IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0119

IN THE MATTER OF:

W.R.,

Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Jessica T. Fehr, Presiding

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STATEMENT OF THE CASE

This matter concerns a direct appeal contesting the involuntary commitment of W.R. The State's petition to involuntarily commit W.R. was filed on Friday, December 21, 2018. (D.C. Doc 1.) The petition alleged W.R. "suffered from a major neurocognitive disorder," "was exhibiting aggressive behavior," and "is unable to care for himself." (D.C. Doc. 1 at 2.)

The District Court held an evidentiary hearing on December 26th and December 27th. At the conclusion of the hearing, W.R. was

committed to the Montana State Hospital for up to three months. (D.C. Doc. 7 at 5., attached as App. A.) W.R. timely appealed. (D.C. Doc. 12.)

STATEMENT OF THE FACTS

W.R.'s evidentiary hearing occurred the day after Christmas. (12/26/2018 Tr. at 1.) At the beginning of the hearing, W.R. immediately indicated to the court that he does not want to testify and that he wanted new counsel and an independent psychological evaluation. (12/26/2018 Tr. at 2.)

The District Court followed by asking W.R.'s attorney, "Were you able to meet with [W.R.] prior to today?" (12/26/2018 Tr. at 2.) W.R.'s attorney responded, "Yes." (12/26/2018 Tr. at 2.) W.R. interjected, "[Y]ou gave me five minutes in two weeks." (12/26/2018 Tr. at 2.) W.R.'s attorney did not contest that statement. (12/26/2018 Tr. at 2.) W.R. also added that he doesn't trust his appointed counsel. (12/26/2018 Tr. at 2.)

The State countered, "[W.R.] cannot terminate representation for the State Public Defender," and added there's no attorney "that's willing and reasonably available." (12/26/2018 Tr. at 3.)

The District Court noted, "[W.R.], you've made it very clear that

you want to hire your own attorney, that you want to hire another psychologist to do an evaluation." (12/26/2018 Tr. at 3.) However, the district court ultimately ordered the parties to complete the hearing, concluding that "I'll make a decision at that point." (12/26/2018 Tr. at 4.)

The State's only witness was Diane Goedde, a nurse practitioner from Billings Clinic. (12/26/2018 Tr. at 7.) Goedde testified that W.R.'s daughter and son-in-law brought him to the Billings Clinic from Big Timber because they "didn't feel that they could care for [W.R.] anymore." (12/26/2018 Tr. at 8.) Goedde also mentioned "an altercation with family members" where W.R. "threaten[ed] to harm them," but did not specify further. (12/26/2018 Tr. at 8.) Goedde did not talk with the family regarding these events, but testified that the family spoke with other Billings Clinic employees who then told her. (12/26/2018 Tr. at 11.) W.R.'s counsel did not object to any of Goedde's testimony as hearsay or on any other grounds.

After ruling out any medical issues, Goedde evaluated W.R. and concluded he had "a major neurocognitive disorder which used to be called dementia," that cannot be treated or cured. (12/26/2018 Tr. at

11.) Goedde testified that W.R. had a bad memory and is "not able to care for himself." (12/26/2018 Tr. at 11.) Asked by the State to specify why W.R. is unable to care for himself, Goedde responded:

> He is not aware of the situation, he believes things are entirely different than what they actually are. He talks about hiring a lawyer, hiring a psychologist. He, at this point, does not have the funds to do so, according to his family.

(12/26/2018 Tr. at 11.) Goedde testified that W.R. was not a threat to himself or others beyond an unspecified threat she heard that he made to his daughter and son-in-law. (12/26/2018 Tr. at 13.) W.R.'s counsel again did not object at any point.

Goedde presented W.R. with the option of entering a "skilled nursing care facility" but testified that he refused, and such a placement is impossible "without him signing in on a voluntary basis." (12/26/2018 Tr. at 13.) W.R.'s family had been notified that they could acquire guardianship to sign him in, but at the time of the hearing he had not been assigned a guardian. (12/26/2018 Tr. at 13.) The District Court offered W.R.'s attorney an opportunity to cross-examine Goedde. (12/26/2018 Tr. at 14.) W.R.'s attorney declined. (12/26/2018 Tr. at 14.)

Feeling "some heartburn" with W.R.'s request for new counsel and an independent psychological evaluation, the District Court continued the case for 24 hours to allow W.R. time to find new counsel and arrange an independent psychological evaluation. (12/26/2018 Tr. at 15.) W.R. immediately expressed concern to the District Court that he wouldn't be able to find a lawyer within 24 hours. (12/26/2018 Tr. at 15.) He pleaded with the District Court for more time, noting that attorneys are "busy as hell, I talked to six of them and they wouldn't come." (12/26/2018 Tr. at 15-16.) W.R. added that he's 84 years, and cannot read or write due to cataracts. (12/26/2018 Tr. at 16-17.)

The District Court responded:

> So we have known that this is the way this was going to progress and your family has known since the 19th when you were placed here that this was a possibility. So if counsel could be obtained privately, that should have begun already.

(12/26/2018 Tr. at 20.) The Court added that it was giving the 24 hours continuance "as a courtesy," (12/26/2018 Tr. at 20) and told W.R. "you should have already begun this process." (12/26/2018 Tr. at 20.)

W.R. remarked that he didn't have a cell phone. (12/26/2018 Tr. at 21.) The District Court responded, "There is a phone in the hall that you are able to use." (12/26/2018 Tr. at 21.) W.R. added that he was a

disabled veteran. (12/26/2018 Tr. at 22.) The District Court thanked him for his service, then reiterated that he had 24 hours. (12/26/2018 Tr. at 22.) Appointed counsel made no offer to help W.R. in securing new counsel or arranging an independent evaluation.

The District Court reconvened 24 hours later. (12/27/2018 Tr. at 1-2.) W.R.'s counsel informed the court that W.R. failed to hire new counsel. (12/27/2018 Tr. at 3.) The District Court did not inquire as to whether W.R. was able to arrange an independent psychological evaluation.

The State put Diane Goedde back on the stand. (12/27/2018 Tr. at 4.) Asked about W.R.'s ability to support himself, Goedde responded:

> We were told by his daughter, who had gone to Seattle to pick him up, to bring him back to Montana, that he had built up $50,000 in credit card debt prior to bringing him to Montana. And also that the home that he had been living in had been foreclosed upon, when they went to pick him up he was actually in an apartment.

(12/27/2018 Tr. at 4.) Goedde further testified that she wasn't aware whether he had financial resources but assumed "he doesn't have a lot at his disposal" based on his past debt and foreclosure. (12/27/2018 Tr. at 5.) W.R. again did not object to any of Goedde's testimony.

Like the day before, W.R.'s counsel was given the opportunity to ask Ms. Goedde questions. (12/27/2018 Tr. at 5.) W.R.'s counsel again declined. (12/27/2018 Tr. at 5.)

The court announced it found W.R. to have dementia, (12/27/2018 Tr. at 10), and that it was going to send him to the State Hospital in Warm Springs for up to three months. (12/27/2018 Tr. at 11, 17.) The court stated, "I base that on your inability to care for yourself based on your medical diagnosis." (12/27/2018 Tr. at 13.) The court added, "It's been testified to that you lack the financial resources to care for yourself." (12/27/2018 Tr. at 14.)

W.R. again protested being given only 24 hours to find a new attorney, asking "how could you build a legal team during Christmas?" (12/27/2018 Tr. at 14.) The court noted W.R. had gaps in his memory and said, again, "You don't have the financial means to care for yourself." (12/27/2018 Tr. at 15.) W.R. asked again for a longer continuance, to which the court responded, "It's been testified to that you do not have the means to retain your own counsel." (12/27/2018 Tr. at 19-20.) The District Court notified the Sheriff's office that W.R. had

an "unwilling state of mind" and may need to be handcuffed, and then ended the hearing. (D.C. Doc. 8; 12/27/2018 Tr. at 21.)

The District Court issued its order afterward. (App. A.) The order states W.R. must be committed because, as a result of his dementia, he "is unable to care for himself." (App. A at 5.) In support of this finding, the order states that W.R. "is likely to be unable to perform the daily functions of life" if released, and "his condition is too severe to perform the daily functions of life." (App. A at 5.)

The District Court's order then states:

> The State has proved by clear and convincing evidence that the Montana State Hospital is the least restrictive treatment option available to [W.R.] that will provide him with the treatment he needs and protect him. He needs constant care to ensure his care needs are met. The Montana State Hospital can provide him with the constant care he needs.

(App. A at 5.)

STANDARD OF REVIEW

In reviewing the sufficiency of the evidence in a civil commitment case, a district court's findings of fact will stand unless they are clearly erroneous, and we evidence is viewed in a light most favorable to the prevailing party. *In re S.C.*, 2000 MT 370, ¶ 8, 303 Mont. 444, 15 P.3d 861. A finding is clearly erroneous if it is not supported by substantial

evidence, if the trial court misapprehended the effect of the evidence, or if this Court has a definite and firm conviction after reviewing the record that a mistake has been made. *In re C.R.C.*, 2004 MT 389, ¶ 11, 325 Mont. 133, 104 P.3d 1065.

Whether the findings of fact meet the statutory requirements is a question of law reviewed for correctness. *In re L.L.A.*, 2011 MT 285, ¶ 7, 362 Mont. 464, 267 P.3d 1 (citing *In re E.P.B.*, 2007 MT 224, ¶ 5, 339 Mont. 107, 168 P.3d 662).

Issues of due process and right to counsel in a civil commitment proceeding are subject to plenary review. *In re J.S.*, 2017 MT 214, ¶ 9, 388 Mont. 397, 401 P.3d 197.

SUMMARY OF THE ARGUMENT

W.R. is an elderly disabled veteran who was involuntarily committed to the State Hospital because he is poor and living with dementia. The process of committing W.R., however, was marred by continuous error. Faced with an indigent respondent requesting an independent psychological evaluation, the trial court ignored its statutory obligation to assign him an evaluator. W.R.'s right to hire new counsel was violated by the court's refusal to grant him anything

more than a brief 24-hour continuance that it itself admitted was symbolic.

Denied these important procedural protections, W.R. found himself ordered to the State Hospital despite an absence of evidence supporting his involuntary commitment. The court's order lacks detailed or accurate factual findings upon which a person in Montana can lawfully be committed. The decision to send W.R., a person with dementia and mental illness, to the State Hospital was similarly unlawful.

The cascading series of errors that led the trial court to order W.R. to the State Hospital was ultimately possible because W.R.'s counsel remained almost perfectly silent for the duration of his case. The most forgiving standard of effective assistance of counsel is not forgiving enough to warrant the total lack of representation W.R. endured.

ARGUMENT

Involuntary commitment has "calamitous" effects on a person and "constitutes a significant deprivation of liberty that requires due process protection." *In re M.P.-L.*, 2015 MT 338, ¶ 24, 381 Mont. 496, 362 P.3d 627 (quotation omitted); *Addington v. Texas*, 441 U.S. 418,

425-26 (1979). Our Montana and federal constitutions recognize the important rights at stake for those subject to involuntary commitment, which include constitutional rights to due process, dignity, and privacy. *See* Mont. Const. art. II, § 4 (right to dignity), § 10 (right to privacy), § 17 (requirement of due process prior to liberty deprivations); U.S. Const. amend. XIV, § 1; *J.S.*, ¶ 19; *Addington*, 441 U.S. at 425. The Legislature enacted important safeguards to ensure that not every person with a mental illness can be involuntarily committed. *See* Mont. Code Ann. § 53-21-101(3) (stating a legislative purpose to institutionalize individuals "only when a person is suffering from a mental disorder and requires commitment"). This Court, too, recognizes the constitutional and statutory rights of persons the State seeks to involuntarily commit. *M.P.-L.*, ¶ 24.

Commitment proceedings are not pro forma proceedings about simply approving the State's petition. *See E.P.B.,* ¶ 12. Rather, at a hearing on a petition for commitment, district courts must assess two requirements: whether the individual (1) has "a mental disorder" and (2) "requires commitment." Mont. Code Ann. § 53-21-126(1). In

determining whether the individual requires commitment, "the court shall consider the following":

> (a) whether the respondent, because of a mental disorder, is substantially unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety;
> (b) whether the respondent has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others;
> (c) whether, because of a mental disorder, there is an imminent threat of injury to the respondent or to others because of the respondent's acts or omissions; and
> (d) whether the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, will, if untreated, predictably result in deterioration of the respondent's mental condition to the point at which the respondent will become a danger to self or to others or will be unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety.

Mont. Code Ann. § 53-21-126(1). The district court may commit an individual to the State Hospital only if an individual requires commitment under one of the criteria of Mont. Code Ann. § 53-21-126(1)(a)-(c). Mont. Code Ann. § 53-21-127(7). If the district court finds that commitment is required only under the criterion of Mont. Code Ann. § 53-21-126(1)(d), the district court is not authorized to commit the individual to the State Hospital. Mont. Code Ann. § 53-21-127(7).

I. The district court failed to appoint W.R. an independent evaluator.

When an indigent respondent facing involuntary commitment requests an independent evaluator, "the court shall appoint a professional person other than the professional person requesting the commitment to perform the examination." Mont. Code Ann. § 53-21-118(2).

At the very start of his commitment hearing, W.R. requested an independent psychological evaluation. (12/26/2018 Tr. at 2.) The State's only witness noted that W.R. wanted an independent evaluation but lacked the funds to pay for it. (12/26/2018 Tr. at 12.) The District Court acknowledged W.R.'s request for an independent evaluation (12/26/2018 Tr. at 2-3), but did not appoint a professional person, as Mont. Code Ann. § 53-21-118(2) requires.

Instead, the court gave W.R. a 24-hour continuance "as a courtesy" to use the phone in the clinic's hallway to try and find an independent evaluator on his own. (12/26/2018 Tr. at 20-21.) W.R., an elderly veteran, who no longer has the ability to read or write, failed. "I used this phone for probably eight hours," he told the judge the next day, noting it was Christmastime, "nobody is around, I can't get a team." (12/27/2018 Tr. at 8.) The district court responded, "I have to make this

decision today," and sent W.R. to Warm Springs without an independent evaluation. (12/27/2018 Tr. at 9, 11.)

The District Court's failure to appoint a professional person to evaluate W.R. is a plain violation of Montana's involuntary commitment statutes: when an indigent respondent requests an independent evaluation, "the court shall appoint" an independent evaluator. Mont. Code Ann. § 53-21-118(2). Contrary to its belief, the District Court did not "have to make [a] decision" that day. As this Court has emphasized on numerous occasions, "the statutory requirements of an involuntary commitment must be strictly adhered to by the district courts." *In re C.C.*, 2016 MT 174, ¶ 23, 384 Mont. 135, 376 P.3d 105. The Court will vacate a commitment order when statutes are not strictly adhered to, and it should do so in this case. *See In re L.K.-S.*, 2011 MT 21, ¶ 27, 359 Mont. 191, 247 P.3d 1100; *In re J.D.L., 2008 MT 445*, ¶ 13, 348 Mont. 1, 199 P.3d 805.

II. W.R.'s right to hire his own counsel was effectively denied when he was only allowed a day-long continuance to hire a new attorney.

A respondent in an involuntary commitment proceeding is guaranteed the right to "secure an attorney of the person's own choice

and at the person's own expense to represent the respondent." Mont. Code Ann. § 53-21-117. A request for a continuance to obtain counsel is "dubious and fraught with uncertainties and contingencies," except when "a defendant has made a good faith effort to obtain substitute counsel before the scheduled trial date." *In re T.M.*, 2004 MT 221, ¶ 37, 322 Mont. 394, 96 P.3d 1147 (quoting *State v. Garcia*, 2003 MT 211, ¶¶ 21–22, 317 Mont. 73, 75 P.3d 313).

Here, W.R. made a good faith effort to obtain substitute counsel before his hearing. After the court denied W.R.'s initial request for more time than the day after Christmas, he testified that he had already contacted six attorneys but was told they wouldn't come. (12/26/2018 Tr. at 16.) The court asked who he spoke to, and W.R. specified that he used the phone book. (12/26/2018 Tr. at 16.) The court responded "Okay," but kept its 24 hours deadline. (12/26/2018 Tr. at 16.) The court maintained its position even after W.R. explained that his cataracts made it difficult for him to read or write (12/26/2018 Tr. at 16) and that he had no phone. (12/26/2018 Tr. at 20.) The 24-hour continuance, by the court's own admission, was symbolic. (12/26/2018,

Tr. at 23 ("I don't see anything changing in the next week, let alone 24 hours.").)

Under Mont. Code Ann. § 53-21-117, W.R. had a right to secure his own attorney. That right was rendered illusory when he was denied a meaningful opportunity to exercise that right and secure an attorney. While the court had the discretion to limit the amount of time it gave to W.R. to find new counsel, it abused the discretion when, on the day after Christmas, it refused to give an 84-year old disabled veteran, who was unable to read or write, more than 24 hours to use a telephone in the Billings Clinic hallway to secure a new attorney. W.R. faced this task without assistance from his appointed counsel or the appointment of a statutory friend of respondent. The nature of involuntary commitment proceedings requires moving fast. But it also involves a significant loss of liberty—up to three months in the State Mental Hospital, in this case. W.R. was upset with the complete absence of advocacy from his appointed counsel, and the record supports his grievance. The District Court abused its discretion when it denied W.R. anything more than a symbolic 24-hour continuance to find new counsel.

Contrast this case with the trial court's use of discretion in *N.A.* The respondent in that case asked for an independent evaluation and the court provided him a total of three days to secure his own evaluation. *N.A.*, ¶ 34. There is no indication N.A. was indigent. N.A.'s counsel then secured an independent evaluator, but N.A. rejected that evaluator. *N.A.*, ¶ 34. On the last day of the continuance, N.A. informed his counsel who he sought to evaluate him, but his counsel determined that evaluator was not available. *N.A.*, ¶ 34. The trial court rejected N.A.'s request to further delay his evidentiary hearing. *N.A.*, ¶ 34. The Court found no abuse of discretion, noting the trial court "was not bound to continually delay the hearing due to N.A.'s indecision or inability to obtain favorable evaluation." *N.A.*, ¶ 34.

Unlike the respondent in *N.A.*, W.R. was left to his own devices in exercising his statutory rights. The task of hiring new counsel on the day after Christmas, using a phone book and a phone in the clinic's hallway, was fundamentally impossible for a person with W.R.'s disabilities to achieve. N.A., by contrast, immediately found a new evaluator with the help of his counsel-- who he then rejected. The trial court in *N.A.* only proceeded to trial after it became clear the

respondent actually sought a specific evaluator who he believed would be "specifically favorable for me." *N.A.*, ¶ 33.

W.R. was not looking to game the system; he wanted to hire counsel who would advocate for him. The court, however, refused to give W.R. more than the day after Christmas to complete that task. The court knew W.R. would not be able to find counsel in such a short period of time, and indeed, he failed. The court exceeded its discretion by when it stated on the record that it had no intention of protecting W.R.'s rights under Mont. Code Ann. § 53-21-117, and the resulting judgment must be vacated. *See e.g. State v. Borchert*, 281 Mont. 320, 328, 934 P.2d 170 (1997).

III. The trial court's commitment order was not supported by sufficient evidence.

In this case, the trial court's order of W.R.'s involuntary commitment was not supported by sufficient evidence, as its finding that he was unable to meet his basic needs was clearly erroneous. The District Court ordered W.R. involuntarily committed based on its finding that "he is unable to care for himself." (12/27/2018 Tr. at 13; App. A, at 5.) The court added in its order that "[W.R.]'s condition is too severe to perform the daily functions of life." (App. A, at 5.) Without a

citation to a statutory subsection in the trial court's order, W.R. must guess at the basis for his involuntary commitment.

W.R. now presumes, but does not assert, that the District Court used Mont. Code Ann. § 53-21-126(1)(a) as the basis for his commitment. That statute states that a person may be committed if the State presents clear and convincing evidence that, because of a mental disorder, they are substantially unable to provide for their own "basic needs of food, clothing, shelter, health, or safety." Mont. Code Ann. § 53-21-126(1)(a). The State failed, however, to present sufficient evidence supporting W.R.'s inability to provide for his own food, clothing, shelter, health, or safety.

As a preliminary matter, the State put forth no evidence regarding W.R.'s ability to meet his needs of food, clothing, or safety. Furthermore, W.R.'s health was assessed upon arrival at Billings Clinic, and the State's witness gave no indication he had any health problems. (12/26/2018 Tr. at 11.) Further, Goedde testified that W.R. had no problem taking medication. (12/26/2018 Tr. at 14.)

With respect to the basic need of "shelter," Goedde testified that other staff at the clinic had heard from W.R.'s daughter that W.R. had

been foreclosed upon in Seattle. (12/27/2018 Tr. at 4.) However, Goedde also testified that W.R. moved to an apartment after that foreclosure. (12/27/2018 Tr. at 4.) The State did not present any evidence indicating W.R. had any trouble staying in that apartment. Nor is there any other testimony suggesting W.R. was unable to maintain housing.

The trial court's finding that W.R. was unable to meet his basic needs was clearly erroneous as it was not supported by substantial evidence. Without such evidence, the order of involuntary commitment in this case must be vacated. *C.R.C.*, ¶ 38.

IV. The District Court unlawfully ordered W.R. to the State Hospital because it is not "the least restrictive alternative to … permit [his] effective treatment."

In determining a respondent's placement, "the court shall choose the least restrictive alternative necessary to protect the respondent and the public *and to permit effective treatment*." Mont. Code Ann. § 53-21-127(5)(emphasis added).

The trial court's placement of W.R., a person with dementia, in the State Hospital does not "strictly adhere" to Mont. Code Ann. § 53-21-

127(5). People with dementia cannot be effectively treated at the State Hospital.

The Legislature has defined the State Hospital as a placement for people who are "mentally ill":

> The Montana state hospital is a mental health facility as defined in 53-21-102, of the department of public health and human services for the care and treatment of *mentally ill* persons.

Mont. Code Ann. § 53-21-601(2)(a) (emphasis added). The next subsection continues:

> The role of the State Hospital is to provide intensive inpatient *psychiatric services*, including those services necessary for transition to community care, as components in a comprehensive continuum of publicly and privately provided programs that emphasize treatment in the least restrictive environment.

Mont Code Ann. § 53-21-601(2)(b) (emphasis added.) Finally, the State Hospital's mission is defined as such:

> The mission of the Montana state hospital is to stabilize persons with severe *mental illness* and to return them to the community as soon as possible if adequate community-based support services are available.

Mont Code Ann. § 53-21-601(2)(c) (emphasis added.)

W.R. was diagnosed with dementia at Billings Clinic. Dementia is not a mental illness. Dementia is a neurocognitive disorder most often

caused by Alzheimer's disease. The record contains no evidence that W.R. had a mental illnesses.

The State Hospital statute's use of "mental illness" here reflects the Legislature's explicit intention to not send people with only dementia to the State Hospital. The Montana legislature has repeatedly emphasized that the State Hospital is not a permissible placement for people with dementia. In 1993, the Legislature passed House Bill 685 to amend the statute defining the State Hospital's mission to remove a clause allowing the facility to serve people with "other medical or organic disorders" if space and funds allow. In 2017, by contrast, the Legislature passed Senate Bill 217 which created a class of specialized nursing homes intended to serve people with dementia. The bill's sponsor introduced it with the following statement:

> As many of you know, we have some issues at the Montana State Hospital. One problem that's increasing is that people with Alzheimer's disease or dementia are being committed to that facility. This usually happens as they have no community placement to go to. Often because of behaviors that nursing homes and assisted living centers can't handle. The Montana State Hospital is not a good place for people with dementia or Alzheimer's. These aren't mental illnesses.

Senate Public Health, Welfare, and Safety, February 22, 2017, 15:43:18, Roger Webb, SB 217.

The district court's placement of W.R. also failed § 53-21-127(5)'s "the least restrictive alternative" standard when it explicitly relied on Goedde's statement that W.R. cannot be placed in a nursing home unless he "signs in on a voluntary basis." (App. A at 3; 12/27/28 Tr. at 13.) Goedde's statement is incorrect. Involuntary commitment proceedings, by their very nature, are not voluntary. See *In re D.S.*, 2005 MT 152, ¶ 21, 327 Mont. 391, 114 P.3d 264 (rejecting a lower court's finding that it "had no other option" but to place respondent at the State Hospital). Mont. Code Ann. § 53-21-127(3)(b) explicitly authorizes involuntary commitment to "community facilit[ies]" instead of the State Hospital. As described above, SB 217 explicitly created one possible, and "less-restrictive," placement for people in commitment proceedings who are suffering solely from dementia.

The Legislature defined the State Hospital as a facility for people with "mental illness," and W.R. is not mentally ill. The State Hospital is therefore not a placement that "permit[s] effective treatment" of W.R., meaning the trial court's order sending him there violates Mont. Code Ann. § 53-21-127(5). If the Court does not vacate W.R.'s commitment entirely, the case should be remanded to the trial court to

determine a placement in strict compliance with Mont. Code Ann. § 53-21-127(8).

V. The District Court's commitment order lacks the required detailed statement of facts.

Montana's involuntary commitment statutes require commitment orders to contain "a detailed statement of the facts upon which the court found the respondent to be suffering from a mental disorder and requiring commitment." Mont. Code Ann. § 53-21-127(8)(a); *In re L.L.A.*, 2011 MT 285, ¶ 10, 362 Mont. 464, 267 P.3d 1. Findings of fact must be highly detailed and supported by the record. *See, e.g., In re O.R.B.*, 2008 MT 301, ¶ 25, 345 Mont. 516, 191 P.3d 482. Conclusory statements do not suffice. *L.L.A.*, ¶ 11.

A detailed statement of facts serves important purposes in commitment cases. *L.L.A.*, ¶ 21. Findings of fact "inform the court of appeals of the basis of the judgment." *L.L.A.*, ¶ 21. Conclusory findings make the Court's review of the appeal more difficult than is necessary. *In re A.K.*, 2006 MT 166, ¶ 14, 332 Mont. 511, 139 P.3d 849. A judgment with detailed facts is particularly important in commitment proceedings because commitment orders apprise treatment professionals at the Montana State Hospital of the patient's particular

condition and behaviors that prompted the need for commitment. *L.L.A.*, ¶ 21 (holding that the failure to follow the statute's express requirement for a detailed statement of facts is not harmless error).

In *L.L.A.*, the lower court found the respondent's disorder "make[s] her unable to protect her life and safety," but it failed to "describe facts particular to L.L.A." *L.L.A.*, ¶ 13. The Court concluded:

> While the court did find that L.L.A. was "unable or unwilling to consent to treatment," the order contains no information about L.L.A.'s behavior demonstrating she was unable to protect herself or others. We have held such a "conclusory restatement of the statutory criteria" is insufficient to comply with the requirement for a detailed statement of facts.

L.L.A., ¶ 13 (quoting *In re G.M.*, 2007 MT 100, ¶ 22, 337 Mont. 116, 157 P.3d 687.) The Court then reversed L.L.A.'s commitment. *L.L.A.*, ¶ 23.

The commitment order in this case is analogous to that in *L.L.A.* Here, the trial court's findings of fact are neither detailed nor factual. The commitment order generally concludes that W.R. "requires commitment" consist of repetitive statements that he has "difficulty performing basic tasks," is "unable to care for himself," is unable to "perform the basic tasks of daily living," and is unable to "perform the daily functions of life." (App. A at 5.) As in *L.L.A.*, the trial court's findings paraphrase the statute without providing case-specific detail.

Even more troubling, the order states "[W.R.] is delusional. He believes he still has a home in Seattle that he can return to, despite it having been foreclosed on." (App. A at 4.) The court here omits the testimony of the State's witness that W.R. moved into a new home in Seattle after being foreclosed upon. (12/27/2018 Tr. at 4.)

In concluding that the State Hospital was the proper placement for W.R., the order is similarly generic:

> The State has proved by clear and convincing evidence that the Montana State Hospital is the least restrictive treatment option available to [W.R.] that will provide him with the treatment he needs and protect him. He needs constant care to ensure his care needs are met. The Montana State Hospital can provide him with the constant care he needs.

(App. A at 5.) Beyond that boilerplate language, the order also makes findings that are not based in fact. The order's only mention of placements other than the State Hospital is a finding that "[W.R.] refuses to sign into [Billings Clinic]." (App. A. at 3.) W.R., however, did not refuse to sign into Billings Clinic. Rather, Goedde testified W.R. was not willing to sign into a "skilled nursing care facility." (12/26/2018 Tr. at 13.) The trial court's order here falls short of the analysis of alternative placements required by Mont. Code Ann. § 53-21-127(8)(b)-(d); *In re D.S.*, 2005 MT 152, ¶ 21, 327 Mont. 391, 114 P.3d 264.

The order's statement of facts is not detailed or based in fact, as required by Mont. Code Ann. § 53-21-127(8)(a). This Court must analyze W.R.'s commitment for an inability to "care for himself" without a factual basis for that finding. The Court is also left without explanation as to why a less-restrictive placement could not better protect and provide care for W.R. Lacking detailed or factual findings, W.R.'s commitment order must be reversed and vacated. *D.S.*, ¶ 21; *L.L.A.*, ¶ 23.

VI. W.R.'s counsel was woefully ineffective.

The right to the effective assistance of counsel ensures the ability of the accused to receive a fair trial. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This Court uses the *Strickland* standard to evaluate ineffective assistance of counsel claims in involuntary commitment proceedings. *J.S.*, ¶ 18.

In *Strickland*, the United States Supreme Court established a two-part test to determine when counsel is ineffective: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth

Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Generally, the defendant must establish both parts of the test to prevail. *Wilson v. State*, 1999 MT 271, ¶ 12, 296 Mont. 465, 989 P.2d 813 (citing *State v. Jones*, 278 Mont. 121, 133, 923 P.2d 560, 567 (1996)). In some cases, counsel's performance is so deficient a presumption of ineffectiveness arises and the second part of the test becomes unnecessary. *Wilson*, ¶ 12 (citing *United States v. Cronic*, 466 U.S. 648, 660, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984)).

J.S. is this Court's only recent case using the *Strickland* standard to evaluate counsel's actions in a commitment proceeding. J.S. argued on appeal that her counsel was ineffective for failing to investigate community placement options. *J.S.*, ¶ 27. The Court, however, noted her counsel was in fact carrying out her client's wishes by seeking to have the petition dismissed with no community placement commitment at all. *J.S.*, ¶ 27. The Court further noted counsel was justified in not seeking alternative placements because J.S. did not believe she was

mentally ill, did not believe she needed medication, and had "an extensive history of illness and commitments." *J.S.*, ¶ 28. Based on these findings, the Court rejected J.S.'s argument that her counsel was ineffective. *J.S.*, ¶ 33.

The inaction of W.R.'s counsel is of an entirely different nature than that seen in *J.S.* W.R.'s counsel remained essentially silent throughout the two-day hearing. He did not ask a single question of the State's only witness. He did not object once despite multiple instances where the State elicited double-hearsay evidence on material issues from its only witness. After the State presented its minimal evidence, W.R.'s counsel did not hold the State to its burden of proof on *any* element.

This is not a case where counsel's silence could be construed as a strategic decision. *See e.g. Golie v. State*, 2017 MT 191, ¶ 32, 388 Mont. 252, 399 P.3d 892 ("It is not unreasonable for counsel to refrain from objecting if she reasonably believes that withholding an objection serves a defense purpose."). Although this appears to be a "basic needs" commitment, the State's only witness could only testify generally that W.R. couldn't "care for himself." (12/26/2018 Tr. at 12.) W.R.'s counsel

did not cross-examine Goedde on this statement, nor did he challenge the State to provide a factual basis for its conclusion. The only enumerated "basic need" mentioned at W.R.'s hearing was housing, and the State's witness testimony was that W.R. was able to move into a new home after he was foreclosed upon. (12/27/2018 Tr. at 4.) W.R.'s counsel remained silent after the State rested its case instead of making the obvious argument to the court that the State presented no evidence demonstrating W.R. requires commitment under Montana law.

The pretrial conduct of W.R.'s counsel is similarly concerning. At his hearing, W.R. repeatedly told the court that his counsel had only met with him for a few minutes before the hearing. (12/26/2018 Tr. at 2, 25; 12/27/2018 Tr. at 2.) W.R.'s counsel did not dispute these statements. Given the State's stated goal of this proceeding, confining W.R. for up to three months in the State Hospital, it was unconscionable for counsel to spend no more than a few minutes total with W.R. before trial. As the Court recently noted:

> Montana Rule of Professional Conduct 1.14(a) states that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Part of a normal

> attorney-client relationship includes "reasonably consult[ing] with the client about the means by which the client's objectives are to be accomplished," M. R. Prof. Cond. 1.4(a)(2), and "abid[ing] by a client's decisions concerning the objectives of representation," M. R. Prof. Cond. 1.2(a). These rules highlight that when an attorney represents a client during a civil commitment proceeding, the attorney has an ethical duty to seek the client's input and, if the client so chooses, to allow for the client's participation in the defense "as far as reasonably possible." M. R. Prof. Cond. 1.14(a).

In re S.M., 2017 MT 244, ¶ 34, 389 Mont. 28, 403 P.3d 324. The record here shows W.R.'s counsel failed to "seek his client's input" or "abide by his client's decisions concerning the objectives of representation."

This is not a case where W.R. is taking advantage of "the distorting effects of hindsight" to second guess difficult decisions made by his counsel. *See J.S.*, ¶ 26. His counsel made no decisions at all, nor engaged in any form of advocacy. Counsel sat silently next to W.R. for two days while his client begged for proper dementia care, begged for basic procedural protections, begged not to be sent to a place where Montana law says he does not belong. The Court should find W.R.'s counsel ineffective and vacate the resulting commitment order.

CONCLUSION

"[A]n involuntary commitment hearing is not merely a procedural nicety, but the only chance for a person facing a loss of liberty to put the

State to its proof." *In re T.P.*, 2008 MT 266, ¶ 29, 345 Mont. 152, 190 P.3d 313 (Gray, C.J., concurring). W.R.'s commitment hearing was, as Chief Justice Gray warned, "a procedural nicety." The case for his commitment and placement in the State Hospital falls apart with a mere glance at what Montana law requires. For the foregoing reasons, the Court must vacate the commitment order in this case.

Respectfully submitted this 30th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 6543, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Danny Tenenbaum
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APPENDIX

CERTIFICATE OF SERVICE

I, Danny Tenenbaum, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-30-2020:

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