IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0162

IN THE MATTER OF:

R.C.,

Respondent and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Jason T. Marks, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

United States Code

United States Constitution

Code of Federal Regulations

Other Authorities

INTRODUCTION

Upon conscientious examination of the record, undersigned counsel advises this Court he has not identified any meritorious issues for Respondent and Appellant, R.C., to present on appeal. Counsel moves this Court for permission to withdraw from representing R.C. in this appeal under *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103. If this Court determines there are issues that merit briefing, counsel requests the Court specify the issues to be briefed and deny the motion without discharging undersigned counsel.

Pursuant to § 46-8-103(2), counsel has mailed a copy of this *Anders* brief to R.C. at his last known address. Counsel has also mailed R.C. a letter advising him of counsel's conclusion regarding the merits of the appeal and informing him that he will have the right to file a response to this motion directly with the Court.

STATEMENT OF THE ISSUE

Whether undersigned counsel and the Appellate Defender Division should be permitted to withdraw from this appeal in accord with the criteria established by the United States Supreme Court in *Anders*.

STATEMENT OF THE CASE

The State filed a petition for R.C.'s involuntary commitment on January 11, 2021. (District Court Document (Doc.) 1.) The petition alleged R.C. suffered from a mental disorder—"Psychotic Disorder NOS"—that caused him to pose an imminent risk of harm to others, as evidenced by his supposed threats of violence against public officials and his attempts to purchase a gun. (Doc. 1 at 2, 6–9.)

An initial hearing was held that same day. (1/11/2021 Hearing Transcript (1/11 Tr.) at 1–14.) After the hearing, the court appointed Shannon McNabb to conduct a mental health evaluation of R.C. (Doc. 3.) McNabb evaluated R.C. and prepared a written report in which she recommended his commitment to the Montana State Hospital (MSH). (Doc. 10; 1/15/2021 Hearing Transcript (1/15 Tr.) at 27–32.)

A commitment hearing was held January 15, 2021. At the conclusion of the hearing, the court found R.C. suffered from bipolar disorder and required commitment due to his posing an imminent risk of harm to others. (1/15 Tr. at 55; Doc. 11 at 12–14.) It ordered him committed to MSH for 90 days. (1/15 Tr. at 55; Doc. 11 at 14.)

R.C. filed a timely notice of appeal. (Doc. 12.)

STATEMENT OF THE FACTS

R.C., a man in his mid-60s, was traveling through Missoula on his way from the east coast to visit family in Oregon. (1/15 Tr. at 44.) On January 9, 2021, employees at Walmart in Missoula called police to report that R.C. was refusing to wear a face mask in their store and refusing to leave. (1/15 Tr. at 10.)

Missoula Police Officer Henry Jensen and his partner responded and spoke with R.C. in the store. (1/15 Tr. at 10–11.) Jensen described R.C. as calm and polite, but also said R.C.'s speech was "quite rapid" and the "subject matter was somewhat disconnected from the situation itself and he changed subjects frequently." (1/15 Tr. at 11.) Jensen said R.C. was more interested in talking about Missoula public officials, such as the mayor and the police chief, and "[h]e wasn't really interested in talking about why we were there." (1/15 Tr. at 11.)

R.C. refused to leave on his own accord but consented to being arrested. (1/15 Tr. at 10–11.) Jensen handcuffed him, placed him in his patrol car, and escorted him back to the motel where R.C. was staying. (1/15 Tr. at 11.) Jensen issued R.C. a citation and released him. (1/15 Tr. at 11–12.)

A couple hours later, the motel staff called police and asked for assistance removing R.C. from the premises. (1/15 Tr. at 12–13.) R.C. was supposedly "making concerning comments about the assassination of public officials."[1] (1/15 Tr. at 12.) He also made some "concerning statements about the acquisition of weapons." (1/15 Tr. at 13.)

Jensen and another officer arrived and spoke with R.C. in his motel room. (1/15 Tr. at 14.) R.C. made "some strange comments" to the officers, such as accusing them of committing a crime by wearing masks and threatening to place them under citizen's arrest. (1/15 Tr. at 14.) Jensen told R.C. the motel staff wanted him to check out, so R.C. began packing his belongings. (1/15 Tr. at 14.) Jensen again noted R.C.'s "speech was very rapid and sometimes the subject matter would change very quickly and without a segue." (1/15 Tr. at 23.)

As R.C. packed his bags, Jensen said R.C. "began talking about broader themes of the government's misdeeds" and "made comments that he believed the government would be overthrown sometime soon

[1] R.C.'s counsel objected to this comment at the commitment hearing on hearsay grounds. (1/15 Tr. at 12.) The District Court allowed the testimony to explain the reason for Jensen's return to the motel, but said it would not consider this "as any facts in evidence that would support commitment." (1/15 Tr. at 13.)

and that public officials," including the Missoula mayor, "would be dead." (1/15 Tr. at 14–15.) R.C. commented on "the death of public officials several times" during this conversation. (1/15 Tr. at 15.)

Jensen asked R.C. whether he intended to obtain any firearms, and R.C. said yes. (1/15 Tr. at 15.) R.C. told Jensen that he had asked motel staff for the phone number for Axmen firearms and told them he intended to purchase a gun there. (1/15 Tr. at 15.) R.C. told Jensen the reason he was at Walmart earlier was to obtain a conservation license, which he believed would facilitate his purchase of a gun from Axmen. (1/15 Tr. at 15.)

When Jensen asked R.C. whether he intended to kill anyone after purchasing a gun, R.C. "became very agitated, started shouting." (1/15 Tr. at 15.) "His demeanor swung to a hostile or a confrontational verbal demeanor." (1/15 Tr. at 15.) After Jensen asked several times whether R.C. intended to kill anyone, R.C. eventually shouted at him, "I already told you I have the intent." (1/15 Tr. at 16.)

R.C. told Jensen he was a soldier who "had killed in the past and he intended to kill again in the future." (1/15 Tr. at 16.) Jensen said R.C. mentioned this generalized intent to kill "[t]wo, three, maybe even

four times over while also circling through his comments about the government being overthrown, public officials dying, and also in between discussing his intent to acquire firearms." (1/15 Tr. at 16.) R.C. also said once or twice that he might return to Walmart and "burn it down." (1/15 Tr. at 22.)

Jensen decided to place R.C. in protective custody and transport him to the hospital for a mental health evaluation. (1/15 Tr. at 16–18.) When Jensen told R.C. this was happening, R.C. told Jensen he would "play nice" for the mental health professionals who evaluated him. (1/15 Tr. at 18.)

In the patrol car on the way to the hospital, R.C. allegedly told Jensen an anecdote "that at some point he had crushed the skull of a 14-year-old girl and watched her brain matter fall out onto the ground below." (1/15 Tr. at 17.) R.C. supposedly laughed immediately after making this comment. (1/15 Tr. at 17.) Jensen testified this increased his concern that R.C. "had serious intent to cause death or harm to somebody." (1/15 Tr. at 17.)

At the hospital, R.C told Jensen he had done background research on Missoula public officials, including the chief of police and the county

sheriff. (1/15 Tr. at 18–19.) R.C. told Jensen he had investigated these officials' prior employment, personal finances, and "history," which Jensen "found very eerie and a disproportionate interest in those public figures," given that Jensen lived on the east coast and had no ties to Missoula. (1/15 Tr. at 19; *see* Doc. 1 at 8.)

Kimberly Nottestad, a licensed clinical social worker, evaluated R.C. at the hospital. (Doc. 1 at 6–9.) Nottestad initially diagnosed R.C. with "Psychotic disorder, NOS." (Doc. 1 at 8.) She noted R.C. was "exhibiting grandiose and manic behaviors along with delusional thought content," he had "made active steps today to buy weapons," and he was "a danger to others." (Doc. 1 at 8.)

After the evaluation, R.C. was involuntarily admitted to West House pending the commitment proceedings. (Doc. 1 at 8.) His behavior there at some point "became escalated," and he "broke a toilet and a window and was sent to MSH." (Doc. 10 at 8; *see also* 1/15 Tr. at 30–31.)

The District Court issued an order appointing four people as "professional persons to examine Respondent." (Doc. 3 at 1.) Shannon McNabb—one of those four—evaluated R.C. while he was at MSH.

McNabb prepared and filed a written report of her findings. (Doc. 10.) The report stated McNabb was a "LCPC"—a licensed clinical professional counselor. (Doc. 10 at 1, 11; *see* Doc. 3 at 1.) In preparing her report, McNabb said she reviewed R.C.'s records from the Missoula Police Department, St. Patrick's Hospital, Western Montana Mental Health Center, and MSH. (Doc. 10 at 4; *see also* 1/15 Tr. at 27.)

McNabb diagnosed R.C. with bipolar disorder. (Doc. 10 at 3.) She wrote that R.C. "had pressured speech and tended to attempt to dominate the evaluation." (Doc. 10 at 4, 7.) She described his thought content as, "Delusional, denial of mental illness." (Doc. 10 at 7.) Her diagnostic impressions included, "delusions, paranoia, manic, threatening, poor sleep, grandiosity." (Doc. 10 at 8.)

McNabb noted that R.C. "does not believe that he suffers from a mental illness and stated that he will not take psychiatric medication." (Doc. 10 at 4.) The report discussed records from a past psychiatric hospitalization in which R.C. had also refused to take medications. (Doc. 10 at 6.) While at West House and MSH, McNabb noted R.C. "refused all medications" and "has continued to present as manic and threatening at times." (Doc. 10 at 8.) She wrote that R.C. "maintained

that he still planned to purchase a gun when he leaves the hospital." (Doc. 10 at 4, 8.)

Commitment Hearing

A full commitment hearing was held January 15. At the start of the hearing, R.C. indicated he wished to represent himself, rather than proceed with his court-appointed counsel. (1/15 Tr. at 4.) The court told R.C., "You do not have the right in Montana, as you indicated you are aware, to represent yourself in a civil commitment proceeding . . . And I would not allow you to represent yourself in this matter." (1/15 Tr. at 4.) R.C. maintained his objection, saying for the record, "my Constitutional rights as a United States citizen are being violated by this." (1/15 Tr. at 6.)

R.C. then, through counsel, objected to the District Court's "authority to hear this case." (1/15 Tr. at 7.) Counsel asserted R.C. asked him to convey to the court that R.C. "is a Moorish American and that there is a distinction under the U.S. Constitution for Moorish people. And that as a result he's a Sovereign citizen who is not subject to either the federal or state authority [and] that the court does not have authority to hear this case." (1/15 Tr. at 7.)

R.C. personally interjected, "I'm a Moorish American and the Moors have never – there's never been any case anywhere in the country, including Montana, where the court has jurisdiction over a Moorish American in local, state or federal court." (1/15 Tr. at 8.) The court found, "I do have authority to hear this case under Montana state law," reasoning R.C. was "detained within this district for an emergency detention." (1/15 Tr. at 7–8.)

After Jensen testified about his encounters with R.C., the State called McNabb to testify. (1/15 Tr. at 26.) The prosecutor asked about McNabb's credentials, and McNabb testified, "I am an LCPC mental health professional and I work for Western Montana Mental Health, the crisis team." (1/15 Tr. at 26.) The prosecutor asked if R.C.'s counsel would "stipulate to her credentials for this case." (1/15 Tr. at 26.) Counsel answered, "I'm familiar with Ms. McNabb's background. And I normally would stipulate to that but my client, I believe, objects to my representation and I believe he objects to Ms. McNabb's credentials." (1/15 Tr. at 26.)

The prosecutor offered to "lay further foundation" to establish McNabb's credentials as a "professional person," but the court stopped

her from doing so. (1/15 Tr. at 26.) The court said, "I don't believe that's necessary. Ms. McNabb has testified in mental health commitment proceedings before me on multiple occasions. I'm familiar with all of her professional credentials and educational background. I don't believe that further foundation is needed and I will accept her testimony in this matter." (1/15 Tr. at 26–27.)

McNabb went on to testify that she believed to a reasonable degree of medical certainty that R.C. suffered from a mental disorder: "Bipolar I disorder." (1/15 Tr. at 27–28.) She disagreed with Nottestad that R.C. also suffered from "unspecified psychosis." (1/15 Tr. at 28.) In arriving at her diagnosis, McNabb cited R.C.'s symptoms of pressured speech, lack of sleep, grandiosity, manic behavior, flight of ideas, disorganization, making "bizarre delusional statements," and disordered thought process. (1/15 Tr. at 28–29.) McNabb observed these behaviors in her evaluation and also noted their appearance in Jensen's description of his encounters with R.C. (1/15 Tr. at 29–30.)

In her conversation with R.C., McNabb asked about his plans to buy a gun. (1/15 Tr. at 30.) R.C. "acknowledged that he did have a plan to purchase a gun," but he denied that he had any intent to kill anyone

with it. (1/15 Tr. at 30.) R.C. told McNabb he was a soldier, he only killed "under the rules of engagement," and his intent in buying a gun was solely self-defense. (1/15 Tr. at 38–39.)

McNabb said she asked R.C. about the incident where he took apart a toilet and used it to break a window at West House. (1/15 Tr. at 30.) R.C. "acknowledged that he did that damage and he did acknowledge that he had been threatening and likely perceived as potentially aggressive and dangerous by the staff there." (1/15 Tr. at 30; *see also* Doc. 10 at 4.) McNabb noted the window R.C. broke was "a window separating the involuntary side of West House from the voluntary side." (1/15 Tr. at 30.) She also testified R.C. had spit on a staff member at West House and was "posturing" towards an evaluator at MSH who "felt threatened and unsafe" as a result. (1/15 Tr. at 38.)

McNabb testified R.C. met the criteria for involuntary commitment because he posed an imminent danger to others. (1/15 Tr. at 31.) To support her conclusion, McNabb referred to R.C. breaking the window at West House and talking "multiple times about having a plan to purchase a gun and kill officials." (1/15 Tr. at 31–32.) McNabb referenced Jensen's account that R.C. made "statements regarding

killing others and having the intent to purchase a gun, too." (1/15 Tr. at 31.) She emphasized Jensen's testimony that R.C. said to him, "I already told you I have the intent" to kill. (1/15 Tr. at 31; *see* 1/15 Tr. at 16.)

When asked why she believed the danger R.C. posed was "imminent," McNabb answered, "His symptoms are related to the manic episode that he's experiencing and without medication and treatment to help him, he's likely to continue to decompensate and be even more dangerous." (1/15 Tr. at 33.) She said R.C.'s mental state prevented him from making sound decisions about taking his medication. (1/15 Tr. at 32.) And she reiterated her concern about R.C. telling her "he still has plans to buy a gun" upon his release. (1/15 Tr. at 33.)

McNabb testified MSH was the least restrictive alternative for R.C.'s treatment. (1/15 Tr. at 32.) She said that because of "his level of aggression and interactions with community and staff," the "crisis facilities are not equipped to deal with that level of aggression and the Montana State Hospital is the only location that can administer medication involuntarily." (1/15 Tr. at 32.)

R.C. testified after McNabb. (1/15 Tr. at 44–54.) He explained he was passing through Missoula on his way to visit family in eastern Oregon. (1/15 Tr. at 44.) R.C. asserted his aggressive behavior at West House was only in response to him being denied proper medical care, and he said the descriptions of him breaking a window and spitting on a staff member were exaggerated. (1/15 Tr. at 46–48.)

R.C. acknowledged he wanted to buy a gun from Axmen. (1/15 Tr. at 48–49.) He said he was a soldier and former secret service agent, he had "quite an arsenal" back home, but he did not have any guns here. (1/15 Tr. at 49.) R.C. stated, "We're in the middle of a civil war," and he made references to Congress members and Supreme Court justices having been recently arrested and executed in Washington, D.C. (1/15 Tr. at 50.)

R.C. testified he had killed before, during "a civil war in D.C., 1970s, special operations." (1/15 Tr. at 51.) He stated he had worked as a contractor for the C.I.A., N.S.A, and Department of Defense. (1/15 Tr. at 51.) When his attorney asked him whether, "[o]utside of those duties," he would ever use violence, R.C. answered, "Absolutely, I would defend in particular the ladies, the children, the old people." (1/15 Tr. at

51.)

R.C. then alleged that the Judge, prosecutors, police, Mayor, City Council, and Governor were all covering up corruption, pedophilia, "satanic rituals," and "child sacrifice." (1/15 Tr. at 53–54.) He stated, "the Insurrection Act has been enacted, people are being arrested and executed and I hope y'all do a good job here to clean up Missoula." (1/15 Tr. at 54.) R.C. added, "Missoula is a shit show." (1/15 Tr. at 54.)

After R.C.'s testimony, the prosecutor called McNabb again and asked her if she had concerns about R.C.'s "ability to assess actual safety risks and respond appropriately." (1/15 Tr. at 54.) McNabb answered, "I don't think he has that ability right now." (1/15 Tr. at 55.) R.C. then concluded the hearing by accusing the court of "treasonous sedition," being "a good team player for the deep state," and saying, "may God have mercy on your soul." (1/15 Tr. at 56.)

Commitment Order

Immediately after the end of testimony, the District Court announced its findings and disposition, without holding a separate disposition hearing or asking for recommendations or arguments from the parties. (1/15 Tr. at 55.) The court found R.C. suffered from bipolar

disorder and, based on the testimony of Jensen and McNabb, he posed a danger to others. (1/15 Tr. at 55.) The court relied on R.C.'s "statements, your attempts to procure a firearm and your actions while at West House." (1/15 Tr. at 55.)

The court ordered R.C. committed to MSH for 90 days with an order for involuntary medication. (1/15 Tr. at 55.) The court added, "Furthermore, I would find that it is appropriate given this commitment that [R.C.] not be allowed to purchase or possess firearms under federal law." (1/15 Tr. at 55.) R.C.'s counsel did not object to the lack of a disposition hearing or to any aspect of the court's disposition. (1/15 Tr. at 55–56.)

The District Court subsequently issued a written commitment order. (Doc. 11.) The court's findings of fact recounted in detail the testimony from Jensen, McNabb, and R.C. (Doc. 11 at 3–12.) The order stated the court's conclusion that R.C. suffered from bipolar disorder and required commitment because of the imminent risk of harm he posed to others, "as evidenced by an act done by Respondent." (Doc. 11 at 7, 12–13.) The stated basis for this conclusion was Jensen's and McNabb's testimony about R.C. trying to buy a gun, his repeated

statements about "killing people," and "his actions at West House." (Doc. 11 at 7–8, 12–13.)

The order discussed alternatives for R.C.'s treatment, but ruled out any facility other than MSH because of R.C.'s "level of aggression" and his need for involuntary medication. (Doc. 11 at 8–9.)

Among its conclusions of law, the District Court stated McNabb was "qualified to testify as an expert in this matter, as so stipulated by both parties." (Doc. 11 at 13.) The court found the State had proved to a reasonable degree of medical certainty that R.C. suffered from bipolar disorder, which is a mental disorder under Mont. Code Ann. § 53-21-102(9). (Doc. 11 at 13.) The court also concluded the State had proved beyond a reasonable doubt that R.C. required commitment, that MSH was the least restrictive alternative available for R.C.'s treatment needs, and that involuntary medication should be authorized. (Doc. 11 at 14.)

Lastly, the order stated:

> IT IS FURTHER ORDERED Respondent is prohibited by 18 U.S.C. § 922(g)(4) from shipping, transporting, receiving, or possessing any firearm or ammunition if the firearm or ammunition was transported at any time across a state line or from a foreign country. Violation of this federal offense is punishable by a fine of $250,000 and/or imprisonment of up to

ten years.

(Doc. 11 at 15.)

STANDARDS OF REVIEW

This Court reviews involuntary civil commitment orders "to determine whether the district court's findings of fact are clearly erroneous and its conclusions of law are correct." *In re D.L.B.*, 2017 MT 106, ¶ 7, 387 Mont. 323, 394 P.3d 169. "Whether a district court's findings of fact satisfy statutory requirements is a question of law reviewed for correctness." *D.L.B.*, ¶ 7.

The Court "may review involuntary commitment proceedings for plain error, regardless of whether an objection was made at trial." *In re N.A.*, 2013 MT 255, ¶ 12, 371 Mont. 531, 309 P.3d 27. The Court will "invoke plain error review where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *In re M.K.S.*, 2015 MT 146, ¶ 13, 379 Mont. 293, 350 P.3d 27 (citation and internal quotations omitted).

The Court has stated that although it requires "strict adherence" to the civil commitment statutes, it will not reverse for a harmless or *de minimis* error. *In re B.H.*, 2018 MT 282, ¶ 18, 393 Mont. 352, 430 P.3d 1006; *In re O.R.B.*, 2008 MT 301, ¶ 30, 345 Mont. 516, 191 P.3d 482.

DISCUSSION

I. Undersigned counsel should be permitted to withdraw from the appeal.

In *Anders*, the United States Supreme Court stated that "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744; *see also* § 46-8-103(2). Such a request must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744; § 46-8-103(2).

The attorney must provide a copy of the brief to the client, and the client must have the opportunity "to raise any points that he chooses." *Anders*, 386 U.S. at 744; *see also* § 46-8-103(2). "[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744.

Here, counsel is compelled by *Anders*, § 46-8-103(2), and his duty of candor to notify this Court that, after a review of the entire record and diligent research of the applicable statutes, case law, and rules, counsel has not identified any non-frivolous issues to appeal. Without arguing against his client, counsel submits this brief which discusses any issues that could arguably support an appeal.

II. The record might arguably support a claim that the District Court lacked jurisdiction over R.C.

R.C. objected below, both through counsel and personally, to the District Court's authority to hear his case. (1/15 Tr. at 7–8.) He argued that because he is "Moorish-American" and a "sovereign citizen," he is not subject to the laws of the United States or Montana. (1/15 Tr. at 7–8.)

R.C. could argue on appeal, as he did below, that the District Court lacked jurisdiction over him personally because of his Moorish-American and sovereign citizen status. *Contra Bey v. State*, 847 F.3d 559, 560–61 (7th Cir. 2017) (discussing the legal and jurisdictional views of Moorish-American sovereign citizens); *United States v. Coleman*, 871 F.3d 470, 476–77 (6th Cir. 2017); *City of Shaker Heights*

v. El-Bey, 86 N.E.3d 865, 866–67 (Ohio Ct. App. 2017); *Taylor-Bey v. State*, 53 N.E.3d 1230, 1231–32 (Ind. Ct. App. 2016).

III. The record might arguably support a claim that R.C. had a constitutional right to represent himself.

R.C. asked to represent himself at the commitment hearing and claimed the District Court's refusal to allow him to do so violated his rights under the United States Constitution. (1/15 Tr. at 4, 6.) R.C. could argue on appeal that it was a violation of his federal constitutional rights to not allow him to proceed *pro se*.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. Const. amend. VI. In *Faretta v. California*, 422 U.S. 806, 819 (1975), the U.S. Supreme Court held, "Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is [ ] necessarily implied by the structure of the Amendment." The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The civil commitment statutes mandate that "[t]he right to counsel may not be waived" and "the respondent must be represented by counsel at all stages of the trial." Mont. Code Ann. §§ 53-21-119(1) and -126(1). By contrast, the criminal statutes provide, "A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently." Mont. Code Ann. § 46-8-102.

R.C. could argue that he had a right under the Sixth Amendment and the substantive due process clause of the Fourteenth Amendment to represent himself at the commitment hearing. He could argue §§ 53-21-119(1) and -126(1), and the District Court's denial of his request to represent himself violated that right.

This Court addressed identical claims in *In re S.M.*, 2017 MT 244, 389 Mont. 28, 403 P.3d 324. There, the Court held the Sixth Amendment right to counsel applied only in criminal proceedings, not civil commitment proceedings. *S.M.*, ¶ 15. The Court also held the denial of the right to self-representation in civil commitment proceedings did not violate substantive due process. *S.M.*, ¶ 35.

R.C. could argue *S.M.* was wrongly decided and should be overruled.

IV. The record might arguably support a claim that Shannon McNabb was not properly qualified as a "professional person," as required by statute.

The civil commitment statutes require the involvement of a "professional person" in commitment proceedings. For instance, the district court "shall appoint a professional person" to examine the respondent prior to the commitment hearing. Mont. Code Ann. § 53-21-122(2)(a); Mont. Code Ann. § 53-21-123(1). And that professional person "must be present for the trial and subject to cross-examination." § 53-21-126(3).

"A person may not act in a professional capacity as provided for in this part unless the person is a professional person as defined in 53-21-102." Mont. Code Ann. § 53-21-105. The statute defines a professional person as:

> (a) a medical doctor;
> (b) an advanced practice registered nurse, as provided for in 37-8-202, with a clinical specialty in psychiatric mental health nursing;
> (c) a licensed psychologist;
> (d) a physician assistant licensed under Title 37, chapter 20, with a clinical specialty in psychiatric mental health; or

> (e) a person who has been certified, as provided for in 53-21-106, by the [Department of Health and Human Services].

§ 53-21-102(16).

The record does not contain extensive evidence of McNabb's credentials, because the District Court cut off inquiry at the commitment hearing into her qualifications. (1/15 Tr. at 26–27.) Despite the prosecutor's willingness to put this evidence on the record, the judge said this was unnecessary because he already knew McNabb to be qualified as a professional person. (1/15 Tr. at 26–27.)

McNabb's written evaluation refers to her as an "LCPC"—a licensed clinical professional counselor. (Doc. 10 at 1, 11.) And before R.C. lodged his objection to McNabb's credentials at the commitment hearing, she testified briefly she was "an LCPC mental health professional and I work for Western Montana Mental Health, the crisis team." (1/15 Tr. at 26.)

The District Court's written commitment order stated that McNabb's qualifications were "stipulated by both parties." (Doc. 11 at 13.) But the record shows R.C. personally opposed such a stipulation. (1/15 Tr. at 26.)

R.C. could argue the State failed to prove McNabb was a "professional person" within the meaning of § 53-21-102(16). He could argue her status as a LCPC and her employment with the Western Montana Mental Health crisis team were not sufficient to prove she met the statutory requirements. And he could contend that the fact the Judge was personally "familiar with all of her professional credentials" was not a sufficient basis to establish McNabb's qualification as a professional person. (*See* 1/15 Tr. at 27.)

R.C. could argue that absent a more developed record of whether McNabb was a "professional person" under the statutory definition, her evaluation and testimony could not lawfully support his commitment.

V. The record might arguably support a claim that the District Court erred by concluding R.C. posed an imminent threat of harm to others.

To order a person involuntarily committed, a district court must first determine that the person suffers from a "mental disorder," which is defined at § 53-21-102(9). § 53-21-126(1). The district court must then find at least one of the following criteria are satisfied:

> (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. Predictability may be established by the respondent's relevant medical history.

§ 53-21-126(1). Commitment is justified if any of these criteria are satisfied. *O.R.B.*, ¶ 24; Mont. Code Ann. § 53-21-127(7).

The District Court based its commitment order on § 53-21-126(1)(c); that R.C. required commitment because his mental disorder caused him to pose "an imminent threat of injury . . . to others because of the respondent's acts or omissions." (*See* Doc. 11 at 7, 12–13.) To satisfy this prong, the State must show evidence of the respondent's "overt acts sufficiently recent as to be material and relevant to the person's present condition." *In re D.S.*, 2005 MT 152, ¶ 15, 327 Mont. 391, 114 P.3d 264. "An overt act can be evidenced by a present

indication of probable physical injury which is likely to occur at any moment or in the immediate future." *D.S.*, ¶ 15.

"Imminent threat does not mean that a person may possibly cause an injury at some time in the distant or uncertain future. The danger must be fairly immediate." *In re S.H.*, 2016 MT 137, ¶ 14, 383 Mont. 497, 374 P.3d 693. The law does not, however, "require proof beyond a reasonable doubt that an injury will occur in the future. Threat is not certainty." *S.H.*, ¶ 14. "A threat to kill qualifies as an overt act." *Matter of D.D.*, 277 Mont. 164, 168, 920 P.2d 973, 975 (1996); *see In re E.M.*, 265 Mont. 211, 213, 875 P.2d 355, 356 (1994). "Actual injury need not occur before the statutory requirements are met." *In re M.C.*, 220 Mont. 437, 443, 716 P.2d 203, 207 (1986).

Examples of "overt" acts include "behavior such as a threat to take one's life; a threat to kill; and verbal abuse coupled with aggressive physical action such as being 'armed' with a baseball bat, throwing food[,] and tearing sheets off a bed." *M.C.*, 220 Mont. at 443, 716 P.2d at 207 (internal citations omitted).

The court based its finding of R.C.'s "imminent threat" on Jensen's and McNabb's testimony about R.C.'s ruminations on the deaths of

public officials, saying he had an intent to kill, his efforts to procure a gun, and his breaking a window at West House. (1/15 Tr. at 55; Doc. 11 at 3–12.)

R.C. could argue this evidence did not establish that he committed any "overt act" showing he posed an imminent threat of harm to others. He could thus claim the evidence was insufficient to support the District Court's finding of a need for commitment under § 53-21-126(1)(c).

VI. The record might arguably support a claim that the District Court committed plain error by failing to hold a separate disposition hearing.

Montana Code Annotated § 53-21-127(2) provides, "If it is determined that the respondent is suffering from a mental disorder and requires commitment within the meaning of this part, the court shall hold a posttrial disposition hearing." A hearing is a "judicial session . . . held for the purpose of deciding issues of fact or of law." *Hearing, Black's Law Dictionary* (Bryan Garner, 11th ed. 2019). The lay definition of this word is "[an] opportunity to be heard, to present one's side of a case," or "a listening to arguments." *Hearing, Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/hearing (accessed April 12, 2022).

The District Court did not hold a separate disposition hearing. Nor did it ask R.C.'s counsel or the prosecutor for recommendations or arguments concerning disposition. Instead, immediately after the close of testimony, the court pronounced its findings and ordered R.C.'s commitment to MSH. (1/15 Tr. at 55.)

In *In re S.L.*, 2014 MT 317, ¶ 18, 377 Mont. 223, 339 P.3d 73, this Court held, "Nothing in the plain language of the statute precludes the court from immediately proceeding to a disposition hearing after a finding that the respondent suffers from a mental disorder." *S.L.*, ¶ 39. The Court also reasoned in that case, "The record clearly supports the District Court's determination that MSH was the least restrictive placement alternative . . . Under these circumstances, a subsequent disposition hearing would have served no purpose." *S.L.*, ¶ 39.

R.C. could argue the District Court violated § 53-21-127(2) by not only failing to hold a separate disposition hearing, but also by failing to give R.C. an opportunity to be heard or to entertain arguments on R.C.'s disposition. Because his counsel did not object to the lack of a disposition hearing or to R.C.'s commitment to MSH, R.C. would need to argue this violation merits plain error review.

VII. The record might arguably support a claim that the District Court lacked authority to impose a gun restriction under federal law.

The District Court ordered, pursuant to 18 U.S.C. § 922(g)(4), that R.C. "is prohibited" from "shipping, transporting, receiving, or possessing any firearm." (Doc. 11 at 15; 1/15 Tr. at 55.) R.C.'s counsel did not object to the District Court's inclusion of this restriction in its commitment order.

The federal gun statute states, "It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution" to ship, transport, possess, or receive a firearm. 18 U.S.C. § 922(g)(4). Federal regulations define the phrase, "adjudicated as a mental defective," as, "A determination by a court . . . that a person, as a result of . . . mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs." 27 C.F.R. § 478.11. And the term "mental institution" includes "mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of . . . mental

illness, including a psychiatric ward in a general hospital." 27 C.F.R. § 478.11.

Montana statute delineates the scope of a district court's original jurisdiction. Mont. Code Ann. § 3-5-302. Although district courts have jurisdiction over "all civil and probate matters," § 3-5-302(1)(b), nowhere does the statute explicitly state that district courts have jurisdiction to impose a federal legal disability.

The civil commitment statutes do allow the court ordering commitment to "make an order stating specifically any legal rights that are denied the respondent and any legal disabilities that are imposed on the respondent." Mont. Code Ann. § 53-21-141(2). And a person involuntarily committed does not forfeit any legal rights or suffer any legal disabilities beyond what is necessary to effectuate treatment, "Unless specifically stated in an order by the court." § 53-21-141(1).

Under the Supremacy Clause of the United States Constitution, the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI. That clause mandates that "state courts cannot refuse to apply federal law." *Printz v. United States*, 521 U.S. 898, 928 (1997)

(citing *Testa v. Katt*, 330 U.S. 386 (1947)). "Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990).

R.C. could argue the District Court exceeded the scope of its statutorily authorized jurisdiction by including a federal gun restriction in its state court commitment order. R.C. could argue that although the District Court could certainly *notify* him of an applicable restriction under federal law, it overstepped its authority by *ordering* such a restriction.

CONCLUSION

After conscientious examination of the record and thorough research of the applicable legal authorities, undersigned counsel has not identified any meritorious issues to appeal. If the Court agrees, it should grant counsel's motion to withdraw as direct appeal counsel. If the Court determines this case presents issues warranting an appeal, counsel asks that the Court issue an order identifying the appealable issues and permit counsel to proceed with briefing on those issues.

Respectfully submitted this 25th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* 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 6,503, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
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APPENDIX

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 04-25-2022:

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