3d 263. “Statutes governing involuntary commitment are critically important due to the ‘calamitous effect of a commitment,’ which includes loss of liberty and damage to the respondent’s reputation; thus, the statutes are to be strictly followed.” *In re A.K.*, 2006 MT 166, ¶ 11, 332 Mont. 511, 139 P.3d 849. Protecting a respondent’s rights protects the integrity of the entire involuntary commitment proceeding. *See In re P.A.C.*, 2013 MT 84, ¶ 13, 369 Mont. 407, 298 P.3d 1166.

The involuntary commitment statutes provide that these rights may be waived. Mont. Code Ann. § 53-21-119. Like any other involuntary commitment statute, the waiver procedure must be strictly adhered to. *In re R.W.K.*, 2013 MT 54, ¶ 18, 369 Mont. 193, 297 P.3d 318. If the waiver procedure is not strictly followed, the remedy is to

reverse and dismiss the commitment. *A.M.*, ¶ 18; *also see In re C.C.*, 2016 MT 174, ¶ 26, 384 Mont. 135, 376 P.3d 105.

Montana Code Annotated § 53-21-119 provides, in relevant part:

Waiver of rights. (1) A person may waive the person's rights, or if the person is not capable of making an intentional and knowing decision, these rights may be waived by the person's counsel and friend of respondent, if a friend of respondent is appointed, acting together if a record is made of the reasons for the waiver. The right to counsel may not be waived. The right to treatment provided for in this part may not be waived.

(2) The right of the respondent to be physically present at a hearing may also be waived by the respondent's attorney and the friend of respondent with the concurrence of the professional person and the judge upon a finding supported by facts that:

(a) (i) the presence of the respondent at the hearing would be likely to seriously adversely affect the respondent's mental condition; and

(ii) an alternative location for the hearing in surroundings familiar to the respondent would not prevent the adverse effects on the respondent's mental condition; or

(b) the respondent has voluntarily expressed a desire to waive the respondent's presence at the hearing.

Mont. Code Ann. § 53-21-119.

In *S.D.*, this Court broke down the statute and stated that it prescribed four rules:

1. All statutory rights in a civil commitment proceeding may be waived, except for the right to counsel and the right to treatment.

2. If capable of doing so, a respondent may waive their own rights.
3. If the respondent is not capable, rights may be waived only when the respondent's counsel and the appointed friend agree to the waiver and make a record of it.
4. If the court holds a hearing and the respondent is not there, the hearing may go forward in the respondent's absence only if the respondent's counsel and appointed friend waive the respondent's presence, with the concurrence of the professional person, and the presiding judge makes the factual findings required by subsection (2).

S.D., ¶ 11.

The district court based its ruling on subsection (2) of the statute, so M.Q. will address subsection (2) first before addressing subsection (1). Regardless of whether a waiver argument originates from subsection (2) or subsection (1), the district court erred in waiving M.Q.'s right to be physically present for her own trial.

- A. The district court erroneously interpreted Mont. Code Ann. § 53-21-119(2) when it granted a waiver of physical presence over the objection of M.Q.'s, in direct contravention of the statutory language.**

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been

inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.”

Mont. Code Ann. § 1-2-101.

The district court stated that the waiver statute was very convoluted and that there is a problem with the statute. (Tr. 66.)

There is not.

Subsection (2) provides a procedure to waive a respondent’s physical presence. The language is written in the conjunctive. The right to waive physical presence may be brought by the respondent’s attorney **and** the friend of the respondent **with** the concurrence of the professional person **and** some additional factual findings by the judge. Mont. Code Ann. § 53-21-119(2). All four parts must be satisfied to waive under subsection (2), and they are laid out right at the beginning of the subsection.

The last part, the requirement of additional factual findings, is then broken down into more components, which the statute groups into (a)(i), (a)(ii) and (b). This last part—and only this last part—is written in the disjunctive. The factual findings by a judge to meet the fourth requirement to establish the physical presence waiver can either be a

respondent's voluntarily expressed desire to waive their presence, or a finding that the respondent's presence at the hearing would be likely to seriously affect their mental condition and that there is no alternative location to prevent the adverse effects.

The single "or" in subsection (2) between (a)(ii) and (b) is only explaining that when it comes to the factual finding requirement, the district court has two paths to getting there. But the district court must still have the respondent's attorney, friend, and professional person on board to accept a waiver that complies with the statute. This Court has previously stated as much. *See In re L.K.*, 2009 MT 366, ¶¶ 15-19, 353 Mont. 246, 219 P.3d 1263.

M.Q.'s attorney was not on board. (Tr. 2, 58-60.) The district court did not have the discretion to ignore subsection (2)'s explicit requirement that Jacobi must consent to the waiver. Furthermore, the power to waive under subsection (2) is not in the hands of the State or the district court; it is a power delegated only to respondent counsel. Mont. Code Ann. § 53-21-119(2) (The right of the respondent to be physically present at a hearing may also be waived **by** the respondent's attorney . . .) (emphasis added).

The district court cannot leapfrog this explicit, conjunctive statutory requirement and immediately proceed to only address the factual finding requirement, as the State incorrectly encouraged the district court to do. (*See* Tr. 65-66.) The district court failed to strictly adhere to the involuntary commitment statute, violating M.Q.'s rights. M.Q.'s trial was conducted entirely outside of her presence. Because the district court failed to strictly comply with the waiver procedure, her commitment must be reversed and dismissed.

This should be the end of the inquiry. The State's argument for waiver emphasized language in subsection (2) and the district court's commitment order justifying the waiver only cited to subsection (2). (Tr. 63-67; Doc. 30 at 1.) However, M.Q. acknowledges that subsection (2) contains the word "also," suggesting that it is not the sole basis to reach a waiver of physical presence. *See* Mont. Code Ann. § 53-21-119(2); *also see P.A.C.*, ¶ 10 ("this case presents a situation covered by the first clause of 53-21-119(1), which allows the person . . . to waive her rights, including the right to be present at the commitment hearing."). For these reasons, M.Q. also argues that a waiver under subsection (1) has not been satisfied.

B. The district court, by not giving M.Q.’s attorney an opportunity to ascertain M.Q.’s wishes, failed to conduct the necessary diligent inquiry required to waive M.Q.’s presence under Mont. Code Ann. § 53-21-119(1).

Before accepting any waiver of rights under subsection (1), the district court must make a diligent inquiry to determine if the respondent is capable of making an intentional and knowing decision to waive those rights. *P.A.C.*, ¶¶ 12-14; *In re N.A.*, 2014 MT 257, ¶ 12, 376 Mont. 379, 334 P.3d 915. Further inquiry is particularly appropriate when the respondent is not in the courtroom. *See P.A.C.*, ¶¶ 4, 12. There must be an affirmative determination on the record that the respondent understands their procedural rights and that she waives those rights intentionally and knowingly. *A.M.*, ¶ 15. “A waiver of rights should not be presumed,” and this Court is “not at liberty to make assumptions to fill in the blanks.” *L.K.*, ¶ 19; *L.K.-S.*, ¶ 24.

The waiver statute anticipates counsel’s involvement throughout the waiver process. *See* Mont. Code Ann. § 53-21-119. The right to counsel may not be waived. Mont. Code Ann. § 53-21-119(1). When a respondent is not capable of making an intentional and knowing decision, the power to waive then falls upon the respondent’s counsel.

Mont. Code Ann. § 53-21-119(1). The waiver cannot occur unless a record is made of the reasons for the waiver. Mont. Code Ann. § 53-21-119(1); *P.A.C.*, ¶ 13. Without counsel's involvement, this procedure would be nonsensical. Counsel cannot bring forth a waiver or create a record of the reasons for a waiver without consultation with their own client, the respondent. Conversely, the respondent cannot waive their own rights until the respondent has consulted with counsel and counsel is satisfied that the respondent has the capability to make an intentional and knowing decision, and therefore the power to waive their own rights.

The opportunity for the respondent to consult with their attorney is paramount to any valid waiver procedure. In *R.W.K.*, respondent counsel informed the district court that she had spoken with her client about the petition. *R.W.K.*, ¶ 9. Counsel represented that R.W.K. had communicated with her prior to the hearing. *R.W.K.*, ¶ 9. He wished to waive his rights and would stipulate to the petition's allegations. *R.W.K.*, ¶ 9. Counsel explained to the district court that he discussed the allegations and the doctor's recommendation to R.W.K. and he still expressed a desire to waive his rights. *R.W.K.*, ¶ 22. The Court upheld

the waiver on appeal because R.W.K. effectively waived his rights himself by allowing counsel to speak to the judge on his behalf to communicate a desire to waive. *R.W.K.*, ¶ 24.

In *S.D.*, the only other case where this Court has affirmed a waiver under Mont. Code Ann. § 53-21-119(1), the Court repeatedly emphasized the role of counsel when addressing the legality of waiving one's rights by a written form instead of a court hearing. *See S.D.*, ¶¶ 12-15. The attorney must be satisfied that their client understands their rights and the nature of the proceeding. *S.D.*, ¶ 12. District courts need not make further inquiry if the court can rely on counsel's representations of a waiver. *S.D.*, ¶ 13. A respondent need not attend a hearing if the attorney can convey the respondent's waiver of attendance for them. *S.D.*, ¶ 14. And *S.D.*'s no-hearing written waiver was upheld because counsel first had a discussion with the respondent, and then made a representation that the respondent had the capability to waive their own rights. *S.D.*, ¶ 15.

“At a minimum, the record must reflect that the attorney discussed the waiver with her client, that the client desired to waive his rights, and that the attorney was satisfied that her client understood

his rights and the nature of the proceeding.” *A.M.*, ¶ 11. Reaching an understanding with the client may take additional time due to the client’s mental condition and medication, so a continuance of the scheduled hearing may sometimes be needed. *See K.G.F.*, ¶ 79; *J.S.*, ¶ 26.

A litigant cannot best express their wishes to the court without the assistance of counsel. “Quality counsel provides the most likely way—perhaps the *only* likely way—to ensure the due process protection of dignity and privacy interests” in commitment cases. *K.G.F.*, ¶ 48 (emphasis in original, internal quotations omitted). The threats to individual liberty posed by involuntary commitment arise at a time when the respondent with a mental illness is least able to defend against them—during times of crisis, confusion, and fatigue. *K.G.F.*, ¶ 56. Counsel are tasked to protect the guarantee of a fair trial to all respondents. *J.S.*, ¶ 15.

In the face of the respondent’s absence from the hearing and the objection of the respondent’s attorney, a court cannot conduct a diligent inquiry without first allowing the respondent an opportunity to speak through their counsel. The risk is too high that the voices of the

mentally ill—whose liberty, dignity, and privacy are at issue—will be muted by the swift and overriding authority of court-appointed professionals. *See K.G.F.*, ¶ 62. The cases of *P.A.C.*, *R.W.K.*, *A.M.*, and *S.D.* all demonstrate that the core to any waiver process is first and foremost a consultation or discussion between the respondent and the respondent’s attorney.

Allowing M.Q. an opportunity to consult with Jacobi is not the same as saying that she should have been required to attend court against her will. *See P.A.C.*, ¶ 15. It is unnecessary to drag a respondent to court before their attorney can inform the court of a physical presence waiver. *P.A.C.*, ¶ 15. But a consultation is necessary. Had M.Q. been given an opportunity to speak through her attorney, Jacobi could have articulated why M.Q. had declined transport and then advocated for a solution to solve the problem. Or, if M.Q. was actually waiving, Jacobi could have put forward a valid physical presence waiver that would have protected M.Q.’s rights.

The district court failed to conduct a diligent inquiry when it waived M.Q.’s right to presence without giving her attorney a day—or even an hour—to consult with M.Q. about whether she wanted to waive

her physical presence. When Maroney completed her evaluation at about 12:20 p.m. on February 14, there had been no information communicated to Maroney or Jacobi that M.Q. was going to back out of the hearing; the same hearing where M.Q. was looking forward to meeting the judge in person. (Doc. 29; Tr. 31-32, 35; 2/12/18 Tr. 11.) If M.Q. had desired to waive her rights, that would have been expressed to Jacobi as part of their discussions while he was still with her at Hope House.

Something happened within the next hour that prompted a change in M.Q.'s behavior. Deputy Rouse arrived at Hope House at 1:10 or 1:15 to conduct the transport. (Tr. 4, 25.) At that same time, Hope House staff were pressuring M.Q. to sign paperwork to release her property. (Tr. 25.) Moments after M.Q. relented and signed the release, Deputy Rouse brought out the restraints: handcuffs, shackles, and a belly belt. (Tr. 25-26, 28.) The belly belt would have to be placed onto and wrapped around M.Q.'s stomach by a male police officer. (See Tr. 28.)

If it is the policy of Gallatin County to use handcuffs and shackles for transport of the mentally ill (*see* Tr. 26), then M.Q. was handcuffed

and shackled when police took her from her home to the emergency room, then placed into physical restraints for over seven hours in the emergency room, then handcuffed and shackled again for transport from the emergency room to Hope House. (*See* Tr. 12, 15-16, 20.)

When M.Q. placed her hands into her pockets once Deputy Rouse brought out the cuffs, there might have been multiple thoughts or intentions within her mind. But the most logical conclusion is that she just didn't want to be handcuffed and shackled again. (*See* Tr. 26.)

A number of other rationales were bandied about to try and justify M.Q.'s physical presence waiver. The district court found that M.Q. had refused to appear by video, even though neither deputy could testify that M.Q. had affirmatively waived a video appearance. (Tr. 6, 27, 66, 68.)⁴ The district court said M.Q. had a belief that she would go back to Montana State Hospital based on past interactions with the court, despite M.Q.'s denials and lack of any record support that she has ever been to Montana State Hospital before. (*See* Tr. 39, 66-67.) The district court also based its waiver on Maroney's testimony, but Maroney had

⁴ Furthermore, objecting to a video appearance is not the same as waiving physical presence. *See* Mont. Code Ann. § 53-21-140(5)(b).

no more insight into M.Q.'s decisions over the last hour than anyone else sitting in the courtroom that had also listened to the testimonies of Deputies Hernandez and Rouse. (*See* Tr. 33-34, 66-67.)

But whether these rationales hold any weight is beside the point. District courts are not free to start granting waivers in violation of a respondent's due process and statutory rights. A district court's inquiry cannot be sufficient without hearing from the only individual with the power to waive their own rights: a capable respondent.

Jacobi, who had not been able to discuss this issue with M.Q. that had only arisen within the last hour, properly asked to continue the ruling for a single day to allow that consultation to take place. The continuance, in truth, needed to only be an hour—to allow Jacobi to drive to Hope House, consult with M.Q., and drive back (or appear from Hope House by video). When the district court refused to grant even that, Jacobi followed the statute and did not consent to waiving M.Q.'s presence.

M.Q. desperately needed a brief consultation with her attorney—her only advocate—to carry out the strategy she wanted. Instead, the district court plowed forward into trial without her, and committed her.

The right to physical presence is a right that cannot be easily quantified, yet it underlies the course of the entire proceeding and affects other rights. By being present, M.Q. could have participated in the preservation of her rights. She could have observed whether her attorney was advocating for her professionally and zealously. She could have observed the demeanor of the trial judge and the county attorney, heard their arguments and rulings, and provided information bearing on the matters being discussed.

Just to use an example, M.Q. was actually taking her medications at Hope House, but she did not agree on the dose she was prescribed. (Tr. 45-46, 56.) M.Q.'s consultation with her attorney or even her testimony could have fleshed out her position on her willingness to take medication. Jacobi, who alluded that he might have pursued a community commitment as a less restrictive alternative if M.Q. was present (Tr. 59), had a compelling argument for that result if the medication matter had been worked out.

In addition to erroneously interpreting subsection (2), the district court's grant of a physical presence waiver also failed to strictly adhere to the requirements of subsection (1). The district court conducted the

entire trial in M.Q.'s absence over her attorney's objection, violating M.Q.'s due process rights. M.Q.'s commitment cannot stand.

CONCLUSION

M.Q. asks this Court to reverse the district court and remand for dismissal of her involuntary commitment.

Respectfully submitted this 12th day of April, 2019.

OFFICE OF THE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ James Reavis
JAMES REAVIS
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,775, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James Reavis
JAMES REAVIS

APPENDIX

Order For CommitmentApp. A

Objection by Counsel, Ruling, Oral Findings of Fact and
Pronouncement of CommitmentApp. B

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-12-2019:

Martin D. Lambert (Prosecutor)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of James Richard Reavis
Dated: 04-12-2019