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Matter of J.S.: Defining the Standard for Ineffective Counsel in Involuntary Commitment Proceedings

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PRECAP; *Matter of J.S.*: Defining the Standard for Ineffective Counsel in Involuntary Commitment Proceedings

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Oral argument is set for Wednesday, June 28, 2017, at 9:30 a.m., in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. Questions Presented

Did appointed counsel provide ineffective assistance during Appellant's involuntary commitment proceedings?[1]

Should the standards for assessing the effectiveness of the assistance provided by a respondent's legal counsel in an involuntary commitment proceeding, adopted in *In re Mental Health of K.G.F.*, be revisited and revised?[2]

This question is of particular importance because the standard for effective counsel articulated in *K.G.F.* is a more stringent standard than the Court applies to appointed counsel in criminal proceedings; these strict requirements, coupled with the tight statutory time constraints in involuntary commitment proceedings, make it difficult for appointed counsel to satisfy the requirements for both effectiveness and efficiency.

II. Introduction

Appellant J.S. was found to be suffering a mental disorder which prevented her from properly caring for her infected wounds. She was involuntarily committed to the Montana State Hospital (MSH), following a hearing in which J.S. was represented by a public defender.[3] The District Court committed J.S. to the custody of MSH for a period not to exceed 90 days.[4]

On appeal, J.S. argues that her appointed counsel failed to effectively represent her because her counsel did not satisfy the five standards of representation that Montana uses to evaluate effectiveness of counsel in involuntary commitment proceedings.[5] J.S. asserts that the five-part test articulated in *In re Mental Health K.G.F.*[6], establishes a strict standard for effective counsel in involuntary commitment proceedings and maintains that her appointed counsel failed to satisfy any of the five of the criteria.[7] However, the State argues that the five-part test from *K.G.F.* is

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[1] Opening Brief of Appellant, *Matter of J.S.*, https://supremecourtdocket.mt.gov/view/DA%2016-0156%20Appellant's%20Opening%20--%20Brief?id={80641E59-0000-CD16-BD6F-322238874015} (Mont. Dec. 20, 2016) (No. DA 16-0156).

[2] Order, Montana State Supreme Court, https://supremecourtdocket.mt.gov/view/DA%2016-0156%20Classified%20-%20Oral%20Argument%20--%20Order?id={20C11D5C-0000-CC13-BDC9-4A8C37102CE4}, (May 18, 2017) (No. DA 16-0156).

[3] Reply Brief of Appellee, *Matter of J.S.*, 2017 WL1158316 at *1 (Mont. Mar. 10, 2017) (No. DA 16-0156).

[4] *Id.*

[5] Opening Brief of Appellant, *supra* note 1, at 13.

[6] 29 P.3d 485 (Mont. 2001).

[7] Opening Brief of Appellant, *supra* note 1, at 13.

unnecessary, and the Court should consider replacing the five-part test with the broadly used *Strickland v. Washington*[8] standard for ineffective assistance of counsel.[9] Ultimately, J.S. argues that her order for committal should be vacated, or the Court should remand for a hearing into her ineffective assistance of counsel claims.[10]

III. Factual and Procedural Background

At the end of January 2016, J.S. was struck by a car on the outskirts of Helena and was brought into the Emergency Room (ER) at St. Peter's Hospital to treat her cuts and abrasions.[11] The physician treating J.S. observed that J.S. appeared delusional and detached, so Kim Waples, a mental health professional, completed a mental health evaluation of J.S..[12] Waples asked the State to place J.S. on emergency detention at MSH, and J.S. was then sent to MSH.[13] The State subsequently filed a commitment petition, but J.S. was discharged a few days later by a different mental health professional. The commitment petition was dismissed.[14]

On February 9, 2016, J.S. called 911 and asked to be taken to the Center for Mental Health (Center). The Center was unable to immediately treat J.S., so at the request of a police officer J.S. was taken back to the ER.[15] ER staff treated J.S. for an infection in her leg, resulting from a lack of proper care for her previous injury, and observed she was delusional and agitated.[16] A mental health professional evaluated J.S., who was then detained at Journey Home, a local mental health center, on an emergency basis.[17] The State filed a petition for involuntary commitment[18] on February 10, 2016, and the court held an initial appearance on the petition that same day.[19] At the initial appearance, J.S. appeared by VisionNet from Journey Home with attorney Suzanne Seburn, whom she had been appointed by the Office of the Public Defender.[20] The court advised J.S. of her rights, appointed Waples as the mental health professional to examine J.S., and scheduled the hearing for the next day.[21] Journey Home, concerned about J.S.'s medical needs, had asked that the hearing be "fast tracked."[22]

On the morning of February 11, Waples examined J.S. at Journey

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[8] 466 U.S. 668 (1984).
[9] Reply Brief of Appellee, *supra* note 3, at *15.
[10] Opening Brief of Appellant, *supra* note 1, at 14.
[11] *Id.* at 3.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 3–4.
[15] Reply Brief of Appellee, *supra* note 3, at *29.
[16] *Id.* at *1.
[17] *Id.* at *2.
[18] To be involuntarily committed, the court considers four factors: 1) whether, because of a mental illness, the person cannot provide for his or her basic needs; 2) whether, because of a mental illness, the respondent has recently caused injury to himself or others; 3) whether, because of a mental disorder, the respondent is an imminent threat to himself or others; 4) whether, if untreated, the respondent's mental disorder will deteriorate and the respondent will likely become a threat to himself or others. MONT. CODE ANN. § 51–21–126(1).
[19] Reply brief of Appellee, *supra* note 3, at *2.
[20] Opening Brief of Appellant, *supra* note 1, at 1.
[21] *Id.* at 1-2.
[22] *Id.* at 1.

Home and filed a report with the court, recommending J.S. be committed to MSH with the ability for MSH to administer involuntary medications.[23] The State called Waples as a witness at the hearing later that day, and also called Justin Kennedy, a registered nurse at Journey Home with training in wound care.[24] J.S. appeared at the hearing with attorney Melissa Edwards, another public defender.[25] Edwards had been present for J.S.'s evaluation, but she did not call any witnesses, including J.S.[26]

Waples testified that J.S. has bipolar disorder and that she had previously treated J.S. at the ER for psychosis and delusion.[27] Waples testified to other events in J.S.'s records, including events for which she was not the treating mental health professional.[28] Waples described the interaction with J.S. and the police officer at the Center, but Edwards objected to that testimony as hearsay and the court sustained the objection.[29] At one point during Waples' testimony, J.S. interrupted, claiming to be an attorney and a cop; the court intervened and told J.S. that it would "hear whatever you have to say later."[30] Waples continued to testify that if J.S. were not committed, she would be unable to care for herself or her infection.[31] Waples recounted that when she had asked J.S. if she understood what kind of care her injury required, J.S. "didn't respond. She just kind of shrugged."[32] J.S. again attempted to interrupt the testimony, but Waples reiterated that J.S. did not respond or indicate that she knew how to care for her wound.[33]

Edwards cross-examined Waples and established that J.S. was capable of seeking treatment, which J.S. had demonstrated by calling 911 and going to the Center and the ER.[34] On redirect, Waples recommended J.S. be committed at MSH because she was an imminent threat of harm to herself; Waples testified that MSH was J.S.'s only option because she would not voluntarily stay at a community placement like Journey Home.[35]

The State's other witness, Kennedy, testified that J.S.'s confusion and lack of access to medical care would contribute to her wound worsening and put her at risk for future infections.[36] Kennedy testified that J.S. initially seemed "very receptive" to his instructions about wound care, but could not recall that information five minutes later.[37] In response to Edward's questioning during cross examination, Kennedy admitted that homelessness, rather than mental health issues, could cause a person to fail to obtain medical care.[38] Kennedy clarified that, in J.S.'s case, her failure to obtain care was due to mental health problems, not her homelessness,

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[23] *Id.* at 2.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Reply Brief of Appellee, *supra* note 3, at *5.
[28] Opening Brief of Appellant, *supra* note 1, at 3.
[29] Reply Brief of Appellee, *supra* note 3, at *5.
[30] *Id.* at *6.
[31] *Id.* at *7.
[32] *Id.*
[33] *Id.*
[34] *Id.* at *8.
[35] Opening Brief of Appellant, *supra* note 1, at 7.
[36] *Id.* at 5.
[37] *Id.*
[38] Reply Brief of Appellant, *supra* note 3, at *4.

and that in his opinion J.S. would be incapable of changing her wound dressings and taking her antibiotics by herself.[39]

Following testimony, the State argued that J.S.'s mental illness put her in imminent danger, and that she was unable to care for herself.[40] The State argued that MSH was the least restrictive solution, and J.S.'s only option, as she could not be involuntarily committed to a community setting.[41] In response, Edwards argued that the court should dismiss the petition, but she also argued that MSH was not the least restrictive alternative, and J.S. had other options.[42] Edwards argued that the State could contact Journey Home to see if it would accept J.S. on a diversion status, or that the court could order a community commitment if it found J.S. required commitment solely because of the probability that her condition would cause her future harm, per § 53–21–126(1)(d) Mont. Code Ann.[43]

While Edwards continued her argument, Waples contacted Journey Home and asked if it would accept J.S. on a diversion commitment—it would not.[44] At the court's request, Waples returned to testify and explained that Journey Home refused to accept J.S. under the diversion statute because J.S. had been extremely disruptive while there: she had thrown food, taken off her bandages, and had attempted to injure another resident.[45] Edwards did not immediately object to this testimony, but made a hearsay objection after the court voiced its concern that J.S. refused to keep her bandage on.[46] The court overruled the objection on the grounds that the information was in Waples' report and she could rely on it as an expert.[47]

During the time when Waples was contacting Journey Home, Edwards had continued her arguments, explaining the court's other option to commit J.S. to a community treatment center. Edwards argued that the sole provision of § 53-21-126(1)(d) allowed the court to order J.S. to seek community treatment, if the court found that J.S. had a mental disorder which would deteriorate and negatively affect her ability to care for herself.[48] Edwards made no suggestions as to where J.S. could go, and admitted she did not know if Journey Home would accept J.S.[49] Edwards also did not request a continuance of the hearing to investigate alternatives to the MSH for J.S.[50]

The court ordered J.S. to be committed to the MSH for up to 90 days with a provision that allowed MSH to involuntarily medicate J.S.[51] In the court's Findings of Fact and Conclusions of Law, the court did not make any findings relying on Waples' testimony regarding J.S.'s behavior at Journey Home.[52] The court summarized J.S.'s background and

[39] *Id.* at *3.
[40] Opening Brief of Appellant, *supra* note 1, at 8.
[41] *Id.*
[42] *Id.* at 9.
[43] *Id.*
[44] Reply Brief of Appellee, *supra* note 3, at *11.
[45] *Id.*
[46] *Id.*
[47] *Id.* at *11–12.
[48] Opening Brief of Appellant, *supra* note 1, at 10.
[49] *Id.* at 11.
[50] *Id.*
[51] Reply Brief of Appellee, *supra* note 3, at 12.
[52] *Id.*

testimony concerning her mental health history, and ultimately lamented the lack of options available to those suffering from mental health issues.[53]

IV. Summary of the Arguments

A. Appellant J.S.

1. Edwards did not effectively represent J.S. because Edwards failed every criterion established in K.G.F.*, and the Court should consequently dismiss the order for involuntary commitment.*

J.S. argues that, under the Court's holding in *K.G.F.*, Edwards did not provide effective and competent representation to J.S. during her involuntary commitment hearing.[54] In *K.G.F.*, the Court rejected applying the *Strickland* standard[55] (deficient performance and prejudice) determining the effectiveness of counsel in an involuntary commitment proceeding, and instead established five areas of representation a respondent is entitled to in an involuntary commitment hearing.[56] The Court analyzes the following factors to measure effective assistance of counsel: 1) appointment of competent counsel; 2) counsel's initial investigation; 3) counsel's interview with the client; 4) the patient-respondent's right to remain silent; and 5) counsel's role as advocate and adversary.[57] J.S. argues that Edwards failed to adequately represent J.S. in any of the five categories required by *K.G.F*, but particularly emphasizes that Edwards misrepresented Montana law and that she failed to adequately investigate and interview with J.S..[58]

J.S. argues that she was not appointed competent counsel because Edwards mistakenly argued that community commitment was only available under § 53–21–126(1)(d) and because Edwards did not possess requisite understanding of J.S.'s other options.[59] According to J.S., the record shows that the District Court favored a community commitment, but Edwards mistakenly informed the court that it could only order a community commitment if it based its order on a belief that J.S.'s mental disorder would deteriorate and inevitably cause her future harm.[60] J.S. argues that community commitments are not limited only to instances that satisfy (1)(d) and that community commitments can apply to any of the criteria in § 53–21–126.[61] Because Edwards incorrectly interpreted the statute, J.S. argues she was denied the opportunity for the court to consider a less restrictive placement than MSH.[62] Furthermore, J.S. did not receive Edwards' name and qualifications before the hearing, which J.S. argues

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[53] *Id.*
[54] Opening Brief of Appellant, *supra* note 1, at 14.
[55] 466 U.S. 668 (1984). In a criminal proceeding, a defendant alleging ineffective assistance of counsel must show that his counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result of counsel's performance.
[56] Opening Brief of Appellant, *supra* note 1, at 14, citing In re Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001).
[57] *Id.* at 15.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 15-16.
[61] *Id.* at 18.
[62] Appellant's Reply Brief, *Matter of J.S.*, 2016 WL 1390996 at *2 (Apr. 13, 2017) (No. DA 16-0156).

prevented her from exercising her right to verify competent counsel.[63] J.S. also rejects the State's argument that Edwards was competent based on her previous training in involuntary commitments, because this information was obtained from sources outside the record.[64]

Second, J.S. argues that counsel's initial investigation was inadequate because she did not investigate records and pursue all available alternatives.[65] J.S. asserts that the record shows Edwards did not adequately investigate because she was unaware that community commitment was an option for J.S., nor did she contact Journey Home or the Center to investigate whether J.S. could stay there.[66] J.S. argues that the fact that Edwards had less than a day to conduct such an investigation is irrelevant.[67] Because Edwards was aware of the short time frame and failed to investigate alternative placements or request a continuance to do so, J.S. argues that Edwards ineffectively represented her during the initial investigation phase.[68]

Third, J.S. contends that under both § 53-21-121(3) and the directives of *K.G.F.*, Edwards failed to satisfy the criteria for the counsel's interview with the client, because she did not "meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings."[69] J.S. emphasizes that a client interview should happen before the involuntary commitment proceeding, and counsel should request a continuation of the hearing if it is not possible to accomplish the interview in the given time frame.[70] Because J.S. appeared with a different attorney at her initial appearance, J.S. argues that she did not have an adequate interview with Edwards when Edwards became her counsel.[71] In addition, J.S. argues that her interruptions indicate that she wanted to testify, that the judge's response about the value of her testimony indicated that she would testify, and that Edwards' failure to call J.S. as a witness ignored J.S.'s desire and deprived J.S. of her constitutional right to testify on her behalf.[72]

Fourth, J.S. argues that she had a constitutional right to remain silent, and her silence during Waples' examination of her should not have been admissible as evidence, so Edwards failed to effectively represent her in this area.[73] J.S. emphasizes that the right to remain silent applies to a professional person examination of a patient-respondent.[74] During Waples' testimony, she discussed her evaluation of J.S. and noted that J.S. did not respond to her questions; J.S. maintains that Edwards' failure to object nullified the value of J.S.'s right to remain silent.[75] By failing to object to Waples' testimony regarding J.S.'s silence, J.S. argues that her due process rights were violated and Edwards failed to provide effective

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[63] *Id.*
[64] *Id.*at *1.
[65] Opening Brief of Appellant, *supra* note 1, at 22.
[66] *Id.* at 22.
[67] *Id.* at 23.
[68] Opening Brief of Appellant, *supra* note 1, at 23.
[69] *Id.*
[70] *Id.* at 24.
[71] *Id.* at 25.
[72] *Id.*
[73] *Id.* at 26.
[74] *Id.* (citing § 53–21–115(6) and § 53–21–123(1)).
[75] *Id.* at 27.

counsel.[76]

Finally, J.S. asserts that Edwards failed in her role as an advocate and adversary, because Edwards incorrectly presented Montana law, and did not allow J.S. to testify in her defense.[77] J.S. also argues that Edwards' misunderstanding of relevant Montana law demonstrated that Edwards did not vigorously investigate alternative placements.[78] Additionally, J.S. argues that Edwards failed in her role as an adversary because her purported lack of preparation led her to invite the State to present questionable testimony from Waples about the possibility of J.S. staying at Journey Home on a diversion status.[79] J.S. stresses that pursuant to Mont. R. Evid. 802, hearsay is generally not admissible at an involuntary commitment proceeding.[80] Responding to the assertion that Waples is a health professional and allowed to testify to otherwise inadmissible hearsay that she relied on in forming her expert opinion, J.S. argues that Edwards failed to object to Waples' testimony on the grounds that it was prevented as substantive evidence.[81] J.S. argues that Waples' testimony about her behavior at Journey Home was provided after Waples had testified to her opinion, so Edwards' failure to contemporaneously object to that testimony as hearsay damaged J.S.'s chances of receiving a community commitment.[82]

B. Plaintiff and Appellee the State of Montana

1. The Court should reconsider using Strickland *to evaluate the effectiveness of counsel in involuntary commitment hearings and overrule the five-part test from* K.G.F.

The State urges the court to reconsider applying the standard from *Strickland*, rather than the test articulated in *K.G.F*., when confronted with the question of effective counsel in involuntary commitment proceedings.[83] The *Strickland* standard is generally applied in criminal proceedings, and has two parts: whether the counsel's performance was deficient and whether the defendant was prejudiced as a result.[84] The State emphasizes that Montana is the only jurisdiction that applies the five-part test in its evaluation of counsel in involuntary commitment proceedings, and most courts favor the *Strickland* standard.[85] The State argues that Montana's application of a stricter test for counsel in an involuntary commitment proceeding presumes that patient-respondents in such actions will be provided with "unreasonably low" levels of legal assistance; the State juxtaposes this perception with the lack of cases in which the court has found counsel ineffective in an involuntary commitment proceeding, and ultimately argues that the five-part test from *K.G.F.* is unnecessary.[86]

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[76] *Id.*
[77] Opening Brief of Appellant, *supra* note 1, 28, 29.
[78] *Id.* at 30.
[79] *Id.* at 31.
[80] *Id.* at 32.
[81] Appellant Reply brief, *supra*, at *14.
[82] *Id.* at *16.
[83] Reply Brief of Appellee, *supra* note 3, at *15.
[84] *Id*. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).
[85] Appellee's Reply Brief, *supra* note 3, at *15.
[86] *Id.* at *15–16.

2. Weighting the current K.G.F. *standards, Edwards represented J.S. competently and effectively, and this Court should consequently affirm the order of commitment.*

The State responds to each of J.S.'s arguments on the five criteria articulated in *K.G.F.* and asserts that J.S. cannot show that Edwards provided ineffective assistance of counsel.[87] The State argues that Edwards meets the competency requirements for assigned counsel in involuntary commitment proceedings because Edwards had previously led a training on representation in involuntary commitments.[88] Additionally, while the State concedes that Edwards misinterpreted § 53–21–126(1)(d), the State argues that this mistake does not indicate that Edwards was incompetent about involuntary commitment actions.[89] The State maintains that the record reflects Edwards' competency because she demonstrated knowledge of the diversion statutes and effectively examined the State's witnesses to show that J.S. understood some level of wound treatment.[90] Furthermore, the State contends that the Court should reject J.S.'s argument that she had a right to learn Edwards name and qualifications before the hearing, because the statutory language underlying the Court's reasoning in *K.G.F.* has since been removed.[91]

Second, the State refutes J.S.'s argument that Edwards conducted an insufficient investigation.[92] The State argues that Edwards did not fail to investigate alternatives to the MSH placement because there were no available alternatives.[93] Edwards did not investigate the possibility of sending J.S. to Journey Home on a diversion status because a professional person must recommend diversion and Waples did not recommend it.[94]

Third, the State argues that *K.G.F.*'s directive that counsel should interview the client "sufficiently before any scheduled hearings to permit effective preparation and prehearing assistance to the client" is unrealistic, considering the fast-paced nature of involuntary commitment proceedings.[95] According to the State, the respondent-patient in involuntary commitment proceedings is better served by counsel who adapts to the fast-paced schedule rather than counsel who delays the commitment hearing; delaying the commitment hearing is detrimental to the respondent if she ultimately does not meet the committal criteria, and delay could be dangerous to a respondent who is in critical need of the services provided by MSH.[96] The State agrees that the timeframe for Edwards and J.S. to meet was short, but notes that there is no minimum amount of time that serves as the standard for effective counsel.[97] The

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[87] *Id.* at *16.
[88] *Id.*
[89] Appellee's Reply Brief, *supra* note 3, at *17.
[90] *Id.* at *18.
[91] *Id.* at *19 (noting that the statutory language requiring "that the desires of the respondent must be taken into consideration in the . . . confirmation of the appointment of the attorney," has been removed from § 53-21-122(2) since the Court in *K.G.F.* relied on it as a requirement for appointing competent counsel).
[92] *Id.*
[93] *Id.*
[94] *Id.* at *21 (citing § 53–21–123(3)(b)).
[95] *Id.* at *22 (quoting *K.G.F.*, ¶ 78).
[96] *Id.* at *22-23.
[97] *Id.* at *23.

State also rejects J.S.'s contention that her interruptions during witness testimony indicated a desire to testify, and that Edwards ignored or failed to understand that desire.[98]

Fourth, the State advocates for a different interpretation of when the right to remain silent attaches in an involuntary commitment proceeding. Quoting *K.G.F.*, the State notes that the right to remain silent "potentially conflicts with § 53-21-123(1), MCA, which requires after the initial hearing, that the respondent must be examined by the professional person without unreasonable delay."[99] To remedy this conflict, the State suggests that the respondent's right to remain silent applies during court proceedings but not during the examination.[100] The right to remain silent in an involuntary commitment proceeding is different than the Fifth Amendment right to remain silent in a criminal proceeding; under the State's argument, the respondent's silence should be admissible as evidence.[101] An involuntary commitment hearing, unlike a criminal proceeding, is designed to help a respondent access the treatment she needs to prevent her from harming herself or others, so the Court needs to be presented with the evidence that a respondent refused to speak with a medical professional.[102] The State argues that Edwards did not object because information regarding J.S.'s silence was admissible.[103]

Finally, the State argues that Edwards met the "vigorous advocacy" requirements of *K.G.F.* in her role as an advocate to J.S.[104] Again, the State agrees that Edwards misrepresented the commitment statute in § 53-21-126(1)(d), but the State maintains that despite this misunderstanding, Edwards continued to advocate for a community commitment for J.S.[105] Additionally, the State argues that Edwards' failure to object to Waples' testimony on background information was justified because Edwards relied on that information to form her professional opinion.[106] The State also notes that while Edwards did not object contemporaneously with Waples' testimony about J.S.'s behavior at Journey Home, she objected shortly thereafter.[107] The State argues that Edwards made an effective choice to let Waples provide information about Journey Home's willingness to accept J.S., because the Court expressed a preference for a community commitment.[108]

V. Analysis

A. The Court is unlikely to replace the K.G.F. *factors with the* Strickland *test, but it will likely reevaluate its analysis of* K.G.F. *or articulate an entirely new test.*

J.S. alleges that she was ineffectively represented, but her appeal

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[98] *Id.* at *24.
[99] *Id.*
[100] *Id.* at *25.
[101] *Id.*
[102] *Id.* at *26.
[103] *Id.*
[104] *Id.* at *27.
[105] *Id.* at *28.
[106] *Id.*
[107] *Id.*
[108] *Id.*

raises broader questions about involuntary commitment procedure and representation. The primary issue for the Court here will be to determine whether the standard articulated in *K.G.F* remains a necessary safeguard for patient-respondents facing involuntary commitment, or if it imposes unnecessary requirements that ignore the rapid nature of involuntary commitment proceedings. Ultimately, J.S. asks the Court to settle the question: to how much due process is a patient-respondent in an involuntary commitment proceeding entitled?

If the Court finds that the *K.G.F.* factors continue to be the best measure for effectiveness of counsel in involuntary commitment proceedings, then the Court will reinforce that patient-respondents are entitled to extra due process protections that are not specifically articulated in the statutes governing the treatment of the severely mentally ill.[109] Furthermore, in *K.G.F.*, the Court noted that the five criteria were "generally" the scope of effective counsel, but they were not the exclusive definition of effective counsel.[110] Thus, if the Court upholds *K.G.F.*, it should define, exclusively, the scope and test of effective counsel to satisfy due process. However, if the Court rejects the standards in *K.G.F.*, the Court will then either adopt the *Strickland* standard or articulate a new test.

The Court is more likely to uphold *K.G.F.* than it is to embrace *Strickland* as the new standard. In *K.G.F.*, the Court emphasized that the unique nature of involuntary commitment proceedings mandated vigilant due process protection not only by counsel, but by the courts as well.[111] Because these proceedings are distinct from criminal proceedings, the Court in *K.G.F.* rejected the *Strickland* standard for evaluating effectiveness of counsel, and the Court is unlikely to change its view.[112] The Court explains its preference for a higher standard for legal assistance in involuntary commitments because patient-respondents face deprivations of their liberty and dignity, but not necessarily because they committed a crime. The Court had the opportunity to reconsider the *Strickland* analysis in 2013, but the Court reiterated its preference for the *K.G.F.* five-part test because *Strickland* did not provide adequate due process protections to patient-respondents.[113]

This consequently leaves the Court with two options: reaffirm *K.G.F.* and its application to the effectiveness of counsel, or derive a new test based on the statutory requirements. However, the statutory requirements that govern the treatment of the severely mentally ill have not drastically changed since *K.G.F.*, so a complete overhaul seems unlikely.[114] Therefore, the Court seems most likely to reconsider its analysis of the five criteria in *K.G.F.*, particularly counsel's initial investigation and counsel's interview with the client.

The Court has consistently acknowledged that the statutory time constraints complicate the way in which counsel approaches its representation in involuntary commitment proceedings.[115] Both the counsel's initial investigation and the counsel's interview with the client

[109] MONT. CODE ANN. § 53–21–101 through § 53–21–198 (2017).
[110] *K.G.F.*, at ¶ 91.
[111] *Id.* at ¶ 92.
[112] *Id.* at 33.
[113] In the Matter of J.S.W., 303 P.3d 741 (Mont. 2013).
[114] MONT. CODE ANN. 53–21–101 through § 53–21–198 (2017).
[115] In re Mental Health of T.M., 96 P.3d 1147 (Mont. 2004).

are severely limited because § 53–21–122 states that the hearing for an involuntary commitment must occur within five days of the initial appearance—an incredibly short span for counsel to review records, research alternative community placements, meet with the client, and attend the psychological examination. The Court in *K.G.F.* attempted to remedy this problem by suggesting that counsel "freely and liberally request a continuance prior to the hearing."[116] This suggestion, however, undermines the Court's previous public policy concern of prolonging involuntary commitment proceedings because it will likely have a disruptive and detrimental effect on the client. This leaves the Court in a position to determine which public policy it prefers: the stringent requirements for the initial investigation and client interview, or a short involuntary commitment process that avoids disruptive and detrimental effects on the client.

B. The Court is unlikely to find that J.S. received ineffective assistance of counsel, even if the Court applies the current version of K.G.F.

If the Court upholds *K.G.F.* and applies it to J.S.'s claim of ineffective counsel as the five-part test currently stands, it will likely find that Edwards was not ineffective. First, Edwards did not supply J.S. with her name and credentials before the hearing; although the express language of the statute does not require such disclosure, the Court has clearly established the precedent that such a disclosure is prudential, and this weighs against the State.[117] What is most problematic for Edwards is that she misinterpreted the statutes governing community commitments, and premised her argument solely on one consideration.[118] Under the community commitment statute, the Court may consider an involuntary commitment if any of the requirements in § 53–21–126(a)–(d) are met, not only if (d) is met, as Edwards suggested. Thus, if the District Court had found that J.S. was unable to care for her basic needs, or that she had recently injured herself or others, or that she was an imminent threat to herself or others, the Court could have ordered a community commitment.[119] However, it is not clear that the court would have altered its decision without this mistake, and Journey Home ultimately refused to keep J.S. on diversion status; thus, the mistake weighs heavily against the State, but is not dispositive.

Second, while Edwards knew that J.S. was staying at Journey Home, and Edwards had dealt with Journey Home in the past, the record suggests that Edwards did not do any further investigation, or discuss J.S.'s continuing stay at Journey Home with any of the Journey Home staff.[120] Although Edwards' time was limited by the statute, she could have "freely and liberally' requested a continuance, but she did not.[121] Again, this illustrates the policy problem of balancing effectiveness against

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[116] *K.G.F.* at ¶ 76.
[117] *Id.* at ¶ 72.
[118] Appellant Reply brief, *supra* note 3, at *14.
[119] § 53–21–126 (2017).
[120] Appellant Reply brief, *supra* note 3, at *21.
[121] *Id.*

expediency. Nonetheless, this factor weighs against the State.

Third, the record is somewhat unclear as to when Edwards initially met with J.S.. Edwards was present at the psychological examination, as required, but there is nothing to indicate whether she met with J.S. to discuss J.S.'s specific goals and the procedure of the hearing before or after that examination. Furthermore, because the general presumption in an involuntary commitment proceeding is that the person being committed does not want to be committed, it is likely that Edwards operated under that presumption, regardless of when and how her initial meeting with J.S. took place. This factor could turn in the State's favor if the record is not decisive.

Fourth, regarding J.S.'s right to remain silent, Edwards did object, but it was not contemporaneous.[122] However, her objection was overruled, and the Court in *K.G.F.* noted that a missed objection is relatively unimportant in comparison to the other factors.[123] This factor therefore has little effect on the Court's analysis.

Finally, when evaluating Edwards in her role as advocate and adversary, the Court will likely find that Edwards satisfied this role because she advocated either for the petition to be dismissed, or for J.S. to be committed to a community placement before she knew Journey Home was not an option. Simply because Edwards did not attain J.S.'s desired result is not grounds for inadequacy. Thus, if the Court applies *K.G.F.* as it stands, the Court will likely find that Edwards was not ineffective counsel. Additionally, if the Court were to apply the current *K.G.F.* test and find Edwards was not ineffective, that would underscore the fact that although *K.G.F.* is a stricter standard, it is still difficult to show that counsel was ineffective; essentially, an application of the current five-part test is really a consideration of the principles in *Strickland's* test, which again emphasizes the need for a revised or entirely new test.

However, if the Court does find that Edwards ineffectively represented J.S., the Court will be issuing a statement that patient-respondents in involuntary commitment proceedings require greater due process protections than those appointed counsel in criminal proceedings. Such a ruling would create even greater strain between the standards of *K.G.F.* and the time limits imposed by the statutes governing the treatment of the severely mentally ill. Ultimately, if the Court does not revise its interpretation of *K.G.F.* or articulate a new standard, and it finds Edwards did ineffectively represent J.S., appointed counsel in involuntary commitment proceedings could face a nearly impossible task when attempting to satisfy due process requirements.

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[122] Appellant Reply brief, *supra* note 3, at *16.
[123] *K.G.F.* at ¶ 37.