

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0411

In the Matter of

M.H.W.,

An Alleged Mentally Ill Person,

Respondent and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, The Honorable Heather Perry, Presiding

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STATEMENT OF THE ISSUES

Whether M.H.W. has met his heavy burden of proving that plain error review is warranted in this case when, despite M.H.W.'s failure to timely request a hearing on a third recommitment petition, the district court held a contested hearing, affording M.H.W. due process sufficient to protect his liberty interests.

STATEMENT OF THE CASE

Appellant M.H.W. was transferred from the Montana State Hospital (MSH) to the Montana Mental Health Nursing Care Center (MMHNCC) on June 16, 2020, pursuant to an involuntary commitment or recommitment (D.C. Doc. 1) ordered by the district court in Anaconda-Deer Lodge County on March 16, 2020 (D.C. Doc. 2).

On August 11, 2020, the State filed its first petition for recommitment (PFR1). (D.C. Doc. 1.) The State also filed the August 10, 2020, Psychiatric Report for Recommitment completed by Peggy A. Albee, LCPC, a certified Mental Health Professional Person. (D.C. Doc. 2.) The district court appointed M.H.W. an attorney, a professional person, and a friend (D.C. Docs. 3-5) and issued notice of the PFR to M.H.W., MMHNCC, and the appointed parties (D.C. Doc. 6).

On August 28, 2020, M.H.W. requested a contested hearing and waived the 10-day hearing requirement. (D.C. Doc. 7.) On September 17, 2020, the district court conducted the hearing and subsequently issued an Order for Recommitment. (D.C. Docs. 9-10). The court found that M.H.W. suffers from schizophrenia, delusional disorder, and antisocial personality disorder, and “is substantially unable to provide for his own basic needs of food, clothing, shelter, health, and safety.” (D.C. Doc. 10 at 2 (emphasis omitted).) The court found M.H.W.’s “mental-health-induced mismanagement of his diabetes has led to multiple instances of severe hypoglycemia due to insulin overdose, resulting in hospitalization,” which, “if he is not supervised, could result in death.” (*Id.* at 2-3.)

The court assessed all placement options available and concluded MMHNCC was the least restrictive environment available and appropriate for him. (*Id.* at 4-5.) The court ordered a period of recommitment for up to one year (September 17, 2020, to September 16, 2021) unless an appropriate, less-restrictive placement was identified sooner. (*Id.* at 5.)

On August 17, 2021, the State timely filed a second PFR (PFR2). (D.C. Doc. 11.) The State also filed the August 16, 2021, Psychiatric Report for Recommitment completed by Albee. (D.C. Doc. 12.) The district court appointed an attorney, a professional person, and a friend, and issued notices of the PFR to M.H.W., MMHNCC, and the appointed parties. (D.C. Docs. 13-16.) The notice

stated, “If you do not request a hearing on this matter, the Court will enter an Order of Recommitment for an additional period not to exceed the maximum allowed by law.” (D.C. Doc. 16 at 1.) The notice further stated, “Written request for a hearing must be made with [the court] on or before the 16th day of September, 2021.” (*Id.*) None of the appointed persons requested a hearing on or before September 16, 2021. The district court did not immediately issue a written order for recommitment.

On November 15, 2021, counsel for M.H.W. untimely filed a request for a contested hearing and waived the 10-day hearing requirement. (D.C. Doc. 17.) The district court set a hearing date and ordered that “the commitment is extended until the hearing is held.” (D.C. Doc. 18.) The court held the contested hearing on January 6, 2022, after which it issued a written order for recommitment. (D.C. Docs. 22-23.) The court found that M.H.W. “suffers from both Type I Diabetes and paranoid schizophrenia, the latter of which leads him to obsess over and mismanage the former[,]” and that, “[l]eft to his own devices, [M.H.W.] thus cannot ensure his own health or safety.” (D.C. Doc. 23 at 2.)

The court summarized recent instances of M.H.W.’s aggressive behavior and found “these behaviors can endanger both [M.H.W.] and those around him[.]” (*Id.* at 3.) The court summarized M.H.W.’s mismanagement of his diabetes, quoting from the August 16, 2021 Psychiatric Report for Recommitment: “He

manipulate[s] his blood sugar by way of overhydration,” “believes that health providers make it hard for him to stay healthy,” and “has a [history] of serious hospitalizations and potentially lethal consequences caused by his underlying delusions about insulin.” (*Id.* at 3 (citations omitted).) Based on these findings, the court concluded M.H.W.’s “mental disorder, as demonstrated by [his] recent acts or omissions, will, if untreated, predictably result in deterioration of [his] mental condition to the point at which [he] will become a danger to self or to others, or will be unable to provide for [his] own basic needs[.]” (*Id.* (emphasis omitted).)

The court assessed all placement options available and concluded MMHNCC is “the least-restrictive environment currently available and appropriate for him.” (*Id.* at 4-5.) The court ordered a period of recommitment for up to one year (January 6, 2022, to January 5, 2023) unless an appropriate, less-restrictive placement was identified sooner. (*Id.*)

On December 14, 2022, the State timely filed a third PFR (PFR3). (D.C. Doc. 25.) The State incorporated in the body of the petition the December 5, 2022, Psychiatric Report for Recommitment completed by Albee. (*Id.* at 11-31, attached to this brief as App. 1, with Albee’s original pagination.) The district court issued notices of the PFR to M.H.W., MMHNCC, and the same parties previously appointed. (D.C. Doc. 26). The notice stated, “Should any person notified request a hearing prior to the termination of the previous commitment, the court will

immediately set a time and place for a hearing[.]” (*Id.* at 2.) The notice further stated, “Failure to request a hearing will result in the court entering an order of commitment for a period not to exceed 1 year.” (*Id.*) The notice also stated, “Written request for a hearing must be made with [the court] on or before the 5th day of January, 2023.” (*Id.*) None of the appointed persons requested a hearing on or before January 5, 2023. The court did not immediately issue a written order for commitment.

On February 8, 2023, counsel for M.H.W. untimely filed a request for a contested hearing and waived the 10-day hearing requirement. (D.C. Doc. 27.) The district court set a hearing date and ordered that “the commitment is extended until the hearing is held and further order of the court.” (D.C. Doc. 28). The court scheduled five cases, including M.H.W.’s, for contested hearings on April 6, 2023, with M.H.W.’s case last on the docket. (D.C. Docs. 28, 30.) M.H.W.’s hearing did not proceed on that date after “the other hearings took longer than anticipated[.]” (D.C. Doc. 30 at 1.) Following the other four cases, the court conferred with the parties present for M.H.W.’s case and, “[w]ithout objection, . . . all agreed to a date and time” on which to reset M.H.W.’s hearing: April 19, 2023. (*Id.*)

The court further noted that M.H.W.’s court-appointed friend had not appeared or otherwise communicated with the court or parties on April 6 and that “the parties will try to reach [the friend] to determine if he can be present for the

rescheduled date and time or if [M.H.W.] needs a different court-appointed friend.” (Id.) Additionally, all parties *stipulated* that the prior order of recommitment would remain in full force and effect in the interim. (Id. at 2.)

Due to an unexpected closure of the county courthouse because of bad weather on April 19, the district court *sua sponte* vacated the hearing and directed the clerk of court to contact counsel for the parties to reset the matter. (D.C. Doc. 31.) The court held the hearing on June 1, 2023, after which it issued an Order for Recommitment. (D.C. Doc. 33-34.) The court found that M.H.W. suffers from paranoid schizophrenia, antisocial personality disorder, and diabetes (Type 1). (D.C. Doc. 34 at 2.) The court summarized recent instances of M.H.W.’s aggressive behavior and concluded his behaviors placed him and others in danger. (Id. at 2-3.) Regarding schizophrenia, the court found that M.H.W. “lacks any insight into that condition and rejects the idea that he suffers a mental health problem,” and that he “thus resists and/or rejects necessary treatment, particularly medication.” (Id. at 3.)

The court further found that M.H.W.’s “actions regarding his diabetes—including improperly using insulin, [hoarding] food in his room, binging on food, and exercising specifically to affect his blood sugar—have caused him to choke, suffer dangerous blood sugar levels, and experience other injurious effects.” (Id.) The court found that M.H.W. “is constantly at grave risk of serious injury or even

death due to his lack of insight into his schizophrenia, delusional beliefs regarding his diabetes, and inappropriate self-treatment efforts of manipulating insulin, food, and exercise to affect his blood sugar levels and the insulin in his system.” (*Id.* at 2.)

The court assessed the placement options available and concluded MMHNCC was the least restrictive and most appropriate environment available. (*Id.* at 4-5.) The court ordered a period of commitment for up to one year (June 1, 2023, to May 31, 2024) unless an appropriate, less-restrictive placement was identified sooner. (*Id.* at 5.)

M.H.W. filed notice of appeal on July 31, 2023. (D.C. Doc. 35.)

STATEMENT OF THE FACTS

Between 2012 and 2019, M.H.W. was involuntarily committed to MSH four separate times “due to aggressive behaviors, delusions regarding his insulin and non-compliance with his medications.” (D.C. Doc. 2 at 1.) Leading up to his 2019 commitment to MSH, M.H.W. had been living at a less restrictive care facility in Libby for more than a year when his mental health deteriorated and he injured a nurse by putting her in a headlock. (*Id.* at 5-6.) Upon his intake at MSH on December 14, 2019, Susan DePasquale, FPMHNP-BC, summarized M.H.W.’s

diagnoses as schizophrenia (paranoid type), delusional disorder, antisocial personality disorder, and diabetes (Type 1). (*Id.* at 6.)

A Psychiatric Report for Recommitment at MSH dated February 24, 2020, described M.H.W.’s prior admission to MSH between April 3 and July 20 of 2017, as being needed “after he presented to the Thompson Falls hospital around 20 times since January 2017 with hypoglycemia secondary to overdosing on insulin.” (*Id.* at 2.) The report stated M.H.W. “held a delusional belief that his insulin had been stolen or was not sufficiently concentrated.” (*Id.*) The report noted that, prior to the 2017 commitment, M.H.W. “was non-adherent” with and then stopped taking, his prescribed psychiatric medication. (*Id.*) The report further postulated that M.H.W.’s “[v]iolent behavior appeared to correspond with episodes of hypoglycemia rather than acute psychiatric symptoms.” (*Id.* at 3.)

After stabilizing at MSH, M.H.W. was transferred to MMHNCC on June 16, 2020, at which time he was 60 years old. (*Id.* at 1.) At MMHNCC, Dr. Jeff Kumar reviewed M.H.W.’s records and reported that M.H.W.’s “poorly controlled insulin dependent diabetes . . . has been complicated by his delusional belief that he needs to take more insulin than is medically recommended.” (*Id.* at 6.) Dr. Kumar noted that M.H.W.’s long-held delusional beliefs repeatedly led him to overdose on insulin, which “result[ed] in several serious hospitalization[s] and potentially lethal consequences.” (*Id.*)

When Dr. Kumar met with him, M.H.W. admitted he had been diagnosed with schizophrenia, but stated, “I’ve never had anything like that.” (*Id.* at 2.) Dr. Kumar summarized M.H.W.’s statement to him as, “[P]eople don’t know what they’re doing with his diabetes and [he] has been disappointed in how little face time he’s had with a doctor at MSH and now MMHNCC.” (*Id.*) When Dr. Kumar asked him about any mental health concerns, M.H.W. said he “wants more nuts to counteract the aluminum and silica.” (*Id.*)

About two months after his transfer to MMHNCC, Albee prepared her first Psychiatric Report for Recommitment, dated August 10, 2020, which was filed with PFR1. (D.C. Docs. 1-2.) Albee reviewed and summarized medical, social services, psychiatric, and nursing notes. (D.C. Doc. 2 at 4-5.) Albee noted that M.H.W. “expressed anger regarding staff and not receiving insulin,” even though he was receiving insulin and blood sugar checks, he was “very resistant to inquiry or recommendations about sugars or food,” and he aggressively resisted and refused psychiatric medication. (*Id.* at 5.) Albee’s professional opinion at that time was that M.H.W. “presents as a danger to himself and/or others; therefore, recommitment is necessary in order to maintain his safety.” (*Id.* at 6.)

Albee assessed placement options for M.H.W. apart from MMHNCC, specifically MSH (for which he did not meet the criteria), group homes or nursing care facilities (for which his aggressive behaviors, medication noncompliance, and

need for psychiatric care disqualified him), and release to the general community (which was not supported based on his inability to manage his diabetes successfully due to his delusional beliefs). (*Id.*) Albee recommended that M.H.W. be recommitted to MMHNCC. (*Id.* at 7.)

On August 16, 2021, Albee prepared a second Psychiatric Report for Recommitment, which was filed in conjunction with PFR2. (D.C. Docs. 11-12.) Albee reviewed and summarized medical, psychiatric, nursing, and staff notes from the previous year. (D.C. Doc. 12 at 4-10.) She quoted from Dr. J. Whitworth's psychiatric note dated July 21, 2021, which stated that M.H.W. continued to have very poor insight and judgment, that M.H.W. had been given an opportunity to take oral psychiatric medication but he would not swallow it, and that M.H.W. was uninterested in trying other psychiatric medications. (*Id.* at 5.) Albee quoted from Dr. A. Amaral's medical notes dated March 9, 2021, which stated in part, "He has had issues with nursing staff due to recurrent hypoglycemia, diet, and medication compliance. He has refused blood work recently. Has also refused haloperidol injection in the past. He claims not to have any disease that would justify haloperidol injections." (*Id.* at 7.)

Albee quoted from RNP Donna VanTassel's nursing note dated January 6, 2021, which stated in part, "Patient also continues to manipulate his blood sugar by use of overhydration which makes control extremely difficult." (*Id.* at 8.) RNP

VanTassel's note concluded by saying, "Patient is not an appropriate candidate for alternative placement or discharge at this time. He has no insight into his mental illness, nor does he have insight into his medical diagnoses and is frequently noncompliant with medication and diet for his diabetes." (*Id.*) Other nursing and staff notes cited by Albee discussed episodes of aggressive and disruptive behavior, refusal to take medications for high cholesterol and other medical conditions, and noncompliance with staff requests. (*Id.* at 8-10.)

Albee concluded that M.H.W. "suffers from a major mental illness: Paranoid Schizophrenia as well as Antisocial Personality Disorder[,] and that M.H.W.'s "delusional beliefs regarding managing his diabetes [have] resulted in several serious hospitalizations and potentially lethal consequences caused by the persecutory belief that others are conspiring against him and intentionally poisoning him." (*Id.* at 10.) Her professional opinion at that time was that M.H.W. "presents as a danger to himself and/or others; therefore, recommitment is necessary in order to maintain his safety." (*Id.*) She opined that he was "being adequately treated and cared for at MMHNCC," and she had considered and ruled out other placement options, recommending he be recommitted to MMHNCC. (*Id.* at 10-11.)

After M.H.W. filed an untimely request for a contested hearing, the district court held a hearing on January 6, 2022, after which it issued a written order for recommitment to MMHNCC. (D.C. Docs. 22-23.)

On December 14, 2022, the State timely filed PFR3. (D.C. Doc. 25.) The State's petition incorporated the Psychiatric Report for Recommitment dated December 5, 2022, drafted by Albee. (App. 1.) Albee summarized key information from the psychiatric, medical, nursing and staff records from the previous year. (*Id.* at 5-17.) Albee referred to Dr. Whitworth's notes dated August 16, 2022, which stated M.H.W.'s diabetes "has even gotten more dysfunctional" with unstable blood sugar levels ranging from very low to very high. (*Id.* at 11.) Dr. Whitworth had expressed concern that M.H.W. "was found about ten days ago in the bathroom and was hypoglycemic, although it was not clear how this transpired" as M.H.W. could not recall how he ended up there with both his hair and torso wet. (*Id.* at 11.) Dr. Whitworth stated that M.H.W. "has been in denial since I met him that he has a thought disorder[,]" "tells me he thinks if we referred him, he would be accepted at a nursing home in the state[,]" but "[i]t is obvious this would not work." (*Id.* at 12.)

Albee also pointed out Dr. Whitworth's September 22, 2022 notes in which he stated M.H.W. "tends to sabotage his [diabetes] treatment by over or under hydrating" and "tends to not follow dietary advice." (*Id.* at 8.) Dr. Whitworth noted

that M.H.W. “previously was not cooperating with injecting the right amount of insulin when he was able to participate more fully[,]” and that M.H.W. “is angry that he is not allowed to do all this himself although he was unable to do this independently prior to the last year-and-a-half.” (*Id.*) Dr. Whitworth pointed out that M.H.W. “continues to present with a lot of oppositional behavior,” “is paranoid[,]” “tends to blame others[,]” “is very upset that he has the diagnosis of schizophrenia[,]” and “continues to assert that his only real diagnosis is diabetes and everyone that has diagnosed him with schizophrenia is wrong.” (*Id.*)

Dr. Whitworth had further stated, “[M.H.W.] tells me that anyone that has called him schizophrenic is a ‘bastard.’” (*Id.*) Dr. Whitworth reported that M.H.W. “has been on Haldol decanoate since his transfer here from Warm Springs” but, due to his opposition, “at times has to be held down to give him his shot.” (*Id.*) Dr. Whitworth noted, when MMHNCC tried to move M.H.W. to oral medication, it lasted only a day due to his refusal to swallow the oral medication. Dr. Whitworth concluded that M.H.W. “is unlikely to be accepted at any nursing care until he is more cooperative.” (*Id.*)

On December 5, 2022, Albee also interviewed staff members, who reported M.H.W. “is not medication compliant and often tries to argue that he knows more about what he needs or does not need than medical staff.” (*Id.* at 18.) Staff members informed Albee that M.H.W. “gets ‘very angry’ regarding the food

restrictions he is on due to his history of choking (stuffing too much food in his mouth at one time or eating breads that cause him to choke)[,]" and "that any changes to his diet causes [M.H.W.] to become very angry and verbally aggressive." (*Id.*)

Albee concluded in her report that M.H.W. "has very poor insight and judgment into his mental disorder and medical condition (diabetes) and as such, he denies having Schizophrenia and is resistant to taking psychotropic medications and tries to manipulate his insulin causing additional medical concerns including hypoglycemia." (*Id.* at 18-19.) She further noted M.H.W. "requires close supervision and frequent room checks due to his hoarding of food and drinks which he uses to manipulate his blood sugar levels." (*Id.* at 19.)

Finally, Albee stated that M.H.W. "is not currently being considered for discharge due to his medical conditions and his disregard for his mental health concerns." Her professional opinion was that M.H.W. "presents as a danger to himself and/or others therefore recommitment is necessary in order to maintain him safely." (*Id.*) She opined that he was "being adequately treated and cared for at MMHNCC," she had considered and ruled out other placement options, and she recommended he be recommitted to MMHNCC. (*Id.*)

After M.H.W. filed an untimely request for a contested hearing, the district court held a hearing on June 1, 2023. (D.C. Doc. 22; 6/1/23 Hr'g Tr.) M.H.W. and

his attorney were present at the hearing via Zoom from MMHNCC, and the district court confirmed on the record that M.H.W. consented to appear remotely. (*Id.*) Albee appeared remotely from the same location as M.H.W. to testify in her capacity as the court-appointed professional. MMHNCC Interim Director of Nursing Jessica Homme also appeared and testified.

Albee testified that she holds a master's degree in rehabilitation and mental health counseling and that she is a licensed clinical professional counselor, a licensed addiction counselor, and a mental health professional person on contract with MMHNCC. (*Id.* at 3.) Albee outlined that the duties of a professional person include: reviewing a patient's records and charts including psychiatric, medical, and nursing notes; reviewing quarterly and/or annual assessments drafted by doctors; and reviewing the records generated by social services and facility staff. (*Id.* at 4-5.) The State, without objection from M.H.W., requested the district court declare Albee an expert, and the district court did so. (*Id.* at 5.) Albee confirmed she had prepared for the hearing by reviewing not only the information contained in her psychiatric report for recommitment drafted in December 2022 but also M.H.W.'s records through the date of hearing. (*Id.* at 5-6.)

Albee confirmed that M.H.W.'s history of aggressive behavior had continued after he was admitted to MMHNCC. (*Id.* at 6-7.) She confirmed with a reasonable degree of medical certainty that the diagnoses of paranoid

schizophrenia, major depressive disorder, and insomnia were correct for M.H.W. (*Id.* at 9.) She testified that M.H.W.’s paranoid schizophrenia causes him to have delusions about his diabetes, in particular his belief “that he is better at managing his diabetes th[a]n the medical providers.” (*Id.*) And she testified that M.H.W. “can be very demanding with staff and has become quite aggressive with one incident where he actually tried to go over . . . the half door at one of the nurses in the nurse’s station to get the insulin that he wanted.” (*Id.* at 10.)

Albee testified that, if M.H.W.’s treatment at MMHNCC were discontinued, he would not be able to provide for his own basic needs including food, clothing, shelter, or health and safety because of his mental disorder. (*Id.* at 10-11.) She testified that, as demonstrated by his history, M.H.W. does not believe he has a mental disorder and resists or refuses to take prescribed psychiatric medicine, and that this results in his manipulation of his blood sugar levels and insulin treatment, which repeatedly leads to trips to the emergency room in life-threatening conditions, and ultimately requires involuntary commitment to MSH to stabilize both his psychiatric and medical conditions. (*Id.* at 11-18.)

Albee stated, “Well, I believe not taking the medication properly, both the psychiatric medication and also the insulin places [him] at extreme risk and as he has demonstrated he can become extremely aggressive[] when he wants what he wants and that places other[s] at risk as well.” (*Id.* at 12-13.) Albee confirmed

M.H.W.’s continued need for concealed or involuntary administration of psychiatric medication and that M.H.W. “requires nursing supervision for managing his medical health.” (*Id.* at 19.)

To reach a point where less restrictive care or discharge could be contemplated, Albee testified, “[H]e would have to demonstrate compliance with his medications and also like not just the psychiatric, but also his other medication because anything outside of here if he was noncompliant with medications, they would not be able to conceal or provide [the] IM or other alternatives which then again places him at significant risk for health deterioration and mental health deterioration.” (*Id.* at 19-20.) Counsel for M.H.W. extensively cross-examined Albee. (*Id.* at 21-32.)

The State called Director Homme, who testified that M.H.W.’s aggressive behaviors and noncompliance issues had continued through spring 2023. (*Id.* at 35.) Homme testified that, in addition to M.H.W.’s diabetes, he more recently had been diagnosed with dysphagia following several incidences of choking while eating. (*Id.* at 37.) She explained, “Dysphagia is difficulty with swallowing. We had sent in for some follow up evals, everything looked good as far as his swallowing went, but the issue is . . . that he stuffs so much food in his mouth at once that he ends up choking on it. That’s why we’ve had to separate it out into 1/3rd portions at meals.” (*Id.*)

Homme explained that staff members had needed to perform the Heimlich maneuver on M.H.W. several times to dislodge food. (*Id.*) She opined that the dysphagia was attributable to M.H.W.’s mental disorder, testifying, “That lack of insight into his health status both medical and psychiatric can definitely play a part in that. He does not believe that he has any issues with swallowing or eating. So, we have seen that that has increased his risk of choking due to overfilling his mouth while eating.” (*Id.* at 37-38.)

Regarding M.H.W.’s diabetes, Homme testified, “Currently his blood sugars are not very stable even considering the interventions that we have in place for him due to the hoarding, the additional snacking and then his excessive exercising or drinking of fluids or taking laxatives.” (*Id.* at 40.) Homme explained that “[hypoglycemia] is when your blood glucose levels drop below a normal range which is typically below 70 or I’m sorry below 90. With those they can cause dizziness, excessive sweating, confusion, irritability. They can have nightmares and then if it drops to[o] low it can cause convulsions, seizures, fainting or loss of consciousness. If dropped to[o] low, it can also cause death.” (*Id.*) She noted, “Here recently he has had blood sugar checks as low as in to the 40s where they’ve had to give him glucagon to increase his glucose levels.” (*Id.* at 41.)

Homme concurred with Albee’s recommendation for recommitment to MMHNCC. (*Id.* at 49-51.) Counsel for M.H.W. extensively cross-examined

Homme. (*Id.* at 52-66.) The district court also questioned Homme to clarify the circumstances surrounding M.H.W.’s choking and to obtain information about his blood sugar levels and insulin injections. (*Id.* at 68-73.)

SUMMARY OF THE ARGUMENT

M.H.W. has failed to meet his heavy burden of proof to trigger plain error review because the alleged error occurred only after he twice failed to timely file requests for contested hearings knowing that his failure would result in the extension of his commitment and, when he twice filed untimely requests for hearings, he implicitly acquiesced to the extended commitment, after which the district court afforded him the same due process as if his requests for contested hearings had been timely filed.

ARGUMENT

I. Standard of review

Although the Montana Supreme Court generally will not review issues raised for the first time on appeal, *State v. Longfellow*, 2008 MT 343, ¶ 19, 346 Mont. 286, 194 P.3d 694, if a constitutional or substantial right is at issue, the Court may review an unpreserved claim under the plain error doctrine. *State v. Gunderson*, 2010 MT 166, ¶ 99, 357 Mont. 142, 237 P.3d 74; *In re M.K.S.*,

2015 MT 146, ¶ 13, 379 Mont. 293, 350 P.3d 27. When an individual invokes the plain error doctrine to request review of issues that were not objected to in the lower court, this Court's review is discretionary and used only sparingly on a case-by-case basis. *In re M.K.S.*, ¶ 13-14.

For review to be invoked, the plain error doctrine establishes a two-pronged test, “with the burden on the person facing involuntary commitment to meet both [prongs] of the test.” *In re M.K.S.*, ¶ 14. The first prong requires the person seeking review to establish that the alleged error implicates a fundamental right. *Id.* The second prong requires the person seeking review to establish that failing to review the alleged error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *In re M.K.S.*, ¶¶ 13-14.

II. M.H.W. has failed to prove that plain error review is warranted in this case.

The first prong of the plain error doctrine requires the person seeking review to establish that the alleged error implicates a fundamental right. *In re M.K.S.*, ¶¶ 13-14. In accordance with the prior decisions of this Court, the State recognizes that involuntary commitment proceedings place a substantial right—liberty—at stake. *In re B.O.T.*, 2015 MT 40, ¶ 22, 378 Mont. 198, 342 P.3d 981. It is under the second prong of the doctrine, however, where M.H.W. cannot meet his heavy

burden of proof. As this Court has held, merely asserting that failure to review the claimed error meets one of the three consequences described under the second prong of the test is insufficient to invoke plain error review. *In re M.K.S.*, ¶ 14. M.H.W. must prove that the alleged error—the district’s failure to issue an order on or before 11:59 p.m. on the expiration date of a commitment period—results in a manifest miscarriage of justice, leaves unsettled the question of the fundamental fairness of the proceedings, or compromises the integrity of the judicial process. M.H.W. argues that “[p]lain error review is warranted to salvage M.H.W.’s due process right and the integrity of the proceedings.” (Appellant’s Br. at 16.)

To the contrary, M.H.W.’s argument that the alleged error results in a consequence under the second prong of the plain error doctrine fails because: (1) the alleged error occurred only after M.H.W. twice failed to comply with the applicable statutes which control extension of commitment proceedings; (2) M.H.W.’s untimely requests for contested hearings implicitly acknowledged that the periods of commitment had been extended, as the district court had warned would happen, due to his failure to meet the deadlines; (3) M.H.W.’s untimely hearing requests did not object to, take issue with, or even address his extended commitment, and did not demand his immediate release or an expedited hearing; and (4) the district court permitted the untimely requests to be filed, immediately

gave notice to the parties of the requests, and provided M.H.W. with the same due process that would have been afforded him had the requests been timely filed.

Montana Code Annotated § 53-21-128(1)(b), provides:

Upon the filing of the petition, the court shall give written notice of the filing of the petition to the patient, the patient's next of kin, if reasonably available, the friend of respondent appointed by the court, and the patient's counsel. If any person notified requests a hearing prior to the termination of the previous commitment authority, the court shall immediately set a time and place for a hearing on a date not more than 10 days, not including Saturdays, Sundays, and holidays, from the receipt of the request and notify the same people, including the professional person in charge of the patient. When a hearing is requested less than 10 days prior to the termination of the previous commitment authority, the previous commitment is considered extended until the hearing is held. The notice of hearing must include a notice of this extension. If a hearing is not requested, the court shall enter an order of commitment for a period not to exceed 6 months.

Following M.H.W.'s involuntary admission to MSH and transfer to MMHNCC and prior to this appeal, the State filed three separate PFRs in the district court in Fergus County seeking to extend M.H.W.'s commitment. Each of these PFRs complied with Mont. Code Ann. § 53-21-128(1)(a), which requires a PFR to be filed “[n]ot less than 2 calendar weeks prior to the end of the . . . period of commitment” and to “be accompanied by a written report and evaluation of the patient's mental and physical condition.” In compliance with Mont. Code Ann. § 53-21-128(1)(b), after the State filed each PFR, the district court gave “written

notice of the filing of the petition to the patient, the patient's next of kin, if reasonably available, the friend of respondent appointed by the court, and the patient's counsel.”

In the notices of PFR1 and PFR2, the district court stated, “If you do not request a hearing on this matter, the Court will enter an Order of Recommitment for an additional period not to exceed the maximum allowed by law[,]” and, “Written request for a hearing must be made . . . on or before the 16th day of September” 2020 and 2021, respectively. (D.C. Docs. 6, 16.) In the notice of PFR3 the court stated, “Failure to request a hearing will result in the court entering an order of commitment for a period not to exceed 1 year,” and, “Written request for a hearing must be made . . . on or before the 5th day of January, 2023.” (D.C. Doc. 26.)

The district court undisputedly warned M.H.W. that failure to timely file a request for a contested hearing would result in the entry of an order extending his commitment. Despite the court’s warning, M.H.W. twice failed to timely file a request for a contested hearing. Under the totality of the circumstances, failure to timely request a contested hearing constituted M.H.W.’s acquiescence to the extension of his commitment.

In *State v. Gardner*, 2003 MT 338, ¶ 44, 318 Mont. 436, 80 P.3d 1262, this Court held: “It has long been the rule of this Court that on appeal we will not put a

District Court in error for a ruling or procedure in which the appellant acquiesced, participated, or to which appellant made no objection.” (*Id.* (quoting *In re Marriage of Smith*, 242 Mont. 495, 501, 791 P.2d 1373, 1377 (1990).) Montana Code Annotated § 1-3-207 provides that “[a]cquiescence in error takes away the right of objecting to it.” *See State v. LaDue*, 2001 MT 47, ¶ 23, 304 Mont. 288, 20 P.3d 775. This Court “will not hold a district court in error when it has not been given an opportunity to correct itself.” *Gardner*, ¶ 44 (quoting *State v. Detonancour*, 2001 MT 213, ¶ 52, 306 Mont. 389, 34 P.3d 487).

M.H.W. argues that when the district court did not immediately enter a written order confirming the extended commitment, the case was over, the district court lost authority to take further action, and M.H.W. was free to leave the facility. Were this Court to adopt M.H.W.’s position, patients and their appointed counsel would be encouraged to not file timely requests for contested hearings, gambling that the expiration date might fall on a weekend or holiday or on a day when an already overworked and understaffed district court is in the middle of a week-long jury trial.

Moreover, for a patient like M.H.W. to be immediately released would mean the discharge of a mentally ill person into a community with which they may have no actual connection, no prescribed plan of care or treatment, no bank account or established pharmacy, and no access to food, housing, employment, transportation,

medication, or ongoing medical and mental health care. Specifically in the instant case, to be free would mean the release of an individual who, over the course of a decade or longer, has been declared many times to be a danger to himself and others because: (1) when he repeatedly overdoses on insulin—which is tied to his delusional belief that he is better at controlling his diabetes than licensed medical professionals—he places his own life at risk, and (2) when he fails to comply with prescribed treatment for both his medical and psychiatric conditions, he consistently decompensates both medically and psychiatrically, resulting in increasingly aggressive behavior toward others, including medical providers such as the nurse he assaulted and injured.

Counsel for M.H.W. filed a timely written request for a contested hearing by the deadline set in the notice of PFR1 but failed to do so by the deadlines set in the notices of PFR2 and PFR3. Montana Code Annotated § 53-21-128(1)(b) provides, “If a hearing is not requested, the court shall enter an order of commitment for a period not to exceed 6 months.” Notably, the statute does not require entry of the order extending commitment to be in writing and does not provide a deadline by which entry of the order must be made. On the other hand, the statute is clear that failure to request a hearing results in extension of the commitment.

Despite having missed the deadlines to request a contested hearing on PFR2 and PFR3, counsel for M.H.W. filed untimely requests for contested hearings on

November 15, 2021 (60 days after deadline), and February 8, 2023 (34 days after deadline), respectively. M.H.W. did not demand the State file new or updated PFRs or psychiatric evaluations. Both untimely requests expressly stated: “The respondent acknowledges that when a hearing is requested less than 10 days prior to termination of the previous commitment authority, the previous commitment is considered extended until the hearing is held” (D.C. Docs. 17, 27), leading to the reasonable conclusion that M.H.W. stipulated or acquiesced to the extended commitments. Neither of the untimely requests objected to, took issue with, or even addressed the district court’s not immediately issuing a written order extending commitment.

More importantly, neither of the untimely requests alleged that the period of M.H.W.’s commitments had terminated or that the court lacked authority to take further action. The untimely requests did not demand M.H.W.’s immediate release and did not object to or even address the continuation of his commitment. Under the totality of the circumstances surrounding the untimely requests for a hearing, M.H.W. stipulated to, or at least acquiesced to, his prior commitments being extended, not terminated, due to his failure to timely request contested hearings. Because the same set of circumstances took place not just once but twice *without objection* by M.H.W., further strengthens the position that M.H.W. stipulated to, or at least acquiesced in, the extension of his commitments.

The district court notably did not reject the untimely hearing requests, and the day after each untimely request was received, the district court set a hearing date and ordered that M.H.W.’s commitment be “extended until the hearing is held.” After the district court issued the notices, M.H.W. again failed to lodge any objection to the extension of his commitment, did not demand his release, and did not request an expedited or emergency hearing. In other involuntary commitment cases, this Court has emphasized that, “While district courts must proactively ensure that a respondent’s rights are protected . . . a simple objection or even suggestion by counsel that a statutory requirement had not been satisfied would have alerted the District Court to the problem, which it then could have easily remedied[.]” *In re B.H.*, 2018 MT 282, ¶ 22, 393 Mont. 352, 430 P.3d 1006; *see also In re M.K.S.*, ¶ 21 (“[C]ounsel could have objected . . . and the defect could have been remedied”); *In re F.S.*, 2021 MT 262, ¶ 13, 406 Mont. 1, 496 P.3d 958.

Instead of rejecting the untimely filings, the district court gave M.H.W. the opportunity to fully challenge the recommendations made in PFR2 and PFR3 and afforded him precisely the same procedural due process that he would have been afforded had he timely made the requests. The district court held contested hearings at which M.H.W. was present with counsel and was given the opportunity to contest the recommendations, to cross-examine all witnesses, to testify on his own behalf, and to argue against the recommendations for recommitment. During

the hearings, the district court followed the procedures under Mont. Code Ann. § 53-21-128 and then issued orders of recommitment as governed by Mont. Code Ann. § 53-21-127.

In assessing whether M.H.W. has met his burden to prove the second prong of the plain error test, the Court has held it must weigh the risk of depriving an individual's liberty against the probable value of the procedure in question. *In re M.K.S.*, ¶ 14; *In re N.A.*, 2013 MT 255, ¶ 23, 371 Mont. 531, 309 P.3d 27. Montana Code Annotated § 53-21-128(1)(b), which controls what happens when a respondent fails to request a contested hearing, does not require that an order of recommitment be in writing and does not provide a deadline for an order to be entered. The statute, however, clearly provides that the respondent's failure to request a hearing will result in the extension of the commitment. M.H.W.'s assertion that the district court's error divested it of authority to take further action, and thus necessitated his immediate release, is contrary to the express language of the statute. This Court has held that the intent of the Legislature is to be determined from the plain language of a statute. *In re N.A.*, 2021 MT 228, ¶ 11, 405 Mont. 277, 495 P.3d 45 (citing *In re J.J.*, 2018 MT 184, ¶ 13, 392 Mont. 192, 422 P.3d 699). The role of the Court is to interpret the meaning of the terms included in a statute, not to insert what has been omitted. *In re Mental Health of E.T.*,

2008 MT 299, ¶ 22, 345 Mont. 497, 191 P.3d 470 (citing Mont. Code Ann. § 1-2-101).

This Court has held that “not all errors of state law amount to deprivation of procedural due process; rather, we employ a flexible balancing test to determine whether a particular safeguard is required in a specific circumstance.” *In re N.A.*, ¶ 23 (citing *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). The Court has held that when a procedural error results in no substantial prejudice to a party, the error is *de minimis* and does not affect an individual’s liberty interest. *In re M.K.S.*, ¶ 18; *In re Mental Health of O.R.B.*, 2008 MT 301, ¶ 30, 345 Mont. 516, 191 P.3d 482. Due process is flexible and calls for procedural protections based upon the totality of the particular circumstances in each case. *In re L.K.*, 2008 MT 169, ¶ 27, 343 Mont. 366, 184 P.3d 353.

Applying these principles to the totality of what occurred in this case, M.H.W. has therefore failed to meet his burden of proving that plain error review is warranted. On the contrary, having twice failed to timely file a request for a contested hearing by the statutory deadline, M.H.W. understood and acquiesced to the prior commitment being extended, even absent an immediate written order from the district court. The alleged error was *de minimis* and, under the specific facts, did not affect M.H.W.’s liberty interests. The district court twice accepted

M.H.W.'s late filings, immediately scheduled the hearings, and ordered that the then-current period of commitment was extended pending the hearings—without any objection by M.H.W., much less a demand for immediate release or request to expedite the hearing.

CONCLUSION

M.H.W. has failed to meet his heavy burden of proving that failure to review the alleged error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. Therefore, plain error review is not appropriate. The State requests that this Court affirm the district court's recommitment order.

Respectfully submitted this 2nd day of December, 2024.

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By: /s/ Carrie L. Garber
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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 Times New Roman 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 7,073 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Carrie L. Garber
CARRIE L. GARBER

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0411

In the Matter of

M.H.W.,

An Alleged Mentally Ill Person,

Respondent and Appellant.

APPENDIX

December 5, 2022, Psychiatric Report for Recommitment Appendix 1

CERTIFICATE OF SERVICE

I, Carrie L. Garber, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-02-2024:

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