IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity of the Hospitalization of L.M.	)	Supreme Court No. S-16467

Trial Court Case No. 3AN-16-01656PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE MARK RINDNER, PRESIDIING

REPLY BRIEF OF APPELLANT

James B. Gottstein (7811100)
Law Project for Psychiatric Rights, Inc.
406 G Street, Suite 206
Anchorage, Alaska
(907) 274-7686

Attorney for Appellant, L.M.

Filed in the Supreme Court of
the State of Alaska, this 4th
day of April, 2017

Marilyn May, Clerk
By: M Lindebonson
Deputy Clerk

I. TABLE OF CONTENTS

II. TABLE OF CONSTITUTIONAL PROVISIONS, CASES, AND STATUTES

CONSTITUTIONAL PROVISIONS

CASES

III. ARGUMENT IN REPLY

A. Summary

Appellee, Alaska Psychiatric Institute ("API" or "State"), devotes just three sentences in its brief that can be construed as addressing L.M.'s argument, which is that when the government seeks to involuntarily commit someone, it has to do so in the least restrictive feasible manner. Instead it devotes the vast bulk of its brief to pulling out testimony by the petitioner as to L.M.'s dangerousness and addressing points L.M., did not raise.

Under both the Alaska and Federal constitutions, a person may not be involuntarily committed if there is a feasible less restrictive alternative. In this case, the Superior Court rejected this principle, holding that it could not direct the Legislature to spend money on a less restrictive alternative to psychiatric incarceration.[1] However, that is not the point. The point is the state may not constitutionally psychiatrically incarcerate someone when a less restrictive alternative is feasible--even if the State has chosen not to fund the less restrictive alternative. It is a question of the constitutional limits on the government's power to infringe the fundamental right of someone to be free from confinement, not the obligation of the state to spend money on a less restrictive alternative.

[1] Exc. 6, Tr. 150.

Also, API tardily brings up the question of mootness.[2] API only half-heartedly suggests this case should not be decided on the merits under the public interest exception to the mootness doctrine, but L.M. feels she must address the mootness issue in some depth due to it having been raised by API.

B. Standard of Review

The sole question presented by this appeal is whether the Superior Court was correct when it held the State could involuntarily commit L.M. for 90 days because the court could not force the state to fund a feasible less restrictive alternative. The less restrictive alternative requirement is a constitution limitation on the state's power to confine someone for being mentally ill and a danger. This is strictly a legal question concerning the construction of the constitutions of the State of Alaska and United States.

In its brief, API cites testimony regarding L.M.'s dangerousness[3] and then addresses the standard of review as follows:

> Whether there is a less intrusive alternative to commitment is a mixed question of fact and law. "Assessing the feasibility and likely effectiveness of a proposed alternative is in large part an evidence-based factual inquiry by the trial court." This Court reviews a trial court's factual

[2] In *In re Reid K.*, 357 P.3d 776, 782-783 (Alaska 2015), this Court directed that in future appeals from involuntary commitments, if the State believes the appeal is moot and no mootness exception is readily apparent, it should move to dismiss the appeal as moot prior to briefing. API first raised mootness in its Appellee's Brief.

[3] L.M., is not going to allow herself to be diverted to this issue which is not involved in this appeal, other than to note that the Superior Court stated "for the record" that if it had concluded serious risk of harm was required to be proven, it would have granted a directed verdict for L.M., and that "there has not been evidence of a risk of serious harm." Tr. 356: 18-21, 24.

> findings for clear error, but reviews de novo the trial court's application of the law to the facts.

(citations omitted).

However, this appeal isn't about whether there was a less restrictive alternative available as a factual matter, but about the legal standard in determining the constitutional least restrictive alternative limitation on the State's power to involuntarily commit someone. It is therefore respectfully suggested the applicable standard of review in this appeal is for this Court to apply its independent judgment and review *de novo* the construction of the Alaska and Federal constitutions. *State, Dept. of Revenue v. Andrad*e, 23 P.3d 58, 65 (Alaska 2001).

C. <u>The State May Not Constitutionally Involuntarily Commit Someone When There Is A Feasible Less Restrictive Alternative</u>

The only portion of API's Brief that addresses the issue on appeal is:

> The Court should reject as unworkable Linda's position that the State cannot commit a person to API if the court can imagine a less restrictive alternative that could be created, but does not exist. The range of treatment and housing options that could be created-in an ideal world with no practical constraints-is infinite. The State would be unable to protect the public if the Court held that the State cannot commit a dangerous patient if any one of these infinite, nonexistent options would be preferable to API.

(Appellee's Brief, page 19.)

L.M., has not asserted any of these extreme positions. In *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 185 (Alaska 2009), in the court ordered involuntary medication context, this Court held a less intrusive alternative was available when it is "feasible." Specifically, this Court held:

> Although the state cannot intrude on a fundamental right where there is a less intrusive alternative, the alternative must actually be available, meaning that it is feasible and would actually satisfy the compelling state interests that justify the proposed state action

(*Id*, footnote omitted). It is hard to see why the same constitutional principle wouldn't apply to involuntary commitment, yet the Superior Court rejected it.

There was unrebutted expert testimony at the 90-day commitment hearing from Dr. Aron Wolf that Soteria-Alaska, a successful program, would have been a less restrictive alternative for L.M., had it not been closed the year before due to insufficient funding from the State.[4] In addition, in support of L.M.'s objections to the Magistrate Judge's recommendations regarding the petition for 30-day commitment,[5] Dr. Brian Saylor, who was:

1. formerly the Director of API and Deputy Commissioner of the Alaska Department of Health and Social Services,
2. very familiar with Soteria-Alaska, and
3. had known L.M., since she was a baby and was well aware of her psychiatric history,

affied that in his opinion, "Soteria-Alaska would have been ideal for [L.M.], dramatically improving her long-term prospect of recovering from her current mental problems and resuming her life."[6]

---

[4] Tr. 72-73.

[5] R. 601.

[6] Supp. Exc. 51, ¶17.

However, this appeal isn't about whether Soteria-Alaska would have been a feasible less restrictive alternative, an issue the Superior Court did not reach,[7] but rather this appeal is about whether the Superior Court was correct in holding:

> I reject the idea that there's a constitutional right that would require the state to fund particular kinds of programs. There would be separation of powers issues, I believe.[8]

API focuses on the language in *Bigley* that the alternative must be actually available, and downplays that this Court defined that as "meaning that it is feasible and would actually satisfy the compelling state interest" in locking L.M. up. Most importantly, API then asserts that Soteria-Alaska was not feasible because it is closed.[9] However, Soteria-Alaska was not infeasible just because it had been closed. In *State v. Alaska Laser Wash, Inc.*, 382 P.3d 1143, 1152 (Alaska 2016), this Court held that, "Feasible means capable of being accomplished or brought about; possible." Soteria-Alaska was clearly feasible because it had operated quite well for seven years.[10]

To hold that closing Soteria-Alaska for insufficient funding made Soteria-Alaska infeasible would eviscerate the constitutional least restrictive alternative limitation on the

---

[7] API argues that Soteria-Alaska would not have been a proper less restrictive alternative even if funded, Appellee's Brief at 19-20 but, again, the Superior Court did not reach this issue because it held that since the State had chosen not to provide adequate funding to keep it open it could not be a less restrictive alternative.

[8] Tr. 150.

[9] Appellee Brief at 2.

[10] Tr. 73.

state's right to confine someone for being mentally ill. In *Bigley*,[11] in the analogous forced drugging situation, this Court specifically rejected the claim that the State was obligated to provide a less intrusive alternative, but did hold the State has the choice of providing a constitutionally sufficient less intrusive alternative or let the person go. It is respectfully suggested the same is true here with respect to the least restrictive alternative constitutional limitation on state power to involuntary commit someone.

The 90-day commitment order in this case has expired and L.M., is no longer locked up at API so this case doesn't present a case of releasing someone who is being unconstitutionally confined. This case presents the legal question for future application of whether the State can constitutionally lock someone up for being mentally ill when there is a feasible less restrictive alternative.

D. <u>This Appeal Should Be Decided on the Merits</u>

As stated in footnote 19 of L.M.'s opening brief, in *In re Reid K.*, 357 P.3d 776, 782-783 (Alaska 2015), this Court directed that in future appeals from involuntary commitments, if the State believes the appeal is moot and no mootness exception is readily apparent, it should move to dismiss the appeal as moot prior to briefing. L.M., also noted that this appeal presents a constitutional issue not involving the sufficiency of the evidence, and therefore the public interest exception to the mootness doctrine is readily apparent. In its brief, the State does not really dispute this, although it does suggest that because the State disagrees with L.M.'s legal position maybe the issue is not

[11] 208 P.3d at 187.

important enough to qualify for the public interest exception.[12] That the State disagrees with L.M.'s legal position does not make the issue unimportant. While the State only half-heartedly suggests the public mootness exception does not apply, L.M. feels she has to address the mootness issue in some depth.

(1) <u>The Public Interest Exception to the Mootness Doctrine Applies</u>

In *In re: Daniel G*, 320 P.3d 262. 267 (Alaska 2014), this Court addressed the public interest exception to the mootness doctrine as follows:

> We "will ... consider a question otherwise moot if it falls within the public interest exception to the mootness doctrine." In determining whether the public interest exception applies, we look to these factors: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."

(footnotes omitted).

With respect to the first factor, in *Daniel G.*[13] this Court held:

> The question of the constitutionality of subjecting someone in custody under AS 47.30.705 to an ex parte proceeding arises every time that an evaluation petition is filed under AS 47.30.710(b).

Similarly, whether there is a constitutionally required less restrictive alternative arises every time there is an involuntary commitment proceeding.

With respect to the second factor, this Court held in *Daniel G*:

> Second, due process challenges to evaluation orders under AS 47.30.710(b) will repeatedly circumvent review because the authorized

[12] Page 15.

[13] 320 P.3d at 268.

> 72–hour confinement period will have long since expired before an appeal can be heard.

Id., footnote omitted. While this was a 90-day commitment proceeding, such a commitment will also have long expired before an appeal can be heard.

With respect to the third, factor, in *Myers v Alaska Psychiatric Institute*, 138 P.3d 238, 244 (Alaska 2006), this Court held the public interest exception applies in order to clarify the requirements for protecting constitutional rights in such a proceeding. There, the constitutional right was to be free from unwanted psychiatric medication, and here it is the constitutional limitation of least restrictive alternative on the State's right to lock someone up for being mentally ill. It is respectfully suggested the public importance factor is also satisfied here. That API believes L.M.'s arguments lack merit[14] does not make the issue unimportant. It is respectfully suggested this appeal should be heard on the merits under the public interest exception to the mootness doctrine.

(2) <u>Mootness Under Wetherhorn Should Be Revisited</u>

If this Court should decline to hear this appeal on the merits, it is respectfully suggested this is an appropriate occasion to revisit *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 380-381 (Alaska 2007). In *In re: Joan K.*, 273 P.3d 594, 596 (Alaska 2012), this Court stated:

> In *Wetherhorn v. Alaska Psychiatric Institute* we established that commitment-order appeals based on assertions of insufficient evidence are moot if the commitment period has passed, subject to the public interest exception.

[14] Appellee's Brief, page 15.

This Court held it would not entertain overturning the mootness holding in *Wetherhorn* because this Court's order for supplemental briefing did not anticipate questioning it and Joan K. did not address the standards this Court imposes for overturning its precedent. It is respectfully suggested this appeal presents an occasion to revisit *Wetherhorn's* mootness ruling as interpreted in *Joan K*.

As set forth at n. 10 of *Joan K*:

> We will overturn one of our prior decisions only when we are "clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."

(citations omitted).

It is respectfully suggested that allowing people to challenge improper involuntary commitments regardless of whether there are additional collateral consequences or the public interest exception to the mootness doctrine applies would result in more good than harm.

Justice Stowers, dissenting in *Joan K.,* would have addressed the issue for a 30 day commitment notwithstanding the failure of Joan K. to address the standards for overturning precedent:

> [A]ny order for involuntary commitment that is erroneously issued remains a "live controversy" for the respondent for the remainder of the respondent's life. Of first importance, the citizen's liberty has been alleged to have been wrongfully taken by court process; the court should afford the citizen the opportunity to prove the error and, if proven, obtain judicial acknowledgment that the order was erroneously issued. Giving the citizen this opportunity will assure the citizen that she will be heard, and that if a lower court has erred, that error will not go unnoticed or unremedied, at least to the extent that the erroneous order will be reversed and vacated. . . .

> I am at a loss to understand how a citizen can be ordered to be involuntarily committed for 30 days and be precluded from appealing this order merely because it is practically impossible to perfect an appeal of an order that by its terms will expire in 30 days.

273 P.3d at 607-608. While this appeal involves a 90-day commitment order, the same principles apply.

In addition to the reasons stated in Justice Stowers' dissent, it is respectfully suggested this Court should consider these appeals on the merits to provide guidance to the trial court. This Court has repeatedly declined to review whether commitment orders were factually justified, which largely leaves the trial courts in the dark as to when commitment orders are factually unjustified.[15] In other words, people's fundamental right to be free from confinement without proper justification can be repeatedly violated because appellate review is unavailable. While the facts which have been found to justify commitment will change from case to case, certainly it would be instructive for trial courts to have examples to draw from. This Court reviews the facts to determine whether they justify relief all the time in non-moot cases and these decisions inform the trial courts in how to apply facts to the law even though the facts are never, or virtually never, identical. It is respectfully suggested the trial courts and future respondents should receive the same benefit.

Finally, it is respectfully suggested such appeals are not moot. *See*, *e.g.*, *Washington v. Harper*, 494 U.S. 210, 219, 110 S.Ct. 1028, 1035 (1990) (appeal of

[15] This Court will review first commitments under the collateral consequences exception to the mootness doctrine. *Joan K.*, 273 P.3d at 598.

involuntary medication order not moot because of possibility that it would be sought in future). Without appellate review on the merits, the person can be subjected to multiple erroneous confinements, all of which are refused review on mootness grounds.

While the exact facts may be different in subsequent proceedings, there is the likelihood of similar facts for people who have been psychiatrically confined numerous times. It is therefore respectfully suggested that because of the possibility, or even probability, of additional psychiatric confinement proceedings against people whose "prior involuntary commitment orders would likely eliminate the possibility of additional collateral consequences,"[16] appeals of psychiatric confinement orders always present a "live controversy" and are not moot even if no collateral consequences are established in the Superior Court proceeding.

Because of this, but most importantly because people who have been subjected to psychiatric confinement orders should have the right to an appellate determination of whether the "massive curtailment of liberty"[17] was lawful, it is respectfully suggested this Court should now hold that appeals of psychiatric confinement orders will be heard on the merits.

---

[16] *Joan K.*, 273 P.3d at 598.

[17] *Wetherhorn*, 156 P.3d at 375, citing *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972).

IV. CONCLUSION

For the foregoing reasons, Appellant L.M. respectfully requests this Court to (1) **Reverse** the Superior Court's holding that whether there is a constitutionally required less restrictive alternative is dependent upon State funding, and (2) **Vacate**, the August 30, 2016, oral order for 90-day commitment.