SUMMARY
July 13, 2023

2023COA69

No. 22CA2278, *Peo in Interest of Uwayezuk* — Criminal Law — Competency to Proceed — Involuntary Administration of Medication; Health and Welfare — Care of Persons with Mental Health Disorders; Attorneys and Clients — Ineffective Assistance of Counsel

In this case involving the involuntary administration of antipsychotic medications under section 16-8.5-112, C.R.S. 2022, a division of the court of appeals addresses four issues of first impression: (1) whether there is a statutory right to effective assistance of counsel in those expedited proceedings; (2) whether, with the statutory right to effective counsel, a respondent on direct appeal of an order may assert an ineffective assistance of counsel claim; (3) whether respondent's ineffective assistance of counsel claim fails under *United States v. Cronic*, 466 U.S 648, 659 (1984); and (4) when a respondent challenges the State's petition under

C.R.C.P. 12(b)(5), whether a court's denial of a motion to dismiss for failure to state a claim is reviewable after the expedited hearing.

The division concludes that (1) there is a statutory right to effective assistance of counsel for proceedings under section 16-8.5-113; (2) a respondent may raise on direct appeal of that order a claim of ineffective assistance of counsel; (3) respondent's ineffective assistance of counsel claim in this case fails under two of the three circumstances identified in *Cronic*; and (4) the State petition is unreviewable under Rule 12(b)(5) after the expedited hearing.

COLORADO COURT OF APPEALS **2023COA69**

Court of Appeals No. 22CA2278
City and County of Denver Probate Court No. 22MH1104
Honorable Elizabeth D. Leith, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of Jean B. Uwayezuk, a/k/a Jean B. Uwayezu,

Respondent-Appellant.

ORDER AFFIRMED

Division I
Opinion by JUDGE JOHNSON
Dailey and Lum, JJ., concur

Prior Opinion Announced June 1, 2023, WITHDRAWN

OPINION PREVIOUSLY ANNOUNCED AS "NOT PUBLISHED PURSUANT TO C.A.R. 35(e)" ON JUNE 1, 2023, IS NOW DESIGNATED FOR PUBLICATION

Announced July 13, 2023

Kerry C. Tipper, City Attorney, Katie L. Donahue, Assistant City Attorney, Denver, Colorado, for Petitioner-Appellee

Nathan Law, P.C., Mary E. Nathan, Pueblo, Colorado, for Respondent-Appellant

¶ 1 Respondent, Jean B. Uwayezuk, a/k/a Jean B. Uwayezu (Uwayezuk),[1] was placed in the custody of the Department of Human Services after his defense counsel raised the issue of his competency in his criminal matters. While awaiting placement in a restoration facility, Uwayezuk's mental health deteriorated to the point that the State sought and was granted an order authorizing the involuntary administration of certain medications under section 16-8.5-112, C.R.S. 2022.

¶ 2 This case involves three issues of first impression for section 16-8.5-112 proceedings. First, drawing from the reasoning in *A.R. v. D.R.*, 2020 CO 10, ¶¶ 47-48, 51, we conclude that there is a statutory right to effective assistance of counsel in expedited proceedings governed by section 16-8.5-112. Second, also relying on *A.R.*, ¶¶ 62-64, 66, we conclude that where the statutory right to

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[1] We use the spelling "Uwayezuk" because that is how the parties refer to respondent in this appeal. But his last name is spelled "Uwayezu" in his criminal cases, Denver District Court Case Nos. 2021CR5013 and 2021CR4617. The district court that issued the order for involuntary administration of medication at issue in this appeal took judicial notice of both of Uwayezuk's criminal cases. We likewise do the same. *See Walker v. Van Laningham*, 148 P.3d 391, 397-98 (Colo. App. 2006) (an appellate court may take judicial notice of public records, including related court cases).

effective counsel exists, a respondent on direct appeal of an order issued under section 16-8.5-112 may assert an ineffective assistance of counsel claim. Finally, when a respondent challenges the State's petition under C.R.C.P. 12(b)(5), a court's denial of a motion to dismiss for failure to state a claim is not reviewable after the expedited hearing is held. Based on these conclusions, and because we conclude, contrary to Uwayezuk's contention, that the circumstances of this case do not result in a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648, 569 (1984), we determine that Uwayezuk's ineffective assistance of counsel claim and his other challenges to the order fail.

I. Background

¶ 3 On November 1, 2021, the district court in Uwayezuk's two criminal cases issued an order placing him in the custody of the Department of Human Services to undergo a competency evaluation. The court granted the order based on a motion filed by Uwayezuk's criminal counsel.[2] The judge presiding over the

[2] The same judge presided over both criminal cases and issued orders for competency evaluations in both matters. Uwayezuk was also represented by the same defense counsel in both criminal cases.

criminal cases ordered the competency evaluation because he had insufficient information to make a preliminary finding concerning Uwayezuk's competency to proceed in his two criminal cases. The evaluation was to be conducted at the Denver County Jail where Uwayezuk was in custody at the time.[3]

¶ 4 In this case, on November 28, 2022, the State filed a petition for the involuntary administration of medication, pursuant to section 16-18.5-112, signed by Dr. Laura Albert (Dr. Albert). At the time, Dr. Albert was a psychiatrist at Denver Health Medical Center and Uwayezuk's treating doctor. The petition alleged that Uwayezuk was in custody at the Denver County Jail because he was awaiting a bed at a "competency restoration program." The State requested an emergency order authorizing the involuntary administration of Zyprexa, Risperdal, Haldol, Ativan, Benadryl, and Cogentin. The probate court appointed counsel for Uwayezuk on

[3] The court in this matter ordered the Denver City Attorney's Office to upload copies of the court-ordered competency referrals issued in Uwayezuk's criminal cases. The record on appeal does not include those orders, but because we took judicial notice of the two criminal cases, we reviewed those orders issued on November 1, 2021.

November 30, 2022, and held an expedited hearing on December 2, 2022.

¶ 5 At the hearing, Uwayezuk's counsel (1) sought a dismissal of this action on grounds that the State's petition failed to plead a plausible claim for relief under *Warne v. Hall*, 2016 CO 50; (2) asserted that the statutes authorizing the involuntary administration of medications were unconstitutionally void for vagueness; (3) requested a continuance because appointed counsel only had two days to prepare for the hearing and had been unable to meet with Uwayezuk because the sheriff did not allow counsel into the jail; (4) alleged constructive ineffective assistance of counsel because the court denied counsel's request for a continuance; and (5) argued that for the State to obtain such an order, the factors from *Sell v. United States*, 539 U.S. 166 (2003) (involving proceedings where the state seeks the involuntary administration of medication for the purpose of restoring a defendant's competency to proceed with criminal proceedings), as opposed to the factors in *People v. Medina*, 705 P.2d 961, 971 (Colo. 1985) (proceedings where the state seeks the involuntary administration of medication

on an emergency basis due to the welfare or safety of the defendant or those around the defendant), applied.

¶ 6 At the beginning of the hearing, the probate court stated that the Denver Sheriff's Department had notified the court that morning that Uwayezuk was unwilling to get out of bed, so the court construed his absence as "refusing to appear." It heard arguments from both counsel on the preliminary issues raised by Uwayezuk's counsel, denied the request for a continuance, and concluded that the statutes governing the involuntary administration of drugs are constitutional. And while the court did not make specific findings that the petition was sufficiently pled under *Warne*, such a finding was implied given that the court went forward with the hearing.

¶ 7 Following these rulings, the court heard testimony from a single witness, Dr. Albert. The court accepted Dr. Albert as an expert in the fields of adult and forensic psychiatry. Dr. Albert testified that Uwayezuk had been sitting in jail for a year awaiting a bed at either the Colorado Mental Health Institute at Pueblo or another restoration facility. Dr. Albert had been referred to evaluate

Uwayezuk at the jail and conducted an evaluation on November 28, 2022. She testified as follows:

- In May 2022, the jail had noticed that Uwayezuk was "decompensating," including (1) not eating or eating significantly less; (2) not engaging with staff when he had been much more communicative previously; (3) refusing visits from family and friends, which was atypical; (4) not communicating and acting in a disorganized or nonsensical manner when he would respond; and (5) not taking care of basic needs like showering, changing clothes, or cleaning his cell.
- Beginning in May 2022, Uwayezuk was put on administrative review in the jail. His disorganized and nonsensical behavior deteriorated, as shown by (1) statements like he wanted his fingernails to grow like "claws"; (2) his tying pieces of towel in his hair; and (3) his being distracted in a manner that suggested that he was responding to internal stimuli, like hearing voices and possibly experiencing hallucinations.

- Sometime in August 2022, Uwayezuk was involved in a use of force incident at the jail, and although Dr. Albert did not know the specifics of the occurrence, she was aware that he was now on "an alert for a two-officer handcuff at all time [sic] because of [his] unpredictable behaviors."
- Uwayezuk was offered voluntary medical treatment, but he refused medication. Dr. Albert was concerned that even if he began to voluntarily take the medications, he was unlikely to adhere to a medication regimen because of his nonverbal and disorganized behavior.
- When she evaluated Uwayezuk on November 28, he was mostly "nonverbal" with her, but she had reason to believe he could hear her because he would look at her when she spoke.
- Based on her observation of Uwayezuk and review of medical records on November 28, Dr. Albert diagnosed him with "unspecified schizophrenia spectrum and other psychotic disorder."

- Uwayezuk did not have any prior psychiatric history, but Dr. Albert believed that he was "having his first break of schizophrenia while" in custody and that being in his early twenties was generally the age when "something like this could happen."
- Because Uwayezuk had been decompensating since May 2022, Dr. Albert's concern was that he was not improving on his own and the longer he went without medical intervention, "the harder it is to get [patients] back to their prior level of functioning." She also testified that this is particularly true when patients experience their "first break," as studies have shown that the sooner the treatment, "the better outcomes there are."

¶ 8 Based on Dr. Albert's observations and current medical diagnosis, she testified that the medications she requested were:

- Risperdal, an antipsychotic medication, with Haldol as an intermuscular backup if he refused the first;
- Zyprexa, another antipsychotic medication, which she would begin in a few weeks if Uwayezuk did not respond to Risperdal, or Haldol as a backup;

- Ativan to help with Uwayezuk's acute agitation if needed; and
- Benadryl and Cogentin to prevent or alleviate stiffness in the muscles because certain antipsychotic medications could produce this side effect, especially if the patient is using Haldol; although both medications are used to treat the same side effects, Dr. Albert noted that she generally prescribed Cogentin when patients experienced long-term side effects because it was less sedating than Benadryl.

¶ 9 Dr. Albert testified to the various side effects of all the medications requested, but she noted that the authority to conduct physicals and labs were also requested as part of the order so that staff could monitor and safely administer the drugs.

¶ 10 On cross-examination, Dr. Albert further testified:

- Even if she later concluded that Uwayezuk did not meet all the criteria for a diagnosis of schizophrenia, his symptoms were definitely related to some mental health illness.

- In response to a line of inquiry about whether Uwayezuk might be nonverbal or disorganized because he might suffer from pain, Dr. Albert indicated that she had no sign that he was in pain. Such symptoms, however, would be treated as a neurological disorder, and mental health patients could simultaneously experience a neurological condition and a mental health illness.
- Even if Uwayezuk continued to be in custody at the jail due to the lack of space at a restoration facility, a nurse, not a sheriff, would administer the court-ordered medications.

¶ 11 After the testimony, the probate court determined that the State had proved by clear and convincing evidence that the four *Medina* factors were satisfied and granted the State's request for an order authorizing the involuntary administration of the medications requested by Dr. Albert. The probate court also concluded that it had "no doubt" that Uwayezuk had effective assistance of counsel, although the court did not make specific findings delineating between Uwayezuk's claim that he was denied effective counsel because two days was inadequate to prepare for the hearing and his

claim that the government interfered with his counsel's ability to meet with him.

¶ 12 Uwayezuk filed this appeal. Although an appeal for this type of order is expedited, issuance of this opinion was delayed given that this division disqualified Uwayezuk's appointed counsel on appeal (who was the same counsel who appeared in the probate court) on the basis that he had a conflict of interest because he asserted claims of ineffective assistance of counsel.[4]

¶ 13 Following appointment of new counsel, the parties submitted amended briefs. Newly appointed counsel contends that the probate court erred because (1) denial of the request for a continuance resulted in the constructive denial of counsel; (2) it denied the request for dismissal on grounds that the State's petition was insufficiently pled; and (3) the State failed to prove the fourth *Medina* factor by clear and convincing evidence.[5]

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[4] Judge Dailey dissented from this division's order.

[5] On appeal, Uwayezuk does not appear to reraise his arguments that (1) the statutes governing involuntary administration of medication proceedings are unconstitutionally void for vagueness or lack clear standards; and (2) the probate court must apply the standards set forth in *Sell v. United States*, 539 U.S. 166 (2003), as opposed to the factors from *People v. Medina*, 705 P.2d 961 (Colo.

II. Ineffective Assistance of Counsel

¶ 14 Uwayezuk contends that, by the court denying his request to continue the hearing, he was deprived effective assistance of counsel because his counsel (1) had only two days to prepare for the hearing and (2) was unable to confer with Uwayezuk due to state interference. As a result, Uwayezuk claims that he was constructively denied his statutory right to counsel at a critical stage of the legal proceedings and his counsel could not effectively subject the State's case to testing in an adversarial manner. As a result, Uwayezuk argues that prejudice should be presumed on his claim, requiring reversal of the order. We conclude that the record supports the probate court's ruling that Uwayezuk had effective assistance of counsel.

A. Standard of Review

¶ 15 "A determination of the proper legal standard to be applied in a case and the application of that standard to the particular facts of the case are questions of law that we review de novo." *A.R.*, ¶ 37.

1985). We construe these issues as abandoned and do not address them. *See Gandy v. Williams*, 2019 COA 118, ¶ 38 n.4 (claims not reasserted on appeal are deemed abandoned and will not be addressed by the appellate court).

B. The Right to Effective Assistance of Counsel for Proceedings under Section 16-8.5-112

¶ 16 The State does not dispute that respondents subject to involuntary medication proceedings under section 16-8.5-112 are entitled to counsel. § 16-8.5-107, C.R.S. 2022 (a defendant is entitled to appointment of counsel for competency proceedings in a criminal case at state expense if the defendant proves indigency); *see also Medina*, 705 P.2d at 972 (mandating counsel for both involuntary medication proceedings and certification proceedings). And the State does not dispute that the right to effective assistance of counsel has been recognized for criminal defendants "at every critical stage of the proceedings," *see Sanchez v. People*, 2014 CO 56, ¶ 14, with that right extended to civil proceedings where there exists a statutory right to appointed counsel, such as in dependency and neglect proceedings, *see A.R.*, ¶ 47.

¶ 17 Certain procedural rights must be afforded to a patient in a proceeding when the State seeks an order for the involuntary administration of medications, such as the opportunity to cross-examine adverse witnesses and present evidence to support the refusal to take involuntary medications. *See* § 27-65-113(5)(c),

C.R.S. 2022 (incorporating section 16-8.5-112 procedures for those deemed incompetent to proceed in a criminal case); *see also People in Interest of Strodtman*, 293 P.3d 123, 128 (Colo. App. 2011). Those procedural rights, however, do not require the patient to be present at the hearing or for the court to talk with or personally observe the patient if the patient refuses to testify. *See Medina*, 705 P.2d at 971; *see also Strodtman*, 293 P.3d at 128.

¶ 18 No Colorado case has directly held that the statutory right to counsel for proceedings involving the involuntary administration of medication to a respondent must include effective counsel. But Colorado has recognized that such proceedings can result in the "deprivation of liberty" and must include due process protections. *Goedecke v. State, Dep't of Insts.*, 198 Colo. 407, 412, 603 P.2d 123, 126 (1979).

¶ 19 Courts in other states have specifically held that the statutory right to counsel in civil commitment proceedings includes the right to effective assistance of counsel. *See In re Londowski*, 986 N.W.2d 659, 670 (Mich. Ct. App. 2022) (concluding that "due process requires that an individual subject to a petition in a civil commitment proceeding has a right to the effective assistance of

counsel"); *In re Commitment of J.M.*, 2018 WI 37, ¶ 29, 911 N.W.2d 41, 48 (statutory proceedings for involuntary commitment proceedings include the statutory right to effective assistance of counsel); *In re Carmody*, 653 N.E.2d 977, 983 (Ill. App. Ct. 1995) ("[T]he State's statutorily providing a respondent in an involuntary commitment proceeding with the right to counsel implicitly includes the right to the effective assistance of that counsel."); *In re Detention of T.A.H.-L.*, 97 P.3d 767, 770 n.15 (Wash. Ct. App. 2004) (collecting cases from other jurisdictions).

¶ 20 We find these authorities persuasive and therefore conclude that the right to effective assistance of counsel applies to proceedings conducted under sections 16-8.5-112 and 27-65-113(5)(c).

C. Direct Appeal of Ineffective Assistance of Counsel Claim

1. The Difference Between *Strickland* and *Cronic*

¶ 21 Generally in criminal cases, a claim of ineffective assistance of counsel may not be raised on direct appeal. *See A.R.*, ¶ 62; *see also Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) (criminal postconviction proceedings provide a defendant an opportunity to develop the record for an ineffective assistance of counsel claim).

This is because there is usually an insufficient factual record for the appellate court to decide the issue on direct appeal. *A.R.*, ¶ 62.

¶ 22 For a defendant to prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the defendant was prejudiced by counsel's errors. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Ardolino*, 69 P.3d at 76. The burden is on the defendant to prove by a preponderance of the evidence both prongs of *Strickland*. *See People v. McDowell*, 219 P.3d 332, 339 (Colo. App. 2009).

¶ 23 To establish deficient performance, a defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*; *see also People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991).

¶ 24 *Cronic*, 466 U.S. at 659, was decided the same day as *Strickland*. Our supreme court noted in *A.R.*, ¶ 66, that *Cronic* acts

as a limited exception to the *Strickland* standard. Under *Cronic*, the Supreme Court identified three situations in which a defendant could prove ineffective assistance of counsel where prejudice is presumed so that the defendant need not litigate the merits of the underlying claim. *See Bell v. Cone*, 535 U.S. 685, 695 (2002).

¶ 25 The three circumstances identified in *Cronic* are (1) "the 'complete denial of counsel'" at a critical stage of the proceedings due to some type of external (e.g., government) action; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) where it is unlikely that any counsel, even a fully competent one, could render effective assistance. *Bell*, 535 U.S. at 695-96 (quoting *Cronic*, 466 U.S. at 659); *see also A.R.*, ¶ 66 (noting that the United States Supreme Court has only applied the presumption of prejudice for an ineffective assistance of counsel claim in a narrow set of circumstances, such as "where counsel was not made available, was prohibited by the trial court from participating in a critical aspect of the proceeding, or acted under a conflict of interest"

(quoting *Ybanez v. People*, 2018 CO 16, ¶ 25)).[6] "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. Thus, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.*

¶ 26 Circumstances under which prejudice is presumed without the need to examine trial counsel's performance are situations in which no counsel could be effective under the facts so that 'the cost of litigating their effect in a particular case is unjustified" because prejudice is so likely to be present. *Hutchinson v. People*, 742 P.2d 875, 886 n.7 (Colo. 1987) (quoting *Cronic*, 466 U.S. at 658).

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[6] Divisions of this court have applied or declined to extend *United States v. Cronic*, 466 U.S. 648, 658-59 (1984), in a variety of situations. *See, e.g.*, *People v. Johnson*, 2022 COA 2, ¶¶ 24-26 (declining to address presumed prejudice from *Cronic* because the record showed that the defendant made voluntary, intelligent, and knowing decision to proceed to trial without counsel or mounting a defense); *People v. Long*, 126 P.3d 284, 286-87 (Colo. App. 2005) (applying *Cronic*'s presumption of prejudice where counsel failed to perfect an appeal that the defendant requested); *People v. Sharp*, 2019 COA 133, ¶ 31 (declining to extend *Cronic*'s presumption of prejudice to counsel failing to file a Colo. R. Crim. P. 33 motion for a new trial).

2. Ineffective Assistance of Counsel in Colorado Dependency and Neglect Cases

¶ 27 In *A.R.*, ¶¶ 62-63, our supreme court determined that because dependency and neglect proceedings are civil and do not include postconviction proceedings like a criminal case, a parent is permitted to raise a claim of ineffective assistance of counsel on direct appeal. The court reasoned that, even though the right to counsel in termination of parental rights proceedings is statutory rather than constitutional, the right to effective assistance of counsel is necessary to protect the parents' rights to a fair proceeding. *Id.* at ¶ 47 (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)) (parents have a fundamental liberty interest in the care and custody their children, so the state must provide fair procedures when it seeks to terminate those rights). Because of the liberty interests at stake, the court in *A.R.* concluded that the *Strickland* test would generally govern direct appeals of ineffective assistance of counsel claims involving the termination of parental rights' hearings. *Id.* at ¶ 51.

¶ 28 In doing so, however, the court noted that on direct appeal, "the record may be insufficient to allow the appellate court to decide

the issue." *Id.* at ¶ 63. "In that scenario, an appellate court will generally remand the case for further factual findings" when "the parent's allegations are sufficiently specific to constitute a prima facie showing of ineffective assistance of counsel." *Id.* But "[i]f the parent's allegations lack sufficient specificity, then the ineffective assistance of counsel claim may be summarily denied." *Id.*

¶ 29 The *A.R.* court instructed that when a parent sufficiently pleads a prima facie claim of ineffective assistance of counsel, an appellate court does not need to remand for factual findings in two circumstances: (1) when the record is sufficiently developed to decide the question of counsel's ineffective assistance, such as when the facts are not disputed so the matter may be decided as a matter of law; and (2) when the court can presume prejudice "if counsel '*entirely* fails to subject the prosecution's case to *meaningful* adversarial testing.'" *Id.* at ¶ 66 (quoting *Cronic*, 466 U.S. at 659); *see also M.A.W. v. People in Interest of A.L.W.*, 2020 CO 11, ¶ 40 (reaffirming that an appellate court may vacate a dependency and neglect case due to ineffective assistance of counsel without remanding for further factual findings if "the record establishes presumptive prejudice under the standard set forth in

Cronic"); *cf. People v. McGlaughlin*, 2018 COA 114, ¶¶ 16-17 (attorney disciplinary case holding that under the Sixth Amendment, a defendant is denied the constitutional right to counsel "during those critical stages [when] no licensed lawyer is present" in the courtroom, and that under *Cronic*, the "complete deprivation of counsel is a structural error, requiring reversal without regard to any showing of prejudice").

3. Adoption of *A.R. v. D.R.* to Proceedings Concerning Involuntary Administration of Medications under Sections 16-8.5-112

¶ 30 Uwayezuk contends that we should extend *A.R.*'s holding to ineffective assistance of counsel claims arising from proceedings conducted under section 16-8.5-112. *See A.R.*, ¶ 47.

¶ 31 No appellate court in Colorado has extended *A.R.* to other types of civil proceedings where the General Assembly has provided a statutory right to counsel. We conclude that *A.R.*'s ineffective assistance of counsel analysis applies to these expedited proceedings based on similar reasoning: (1) a liberty interest to refuse the administration of medication is at stake; (2) there is a statutory right to counsel; and (3) proceedings under section 16-

8.5-112 have no civil counterpart to criminal postconviction proceedings.

¶ 32 In applying *Cronic* to section 16-8.5-112 proceedings, however, we must clarify that the three narrow circumstances are distinct. Instead of recognizing this distinction, Uwayezuk conflates the three *Cronic* circumstances into one argument: The court's denial of his request for a continuance was government interference that denied Uwayezuk counsel during a critical stage of the proceedings; he could not subject the State's case to meaningful adversarial testing because he only had two days to prepare for the hearing and he was denied access to his attorney; and, under the described circumstances, no counsel, no matter how competent, could have provided effective assistance.

¶ 33 The three *Cronic* situations involve different considerations and legal standards. Many of Uwayezuk's contentions involving the *Cronic* situations are underdeveloped and conclusory, and therefore, we decline to address them. *Prospect 34, LLC v. Gunnison Cnty. Bd. of Cnty. Comm'rs*, 2015 COA 160, ¶ 28. To the extent we

understand his position on the developed arguments, we address and deny Uwayezuk's claim of ineffective assistance of counsel.[7]

D. State Interference with Effective Assistance of Counsel

¶ 34 Uwayezuk contends that no competent counsel could have adequately rendered assistance without a continuance of the hearing because (1) counsel had only two days to prepare for the hearing, and (2) the sheriff refused counsel entry to the jail to confer with Uwayezuk.[8] Likewise, Uwayezuk contends that the

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[7] *Cronic*, 466 U.S. at 666, determined that a presumption of prejudice did not apply to the ineffective assistance of counsel claim there, so the case was "remanded to allow the claim to be considered under *Strickland*'s test." *Bell v. Cone*, 535 U.S. 685, 695 (2002). But we decline to remand this matter to the probate court because Uwayezuk did not plead a claim for ineffective assistance of counsel under the two prongs of *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Instead, Uwayezuk alleged actual or constructive denial of counsel under *Cronic*'s exception to *Strickland*. While *Cronic* was not specifically cited at the December 2 hearing, counsel's argument for ineffective assistance of counsel was essentially that under *Strickland*, "the Court stated unequivocally that actual denial or constructive denial of the assistance of Counsel altogether" results in presumed prejudice. As our supreme court noted in *A.R. v. D.R.*, 2020 CO 10, ¶ 66, an appellate court applying the *Cronic* standards to claims of ineffective assistance of counsel in dependency and neglect proceedings will generally be able to resolve presumed prejudice arguments without the need for remand.

[8] Although the State characterizes Uwayezuk's argument for the denial of a continuance as one in which the court's decision was

denial of the continuance prevented his counsel from meaningfully subjecting the State's case to adversarial testing, again due to the inadequate time to prepare and no access to the client. He also raised a claim under the first circumstance of *Cronic* (complete denial of counsel at a critical stage), but we conclude that it is inapplicable under the facts of this case.[9]

1. No Counsel Could Render Assistance

¶ 35 As an example of a situation where no counsel, even competent counsel, was able to provide effective assistance, *Cronic*

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discretionary, we do not interpret his contention to be based on the factors from *People v. Brown*, 2014 CO 25, ¶ 24 (adopting an eleven-part test for a court to consider when confronted with a request for a continuance so that the defendant may obtain counsel of choice). Uwayezuk did not seek a continuance to obtain counsel of his choice; rather, the continuance was sought so that, as counsel argues, he could effectively prepare for the hearing and have time to confer with the client.

[9] To the extent Uwayezuk contends that he was denied complete access to counsel because of government interference at a critical stage of the proceedings, we view his contentions as more aligned with the second and third *Cronic* situations. Unlike a criminal case where a defendant has the right to be present and receive assistance of counsel at all critical stages of the proceeding, *see People v. Guzman-Rincon*, 2015 COA 166M, ¶ 31, a patient opposing involuntary administration of medication under section 16-8.5-112, C.R.S. 2022, is not statutorily required to be at the hearing, *see Medina*, 705 P.2d at 971. Thus, Uwayezuk had counsel present and available at the hearing despite any alleged government interference.

cites *Powell v. Alabama*, 287 U.S. 45, 53 (1932). There, defendants in a highly publicized capital case appeared at the arraignment with trial scheduled six days after the indictment was filed. The court appointed "all the members of the bar" to assist at the arraignment. *Id.* On the first day of trial, an attorney from Tennessee appeared on behalf of the defendants, but he stated that he did not have time to familiarize himself with the case or learn local procedures. *Id.* *Powell* held that given the order appointing counsel so close to trial and the horrendous nature of the crimes publicized in the community, defendants were effectively denied counsel in this circumstance because it was doubtful that counsel could be an effective adversary, thus rendering the trial unfair. *Id.*

¶ 36 But *Cronic* noted that not every refusal to continue a criminal trial effectively amounts to presumed prejudice. For example, in *Avery v. Alabama*, 308 U.S. 444, 450-53 (1940), another capital case, the Court held that even though counsel was appointed only three days before trial, defendant had effective counsel because the evidence and witnesses were easily accessible. *Id.* And in *Chambers v. Maroney*, 399 U.S. 42, 54 (1970), the Court declined to

fashion a "per se" rule warranting reversal of a conviction based on tardy appointment of counsel.

¶ 37 Despite the expedited nature of a proceeding under sections 16-8.5-112 and 27-65-113, the court's denial of a continuance, and counsel's inability to meet with Uwayezuk before the hearing, we cannot say that this situation establishes presumptive prejudice under *Cronic* such that even competent counsel would be unable to provide effective assistance. We reach this conclusion for three reasons.

¶ 38 First, although Uwayezuk was only given two days' notice to prepare, evidence and witnesses were readily accessible to him, the State's petition was signed by Uwayezuk's treating physician, and the State provided notice to counsel that he had access to all of Uwayezuk's medical records, both from Denver Health Medical Center and the Denver Sheriff's Department. Counsel was also authorized to speak to Uwayezuk's treating physician, Dr. Albert, and there is no evidence in the record or argument made on appeal that access to the records or to Dr. Albert was denied.

¶ 39 Second, even assuming Uwayezuk's attorney had been permitted to meet with him before the hearing to obtain treatment

preferences and build rapport, Uwayezuk does not allege any other information that counsel would have been able to obtain from him. We acknowledge that Uwayezuk's counsel made a record that he and Uwayezuk were unable to meet because the Denver Sheriff's Department stated Uwayezuk was unstable. We agree that appointed counsel's inability to meet with the client before the expedited hearing under section 16-8.5-112 should be a rare occurrence.

¶ 40 But it was undisputed that Uwayezuk's criminal defense counsel had already raised the issue of competency in his criminal proceedings and the probate court took judicial notice of the orders that required Uwayezuk to undergo a competency evaluation.

¶ 41 Relatedly, Uwayezuk's claim that his counsel could have personally observed him before the hearing to make sure Uwayezuk was unstable and decompensating is a legitimate point. And this argument could be significant if evidence were disputed and it was unclear whether the State had met its burden of proof to satisfy the *Medina* factors with clear and convincing evidence. But on appeal Uwayezuk concedes three of the four *Medina* factors, which diminishes the risk of any clearly erroneous findings.

¶ 42 Finally, Uwayezuk does not provide any bona fide reason for opposing administration of the medications, other than their possible side effects. But the probate court noted that appointed counsel was experienced in these expedited mental health proceedings. This suggests that counsel was also aware of the likely side effects of the requested medications identified in Dr. Albert's petition or counsel could have accessed publicly available information about the medications. On this point, counsel did not need to confer with Uwayezuk to have knowledge of the medications' possible side effects before the hearing, and many clients object to taking the medications due to the side effects. *See, e.g., People in Interest of C.J.R.*, 2016 COA 133, ¶ 17 (our supreme court has acknowledged that antipsychotic medications "'can cause numerous and varied side effects and carry with them the risk of serious and possibly permanent disabilities in the patient.") (quoting *Medina*, 705 P.2d at 968).

¶ 43 Therefore, although we do not diminish the liberty interests at stake in these involuntary proceedings, and even though the hearings are expedited under sections 16-8.5-112 and 27-65-113, there is no "per se" rule for when counsel is rendered ineffective

based on tardy appointment. Furthermore, Uwayezuk has failed to provide a reason based on this record that competent counsel would not have been able to render effective assistance under any circumstance. *See Cronic*, 466 U.S. at 666; *see also A.R.*, ¶ 66.

2. Counsel Could not Meaningfully Subject the State's Case to Adversarial Testing

¶ 44 In *Bell*, 535 U.S. at 696, the Supreme Court identified a presumption of prejudice for ineffective assistance of counsel "if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* (quoting *Cronic*, 466 U.S. at 659). The Court noted that to presume prejudice under this situation, "the attorney's failure must be *complete*." *Id.* at 697 (emphasis added). Although Uwayezuk claims that his counsel was unable to meaningfully subject the State's case to adversarial testing throughout the entirety of the expedited hearing, we conclude that the record demonstrates otherwise.

¶ 45 He sought to dismiss the case, challenged the constitutionally of the statutes governing the proceedings, and cross-examined Uwayezuk's treating physician, Dr. Albert.

¶ 46 Below and on appeal, he claims that if the probate court had granted the continuance, he would have called Uwayezuk's family or friends to testify at the hearing. But this type of argument appears more akin to a traditional *Strickland* allegation in which a defendant claims prejudice because the outcome would have been different if additional witnesses could be identified or further investigation had been undertaken. These types of conclusory allegations, however, do not satisfy the prejudice prong of *Strickland*. *See People v. Pendleton*, 2015 COA 154, ¶ 34 ("[T]he mere possibility that additional investigation would have revealed useful information does not" render the failure to conduct the investigation prejudicial.).

¶ 47 And absent evidence in the record that family or friends or other witnesses failed to appear at the expedited hearing because, for example, Uwayezuk's counsel could not secure their appearances under subpoenas due to the requirements of C.R.C.P. 45 in relation to the hearing date, we see nothing in the record showing that counsel "completely" failed to act as an adversary in this matter so as to presume prejudice.

¶ 48 Finally, Uwayezuk does not put forth any other defenses or arguments that he could have raised or made if a continuance had been granted or if he had been able to meet with his attorney before the hearing. As the State notes, a respondent in these expedited proceedings generally does not assert a myriad of defenses other than that one or more of the *Medina* factors were not proved by clear and convincing evidence.

¶ 49 Certainly, divisions of this court have struck down orders for the involuntary administration of medication where (1) the medications requested are based on "[s]peculation that the patient might deteriorate in the future," *People in Interest of R.K.L.*, 2016 COA 84, ¶ 43 (citation omitted); (2) the order does not treat a mental health disorder but is a request for medication that would change the hormonal balance of male and female characteristics, *see People in Interest of C.J.R.*, 2016 COA 133, ¶¶ 22-23; or (3) a patient was entitled to, but did not receive, a copy of the mental health hearing transcript at state expense because proceedings under sections 24-65-113 and 16-8.5-112 are akin to a criminal proceeding due to the possible deprivation of liberty, *see Goedecke*, 198 Colo. at 412, 603 P.2d at 126.

¶ 50 And indeed, in attempting to argue that the probate court lacked jurisdiction under Title 24 of the Colorado Revised Statutes, counsel argued — though unsuccessfully — that a medical patient who is voluntarily committed should not be subject to forced medication absent an emergency situation — for example, where the person seeks to be released or is a danger to himself or others. *See People in Interest of Schmidt*, 720 P.2d 629, 631 (Colo. App. 1986). The State argued, and the probate court agreed, that the *Schmidt* case was inapposite to this situation because Uwayezuk was not voluntarily committed but was referred for in-custody evaluation based on a motion filed by his criminal defense counsel that he might be incompetent to proceed with his criminal cases under section 16-8.5-102(2)(b), C.R.S. 2022.

¶ 51 Again, while the probate court rejected many of the arguments raised by counsel, the court allowed those arguments to be heard, and the State had to defend against the arguments in an adversarial manner. Thus, based on this record, Uwayezuk has failed to prove that his counsel completely failed to test the State's case in an adversarial setting, which would entitle him to a

presumption of prejudice for his ineffective assistance of counsel claim. *See Cronic*, 466 U.S. at 666; *see also A.R.*, ¶ 66.

III. Pleading Standards for Petition

¶ 52 Uwayezuk claims that the petition filed by the State was insufficient under the pleading standards set forth in *Warne*, ¶¶ 9-10, 24, and, consequently, should have been dismissed. The State contends that this claim was not preserved because Uwayezuk did not ask for dismissal but a continuance, or alternatively, that the petition pled sufficient facts to give Uwayezuk reasonable notice.

¶ 53 A division of this court has held that the denial of a motion to dismiss under C.R.C.P. 12(b)(5) is unreviewable after a trial on the merits. *See Credit Serv. Co. v. Skivington*, 2020 COA 60M, ¶ 12. Such an order is unreviewable because the purpose of a motion to dismiss for failure to state a claim is to test the "sufficiency of the complaint" and to dismiss "meritless claims" early, but that purpose is meaningless after a trial on the merits. *Id.* at ¶ 11 (citation omitted). The division also pointed to the policy behind the rules of civil procedure that seeks to resolve controversies on the merits, as well as the liberal policy to allow amendments to a pleading to

conform to the evidence, to further support why such orders are unreviewable after a trial on the merits. *Id.* at ¶ 12.

¶ 54 We acknowledge that an expedited proceeding under sections 16-8.5-112 and 27-65-113 is not a full trial. But there is nothing further for the court to determine following the hearing, and the respondent is provided a right to appeal the court's order. Therefore, we see no reason why the holding in *Skivington* should not apply to orders issued under sections 16-8.5-112 and 27-65-113. Thus, we decline to further review the court's denial of the motion to dismiss.[10]

IV. *Medina* Factors

¶ 55 Finally, Uwayezuk contends that there was not clear and convincing evidence to support the court's order authorizing the involuntary administration of medication. We disagree.

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[10] There was no specific reference to C.R.C.P. 12(b)(5) at the December 2 hearing. But Uwayezuk's counsel requested dismissal for failure to state a claim upon which relief could be granted, and on appeal, both parties treat Uwayezuk's request for dismissal as one under Rule 12(b)(5).

A. Standard of Review and Applicable Law

¶ 56 An involuntarily committed person retains the right to refuse treatment. *See Medina*, 705 P.2d at 971. Even so, a district court may authorize the involuntary administration of medication to a patient if the State establishes each of the following elements by clear and convincing evidence: (1) the patient is incompetent to effectively participate in the treatment decision; (2) treatment by antipsychotic medication is necessary to prevent a significant and likely long-term deterioration in the patient's mental condition or to prevent the likelihood of the patient's causing serious harm to himself or others in the institution; (3) a less intrusive treatment alternative is not available; and (4) the patient's need for treatment by antipsychotic medication is sufficiently compelling to override the patient's bona fide and legitimate interest in refusing treatment. *Id.* at 973; *see also Strodtman*, 293 P.3d at 131.

¶ 57 When, as here, a patient challenges the sufficiency of the evidence supporting the district court's findings on any of these elements, we review the court's conclusions of law de novo and defer to its findings of fact if supported by record evidence. *See People v. Marquardt*, 2016 CO 4, ¶ 8. We view the record in the

light most favorable to the State, leaving the resolution of conflicts in the testimony and determination of the credibility of the witnesses solely to the province of the fact finder. *See People v. Fuentes*, 258 P.3d 320, 326 (Colo. App. 2011). Where there is "ample evidence in the record to support the [district] court's findings and conclusion[s], based on clear and convincing evidence," we may not "substitute[] [our] judgment for that of the [district] court." *People in Interest of A.J.L.*, 243 P.3d 244, 255 (Colo. 2010).

B. Analysis

¶ 58 Uwayezuk concedes that the State proved by clear and convincing evidence the first three *Medina* factors. Thus, the fourth factor is the only one at issue: whether the patient's need for treatment by antipsychotic medication is sufficiently compelling to override the patient's bona fide and legitimate interest in refusing treatment.

¶ 59 To satisfy the fourth factor, the court must first determine whether the patient's refusal is bona fide and legitimate. *See Medina*, 705 P.2d at 974. If the refusal is legitimate, the court must then determine "whether the prognosis without treatment is so

unfavorable that the patient's personal preference must yield to the legitimate interests of the state in preserving the life and health of the patient placed in its charge and in protecting the safety of those in the institution." *Id.*

¶ 60 On appeal, Uwayezuk contends that his bona fide reason for refusing the treatment is "based on the risks of side effects that have the potential to undercut his quality of life to a significant degree."

¶ 61 At the hearing, Dr. Albert testified to the various side effects for the requested medications and that medical staff monitors to ensure the medications are administered safely. At the time of the hearing, Dr. Albert conceded she was not aware of what side effects Uwayezuk might experience given this was his "first break," so there was no prescribing history for any antipsychotic medications. But Dr. Albert testified that she was requesting multiple medications precisely because she was unsure which antipsychotic medication would be most effective to treat Uwayezuk's mental health issues while avoiding long-term side effects.

¶ 62 We agree that significant side effects to the medications can constitute a bona fide reason for Uwayezuk's refusal. But Dr.

Albert testified and the court concluded that his mental health disorder was "severe," and his prognosis without treatment was "poor" and unlikely to improve without the involuntary administration of medication. She further testified that studies had shown that the quicker medication could be administered to the patient, the more effective it was, especially during a patient's "first break." And she testified that Uwayezuk was on a two-person handcuff alert given his erratic behavior, supporting the conclusion that any bona fide reason he might have was outweighed by the State's compelling interest to protect Uwayezuk and others around him from harm. Thus, viewing the record in the light most favorable to the State, *see Fuentes*, 258 P.3d at 326, there was clear and convincing evidence that Uwayezuk's personal preference to refuse medication had to yield to the State's legitimate interest to protect his health, as well as to protect the staff and others in custody at the jail, *see Medina*, 705 P.2d at 974.

¶ 63 Thus, we reject the argument that the fourth *Medina* factor was not supported by clear and convincing evidence.

V. Conclusion

¶ 64 The order is affirmed.

JUDGE DAILEY and JUDGE LUM concur.