STATE OF MICHIGAN

IN THE COURT OF APPEALS

In re CHADD LONDOWSKI,

Respondent-Appellant.

______________________________________/

COA No. 355635
LC No. 2020-000737-MI

AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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STATEMENT OF QUESTIONS PRESENTED

1. Does a respondent in an involuntary mental health treatment proceeding have a right to the effective assistance of counsel in some or all circumstances? If so, what is the extent of that right, and is it grounded in the United States Constitution, statute, and/or court rule?

   Amicus Curiae's answer: Yes. A respondent has the right to effective assistance of counsel under Michigan statute and court rule, and the Michigan and United States Constitutions, in all circumstances in involuntary mental health treatment proceedings.

2. If there is a right to effective assistance of counsel in this area, how should an appellate court review the claim that this right was denied?

   Amicus Curiae's answer: The Court should use the general framework from the criminal context, with the approach tailored to the unique features of involuntary mental health proceedings.

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over 1.5 million members dedicated to protecting fundamental liberties and basic civil rights guaranteed by the United States Constitution. The ACLU is firmly committed to protecting the constitutional rights of all people in this country.

The ACLU has previously been involved in numerous cases, either through direct representation or as amicus curiae, on issues relating to the right to the counsel. See, e.g., *People v Tanner*, 496 Mich 199; 853 NW2d 653 (2014) (right to counsel during custodial interrogation); *Duncan v Michigan*, 284 Mich App 246; 774 NW2d 89 (2009) (challenging systemic failures in effectiveness of indigent defense services); *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005) (establishing constitutional right to appointment of counsel on appeal from guilty plea); *People v James*, 272 Mich App 182; 725 NW2d 71 (2006) (application and enforcement of *Halbert*).

In its order dated June 21, 2021, the Court invited the ACLU to file an amicus curiae brief in this case.

[1] No party authored this brief in whole or in part, nor contributed financially to support the submission of this brief.

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INTRODUCTION

Civil commitment enjoys an extensive and troubled pedigree in this country's history.[2] The institutionalization of those with mental health issues arose after those individuals were initially relegated to prisons and shelters for the poor.[3] In the early nineteenth century, public and private asylums rapidly spawned throughout the country, with institutionalization becoming the practice of "first resort, the preferred solution to the problems of poverty, crime, delinquency, and insanity."[4] These institutions, however, were frequently overcrowded, and those detained faced squalid conditions and little supervision. In some institutions, many individuals died, others were subjected to dangerous, experimental treatments, and only a handful recovered.[5]

Although the twentieth century saw some improvements, the number of individuals involuntarily committed skyrocketed by the middle of the century, with more than half a million commitments in 1953 alone.[6] In response to criticism and in recognition of the constitutional rights of those civilly committed, states began moving toward a system in which confinement

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[2] In Michigan, proceedings seeking an order for involuntary mental health treatment are generally referred to as civil commitment proceedings. *In re Portus*, 325 Mich App 374, 382; 926 NW2d 33 (2018). Therefore, the terms will be used interchangeably throughout this brief.

[3] Testa & West, *Civil Commitment in the United States*, 7 Psychiatry 30, 31–33 (2010).

[4] Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 Tex L Rev 1751, 1758 (2006), quoting Rothman, *The Discovery of Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown and Company, 1971), p 131.

[5] See, e.g., Hensley, *The Consequence of the Trend of Decline: The Life of St. Louis Insane Asylum ca. 1900*, 107 Mo Med 410, 410–415 (2010).

[6] See *Civil Commitment in the United States*, 7 Psychiatry at 31–33.

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would be limited to situations in which an individual was determined to be dangerous.[7] This approach nonetheless produced its own difficulties, as it created a significant overlap between the country's prison and hospitalized populations.[8] And for many, commitment became de facto detention, because some individuals met the legal standard for involuntary commitment but not the medical standards for involuntary treatment.[9] Recent data from 2014 revealed that in 24 states, which make up almost 52% of the country's population, researchers recorded upwards of 590,000 detentions, with an estimated rate of 357 detentions per 100,000 people.[10] In Michigan in 2018, there were approximately 200 commitments per 100,000 people.[11]

The history and scope accompanying civil commitments have led courts to recognize significant interests of those subject to civil commitment proceedings. The United States Supreme Court has recognized, for example, that civil commitment involves "a massive curtailment of liberty" and "can engender adverse social consequences to the individual."[12] The unwanted administration of medication, too, implicates a "significant constitutionally protected liberty interest," as it involves a compelled intrusion into one's body implicating longstanding

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[7] See Anfang & Appelbaum, *Civil Commitment — The American Experience*, 43 Israeli J Psychiatry and Related Sciences 209, 211–212 (2006).

[8] *Id.* at 215–217.

[9] *Id.* at 213.

[10] Lee & Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 Psychiatric Servs 61, 63 (2021).

[11] *Id.* at 65.

[12] *Vitek v Jones*, 445 US 480, 491–492; 100 S Ct 1254; 63 L Ed 2d 552 (1980) (quotation marks and citations omitted).

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expectations of privacy and security.[13] Yet, the Court has also observed that the average length of these important proceedings is merely between three and nine minutes.[14]

Consistent with the protections offered by Michigan statutes,[15] this Court should find that the basic due protections required for these hearings include the right to effective assistance of counsel.[16] A robust right to counsel ensures that any individual is able to "cope with problems of law," "make skilled inquiry into the facts," "insist upon the regularity of proceedings," and "ascertain whether he has a defense" and "prepare and submit it."[17] It also requires an effective assistance of counsel standard that both recognizes the seriousness of these proceedings and respects the unique aspects of civil commitment. Absent these basic protections, there is too great a risk that the indignities and harms observed through civil commitment's sordid history will worsen and persist.

ARGUMENT

I. The Respondent in an Involuntary Mental Health Treatment Proceeding Has Both Statutory and Constitutional Rights to the Effective Assistance of Counsel.

A. Michigan Statute and Court Rule Provide for the Right to Effective Assistance of Counsel in Involuntary Mental Health Treatment Proceedings.

Michigan law states that "[e]very individual" who is the subject of a petition for involuntary mental health treatment "is entitled to be represented by legal counsel." MCL 330.1454(1). Although the statute does not define "entitled," see MCL 330.1400, this Court has

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[13] *Sell v United States*, 539 US 166, 178; 123 S Ct 2174; 156 L Ed 2d 197 (2003) (quotation marks and citations omitted).

[14] *Parham v JR*, 442 US 584, 609 & n 17; 99 S Ct 2493; 61 L Ed 2d 101 (1979).

[15] MCL 330.1400 *et seq*.

[16] *Vitek*, 445 US at 492.

[17] See *In re Gault*, 387 US 1, 36; 87 S Ct 1428; 18 L Ed 2d 527 (1967).

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already held that the "plain meaning" of the term means "having a legal right," which in this context is the right to counsel. See *In re Jajuga Estate*, 312 Mich App 706, 718; 881 NW2d 487 (2015). Neighboring statutory provisions confirm this legal entitlement. For individuals without private counsel, the probate court "shall" appoint counsel to represent the respondent within statutorily-specified time limits. MCL 330.1454(2). And the court "shall" compensate appointed counsel for indigent respondents. MCL 330.1454(5). Counsel then "must" represent the respondent in "all probate court proceedings." MCR 5.732(A). Phrases like "shall" and "must" indicate mandatory obligations. See *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002).

In interpreting similar provisions providing for the legal right to counsel in other civil contexts, this Court has recognized that the right to counsel is a right to effective assistance of counsel. With the termination of parental rights, for example, a parent's right to appointed counsel includes "a correlative right to effective representation." *In re Osborne*, 237 Mich App 597, 606 & n 5; 603 NW2d 824 (1999), citing MCL 712A.17c(5); MCR 5.915(B)(1)(b). Similarly, in child protective proceedings, a child's right to an effective attorney derives from their statutory right to counsel. *In re AMB*, 248 Mich App 144, 222; 640 NW2d 262 (2001), citing MCL 712A.17c(7); MCR 5.915(B)(2). These cases rely on the longstanding principle that "[i]t is axiomatic that the right to counsel includes the right to competent counsel." *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986); cf. *People v DeGraffenreid*, 19 Mich App 702, 709; 173 NW2d 317 (1969) ("Without a minimum criterion of competence the right might prove in many cases to be meaningless.").

Here, not only is the same conclusion compelled by this commonsense inference from the statutory right to counsel, but also by the fact that the commitment statute prescribes specific

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duties for a respondent's attorney. The statute states that counsel "shall" consult with the respondent 24 hours before the hearing, and not more than 72 hours after the petition and certificates are filed for an individual who is hospitalized. MCL 330.1454(7)–(8). Moreover, counsel "must" advocate for the respondent's preferred position, or "the individual's best interest" if there is no stated preference. MCR 5.732(B). By setting forth substantive duties, the statute provides a standard by which a court can measure competence. See *AMB*, 248 Mich App at 225–226 & n 191 (holding that statutory standards are relevant to the question of effective representation).

B. The Due Process Clauses of the United State and Michigan Constitutions Also Guarantee the Right to Effective Assistance of Counsel During Involuntary Mental Health Treatment Proceedings.

The United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV, § 1. The Michigan Constitution likewise guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Const 1963, art 1, § 17. Although the two provisions are worded similarly, the Michigan Supreme Court recently clarified that Michigan courts, in interpreting the Due Process Clause of the Michigan Constitution, are "not bound by federal precedent interpreting the Due Process Clause of the United States Constitution." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 185 n 12; 931 NW2d 539 (2019). Thus, United States Supreme Court cases interpreting the United States Constitution's Due Process Clause can be considered persuasive by this Court, but are not binding, in determining the protections required by the Due Process Clause of the Michigan Constitution. See *id.*[18]

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[18] Indeed, three justices of the Michigan Supreme Court recently observed that the Due Process Clause of the Michigan Constitution may provide for a broader right to counsel in parental termination proceedings than that which is found under the Due Process Clause of the United

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The United States Supreme Court first explored the right to counsel in the involuntary mental health treatment context in *Vitek v Jones*, 445 US 480; 100 S Ct 1254; 63 L Ed 2d 552 (1980). There, the plaintiff argued that his federal due process rights were violated when he was transferred from criminal custody to a state mental health hospital without, among other things, being appointed counsel. *Id.* at 484–485. The Court initially found that "the stigmatizing consequences" of being civilly committed, coupled with the subjection to mandatory confinement and treatment, "constitute the kind of deprivations of liberty that requires procedural protections." *Id.* at 494. Confronted with this conclusion, four justices observed that an individual thought to be suffering from mental health issues has a right to legal counsel, for such a person is "more likely to be unable to understand or exercise his rights." *Id.* at 496–497 (plurality opinion). Justice Powell concurred only in the judgment, opining that the right to "qualified and independent assistance" does not require "that a licensed attorney be provided" in every case. *Id.* at 497–500 (Powell, J., concurring). The remaining four justices would have dismissed the case as moot, and did not render an opinion on the right to counsel. See *id.* at 500–501 (Stewart, J., dissenting); *id.* at 501–506 (Blackmun, J., dissenting). Therefore, although the right to counsel did not command a majority of the Court in *Vitek*, it did command a plurality.

Since *Vitek*, the United States Supreme Court has emphasized that its precedents recognize a presumption that an indigent litigant has the right to counsel "where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v Dep't of Social Servs*, 452 US 18, 25; 101 S

States Constitution. See *In re Guardianship of Orta*, 962 NW2d 844, 846–847 (Mich, 2021) (CAVANAGH, J., concurring).

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Ct 2153; 68 L Ed 2d 640 (1981). Many state[19] and federal[20] courts, applying this principle, have therefore recognized a due process right to counsel in civil commitment proceedings. These courts have reached this conclusion by also weighing the due process factors delineated in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976): the private interests affected, the risk of an erroneous deprivation without additional procedural safeguards, and any countervailing interests.[21]

In doing so, these courts have observed that a respondent's fundamental rights to liberty and privacy are implicated by involuntary commitment and the involuntary administration of medication. See, e.g., *Wetherhorn v Alas Psychiatric Institution*, 156 P3d 371, 383 (Alas, 2007),

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[19] See, e.g., *Pope v Alston*, 537 So 2d 953, 956 (Ala Civ App, 1988); *Wetherhorn v Alas Psychiatric Institution*, 156 P3d 371, 383 (Alas, 2007), overruled in part on other grounds by *Matter of Naomi B*, 435 P3d 918 (Alas, 2019); *In re MH2010-002637*, 228 Ariz 74, 82; 263 P3d 82 (Ariz App, 2011); *Honor v Yamuchi*, 307 Ark 324, 327–330; 820 SW2d 267 (1991); *People v Hill*, 219 Cal App 4th 646, 650–652; 162 Cal Rptr 3d 3 (2013); *Jones v United States*, 432 A2d 364, 372–373 (DC, 1981); *Pullen v State*, 802 So 2d 1113, 1116 (Fla, 2001); *In re True*, 103 Idaho 151, 163; 645 P2d 891 (1982); *In re Ontiberos*, 295 Kan 10, 22–27; 287 P3d 855 (2012); *Commonwealth v Ferreira*, 67 Mass App 109, 114–115; 852 NE2d 1086 (2006); *Grado v State*, 559 SW3d 888, 895–896 (Mo, 2018); *In re Simons*, 215 Mont 463, 465; 698 P2d 850 (1985); *In re Commitment of MG*, 331 NJ Super 365, 375–376; 751 A2d 1101 (NJ App, 2000); *In re Watson*, 209 NC App 507, 516; 706 SE2d 296 (2011); *In Interest of JB*, 410 NW2d 530, 532 (ND, 1987); *In re Fisher*, 39 Ohio St 2d 71, 82; 313 NE2d 851 (1974); *In re Chapman*, 419 SC 172, 179–180; 796 SE2d 843 (2017); *Ex parte Ullmann*, 616 SW2d 278, 283–284 (Tex Civ App, 1981); *Jenkins v Dir of Va Ctr for Behavioral Rehab*, 271 Va 4, 16; 624 SE2d 453 (2006); *Tetro v Tetro*, 86 Wash 2d 252, 253; 544 P2d 17 (1975); *State ex rel Hawks v Lazaro*, 157 W Va 417, 440; 202 SE2d 109 (1974).

[20] See, e.g., *Sarzen v Gaughan*, 489 F2d 1076, 1085–1086 (CA 1, 1973); *Project Release v Prevost*, 722 F2d 960, 976 (CA 2, 1983); *Heryford v Parker*, 396 F2d 393, 396 (CA 10, 1968); *In re Barnard*, 147 US App DC 302, 307; 455 F2d 1370 (1971); *Stamus v Leonhardt*, 414 F Supp 439, 448 (SD Iowa, 1976); *Lynch v Baxley*, 386 F Supp 378, 389 (MD Ala, 1974); *Bell v Wayne Co Gen Hosp*, 384 F Supp 1085, 1092 (ED Mich, 1974); *Dixon v Attorney General of Pa*, 325 F Supp 966, 972 (MD Pa, 1971).

[21] The *Mathews* factors are also relevant in determining the protections required under the Due Process Clause of the Michigan Constitution. See *In re Rood*, 483 Mich 73, 91–92; 763 NW2d 587 (2009).

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overruled in part on other grounds by *Matter of Naomi B*, 435 P3d 918 (Alas, 2019). They have also recognized a significant risk of error absent the assistance of counsel, because "psychiatric diagnosis is both fallible and lacks certainty" and therefore benefits from well-informed adversarial testing. See, e.g., *In re MH2010-002637*, 228 Ariz 74, 79–80; 263 P3d 82 (Ariz App, 2011); see also *Addington v Texas*, 441 US 418, 430; 99 S Ct 1804; 60 L Ed 2d 323 (1979) ("The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations."). Finally, these courts have recognized that the fiscal and administrative burdens of appointing counsel are small when compared to the substantial liberty interest at risk. See, e.g., *In re Ontiberos*, 295 Kan 10, 25; 287 P3d 855 (2012).

These same conclusions should obtain in the context of Michigan's civil commitment scheme. Here, too, civil commitment involves "a massive curtailment of liberty." *Vitek*, 445 US at 492 (quotation marks and citations omitted). The right "to remain free from bodily restraint" also implicates significant due process interests under the Michigan Constitution. See *Artibee v Cheboygan Circuit Judge*, 397 Mich 54, 57–58; 243 NW2d 248 (1976). These interests are even more pronounced, and thus justify greater procedural protections, if the term of commitment has the potential to be especially lengthy. See *McNeil v Dir, Patuxent Institution*, 407 US 245, 249–250; 92 S Ct 2083; 32 L Ed 2d 719 (1972). Under Michigan's commitment scheme, an initial court order of hospitalization can last up to 60 days. MCL 330.1472a(1)(a). The initial order triggers the possibility of subsequent petitions for up to 90 days of hospitalization, MCL 330.1472a(2), and then hospitalization for up to one year, which can be continually sought on a yearly basis until it is no longer required, MCL 330.1472a(3)–(4).

Moreover, there is a significant risk of error absent the right to counsel. Both the United States and Michigan Supreme Courts have recognized that more formal and complex proceedings,

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such as those involving a prosecutor, formal rules of evidence, the possibility of a jury trial, and various procedural rights, require the assistance of counsel to help prepare a defense. See *Gagnon v Scarpelli*, 411 US 778, 789; 93 S Ct 1756; 36 L Ed 2d 656 (1973); *Artibee*, 397 Mich at 56–57. Those features are present in Michigan's commitment scheme. A prosecutor typically presents the case for treatment. MCL 330.1457. The rules of evidence apply absent narrow exceptions. MCL 330.1459(2). The respondent enjoys the right to a six-person jury, MCL 330.1458, "the right to present documents and witnesses and to cross-examine witnesses," MCL 330.1459(1), and the right to investigate and prepare, MCL 330.1460. The respondent is also entitled to cross-examine the examining physician or psychologist, MCL 330.1461, and an independent clinical evaluation, MCL 330.1463.[22]

Finally, the costs and administrative burden associated with providing counsel do not overcome the balance of the remaining *Mathews* factors. Although this "pecuniary interest is legitimate, it is hardly significant enough to overcome" the substantial liberty interests favoring a right to counsel, especially when the costs of providing counsel are "*de minimis* compared to the costs in all criminal actions." *Lassiter*, 452 US at 28 (quotation marks and citations omitted). The other statutory protections provided to respondents in these hearings already impose an administrative burden and imply that the legislature understands "a person's substantial stake in the process and its outcomes." See *In re Ontiberos*, 295 Kan at 25; see also *Artibee*, 397 Mich at 59 (same).

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[22] These aspects of Michigan's commitment scheme distinguish this case from *Turner v Rogers*, 564 US 431; 131 S Ct 2507; 180 L Ed 2d 452 (2011). Although recognizing that Turner's loss of physical liberty "strongly" favored a right to counsel, the United States Supreme Court did not recognize such a due process right in all South Carolina civil contempt proceedings. *Id.* at 445–449. The Court relied on the fact that plaintiffs in those proceedings were sometimes not represented and that the state statute had sufficient safeguards to ensure an accurate answer to the straightforward factual question of whether the defendant had the ability to pay. *Id.* at 446–449.

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Because *Lassiter* and the *Mathews* factors favor a due process right to counsel, either under the United States Constitution or under the Michigan Constitution, they necessarily favor a due process right to the effective assistance of counsel. “It has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *McMann v Richardson*, 397 US 759, 771 n 12; 90 S Ct 1441; 25 L Ed 2d 763 (1970); see also *Covington v Cox*, 82 Mich App 644, 651; 267 NW2d 469 (1978) (applying this principle in the context of paternity actions). In the criminal context, for example, “a serious risk of injustice infects the trial itself” unless the accused receives the effective assistance of counsel. *United States v Cronic*, 466 US 648, 656; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *Cuyler v Sullivan*, 446 US 335, 343; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Effective assistance of counsel is necessary for proper adversarial testing, *id.* at 656–657, for “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.” *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932). Such a consideration is of even greater import in this context where the respondent’s mental capacity has been challenged, because the individual may have diminished capacity in assisting in their own defense. See *Drope v Missouri*, 420 US 162, 171–172; 95 S Ct 896; 43 L Ed 2d 103 (1975). This is why those courts that have recognized a due process right to counsel in civil commitment hearings have also recognized the concomitant right to effective assistance of counsel. See *supra* nn 3–4.

II. *Strickland* Provides an Appropriate General Framework for Evaluating Ineffectiveness Claims from Involuntary Mental Health Treatment Proceedings.

A. The General Framework From Strickland Can Be Used to Evaluate Ineffectiveness Claims in the Civil Commitment Context.

In criminal cases, courts apply the two-pronged test from *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), to assess whether a defendant was deprived of their constitutional right to effective assistance of counsel. See also *People v Pickens*, 446 Mich

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298, 317; 521 NW2d 797 (1994) (adopting this standard for ineffectiveness claims under the state constitution). The defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 US at 687. Under the first prong, the defendant is required to demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This inquiry is guided by "prevailing professional norms." *Id.* The second prong asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The defendant need not show prejudice, however, if counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. *Cronic*, 466 US at 659.

Michigan courts typically apply *Strickland* by analogy (and with some modifications) in various civil contexts. See, e.g., *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988) (parental termination context); *AMB*, 248 Mich App at 226 (child protective context); *In re Sasak*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2012 (Docket No. 301696), p 1 (juvenile delinquency context). And the majority of other states' courts have used the framework set forth in *Strickland* in the civil commitment context.[23] There are two principal reasons why it would be appropriate to use *Strickland*'s general framework here as well.

First, an individual's interests at stake in civil commitment hearings are comparable with

[23] See, e.g., *Pope*, 537 So 2d at 956–957; *Smith v. State*, 146 Idaho 822, 835; 203 P3d 1221 (2009); *In re Carmody*, 274 Ill App 3d 46, 54–58; 653 NE2d 977 (1995); *Jones v State*, 477 NE2d 353, 356–357 (Ind App, 1985); *In re Detention of Crane*, 704 NW2d 437, 438–439 (Iowa, 2005); *Ontiberos*, 287 P3d at 866–869; *In re Henry B*, 159 A3d 824, 827; 2017 Me 72 (2017); *Ferreira*, 67 Mass App at 115; *In re Alleged Mental Illness of Cordie*, 372 NW2d 24, 28–29 (Minn App, 1985); *In re JS*, 388 Mont 397, 404–408; 401 P3d 197 (2017); *In re Commitment of JS*, 467 NJ Super 291, 303–305; 252 A3d 222 (NJ App, 2021); *Chapman*, 419 SC at 184–185; *In re Protection of HW*, 85 SW3d 348, 355–356 (Tex App, 2002); *Jenkins*, 271 Va at 16–17; *In re Detention of TAH-L*, 123 Wash App 172, 179–181; 97 P3d 767 (2004); *In re Commitment of JM*, 381 Wis 2d 28, 43–46; 2018 WI 37; 911 NW2d 41 (2018).

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those at stake in criminal cases. Like a defendant in a criminal prosecution, the respondent in involuntary mental health proceedings risks the loss of their personal liberty. *In re Chapman*, 419 SC 172, 185; 796 SE2d 843 (2017); see also *In re Commitment of JM*, 381 Wis 2d 28, 43–44; 2018 WI 37; 911 NW2d 41 (2018). This interest is especially strong because the respondent would typically be free were it not for the civil commitment proceedings. See *Ontiberos*, 295 Kan at 24. And it is especially acute under Michigan's civil commitment scheme, because an individual's confinement can be sought continuously and therefore has the potential to last indefinitely. See MCL 330.1472a.

Second, *Strickland*'s two-step framework has long been used to assess ineffective assistance of counsel claims. This framework is the one "most familiar" to judges and attorneys, and thus promotes consistent, efficient, and timely resolution of claims. See *Chapman*, 419 SC at 185; *In re Henry B*, 159 A3d 824, 827; 2017 Me 72 (2017). *Strickland* has not only been used extensively in the criminal context, but it has also been modified and applied in a variety of civil contexts. See *JM*, 381 Wis 2d at 44–45; *Henry B*, 159 A3d at 827; see also *Chapman* 419 SC at 185 ("[I]n our state and others, *Strickland* is a well-known standard applied in an extensive body of case law in the criminal *and* civil contexts."). This Court, for example, has experienced little difficulty in applying *Strickland* to attorney performance at parental termination hearings. See, e.g., *In re Martin*, 316 Mich App 73, 85–90; 896 NW2d 452 (2016).

B. Application of Strickland Must Reflect the Unique Features of Involuntary Mental Health Proceedings.

When confronted with an ineffective assistance of counsel claim deriving from an involuntary mental health proceeding, Michigan courts must tailor *Strickland*'s framework to the specific context. After all, mental health issues "interfere[] with an individual's functioning at different times in different ways." *Indiana v Edwards*, 554 US 164, 175; 128 S Ct 2379; 171 L

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Ed 2d 345 (2008). Individuals may suffer from symptoms, such as disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, and anxiety, all of which can hinder their ability to cooperate with counsel and the overall efficacy of their representation. See *id.* at 176. Thus, under the first *Strickland* prong, Michigan courts must recognize the unique duties of counsel for respondents, which arise from the needs of those suffering from mental health issues and the specialized inquiries of civil commitment proceedings. And when applying the second *Strickland* prong, Michigan courts should recognize the multi-faceted inquiry involved in involuntary mental health proceedings and the unique ways in which a respondent in these proceedings may be prejudiced by their attorney's defective performance. The failure to do this would vitiate an individual's right to effective assistance of counsel.

Indeed, when *Strickland*'s general framework may be appropriate, this Court has not hesitated to adapt the inquiries under each prong to a particular civil scheme. See *AMB*, 248 Mich App at 221–229; see also *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). *AMB*, for example, addressed an ineffective assistance of counsel claim brought by a minor against his attorney in child protective proceedings. *AMB*, 248 Mich App at 222. Recognizing the need to adapt the traditional test for ineffective assistance of counsel to this particular statutory scheme, this Court enlarged the inquiry under the first prong to determine "whether the attorney's conduct complied with the applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *Id.* at 226. And the second prong was modified to require evidence that the defective representation led to an outcome not in the child's

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best interest, because that was the special purpose of child protective proceedings.[24] *Id.* at 226–27. An analogous approach, tailored to the unique context and needs of involuntary mental health proceedings, is appropriate here.

1. Under the First *Strickland* Prong, Courts Must Recognize the Unique Obligations of Respondent's Counsel in Involuntary Mental Health Proceedings.

When applying the first prong of *Strickland*, courts consider whether counsel rendered objectively reasonable assistance in light of prevailing professional norms. *Strickland*, 466 US at 687–688. Prevailing professional norms recognize that attorneys take on unique responsibilities in civil commitment proceedings. See, e.g., Committee on Mental Disability Law, *Guidelines for Attorneys Representing Adults in Civil Commitment Proceedings*, 79 Mich B J 1674, 1674, 1676–1678 (2000) (recognizing the "specific duties" of attorneys in the commitment process); 26 Am Jur Trials 97, Representing the Mentally Ill: Civil Commitment Proceedings (same). These obligations correspond to the heightened needs of those with mental health issues and the specialized considerations involved in civil commitment proceedings. Performance of these duties is necessary to ensure a fair process and beneficial outcomes. See, e.g., Ferris, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 Vanderbilt L Rev 959, 979–981 (2008) (explaining how a model that encourages zealous representation best benefits the respondent). Although the following list is illustrative, not exhaustive, five considerations are likely to be important in determining whether counsel's representation fell below an objective standard of reasonableness.

First, as acknowledged in *AMB*, attorneys who fail to comply with the requirements and

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[24] Although *AMB* addressed a prior version of the child protective statutes, it "set a foundation for analyzing" claims of ineffective assistance of counsel in that context. *AMB*, 248 Mich App at 223–224 & nn 187–188.

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guidelines established by statute likely rendered ineffective assistance. *AMB*, 248 Mich App at 222. Other states, too, view compliance with statutory protections as integral to the right to effective assistance of counsel and thus excuse noncompliance only in limited circumstances. See *In re Hutchinson*, 500 Pa 152, 157–158 & n 6; 454 A2d 1008 (1982); *In re JS*, 388 Mont 397, 406 & n 3; 401 P3d 197 (2017). Michigan's civil commitment statutes require that counsel consult with the respondent at least 24 hours before any hearing and, if the individual is hospitalized, not more than 72 hours after the petition and clinical certificates have been filed. MCL 330.1454(7)–(8). Moreover, counsel "must serve as an advocate for the individual's preferred position" and "[i]f the individual does not express a preference, the attorney must advocate for the position that the attorney believes is in the individual's best interest." MCR 5.732(B). Because statutes set forth only "minimum standards of conduct" for an attorney, any failure to comply with these requirements should be considered strong evidence that the attorney performed deficiently. See *AMB*, 248 Mich App at 225.

Second, prevailing professional norms recognize that attorneys need familiarity with commonly recurring issues in civil commitment proceedings. See Cook, *Good Lawyering and Bad Role Models: The Role of Respondent's Counsel in a Civil Commitment Hearing*, 14 Georgetown J of Legal Ethics 179, 192 (2000) (collecting authorities on necessary preparation for a civil commitment lawyer). For instance, "scant knowledge about psychiatric decision-making, diagnoses, and evaluation tools" can "seriously impede their cross-examination of expert witnesses."[25] Perlin & Sadoff, *Ethical Issues in the Representation of Individuals in the*

[25] In assessing statements from medical professionals in support of a petition for civil commitment, the Michigan State Bar recommends that those statements should presumptively be considered "a violation of client confidentiality" absent evidence that "the individual was informed at the outset of the interview that any communication with the health care professional

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Commitment Process, 45 L and Contemporary Problems 161, 166 (1982). Attorneys must therefore have the ability to read and understand their client's medical chart, as such an understanding is essential to any evaluation of their client. *Id.* at 170. Attorneys should also be expected to take advantage of the statutory right to an independent psychiatric examination, see MCL 330.1463, because an independent expert is often regarded as "the single most valuable person to testify on behalf of a client in a contested commitment hearing." Hickman et al., *Preparation and Trial of a Civil Commitment Case*, 5 Mental Disability Law Reporter 281, 289 (1981). For hospitalized clients, attorneys should understand that it can be more difficult to gain access to their clients and important witnesses. Thus, attorneys must be persistent in interviewing coworkers, friends, relatives, neighbors, hospital staff members, outside therapists, other patients, and anyone else capable of providing favorable testimony. See *Ethical Issues*, 45 L and Contemporary Problems at 165–166. These witnesses will also be important in ascertaining the facts and circumstances surrounding hospitalization. *Id.* at 170. To gain familiarity with civil commitment proceedings, attorneys should be encouraged to consult model guidelines and practice manuals. See, e.g., *Guidelines for Attorneys*, 79 Mich B J at 1674–78; 26 Am Jur Trials 97, Representing the Mentally Ill: Civil Commitment Proceedings.

Third, prevailing professional norms include the expectation that civil commitment attorneys will be diligent in opening up lines of communication with their clients. "Patients are often passive, frightened, heavily medicated, unable to articulate their wishes forcefully, and unaware of their alternative options." *Ethical Issues*, 45 L and Contemporary Problems at 167. These circumstances often require an attorney to overcome the fact that their client "may be

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could be used as evidence in a civil commitment proceeding." *Guidelines for Attorneys*, 79 Mich B J at 1677.

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suspicious, terrified, puzzled, or simply distrustful of the attorney." *Id.* at 170. Thus, the attorney may have to exhibit an adversarial posture vis-à-vis other stakeholders in the system in order to build their client's trust and confidence. *Id.* at 166. Such zealous advocacy can "serve as a check on a system characterized by rushed hearings and psychiatric opinions seeking commitment that are frequently based solely on exaggerated behavior contained in the initial commitment petitions."[26] Stone, *Giving Voice to the Mentally Ill Client: An Empirical Study of the Role of Counsel in Civil Commitment Hearings*, 70 UMKC L Rev 603, 621 (2002). It also compels the state to make a strong case in favor of commitment, improves the transparency of these proceedings, demands more specific information than what is usually provided, and results in an overall more honest process. *The Search for Due Process*, 61 Vanderbilt L Rev at 979–980.

Fourth, prevailing professional norms place special emphasis on advocating for less restrictive means than hospitalization.[27] See, e.g., *Guidelines for Attorneys*, 79 Mich B J at 1677 ("[T]he attorney should spend some time with the client in exploring alternatives to hospitalization."). After all, the statute reserves counsel "adequate time for investigation of the matters at issue," including "alternatives to hospitalization," MCL 330.1460, and the court must order any such alternative if it is "adequate to meet the individual's treatment needs and prevent harm," MCL 330.1469a(2). Identifying these alternatives should include a review of the client's

[26] A respondent should therefore be able to assert an ineffective assistance of counsel claim even if they took their attorney's advice to waive their right to a jury trial or to stipulate to the petition. Cf. *Lafler v Cooper*, 566 US 156, 165; 132 S Ct 1376; 182 L Ed 2d 398 (2012) (explaining that there are pretrial stages of proceedings "in which defendants cannot be presumed to make critical decisions without counsel's advice").

[27] Indeed, Title II of the American with Disabilities Act, 42 USC 12132, contains an integration mandate prohibiting states from institutionalizing persons with disabilities who qualify for noninstitutional care. See *Olmstead v LC ex rel Zimring*, 527 US 581, 592, 600–603; 119 S Ct 2176; 144 L Ed 2d 540 (1999); 28 CFR 35.130(d) (2016).

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medical file, interviews with mental health professionals who have been providing treatment, and the appointment of an independent medical expert. *Guidelines for Attorneys*, 79 Mich B J at 1677–1678. This process should also include asking questions, such as: "What halfway houses, community mental health centers, or patient-run alternatives are available"? and "Is the program one specifically suited for persons with the client's conditions"? *Ethical Issues*, 45 L and Contemporary Problems at 170. Advocating for alternatives best respects the respondent's significant liberty interests and requires the state to make a more tailored showing for commitment. See *Giving a Voice*, 70 UMKC L Rev at 621.

Fifth, prevailing professional norms expect a civil commitment attorney to understand that their obligations to their client do not end after the initial commitment hearing. See, e.g., *Guidelines for Attorneys*, 79 Mich B J at 1678 ("If the efforts of the attorney to defeat the petition or application are unsuccessful, the attorney has an obligation to advise his or her client on certain issues."); *Ethical Issues*, 45 L and Contemporary Problems at 172 ("[T]he lawyer's ethical duties do not necessarily terminate at the time of the commitment disposition."). As explained, individuals may be initially committed for only 60 days, after which petitions for longer terms may be filed. See MCL 330.1472a. An unsuccessful respondent also enjoys the right to appeal, see MCR 5.801(A)(4), so the attorney must advise their client of the right to appeal and of the timelines for filing the appeal, *Guidelines for Attorneys*, 79 Mich B J at 1678. Counsel should also inform their client of any practical and legal implications of the hospitalization or alternative treatment order. *Id.* Continued attorney involvement can help with representation on subsequent petitions, assist in monitoring progress with treatment, and help protect other civil, economic, or due process rights in institutional determinations. *Ethical Issues*, 45 L and Contemporary Problems at 172.

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2. Under the Second *Strickland* Prong, Courts Must Recognize the Unique Ways in Which Respondents May Be Prejudiced by Counsel's Defective Performance.

When applying *Strickland*'s second prong to an ineffective assistance of counsel claim in civil commitment proceedings, courts must recognize the unique ways in which respondents may be prejudiced by their counsel's objectively deficient performance. Although respondents may suffer prejudice in ways that parallel prejudice experienced by criminal defendants, they also suffer from prejudice in ways that lack an obvious analogue in criminal prosecution.

As with an adult in a criminal case, a respondent in civil commitment proceedings can be prejudiced when there is a reasonable probability that the outcome of their proceedings would have been different. See *Strickland*, 466 US at 694–695. Moreover, there will be cases in which prejudice must be presumed because counsel failed to subject the petitioner's case to meaningful adversarial testing. *Cronic*, 466 US at 659. For example, the Kansas Court of Appeals presumed prejudice under *Cronic* in a case in which counsel stipulated to the admission of all of the state's documentary evidence, including hearsay evidence and an unfavorable expert report, agreed to have the court decide the propriety of commitment without any witness testimony, made no oral argument on his client's behalf, and did not submit a brief or proposed findings of law advocating for his client's release. See *In re Downey*, unpublished per curiam opinion of the Court of Appeals of Kansas, issued January 2, 2015 (Case No. 110,474), p 4.

In addition to these familiar forms of prejudice, involuntary mental health proceedings involve unique considerations not present in criminal cases. In Michigan, two determinations must be made before an individual can be committed. See *Guidelines for Attorneys*, 79 Mich B J at 1674–76. The first is that the individual is a "person requiring treatment," which is a term defined by statute. See MCL 330.1401. "Without a finding that the respondent is a person requiring treatment, there is no basis for a court in Michigan to order the involuntary civil

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commitment of an adult for mental health treatment." *Guidelines for Attorneys*, 79 Mich B J at 1675. The second determination requires that there be no alternative to hospitalization. See MCL 330.1469a. Because a court must make both determinations before an individual may be hospitalized, a showing that an attorney's deficient performance may have reasonably affected *either* determination is sufficient to satisfy the second *Strickland* prong. For instance, if an attorney refused to explore a colorable possibility that their client does not need treatment, the court should conclude that there was a reasonable probability that the results of his proceedings would have been different. Or if an attorney made no argument regarding alternative placements despite the reasonable probability that adequate outpatient treatment would have been available, the court should similarly find that the respondent was prejudiced by the attorney's failure. See *Guidelines for Attorneys*, 79 Mich B J at 1675.

The prejudice inquiry should also be sensitive to the serious risk of error in any civil commitment decision. "Subjective judgment is necessarily involved in an evaluation of mental illness and there can be little responsible debate regarding the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *People v Stevens*, 761 P2d 768, 777 (Colo, 1988); see also *Giving a Voice*, 70 UMKC L Rev at 621 ("[T]he criteria used to determine the need for inpatient psychiatric hospitalization, specifically the clear and imminent danger to self or others criteria, is extremely difficult to predict, resulting in inaccurate predictions of dangerousness with a considerable margin of error."). "Mental illness itself is not a unitary concept. It varies in degrees. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Edwards*, 554 US at 175. In light of the significant liberty interests implicated by any commitment decisions, courts should therefore err on the side of finding prejudice in a close case.

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CONCLUSION

This Court should find that there are both statutory and constitutional rights to effective assistance of counsel in involuntary mental health proceedings. *Strickland*'s general framework, tailored to reflect the special duties of civil commitment attorneys and the unique features of these proceedings, may be used to evaluate claims of ineffective asssitance of counsel.

Respectfully submitted,

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