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State Of Minnesota
In Supreme Court

In the Matter of the Civil Commitment of:
Michael Benson

Appellant's Brief and Addendum

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TABLE OF CONTENTS

Page

The addendum to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(h)(3).

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Whether patient seeking release from the Minnesota Sex Offender Program has a right to act as his own counsel?

How raised below: Benson's August 16, 2022 motion and supporting memorandum. (Add.19 n.3.)

Trial court ruling & preservation: An order on that motion stated that Benson "will be allowed to assist with cross examination at the Panel hearing, if his counsel is also present." (Add.13.) Benson raised the self-representation issue to the court of appeals, which affirmed. (Add.3) The court of appeals declined to reach the constitutional issues. (Add.3-4) But Benson's PFR raised the issue of self-representation under specific provisions of the U.S. Constitution and of the Minnesota Constitution (PFR p. 4) and the commitment statutes. (PFR p. 6.) That PFR was granted without excluding the constitutional arguments.

Apposite Cases: *Faretta v. California*, 422 U.S. 806 (1975)

2. Assuming no such right to self-representation exists, was the assistance of counsel here ineffective?

How raised below: Benson raised ineffective assistance to the court of appeals. (Add.6-7.)

Trial court ruling & preservation: N/A.

Apposite Cases: *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 643 (Minn. 2012)

STATEMENT OF THE CASE

Trial court and judge: The three-judge Commitment Appeal Panel was composed of Senior Judges Karen Asphaug, Robert Birnbaum, and Herbert Lefler. Panel Chief Judge Jay Quam issued the pre-hearing order.

Nature of the case and its disposition: This is an appeal from a Commitment Appeal Panel (CAP) decision that dismissed a petition for a reduction in custody from the civil commitment. *See* Minn. Stat. § 253D.27.

INTRODUCTION

The right to self-representation is older than the United States, and much older than the state of Minnesota. This appeal seeks to vindicate that right either by statute or by constitutional provision.

BACKGROUND

In 1989, Michael Benson was sentenced to 43 months after pleading guilty to first-degree criminal sexual conduct. *In re Benson*, No. C0-93-1357., 1993 WL 459840 *1 (Minn. App. Nov. 9, 1993); *In re Benson*, No. A19-0666, 2019 WL 5304518 (Minn. App. Oct. 21, 2019). After serving his criminal sentence, Benson was indeterminately civilly committed because he was adjudicated as having a psychopathic personality. *See* 1993 WL 459840 *1. He challenged that adjudication and the court of appeals affirmed, citing a district court's findings that Benson was impulsive, unable to control his sexual impulses, emotionally unstable, had band judgment, did not appreciate consequences, and had history of habitual sexual misconduct. *Id.* That was thirty years ago. *Id.*

In the 30 years since, Benson has repeatedly sought his release from civil commitment. His efforts have included at least nine litigated challenges to that commitment. *See Benson v. Johnson*, No. A21-1111, 2022 WL 1004845, *1 (Minn. App. June 21, 2022) (affirming denial of petition for writ of habeas

corpus, noting "[t]his case represents at least his eighth litigated challenge to his commitment since that [1993] affirmance.").[1]

The present appeal stems from an April 6, 2021 Special Review Board's[2] Findings of Fact and Recommendation that urged denying Benson's petition for transfer or discharge. (Hereinafter "Recommendation") The SRB

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[1] A non-exhaustive list includes:

- *Benson v. Johnson*, No. A21-1111, 2022 WL 1004845, *1 (Minn. App. June 21, 2022) (Ross, J.) (affirming denial of petition for writ of habeas corpus);
- *In re Benson*, No. A19-0666, 2019 WL 5304518 (Minn. App. Oct. 21, 2019) (Smith, J.) (affirming CAP denial of Benson's petition for discharge);
- *In re Benson*, No. A13-1260, 2013 WL 6223576 (Minn. App. Dec. 2, 2013) (Johnson J.) (affirming denial of Benson's motion for appointment of counsel in connection with his rule 60.02(e) motion);
- *Benson v. Mooney*, No. A04-0041 (Minn. App. Apr. 22, 2004) (Toussaint, C.J.) (Order) (affirming district court order denying and dismissing appellant's petition for a writ of habeas corpus);
- *In re Benson*, No. CX-02-1326, 2003 WL 139397 (Minn. App. Jan. 21, 2003) (Anderson, G. Barry, J.)* (affirming denial of petition for discharge from commitment)
- *Benson v. Gomez*, No. C6-96-79, 1996 WL 291552 (Minn. App. June 4, 1996) (Kalitowski, J.) (affirming order of a judicial appeal panel denying his petition for discharge from the commitment).
- *In re Benson*, No. C0-93-1357, 1993 WL 459840 *1 (Minn. App. Nov. 9, 1993) (Lansing, J.) (affirming initial civil commitment).

*Benson does not believe that Justice Anderson should recuse here; authoring judges are noted only for ease of reference.

[2] A petition is first reviewed by a three-member Special Review Board (the "Board"), comprised of mental illness experts and at least one attorney. See Minn. Stat. § 253B.18, subd. 4c(a). The Board holds an administrative hearing at which the client is represented by his attorney. *Id.* The Board then issues a written recommendation as to whether the petition should be denied or granted. *See* Minn. Stat. § 253D.27, subd. 4.

Recommendation followed a March 23, 2021 hearing pursuant to that petition. (Recommendation p. 1.)

The SRB findings (p. 5), in their entirety, are as follows:

1. Mr. Benson was civilly committed in 1993.
2. Mr. Benson has never participated in the MSOP's treatment program.
3. Mr. Benson has generally been well-behaved since October 2019.
4. Mr. Benson has a moderate density of dynamic risk factors and an average static risk of recidivism.
5. Mr. Benson's refusal to participate in treatment or submit to objective assessments makes it difficult to definitively state if he does or does not have a paraphilic disorder.
6. Mr. Benson lacks sufficient internal and motivational resources to effectively mitigate his risk for recidivism.
7. Mr. Benson's level of risk, lack of clinical progress, limited internal resources, and personality dysfunction indicate an ongoing need for treatment and supervision in his current setting.

Based on those findings, the SRB concluded that Benson had not satisfied the statutory criteria for transfer or discharge under Minn. Stat. §§ 253D.29, 253D.30, subd. 1, or 253D.31. (Recommendations pp. 5-6.) The SRB recommended denying Benson's petition.

Benson sought panel rehearing and reconsideration under Minn. Stat. § 253D.28. (Add.27.)[3] In a May 24, 2022 order, the panel chief appointed counsel for Benson. (Add.23.)

[3] The panel presides over a *de novo* evidentiary hearing. Minn. Stat. § 253D.28, subds. 1-3. The burden is on the party opposing discharge or provisional discharge to prove by clear and convincing evidence that the client is still in need of commitment. Minn. Stat. § 253D.28, subd. 2(d).

Then on August 16, 2022, Benson moved, via appointed counsel, to represent himself before the panel hearing. (Add.14 & 19 n.3.) Though his motion sought to permit Benson to ask questions at the panel hearing (Add.14), Benson's accompanying memorandum explained that Benson "prefers to proceed *pro se* if at all possible." (Add.19 n.3.)

In response to Benson's motion, the panel chief ordered that

> 1. [Benson] will be allowed to assist with cross examination at the Panel hearing, if his counsel is also present. This is based on the Panel's reading of *In Re Irwin*, 529 N.W.3d 366 (Minn. Ct. App. 1995) (indicating that a civilly committed person does not have the right to self-representation but allowing limited cross examination by a client in Panel proceedings).
>
> 2. The parameters of Mr. Benson's questioning of the expert witnesses will be determined by the Panel on the day of the hearing, but the client will be allowed to directly ask the expert(s) questions as long as the questioning remains respectful and appropriate.

(Add.13.)

The panel held a hearing on November 14, 2022. (Add.8.) No exhibits were offered to the panel and no testimony was taken. (*Id.*) Benson desired to represent himself before the panel, to be the one to offer exhibits and ask any questions. (*Id.*)

The panel concluded that "Benson had been granted leave by the Panel Chief, the Hon. Jay M. Quam, to ask limited cross examination questions under the direction of the assigned Panel." (Add.8.) The panel did not allow

Benson to conduct the direct exam of witnesses. (Add.11.) And the panel concluded that "Benson preferred to not follow the assigned Panel's instructions about the mode and presentation of evidence and chose not to offer any exhibits or witness testimony at the hearing." (Add.8-9.) Concluding that Benson had not made a *prima facie* showing because he presented no evidence, the panel denied Benon's petition. (Add.9.)

Benson appealed, asserting that the panel violated his statutory and constitutional rights to self-representation, and that he received ineffective assistance of counsel. (Add.3) The court of appeals affirmed. (*Id.*)

As to his right to self-representation, the court of appeals concluded that Benson waived the constitutional arguments by failing to raise them below. (Add.3-4 n.1) As to his statutory arguments, the court of appeals reaffirmed its prior decision—*In re Irwin*, 529 N.W.2d 366, 371 (Minn. App. 1995). (Add.5.) The *Irwin* decision held that the legislature intended the then-existing statute to mean a civilly committed person was not "permitted to waive the right to representation." 529 N.W.2d 366, 371. Though the relevant statute had changed,[4] the court of appeals had already reaffirmed *Irwin* in *In re Civ.*

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[4] *Irwin* interpreted the predecessor statute to section 253B.07, subdivision 2c, Minn. Stat. § 253B.03, subd. 9 (1994), and a comment to then Minnesota Rule of Civil Commitment 3.01. In 1997, the legislature repealed section 253B.03, subdivision 9, and replaced the statute with section 253B.07, subdivision 2c. *See* 1997 Minn. Laws ch. 217, art. 1, §§ 43, 118, at 2155, 2183. In 1999, the

Commitment of Emberland, No. A11-1561, 2012 WL 612320, at *6-7 (Minn. App. Feb. 27, 2012). (Add.4-5.)

As to ineffective assistance, the court of appeals held that the issue was waived because Benson decided not to submit any exhibits or proceed with any witnesses at the panel hearing. (Add.6.) And even if the court of appeals reached the merits, it would have rejected the claim because Benson could not satisfy the prejudice prong of the two-part test for ineffective assistance. (Add.7 (discussing the "the analytical framework ordinarily used in criminal cases when applying the Sixth Amendment right to counsel" of *Strickland v. Washington*, 466 U.S. 668 (1984)).)

This Court granted Benson's petition for review.

Minnesota Rules of Civil Commitment were replaced with the Special Rules of Procedure Governing Proceedings under the Minnesota Commitment and Treatment Act. *See Promulgation of Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act*, No. C4-94-1646 (Minn. Nov. 10, 1999) (order).

ARGUMENT

I. Review is *de novo*.

Statutory interpretation is reviewed *de novo*. *City of Oronoco v. Fitzpatrick Real Estate, LLC*, 883 N.W.2d 592, 595 (Minn. 2016) The existence of a right under the federal or state constitution is also reviewed *de novo*. *State v. Andersen*, 784 N.W.2d 320 333 (Minn. 2010). Right-to-counsel violations are reviewed *de novo*. *State v. Andersen*, 871 N.W.2d 910, 916 (Minn. 2015).

II. The court of appeals should be reversed because an MSOP patient has a right to proceed *pro se*.

A. The statutes do not prohibit self-representation.

Two statutory chapters are relevant here, Chapter 253B (the "Minnesota Commitment and Treatment Act"[5]) and Chapter 253D (the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities"[6]). Chapter 253D is newer and was created from a session law that modified 253B. *See* 2013 Minn. Laws ch. 49. The general provisions of chapter 235B apply, except where inconsistent with Chapter 253D. *See* Minn. Stat. § 253D.02.

There exists "Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act" that govern proceeding under

[5] Minn. Stat. § 253B.01.
[6] Minn. Stat. § 253D.01

both chapters. *See* Rule 1(a) & 1(c) (citing the rules themselves as "Commitment and Treatment Act Rules").

Chapter 253D provides a right to counsel. Minn. Stat. § 253D.20 states in full:

> A committed person has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the committed person if neither the committed person nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed. In all proceedings under this chapter, the attorney shall:
>
> (1) consult with the person prior to any hearing;
>
> (2) be given adequate time and access to records to prepare for all hearings;
>
> (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and
>
> (4) be a vigorous advocate on behalf of the person.

Minn. Stat. § 253B.07, subd. 2c contains nearly identical language.

Nothing in either Section 253D.20 or 253B.07 forbids a committed person from acting as his own counsel. Rather, the appointment of counsel is mandatory *unless* the committed person provides his own counsel. *Id.* ("The court shall appoint a qualified attorney…if neither the committed person nor others provide counsel."). If the sacred constitutional right to counsel can be waived, then a mundane statutory right to counsel should be waivable too. *Cf. State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998) ("This [Sixth Amendment]

right to an attorney may be waived if the waiver is competent and intelligent." (citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).)).

In the context of self-representation, this Court has held that *pro se* litigants act as their own counsel. "Although a person who is not a licensed attorney may represent themselves in court, they may not represent others." *In re Conservatorship of Riebel*, 625 N.W.2d 480, 481 (Minn. 2001); *see, e.g.*, *State v. Jones*, 266 N.W.2d 706 (Minn. 1978) (describing defendant who "intended to act as his own counsel"); *Matthis v. Kennedy*, 243 Minn. 219, 221 (Minn. 1954) (describing defendant who "appeared at the hearing as his own counsel"); *State v. Cotton*, 210 N.W.2d 244, 245 (Minn. 1973) (describing defendant who "act[ed] as his own counsel at his trial").

Statutory law confirms this case law. The legislative prohibition against unauthorized practice of law specifically allows a party to "appear as attorney" on his own behalf. Minn. Stat. § 481.02, subd. 1 ("It shall be unlawful for any person… except members of the bar…to appear as attorney or counselor at law in any action or proceeding…except personally as a party thereto in other than a representative capacity….").

At common law, a person had a right to self-representation, even in civil cases. *See infra* part II.B (detailing that history). Minnesota statutes are not to be interpreted in derogation of the common law. *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002); *Bloom v. Am. Express*

Co., 222 Minn. 249, 253, 23 N.W.2d 570, 573 (1946); *see also Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 328 (Minn. 2004) ("[I]t is not presumed that the legislature intended to abrogate or modify a rule of the common law on the subject any further than that which is expressly declared or clearly indicated." (quotation omitted)). Here, the Court can be faithful to the long tradition of self-representation and the language of the statute by allowing competent persons to appear as their own attorney. This Court explained that, at least in the criminal context, "the self-representation right embodies such bedrock concepts of individualism and personal autonomy that its deprivation is not amenable to harmless error analysis." *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990).

The court of appeals' reliance on *In re Irwin*, 529 N.W.2d 366 (Minn. App. 1995) was error. *Irwin*'s reasoning does not stand up to analysis. First, *Irwin*'s analysis is very thin. It total, that analysis reads:

> A patient has the right to be represented by counsel. Minn. Stat. § 253B.03, subd. 9; Minn. R. Civ. Commitment 3.01. Neither the statute nor the rules gives appellant the right to represent himself. Instead, the comments to the rules state that the intention is that the patient not be permitted to waive the right to representation. Minn. R. Civ. Commitment 3, cmt. B. While the statute does not have similar preclusionary language, we follow the comments. The trial court did not abuse its discretion in denying appellant's motion to represent himself.

Id. at 372.

Even if *Irwin* was good law when decided, *Irwin*'s reasoning depends on its interpretation of a comment to a rule that is no longer in force. Any Minnesota Rules of Civil Commitment that were in force in 1995, when *Irwin* was decided, were superseded by Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Acts, by 1999. *See* Rule 1(a). And the comments to the current rule on appointment of counsel does *not* state that the right to counsel is unwaivable. *See* Rule 9, advisory committee comments.[7]

Second, *Irwin* admits that the statutory text does not forbid self-representation nor waiver of the right to counsel. *Id.* at 372. (noting "the statute does not have similar preclusionary language"). This Court has held that ordinarily, rights are waivable. *E.g.*, *Worthy*, 583 N.W.2d at 275. Waiver is nothing more than the voluntary and intentional relinquishment of a known right. *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 156-57, 218 N.W.2d 751, 756 (1974).

Unwaivable rights are a rare exception, not the rule. *E.g.*, *State v. White*, 300 Minn. 99, 105-06, 219 N.W.2d 89, 93 (1974) (double-sentencing claims are

[7] Though those comments direct that "No individual should be without counsel while under commitment." *Available at* https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/Civil-Commitment-rules-10012016-(current).pdf They do not stated that such an individual is forbidden from acting as his own counsel.

not waivable). Unwaivable rights can harm those whom they purportedly protect.[8]

When the legislature wants to make a right unwaivable, it does so explicitly. *E.g.*, Minn. Stat. 336.9-406(g) (stating "an account debtor may not waive or vary its option under subsection (b)(3)"); Minn. Stat. § 504B.171, subd. 3 ("**Waiver not allowed**. The parties to a lease or license of residential premises may not waive or modify the covenant imposed by this section."); Minn. Stat. § 524.5-114 ("**Waiver of Notice**. A person may waive notice by a writing signed

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[8] One group of federal appellate judges colorfully criticized unwaivable rights as follows:

> Rights are most valuable when individuals have the choice not to invoke them, depending on the circumstances. An old legend tells how the King of Siam would bestow sacred white elephants upon his political rivals. As gifts from the king, the elephants could not be rejected. Yet the sacred pachyderms, which could not be sold or used for work, would inevitably eat their owners out of house and home—driving them into bankruptcy, and leaving them far worse off than before they received the "gift."
>
> Forcing unwaivable "rights" upon the accused can have a similar effect. We empower the accused when we allow them to waive their rights. From the defendant's perspective, the way to maximize the value of a right is to give him the option to waive it, just in case (as is often the case) he can exchange it for something else that is even more valuable to him.

Alvarez v. City of Brownsville, 904 F.3d 382, 400-01 (5th Cir. 2018) (Ho, Jolly, Jones, Smith, Clement, and Owen, JJ. Concurring).

by the person or the person's attorney and filed in the proceeding. However, a respondent, person subject to guardianship, or person subject to conservatorship may not waive notice.").

Here, if the legislature had wanted to make the right to counsel unwaivable, it could have done so explicitly. If this Court infers a general rule of waivability from the legislature's silence here, the Court leaves the legislature free to later make the right explicitly unwaivable, should it wish to do so. *Cf. State v. Branch*, 942 N.W.2d 711, 714 n.3 (Minn. 2020) ("If the Legislature disagrees with our holding in … the Legislature can, of course, pass new legislation….")

B. The federal constitution secures the pre-existing common law right to proceed represent oneself.

Even before the United States' founding, self-representation was a recognized right. *See* Van Wormer and Nina Ingwer, *Help at Your Fingertips: A Twenty-First Century Response to the* Pro Se *Phenomenon*, 60 Vand. L. Rev. 983, 987 (2007) (tracing the right to Magna Carta); *see also* Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22,* 71 Fla. L. Rev. 831, 846 (2019) (explaining that "the right [to self representation] emerged as a bulwark against the abuses of the English Star

Chamber,[9] in which individuals were forced to be represented by state counsel in politically motivated trials."); *accord Faretta v. California*, 422 U.S. 806, 822-23 (1975) ("The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed…. "); *see also* 1 Frederic Pollack & William Maitland, *The History of English Law Before the Time of Edward I* 211 (2d ed. 1923) (describing, by the end of the thirteenth century that "[t]he old procedure *required* of a litigant that he should appear before the court in his own person and conduct his own cause in his own word" (emphasis added).[10]

Regardless of exactly when the self-representation right emerged, in "the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England." *Faretta*, 422 U.S. at 826. Though *Faretta* dealt with the criminal defendant's right to counsel (and self representation) under the Sixth Amendment, its history and reasoning is useful in the context of civil commitments. Even though civil commitment is

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[9] Star Chamber was better known for its criminal cases, but it had civil jurisdiction too. *See* Mary Taylor Blauvelt, *The Development of Cabinet Government in England* 15 (Macmillan Co. 1902).

[10] *Available at* https://archive.org/details/historyofenglish01polluoft/page/n7/mode/2up

civil, not criminal, civil commitment still deprives a person of liberty, and so federal and state due process clauses apply to civil-commitment proceedings. *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994)*; see also Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992)*; Addington v. Texas*, 441 U.S. 418, 425 (1979).

The Fourteenth Amendment's Due Process Clause presumptively gives an indigent litigant the right to appointed counsel when her physical liberty is being threatened. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981). *But see Beaulieu v. Dep't of Hum. Servs.*, 798 N.W.2d 542 (Minn. Ct. App. 2011) (declining to apply *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1986)[11] to recognize a federal constitutional right to counsel under the Fourteenth Amendment Due Process Clause for a person challenging an involuntary civil commitment).

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[11] *Heryford*, 396 F.2d at 396 (emphasis added), held in relevant part:

> It matters not whether the proceedings be labeled 'civil' or 'criminal' [rather it is] the likelihood of involuntary incarceration [that] commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings*, unless effectively waived* by one authorized to act in his behalf.

The Founding generation maintained an abiding "appreciation of the virtues of self-reliance." *Faretta*, 422 U.S. at 826. Informed by "the natural law thinking that characterized the Revolution's spokesmen," the "Founders believed that self-representation was a basic right of a free people." *Id.* at 830 n.39 (cleaned up). They understood "the freedom to state one's own case" as "a defense against government oppression" and "a guarantee of individual dignity and autonomy." Martin, 71 Fla. L. Rev. at 846. Thomas Paine, for example, argued in support of the 1776 Pennsylvania Declaration of Rights by explaining that people had "a natural right to plead [their] own case." *Faretta*, 422 U.S. at 830 n.39 (quotation omitted)). "[A] a right to counsel developed early in *civil cases* and in cases of misdemeanor [but,] a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason." *Id.* at 823 (emphasis added).

The U.S. Supreme Court has explained, "the right of self-representation has been protected ... since the beginnings of our Nation." *Faretta*, 422 U.S. at 812. And many pre-federal colonial charters, declarations of rights, and State constitutions guaranteed self-representation. *See, e.g.*, *id.* at 828 nn.37-38 (collecting examples). "These early documents establish that the 'right to counsel' meant to the colonists a right to choose between pleading through a lawyer and representing oneself." *Faretta*, 422 U.S. at 829. As Justice Frankfurter eloquently put it in *Adams v. United States ex rel. McCann*, 317

U. S. 269 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution." *Id.*, at 280.[12]

In the federal courts, the right to represent oneself in civil cases has been essentially unchallenged because the Judiciary Act of 1789 protected every person's right to represent themselves in federal court. *See* Pub. L. No. 1-20, 1 Stat. 73, 92 (providing "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of ... counsel."). *But see Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 158-59 (2000) (concluding no federal constitutional right to self-representation on appeal, in part because "[a]ppeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was rarely allowed" (quotation omitted)).

[12] Admittedly, *Faretta* recognized the right to self-representation is not absolute. The defendant must voluntarily and intelligently choose to conduct his own defense, 422 U. S., at 835. And he must be made "aware of the dangers and disadvantages of self-representation." 422 U. S., at 835. A trial judge may also terminate self-representation or appoint "standby counsel"—even over the defendant's objection—if necessary. *Id.*, at 834, n.46. A knowing and intelligent waiver is not honored because proceeding *pro se* is wise, desirable, or efficient. Rather, it must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U. S. 337, 350-351 (1970) (quoted by *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990)). Accordingly, competency to represent oneself is a prerequisite to exercising the right of self-representation.

C. The state constitution provides a right to proceed *pro se*.

The Minnesota Constitution guarantees due process of law. Minn. Const. Art. I § 7. The due process requirements for self-representation are detailed *supra* part II.B, and apply with equal force to the state constitution. *Kahn v. Griffin*, 701 N.W.2d 815, 826 (Minn. 2005).

The Minnesota Constitution protects unenumerated rights. It specifically provides that the "enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." Minn. Const. Art. I § 16. Under this "Inherent Rights Clause," the Court has considered ancient laws in determining whether a particular right is protected. *See* Mary Jane Morrison, *The Minnesota State Constitution: A Reference Guide* 121 (2002). For example, in *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 225-27 (1944), this Court held that Art. I § 16 protected the unenumerated right to establish a home without undue interference from authorities after examining Magna Carta, the Declaration of Independence, the Bill of Rights, and now-ancient treatises. *Id.* at 225 ("The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions."). The types of sources that this Court examined in *Thiede* support finding an unenumerated right to self-representation here.

Nearly identical language in the Alaska Constitution[13] was held to secure the right of self-representation in *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974). The Alaska Supreme Court held that by the time of the adoption of its constitution, the right of self-representation was so well established that it must be regarded as a right "retained by the people." *Id.* The Court should adopt that same analysis with respect to the Minnesota Constitution:

> In considering the fundamental importance of self-representation, we are mindful that ours is a society valuing the autonomy of the individual and his freedom of choice. When accused of a crime, or, as here, when seeking relief from a conviction resulting in imprisonment, the opportunity to determine whether to present one's own case or to be represented by appointed counsel is of paramount importance to the individual. Under some circumstances, he may indeed be the only person who will forcefully advance arguments in an unpopular cause. Alaska has been and is endowed with courageous attorneys who have zealously represented those accused of crime, but such dauntless representation may not always be available to one who is the object of opprobrium. The opportunity to present one's own position where liberty itself is at stake should not lightly be disregarded, and the right to counsel should not be used to bar self-representation.

Id.

If the court decides to reach the state constitutional question, it should hold that the Minnesota Constitution provides an unenumerated right of self-

[13] Alaska Const. Art. I, § 21 specifies that "[t]he enumeration of rights in this constitution shall not impair or deny others retained by the people." *Available at* https://ltgov.alaska.gov/information/alaskas-constitution/.

representation in any situation where personal liberty is at stake and where the person can knowingly and intelligently waive a right to counsel.

D. The Court should reach the constitutional issues.

The court of appeals concluded that Benson's federal and state constitutional arguments were waived for failure to raise them to the panel, citing *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988). (Add.3.) The court should consider them anyway for three reasons.

First, Benson did not need to raise his constitutional arguments to the panel, because the panel lacked jurisdiction to consider them. The panel is not part of the judiciary, *See* Minn. Const. Art. VI § 1 ("The judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish."). Appeals from panel decisions do not go to district court, Minn. Stat. 253B.19, subd. 5, and thus the panel does not have "jurisdiction inferior to the district court." *Id.*

Rather, the panel is a is essentially an administrative agency, deriving its power from a grant by the legislature. *See* Minn. Stat. § 253B.19, subd. 1. "As a general rule, administrative agencies lack the power to declare legislation unconstitutional. Instead, these issues must be raised in a court of

the judiciary." *Matter of McCannel*, 301 N.W.2d 910, 919 (Minn. 1980). Thus, the panel lacks jurisdiction to make constitutional rulings without some transfer of jurisdiction from district court. *Id.* (concluding that tax court may acquire jurisdiction in the first instance through transfers of cases from the district court, which does have jurisdiction to determine the constitutionality); *accord Ondler v. Peace Officers Benefit Fund*, 289 N.W.2d 486, 487 & n.1 (Minn. 1980) (holding Workers' Compensation Court of Appeals lacks jurisdiction to decide the constitutionality of a statute challenged on equal protection grounds).

Second, Benson's constitutional arguments are essentially facial challenges that fall outside of the rule in *Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988). This Court explained in *Jacobson v. $55,900 in US Currency*, 728 N.W.2d 510, 522-23 (Minn. 2007) that the rule in *Thiele* was justified by the absence of "key facts" that had never been presented to the district court, because those facts were "largely irrelevant to the question litigated there." Here, there are no "key facts" that Benson would have needed to introduce. Indeed, Benson introduced no facts *whatsoever*, as the panel noted. (Add.9.) Thus, as in *Jacobson*, the Court can "evaluate this argument on facts already present in the record." *Id.*

Third, this Court granted Benson's PFR, which included the constitutional questions. No opposition was filed to the PFR asserting these

questions had been waived. And the order granting review did not exclude those questions. This Court's power to hear issues is not restricted by non-jurisdictional claim-processing rules like the holding in *Theile*.

This Court has "the authority to take any action 'as the interest of justice may require.'" *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (quoting Minn. R. Civ. App. P. 103.04). And it "may base its decision upon a theory not presented to or considered" by the court of appeals when "the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling." *Holen v. Minneapolis-St. Paul Metro. Airport Comm'n*, 84 N.W.2d 282, 286 (Minn. 1957) (emphasis omitted). "Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was 'implicit in' or 'closely akin to' the arguments below; and the issue is not dependent on any new or controverted facts." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 688 (Minn. 1997).

Each factor favors reaching the constitutional issues here: (1) the constitutional issues presented are ones of first impression to this Court (as the court of appeals cited only its own case law); (2) the constitutional issues are "closely akin" to the statutory issue that was raised below; (3) the

constitutional issues do not depend on any new facts, as Benson introduced no facts at all. (Add.9.)

If the Court does not dispose of this appeal on statutory grounds, then it should reach the constitutional ones.

III. Alternatively, Benson received ineffective assistance of counsel.

A person who is indeterminately committed as an SDP or an SPP may bring an ineffective-assistance-of-counsel claim. *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 643 (Minn. 2012). To prevail, a person "must show that counsel's representation fell below an objective standard of reasonableness" (the performance factor) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (the prejudice factor). *Strickland* v. *Washington*, 466 U.S. 668, 687-88, 694 (1984); *see also State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland* to a claim of ineffective assistance of counsel). "A court may address the two prongs of the test in any order and may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

If the Court does not reach the constitutional issues because it concludes they have been waived, (despite the reasons that favor reaching these issues, *supra* part II.D.) Benson then can show ineffective assistance of counsel.[14]

An objective standard of reasonableness requires that a counsel who raises a statutory argument also raise a corresponding constitutional argument. Members of this court have reminded the bar that not raising constitutional issues below can preclude appellate review. *E.g.*, *Nelson v. State,* 947 N.W.2d 31 (Minn. 2020); *id.* at 41 (Chutich, J., dissenting and recognizing forfeiture of the state constitutional issue where only federal constitutional issue was raised); *id.* at 58 n.7 (Thissen, J., same). The Court should hold that objective standard of reasonableness requires that an appointed counsel in civil-commitment proceedings who raises a statutory argument should also raise corresponding constitutional arguments. *Cf.* Minn. Stat. § 253D.20(4) (requiring appointed counsel to "be a vigorous advocate on behalf of the person" represented).

Prejudice is easily demonstrated. Had Benson's counsel raised the constitutional arguments in addition to the statutory argument, the court of appeals would have reached them. (Add.3.)

[14] This ineffective-assistance-of-counsel argument was not made to the court of appeals because the court of appeals had not held that the constitutional issues were waived.

CONCLUSION

The court of appeals should be reversed, and the case remanded for a new hearing before a panel wherein Benson is allowed to act as his own counsel.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2010 and contains approximately 5,949 Word Count words, including headings, footnotes and quotations.

Dated: Nov. 21, 2023 */s/ Scott M. Flaherty*