IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0672

IN THE MATTER OF

P.S.,

Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUES

1. Two-way electronic audio-video communication "may not be used" at an involuntary commitment hearing if the respondent objects. § 53-21-140(5), MCA. Did the District Court commit reversible error when it allowed testimony by video at the commitment hearing over respondent's objection?

2. In the alternative, did the District Court err in ordering the involuntary administration of medication where it was undisputed that respondent was voluntarily taking his medication?

STATEMENT OF THE CASE

On October 2, 2023, the State filed a renewed petition for the involuntary commitment of Appellant P.S. (D.C. Doc. 101.) At the commitment hearing, the District Court allowed the State's three witnesses to testify by electronic audio-video communication, over objection by P.S.'s counsel as to two of the witnesses. (10/4/23 Tr. at 6–9, 24–33, attached as App. A.) The District Court granted the petition and committed P.S. to the Montana State Hospital ("MSH") for up to 90 days. (D.C. Doc. 108, attached as App. B.) P.S. timely appeals. (D.C. Doc. 113.)

STATEMENT OF THE FACTS

On September 28, 2023, a receptionist at the AC Hotel in Missoula approached P.S. as he was walking toward the lobby coffee stand and

asked him if he was a hotel guest. (10/4/23 Tr. at 12.) In response, P.S. cursed at the staff member. (10/4/23 Tr. at 12–13.) Hotel staff called the police and ordered P.S. to leave the hotel. (10/4/23 Tr. at 11–12.) P.S. left the hotel premises before attempting to come back inside a few minutes later. (10/4/23 Tr. at 14–15.) The hotel manager prevented P.S. from reentering the hotel. (10/4/23 Tr. at 16.)

As it turns out, P.S. was a paying hotel guest. (10/4/23 Tr. at 17.) Following his eviction from the hotel, P.S. was seized by the police and taken to the emergency room at St. Patrick's hospital. (10/4/23 Tr. at 17–18, 35.) At the recommendation of hospital staff, the Missoula County Attorney's Office filed a petition for involuntary commitment of P.S. to the Montana State Hospital. (D.C. Doc. 101.) The State's petition alleged that P.S. suffers from the mental disorder of schizophrenia and that he was an imminent risk of harm to others and substantially unable to meet his basic needs due to his mental illness. (D.C. Doc. 101, at 2.) The State later amended the petition to drop the claim about inability to meet basic needs. (10/4/23 Tr. at 5–6.)

The State called three witnesses at the civil commitment hearing, starting with Joseph Gary, a manager at the AC Hotel. (10/4/23 Tr. at

10.) Gary appeared at the hearing via the Zoom two-way audio-video platform. (10/4/23 Tr. at 6.) P.S.'s counsel objected to Gary testifying remotely on the grounds that it is challenging to confront and test the veracity of a witness on Zoom and difficult to tell if a remote witness is testifying based solely on personal knowledge. (10/4/23 Tr. at 6, 8.) The District Court asked why Gary could not be in court, and the prosecution conceded that Gary was located a short distance away in Missoula but said that he was working and had received short notice of the hearing. (10/4/23 Tr. at 6.) In response to questioning by the District Court about potential medical justifications for remote testimony, Gary testified that he was not ill. (10/4/23 Tr. at 7.)

The District Court overruled P.S.'s objection, finding that there was not "any particular reason to require him to be here." (10/4/23 Tr. at 9.) Gary testified to the altercation that led to P.S.'s hospitalization and confirmed that the AC Hotel staff kicked out P.S. "based solely off of appearance." (10/4/23 Tr. at 18.)

Next, the State called Sandra Cummings, a mental health professional in the St. Patrick's hospital emergency department. (10/4/23 Tr. at 27–28.) Cummings also appeared at the hearing via

Zoom, and P.S.'s counsel renewed his objection, explaining that Zoom does not allow for proper cross-examination and that the witness was a short distance away. (10/4/23 Tr. at 26.) After Cummings sorted out technical difficulties with her video connection, the District Court questioned her about her availability to "run across a couple blocks" to testify in person. (10/4/23 Tr. at 25–26, 29.) Cummings explained that she was busy in the emergency department and had other patients waiting for her. (10/4/23 Tr. at 27, 29.) P.S.'s counsel reiterated his objection, adding: "This is my client's freedom. This is what's on the table. There is no reason that the State could not have their witnesses be here . . . ." (10/4/23 Tr. at 30.)

The District Court overruled the objection, explaining that Cummings's "availability is best accommodated and the safety of the community and the safety of its citizens by her testifying via Zoom." (10/4/23 Tr. at 32.) Cummings testified that she was working when P.S. was brought to the emergency room on September 28. (10/4/23 Tr. at 34.) When P.S. arrived, he was placed in four-point restraints and sedated after swearing, calling people names, and threatening to rape and kill people. (10/4/23 Tr. at 35.) P.S. was more cooperative the

following day when he voluntarily took medication, but his behavior escalated again when the staff began the process of transporting him. (10/4/23 Tr. at 36.) Cummings concluded that P.S.'s displays of anger and verbal aggression were dangerous, though she had limited interactions with P.S. and never performed an individual assessment of his mental state. (10/4/23 Tr. at 37–39.)

Finally, the State called Kimberly Nottestad, a certified mental health professional. (10/4/23 Tr. at 46.) Nottestad also testified via Zoom, but P.S.'s counsel did not "object to Ms. Nottestad testifying by Zoom based on health reasons." (10/4/23 Tr. at 7.)

Nottestad testified as an expert professional person. (10/4/23 Tr. at 46–47.) Because P.S. exercised his right to remain silent for the court-ordered examination, Nottestad did not personally evaluate him. (10/4/23 Tr. at 47.) Nottestad based her evaluation on P.S.'s medical records, the petition for commitment and request for detention, and conversations with his healthcare providers. (10/4/23 Tr. at 47.) Nottestad testified that, in her opinion, P.S. suffers from schizophrenia. (10/4/23 Tr. at 48.)

As to P.S.'s dangerousness, Nottestad reported that P.S. had improved significantly since his initial hospitalization. After an initial refusal to engage with medical treatment, P.S. grew cooperative, made friends in his group, and started voluntarily taking medication. (10/4/23 Tr. at 49–50.) Nottestad also acknowledged that hospital records stated that P.S.'s anger may have been due to physical discomfort from an infection and that he had "no obvious psychosis." (10/4/23 Tr. at 55.) However, Nottestad concluded that P.S. was an imminent risk to others "based on what I read in the record and listening to the testimony today." (10/4/23 Tr. at 50.) Nottestad testified that P.S. needed commitment for longer than 14 days and that MSH was the least restrictive alternative. (10/4/23 Tr. at 52–53.) When asked whether the MSH should be authorized to administer involuntary medication, Nottestad said: "Not at this time because he did start taking his medications." (10/4/23 Tr. at 52.)

Finally, P.S. testified. (10/4/23 Tr. at 59.) P.S. referenced a long history of mental health treatment and explained that he has never been a danger to others and that he tries to make the world a better place. (10/4/23 Tr. at 63–64.) P.S. urged the District Court to read a

book he wrote and asked that the judgment not be based on hearsay testimony by people who do not know who he is. (10/4/23 Tr. at 64–65.)

The District Court granted the State's petition. (10/4/23 Tr. at 67.) In its commitment order, the District Court credited Gary's testimony that P.S. acted aggressively toward AC Hotel staff when he was kicked out of the hotel and Cummings's testimony that P.S.'s belligerence continued when he made graphic threats upon admission to the hospital. (App. B at 2–3.) Relying on the testimony of Nottestad and P.S., the District Court found that P.S. suffers from schizophrenia. (App. B at 4.) The Court then concluded that P.S. is an imminent risk to others, relying on Nottestad's opinion and noting that her opinion was supported by the testimony of Gary and Cummings. (App. B at 5.)

In its oral decision, the District Court noted that it "appears that currently the Respondent is taking medications, so it will not be mandatorily imposed by the Court. But, of course, if there are emergencies and emergency situations, medical personnel can administer appropriate medication to provide safety to those who are nearest the Respondent." (10/4/23 Tr. at 67.) In the commitment order, the District Court concluded: "Medications are necessary to protect the

Respondent or the public and facilitate effective treatment. Therefore, Respondent's treating professionals are authorized to administer medications involuntarily, if necessary, pursuant to Montana Code Annotated § 53-21-127(6)." (App. B at 7.) The District Court then ordered "that the chief medical officer at Montana State Hospital or any facility to which Respondent is released shall have the authority to administer appropriate medication involuntarily." (App. B at 8.)

MSH unconditionally discharged P.S. 13 days after the commitment hearing. (D.C. Doc. 109.)

STANDARDS OF REVIEW

This Court reviews a district court's civil commitment order to determine whether the court's findings are clearly erroneous and whether the court's conclusions of law are correct. *In re B.H.*, 2018 MT 282, ¶ 9, 393 Mont. 352, 430 P.3d 1006. A finding of fact is clearly erroneous if it is not supported by substantial credible evidence, if the district court misapprehended the effect of the evidence, or if this Court has a definite and firm conviction upon review of the record that the lower court otherwise erred. *In re C.K.*, 2017 MT 69, ¶ 10, 387 Mont. 127, 391 P.3d 735. In considering whether a district court correctly

interpreted and applied relevant statutes, this Court exercises de novo review. *In re Mental Health of O.R.B.*, 2008 MT 301, ¶ 14, 345 Mont. 516, 191 P.3d 482. "Strict adherence to the involuntary commitment statutory scheme is required, considering the utmost importance of the rights at stake." *In re N.A.*, 2021 MT 228, ¶ 8, 405 Mont. 277, 495 P.3d 45.

SUMMARY OF THE ARGUMENT

The District Court deviated from the strict requirements of the involuntary commitment statute in at least two ways. First, the District Court erred in allowing two witnesses to testify via Zoom over an objection. P.S.'s counsel reasonably insisted that the State's two healthy witnesses who were a short distance from the courthouse be required to testify in person, given the difficulty in cross-examining a witness over video and in recognition of the significant rights at stake and serious consequences of a civil commitment. This Court has recently held that when a party objects to the use of electronic audio-video communication in a commitment hearing, the prohibition on its use must be strictly enforced and that a violation constitutes reversible error. The present

case is on all fours with this Court's recent precedent, and the result should be the same—reversal of the District Court's commitment order.

In the alternative, the District Court clearly erred in granting MSH authority to administer involuntary medication. As the District Court appeared to recognize in the oral pronouncement, involuntary medication was unnecessary. Indeed, there was no question that P.S. was voluntarily taking his medication at the time of the commitment hearing. As a result, neither the State nor the professional person requested involuntary administration of medication. If the District Court's order is not reversed in its entirety, this Court should reverse the clearly erroneous involuntary medication order.

ARGUMENT

I. The District Court Committed Reversible Error When it Allowed Testimony by Video at the Commitment Hearing Over Objection.

A. The District Court Violated the Unambiguous Terms of Section 53-21-140.

Section 53-21-140, MCA, governs the use of two-way electronic audio-video communication in involuntary commitment proceedings. According to the statute, "the trial or hearing on a petition" for involuntary commitment "may be conducted through two-way electronic

audio-video communication." § 53-21-140(3)(c), MCA. However, the statute goes on to provide that "a two-way electronic audio-video communication *may not be used*" in a hearing on a petition "if a respondent or patient, the respondent's or patient's counsel, or the professional person objects." § 53-21-140(5)(b), MCA (emphasis added).

This Court has held that this restriction on use of audio-video communication at a commitment hearing must be strictly enforced. In *In re N.A.*, the respondent objected to the State calling a licensed clinical social worker to testify by two-way electronic audio-video communication. 2021 MT 228, ¶ 4. The State justified the remote testimony with the witness's concern about being away from her office in case of emergency, and the district court overruled the objection and ordered N.A.'s commitment to MSH for up to 90 days. *Id.* ¶¶ 4, 7.

This Court reversed, holding that § 53-21-140(5), MCA, means what it says: Allowing testimony by video conferencing over an objection "violate[s] the plain and unambiguous language of the statute." *Id.* ¶ 13. After *In re N.A.*, the rule governing use of video conferencing technology in an involuntary commitment hearing is clear: "If the respondent, patient, or their counsel objects, the district court's discretion is

terminated, and the court may not allow testimony by electronic audio-video communication." *Id.*

In consideration of the weighty stakes of a civil commitment and the challenge of video cross-examination, P.S.'s counsel reasonably insisted that the State's two healthy witnesses travel several blocks to be present for in-person testimony and cross-examination.[1] *See State v. Hogues*, 2024 MT 304, ¶ 27 ("The purpose of the face-to-face confrontation and cross-examination right is to ensure the reliability of the [adverse] evidence through rigorous adversarial face-to-face testing in the presence of the factfinder in accordance with the long-settled norm of Anglo-American justice." (quotations omitted)). The District Court overruled the objections, citing convenience and the risks of COVID. However, the statutory requirement is clear, and the District Court had a responsibility to enforce the statute as written—"not to determine the prudence of a legislative decision." *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42.

[1] Though P.S.'s counsel did not cite § 53-21-140(5), MCA, in his oral objection, "an objection [is] sufficient if it specifies the reason for disagreement with the procedure employed by the court." *In re N.A.*, ¶ 17 (quoting *State v. Johns*, 2019 MT 292, ¶ 18, 398 Mont. 152, 454 P.3d 692).

The District Court's decision to allow testimony by Zoom over an objection constitutes clear error.

B. The District Court's Error Requires Reversal of P.S.'s Commitment.

This Court has long and consistently held that Montana's civil commitment laws must be "strictly followed." *See, e.g.*, *In re Mental Health of S.J.*, 231 Mont. 353, 355, 753 P.2d 319, 320 (1988); *In re Mental Health of R.M.*, 270 Mont. 40, 44, 889 P.2d 1201, 1204 (1994). The strict enforcement of the civil commitment statutes recognizes that the procedural safeguards "are of critical importance because of the 'calamitous effect of a commitment,' including loss of liberty and damage to a person's reputation." *In re Mental Health of T.J.D.*, 2002 MT 24, ¶ 20, 308 Mont. 222, 41 P.3d 323 (quoting *In re Mental Health of R.M.*, 270 Mont. at 44). This Court should therefore reverse without considering whether the error was harmless.

In involuntary commitment appeals, this Court has applied harmless error review in only two contexts: First, where the district court's commitment order does not contain the required detailed factual findings. *See In re Mental Health of R.J.W.*, 226 Mont. 419, 736 P.2d 110 (1987); *In re D.D.*, 277 Mont. 164, 920 P.2d 973 (1996). Second,

where errors do not amount to violations of specific statutory mandates for ordering an involuntary commitment. *See In re Mental Health of A.S.B.*, 2008 MT 82, 342 Mont. 169, 180 P.3d 625; *In re Mental Health of O.R.B.*, 2008 MT 301, 345 Mont. 516, 191 P.3d 482.

This case fits in neither context. Moreover, recent decisions have clarified that this Court will no longer apply harmless error to deficient factual findings and will not apply harmless error to violations of the specific statutory requirements in civil commitment cases. In *In re L.L.A.*, the Court found that the district court's order of commitment listed conclusory statements of statutory criteria and therefore did not meet the strict factual findings requirement of the civil commitment statutes. 2011 MT 285, ¶ 11, 362 Mont. 464, 267 P.3d 1. The Court reversed and declined to apply harmless error for a violation of the statute's "express requirements." *Id.* ¶ 21.

This Court recently applied the same principle to the use of audio-video testimony over a respondent's objection. In *In re N.A.*, the Court "decline[d] to apply the harmless error doctrine" because "the District Court's errors amounted to a violation of the specific statutory mandates for ordering an involuntary commitment." *In re N.A.*, ¶ 16

(citing *In re L.L.A.*, ¶ 20). Likewise, in *In re S.E.*, this Court considered whether a district court committed reversible error in allowing a professional person to testify by telephone over the respondent's objection, in violation of § 53-21-140, MCA. 2022 MT 205, ¶ 2, 410 Mont. 345, 519 P.3d 11. The Court answered in the affirmative and reversed the commitment without considering whether the decision constituted harmless error. *Id.* ¶¶ 22–23.

The present case fits squarely within *In re L.L.A.*, *In re N.A.*, and *In re S.E.*, and the result should be the same. The District Court's decision to allow audio-video testimony over P.S.'s objections violated "the specific statutory mandates for ordering an involuntary commitment." *In re L.L.A.*, ¶ 20. Consequently, the District Court's order must be reversed without consideration of harmless error. *Id.* ¶ 21; *In re N.A.*, ¶ 16; *In re S.E.*, ¶ 23.

II. The District Court Clearly Erred in Ordering Involuntary Medication Where the State Did Not Demonstrate a Need for Involuntary Medication.

In the alternative, this Court should reverse so much of the judgment as allows the involuntary administration of medication.

Individuals have constitutional and statutory rights protecting against arbitrary forced medication. "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). Under Montana law, "[p]atients have a right to be free from unnecessary or excessive medication." § 53-21-145, MCA.

The civil commitment statutes understandably set a high bar for an order of involuntary medication. A district court may authorize the involuntary provision of medication only if the court finds that involuntary medication "is *necessary* to protect the respondent or the public or to facilitate effective treatment." § 53-21-127(6), MCA (emphasis added). If involuntary medication is ordered, the commitment order must include "the reason involuntary medication was chosen among other alternatives." § 53-21-127(8)(*i*), MCA.

This Court recently considered whether involuntary medication could be authorized in the absence of an immediate need. In *In re M.T.H.*, the professional person asked the district court to authorize involuntary medication because "MSH often medicates individuals with M.T.H.'s condition, and M.T.H. had a history of refusing medications,"

even though "M.T.H. had otherwise been a compliant patient." 2024 MT 26, ¶ 26, 415 Mont. 158, 543 P.3d 581. The district court obliged. *Id.* ¶ 11. On appeal, the State conceded that the district court "clearly erred." *Id.* ¶ 24.

Though the State confessed error, this Court took the opportunity "to emphasize the importance of the due process protections afforded individuals in instances of involuntary medication." *Id.* In order to protect patients' due process rights against unnecessary or excessive forced medication, the State "must demonstrate a need before a court may authorize it." *Id.* ¶ 25. It is therefore incumbent on the State to prove an individualized and urgent need to administer involuntary medication before a district court orders that the state hospital shall have that authority. *Id.* ¶ 26. Crucially, the Court "refuse[d] to endorse the proposition that healthcare providers should be given prior authorization to medicate individuals involuntarily simply because a particular condition often warrants the use of prescription medications." *Id.* ¶ 27; *see also In re R.H.*, 2016 MT 329, ¶ 21, 385 Mont. 530, 385 P.3d 556 ("A finding or general understanding that an individual with bipolar disorder may at some undisclosed future point in time decide

not to take her medications is insufficient to satisfy the plain language of the statute requiring that involuntary medication 'is necessary.'")

There are several issues with the District Court's order in the present case. First, the District Court's written order does not appear to conform to its oral pronouncement. At the end of the hearing, the District Court pronounced that "medications . . . will not be mandatorily imposed by the Court." (10/4/23 Tr. at 67.) However, the written order authorized the administration of involuntary medication. (App. B at 7.) Second, the District Court did not explain why involuntary medication was ordered "among other alternatives," in violation of the statute. § 53-21-127(8)(*i*), MCA. Finally, and most importantly, the State did not demonstrate and individualized and pressing need for MSH to have involuntary medication authority. Indeed, the professional person testified that forced medication was not necessary and the State did not request authority to administer involuntary medication. Far from demonstrating a need for involuntary medication, the State actively demonstrated that it was not necessary—and the District Court ordered it anyway. The District Court clearly erred and the order of involuntary medication must be reversed.

CONCLUSION

The critically important safeguards of the involuntary commitment statute were not respected when P.S. was committed to MSH. The order of commitment should be reversed in its entirety, or, in the alternative, the order of involuntary medication should be reversed.

Respectfully submitted this 24th day of December, 2024.

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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 Mac is 3,652, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Nicholas T. Hine
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APPENDIX

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