

# E.P. V. ALASKA PSYCHIATRIC INSTITUTE: THE EVOLUTION OF INVOLUNTARY CIVIL COMMITMENTS FROM TREATMENT TO PUNISHMENT

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## ABSTRACT

*The Alaska Statutes require the State to prove by clear and convincing evidence that an individual is either gravely disabled or a danger to himself or others before that person can be involuntarily civilly committed. If a person is gravely disabled, the State must also prove that his condition will improve with treatment during the commitment. There is no such requirement for those who are a danger to others, but there is controversy over whether a showing of improvement is required for those who are a danger to themselves. In E.P. v. Alaska Psychiatric Institute, E.P. was involuntarily committed because he was addicted to huffing gasoline, and the courts found that this condition made him a danger to himself. E.P. was wrongfully committed for three reasons. First, he was more likely gravely disabled than a danger to himself; however, he could not be committed for being gravely disabled because the State could not show that his condition would improve with treatment. Second, the State did not meet its burden of proving that E.P. was a danger to himself. Third, even if E.P. was a danger to himself, the Alaska Statutes require the State to show that he would improve with treatment.*

## INTRODUCTION

Terry Foucha was charged with aggravated battery inside of an inhabited dwelling and illegal discharge of a .357 revolver.<sup>1</sup> Foucha was

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found not guilty by reason of insanity and was admitted to a hospital because he was found to be a menace to himself and others.<sup>2</sup> While at the hospital, he remained “combative, agitated, and psychotic” and continued to be a “menace to society.”<sup>3</sup> Foucha frequently fought with other patients and consequently was sent to the maximum security section of the hospital.<sup>4</sup> Nevertheless, the Supreme Court of the United States found his commitment unconstitutional because the State of Louisiana failed to meet its burden of proving by clear and convincing evidence that Foucha was a danger.<sup>5</sup>

In stark contrast, E.P. was involuntarily committed to the Alaska Psychiatric Institute (API) for ten months on the grounds that he was mentally ill and was considered a danger to himself.<sup>6</sup> Unlike Foucha, E.P. was never charged with a crime and did not get into altercations at the hospital.<sup>7</sup> E.P. was involuntarily committed because he was addicted to huffing (or inhaling) substances like gasoline fumes.<sup>8</sup> Although E.P.’s addiction was cited as the reason for his commitment, E.P. did not receive any treatment for his addiction while he was locked in API because API is not a substance abuse treatment facility.<sup>9</sup> Nevertheless, the Alaska Supreme Court upheld the commitment and agreed with the superior court’s finding that E.P. was a danger to himself.<sup>10</sup>

Mental hospitals provide treatment and medication for thousands of mentally ill individuals across the nation and are effective for many patients. However, the denial of liberty that results from an involuntary commitment to a mental hospital has substantial negative effects on a person’s physical, social, and mental well-being.<sup>11</sup> People who are committed to psychiatric hospitals also face social consequences, which makes it harder for them to fit in amongst peers and to find jobs post-commitment.<sup>12</sup> Despite the negative aspects of involuntary hospitalization, mental hospitals are useful to society when they provide

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1. State v. Foucha, 563 So. 2d 1138, 1138–39 (La. 1990).

2. *Id.* at 1139.

3. *Id.* at 1141 (internal quotation marks omitted).

4. *Id.*

5. Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

6. E.P. v. Alaska Psychiatric Inst., 205 P.3d 1101, 1103–06 (Alaska 2009).

7. *Id.* at 1104.

8. *Id.* at 1104–06.

9. *Id.*

10. *Id.* at 1112.

11. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 301–02 (2d ed. 1997).

12. Beth E. Molnar, *Juveniles and Psychiatric Institutionalization: Toward Better Due Process and Treatment Review in the United States*, 2 *HEALTH & HUMAN RIGHTS* 98, 107–08 (1997).

treatment for the mentally ill. However, when an individual confined in a mental hospital does not receive treatment for his illness, the hospital no longer serves its purpose and becomes merely a prison.

For these reasons, the Supreme Court of the United States “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”<sup>13</sup> When deciding whether a commitment is necessary, courts must weigh the potential harms to the individual, including the denial of constitutional rights, against the state’s interest in providing treatment to the individual and preventing future harm to the individual and to society.<sup>14</sup> Because such important individual rights are at stake, the Supreme Court has held that the state bears the burden of proving by clear and convincing evidence that the commitment is necessary.<sup>15</sup>

In the Alaska Statute sections that governed E.P.’s case, the Alaska Legislature codified the Supreme Court’s recognition that involuntary commitments should be used primarily for treatment.<sup>16</sup> In Alaska, there are three groups of mentally ill individuals who can be committed: those who are gravely disabled, those who are a danger to themselves, and those who are a danger to others.<sup>17</sup> The statute clearly mandates that the State can commit a gravely disabled person only when he will improve with treatment.<sup>18</sup> But, this requirement is not present when a person is a danger to others<sup>19</sup> because other citizens’ safety concerns are at stake. However, an important issue in this case, which will be discussed at

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13. *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) (Indiana state law allowing pretrial commitment under lenient conditions of criminal defendants incompetent to stand trial violated due process); *Humphrey v. Cady*, 405 U.S. 504 (1972) (renewal of involuntary commitment under Wisconsin state law required at least an evidentiary hearing); *In re Gault*, 387 U.S. 1 (1967) (Arizona court decision to suspend notice of a juvenile delinquency and detention hearing violated due process, despite the fact that its stated purpose was to “shield the child from public stigma”); *Specht v. Patterson*, 386 U.S. 605 (1967) (Colorado Sex Offenders Act violated due process because it allowed imposition of indeterminate sentence lengths without a hearing)). In *Addington* the Court noted that since the preponderance standard results in a “risk of increasing the number of individuals erroneously committed,” the interests of the State of Texas were questionable when that standard was employed for involuntary commitment. *Id.* at 426.

14. *See Addington*, 441 U.S. at 432–33.

15. *Id.*

16. *See* ALASKA STAT. § 47.30.655 (2010). For example, section 47.30.655(2) of the Alaska Statutes states “that persons be treated in the least restrictive alternative environment consistent with their treatment needs.” § 47.30.655(2).

17. *See* § 47.30.730(a)(1).

18. *See* § 47.30.730(a)(3).

19. *See* § 47.30.730.

length in Part IV.C, is whether the State is required to show that an individual will improve with treatment when that individual is committed for being a danger to himself.

In *E.P. v. Alaska Psychiatric Institute*,<sup>20</sup> the Alaska Supreme Court wrongly upheld E.P.'s commitment because the State failed to prove by clear and convincing evidence that E.P.'s commitment was necessary. First, E.P. was more likely gravely disabled than a danger to himself, so the State should have been required to show that he would improve with treatment. The State itself admitted that it could not commit E.P. for being gravely disabled because he would not improve with treatment.<sup>21</sup> The State therefore attempted to commit E.P. on the basis that he was a danger to himself.<sup>22</sup> Second, because the evidence more clearly supported the assertion that E.P. was gravely disabled, the State did not meet its burden of showing that E.P. was a danger to himself with clear and convincing evidence. Third, even if E.P. was a danger to himself, the statute required that the State show that E.P. would improve with treatment,<sup>23</sup> and the State failed to do so. For these reasons, E.P.'s involuntary commitment was an unconstitutional deprivation of his rights and served more as a punishment than as a form of treatment.

Part I more thoroughly examines the facts of *E.P. v. Alaska Psychiatric Institute*<sup>24</sup> ("*E.P. v. API*") and the sections of the Alaska Statutes that apply to involuntary civil commitments. Part II describes the Alaska Supreme Court's holdings in *E.P. v. API*. Part III explores the legal background of involuntary civil commitments with a focus on the standard of proof and the difficulties of defining the dangerousness standard. Part IV is a critique of the State's failure to meet its burden in E.P.'s case and of the Alaska Supreme Court's interpretation of the civil commitment statutes. It explains why the court should not have found E.P. to be a danger to himself and why this error resulted in a commitment that was more of a punishment for E.P.'s lifestyle choices than an effort to treat his mental illness. This section discusses the need for statutory revisions, including a more concrete definition of "dangerousness" and a clarification of the elements that must be proved in civil commitment cases. Finally, the Note proposes alternatives to

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20. 205 P.3d 1101 (Alaska 2009).

21. *Id.* at 1104.

22. *Id.*

23. See § 47.30.655(6) ("[P]ersons who are mentally ill but not dangerous to others [may] be committed only if there is a reasonable expectation of improving their mental condition.").

24. 205 P.3d 1101.

civil commitments that would prevent individuals from being wrongfully committed in the future.

## I. E.P.: TO COMMIT OR NOT TO COMMIT?

### A. Involuntary Commitment Statutes

Sections 47.30.655 through 47.30.770 of the Alaska Statutes govern the involuntary civil commitments of mentally ill individuals.<sup>25</sup> Section 47.30.655 of the Alaska Statutes states the Legislature's purpose in writing these statutes—to “more adequately protect the legal rights of persons suffering from mental illness.”<sup>26</sup> Other principles that guide these provisions are “that persons be treated in the least restrictive alternative environment consistent with their treatment needs” and “that persons who are mentally ill but not dangerous to others be committed only if there is reasonable expectation of improving their mental condition.”<sup>27</sup>

The other sections describe the elements that must be met in order to commit an individual involuntarily to a mental facility for thirty, ninety, or 180 days.<sup>28</sup> A person must first be committed for thirty days before he can be re-committed for ninety days,<sup>29</sup> and for ninety days before he can be re-committed for 180 days.<sup>30</sup> The individual may then be committed for successive 180-day terms with no limit to the number of commitments.<sup>31</sup> Generally, to commit an individual for any length of

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25. §§ 47.30.655–47.30.770.

26. § 47.30.655.

27. *Id.*

28. *See* §§ 47.30.730–770.

29. § 47.30.740(a). Section 47.30.740(a) of the Alaska Statutes states:

At any time during the respondent's 30-day commitment, the professional person in charge, or that person's professional designee, may file with the court a petition for a 90-day commitment of that respondent. The petition must include all material required under AS 47.30.730(a) except that references to “30 days” shall be read as “90 days.”

*Id.*

30. § 47.30.770(a). Section 47.30.770(a) of the Alaska Statutes states:

The respondent shall be released from involuntary treatment at the expiration of 90 days unless the professional person in charge files a petition for a 180-day commitment conforming to the requirements of AS 47.30.740(a) except that all references to “30-day commitment” shall be read as “the previous 90-day commitment” and all references to “90-day commitment” shall be read as “180-day commitment.”

*Id.*

31. § 47.30.770(c). Section 47.30.770(c) of the Alaska Statutes states that “[s]uccessive 180-day commitments are permissible on the same ground and

time, a court must find by clear and convincing evidence that the individual is mentally ill, and as a result is likely to cause harm to himself or others, or that he is gravely disabled.<sup>32</sup>

“Gravely disabled” is “a condition in which a person as a result of mental illness is in danger of physical harm arising from . . . complete neglect of basic needs for food, clothing, shelter, or personal safety” or the person will suffer “abnormal mental, emotional, or physical distress” associated with significant impairment of judgment if left untreated.<sup>33</sup> In order to commit an individual for being gravely disabled, the State must show that there is a reasonable expectation that the individual will improve with treatment.<sup>34</sup>

A person likely to cause serious harm is either a person who poses a substantial risk of bodily harm to that person’s self or to others or a person who manifests a current intent to carry out plans of serious harm.<sup>35</sup> Unlike a person committed for grave disability, a person who poses a substantial risk of bodily harm to others may be committed without showing that the person’s condition will improve with

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under the same procedures as the original 180-day commitment. An order of commitment may not exceed 180 days.” *Id.*

32. § 47.30.730; § 47.30.740; § 47.30.755. Section 47.30.730(a) of the Alaska Statutes states:

The petition must (1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled; (2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it; (3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent’s mental condition could be improved by the course of treatment sought; (4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent’s condition has agreed to accept the respondent; (5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days; (6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and (7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

§ 47.30.730(a). Sections 47.30.740 and 47.30.755 of the Alaska Statutes refer back to the factors listed in section 47.30.730(a). §§ 47.30.740, .755.

33. § 47.30.915(7).

34. § 47.30.730.

35. § 47.30.915(10).

treatment.<sup>36</sup> However, the statute is unclear as to whether the State must show that a person who poses a substantial risk of bodily harm to himself will likely improve with treatment.<sup>37</sup>

## B. Mental Health History of E.P.

E.P. had a history of huffing gasoline fumes and other substances, which damaged the frontal lobe of his brain and led to dementia, a personality disorder, and a “not otherwise specified psychotic disorder.”<sup>38</sup> Prior to the commitments at issue in this case, E.P. was committed both voluntarily and involuntarily several times to API, which is a state-run locked mental institution.<sup>39</sup> In May 2007, he was released to an assisted living facility in Big Lake, Alaska but left after a few days because he “got bored.”<sup>40</sup> He voluntarily committed himself to API for the last time on May 13, 2007.<sup>41</sup>

## C. The Thirty-Day Commitment

Soon after E.P. voluntarily committed himself to API, he expressed the desire to leave API to live with his sister.<sup>42</sup> In order to prevent him from leaving, API filed a petition to commit E.P. involuntarily for thirty days on August 2, 2007.<sup>43</sup> According to Dr. Khanaz Khari, a psychiatrist at API and the sole witness for the State, E.P. was both gravely disabled and a threat to himself and others because he wished to continue huffing upon release.<sup>44</sup>

Dr. Khari also testified that she did not expect E.P.’s condition to improve at API because API is not a substance abuse treatment facility.<sup>45</sup> She nevertheless recommended that E.P. be committed because API is a locked facility that would be able to restrict his access to harmful substances.<sup>46</sup> Her theory was supported by the fact that E.P. was a

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36. § 47.30.655(6).

37. *See id.*; § 47.30.730(3); *see also infra* Part IV.C.

38. *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101, 1103–04 (Alaska 2009).

39. *Id.*

40. *Id.* at 1104; Brief of Appellant at 2, *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101 (Alaska 2009) (No. S-12853).

41. Brief of Appellant, *supra* note 40, at 2.

42. *E.P.*, 205 P.3d at 1104.

43. Brief of Appellant, *supra* note 40, at 2–3.

44. *Id.* at 3.

45. *E.P.*, 205 P.3d at 1104.

46. *Id.*

model patient while he was at API because he did not engage in any dangerous behavior while he was committed.<sup>47</sup>

Standing Master Andrew Brown found that E.P. was mentally ill and gravely disabled but did not find that he was a danger to himself or others.<sup>48</sup> The superior court judge, following the recommendation of the standing master,<sup>49</sup> then committed E.P. to API for thirty days<sup>50</sup> pursuant to section 47.30.735(c) of the Alaska Statutes.<sup>51</sup> E.P. objected to this commitment because according to the statute, a gravely disabled individual may be committed only if treatment will improve his condition, and Dr. Khari had testified that she did not expect E.P.'s condition to improve.<sup>52</sup> API agreed with his legal argument but responded that E.P. should be committed because he was likely to harm himself, since he wished to continue huffing upon his release.<sup>53</sup> Alternatively, API argued that E.P. was a danger to others because he wanted to live with his sister upon release and she had small children who could be influenced by E.P.'s huffing habits.<sup>54</sup> The superior court found in favor of API but did not elaborate on its reasoning.<sup>55</sup>

#### D. The Ninety-Day Commitment

After E.P. served his thirty-day commitment, API petitioned for an additional ninety-day commitment<sup>56</sup> pursuant to section 47.30.755(a) of the Alaska Statutes.<sup>57</sup> Dr. Khari was again the only witness for the

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47. *Id.*

48. *Id.*

49. Section 2(b) of the Alaska Rules of Probate Procedure provides that a "master's report is not binding until approved by a superior court judge" but also that a "master's order of commitment to a treatment facility is effective pending superior court review." ALASKA R. PROB. P. § 2(b). Thus, during the commitment proceedings when the superior court makes a finding, it is acting off a recommendation from the standing master.

50. *E.P.*, 205 P.3d at 1104-05.

51. Section 47.30.735(c) of the Alaska Statutes states that a court may commit an individual for thirty days if it finds by clear and convincing evidence that the individual is "mentally ill and as a result likely to cause harm to [himself] or others or is gravely disabled." ALASKA STAT. § 47.30.735(c) (2010).

52. *E.P.*, 205 P.3d at 1104.

53. *Id.*

54. *Id.*

55. *Id.* at 1105.

56. *Id.*

57. Section 47.30.755(a) of the Alaska Statutes states that after the time limit specified in section 47.30.735(c), a court may commit an individual for ninety days if it finds by clear and convincing evidence that the individual is "mentally ill and as a result likely to cause harm to [himself] or others, or is gravely disabled." ALASKA STAT. § 47.30.755(a) (2010).



State.<sup>58</sup> She testified that E.P.'s condition had not changed since the last hearing and reiterated that he had not exhibited any dangerous behavior at the hospital.<sup>59</sup> Master Brown recommended that E.P. be committed on the grounds of grave disability and again did not find that he was a danger to himself or others.<sup>60</sup> During the superior court's review of Master Brown's recommendation, E.P. objected on the same grounds as before—that if he was committed because he was gravely disabled, API was statutorily required to show a reasonable belief that he would improve with treatment.<sup>61</sup> API argued alternatively that "other people could be harmed as a result of [E.P.'s] choice to drink and abuse substances"—again referring to the children of E.P.'s sister.<sup>62</sup> The superior court and API agreed with E.P. that it was error to commit him based on the theory that he was gravely disabled because he would not improve with treatment.<sup>63</sup> However, the superior court concluded that the evidence provided at both the thirty-day and ninety-day commitment hearings supported the finding that E.P. was a danger to himself.<sup>64</sup>

#### E. The 180-Day Commitment

When E.P.'s ninety-day commitment expired, API petitioned for a 180-day commitment<sup>65</sup> pursuant to section 47.30.770(b) of the Alaska Statutes.<sup>66</sup> The facts of this commitment are largely similar to the first two: Dr. Khari was the only witness, and she testified that E.P. had not shown any dangerous behavior except his desire to huff.<sup>67</sup> However, this time a different standing master found E.P. both gravely disabled and a danger to himself.<sup>68</sup> E.P. again objected, but nevertheless the superior court judge committed him upon a finding that he was a danger to himself.<sup>69</sup>

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58. *E.P.*, 205 P.3d at 1105.

59. *Id.*

60. *Id.*

61. *Id.* (citing ALASKA STAT. § 47.30.655(6) (2010)).

62. *E.P.*, 205 P.3d at 1105 (internal quotation marks omitted).

63. *Id.* at 1106; Brief of Appellant, *supra* note 40, at 11.

64. Brief of Appellant, *supra* note 40, at 12.

65. *E.P.*, 205 P.3d at 1105.

66. Section 47.30.770(b) of the Alaska Statutes states that if a court finds by clear and convincing evidence that the grounds set out in section 47.30.775 are present, then the court may order an individual committed for an additional 180 days from the date that the ninety-day treatment period would have expired. ALASKA STAT. § 47.30.770(b) (2010).

67. *E.P.*, 205 P.3d at 1105.

68. *Id.* at 1105–06.

69. *Id.* at 1106.

## II. THE ALASKA SUPREME COURT'S OPINION

Although all three of E.P.'s commitments had expired and E.P. had passed away by the time his case reached the Alaska Supreme Court, the court nevertheless opted to decide the otherwise-moot case because the questions that it raised are likely to be repeated and are important to the public interest.<sup>70</sup> The court reviewed findings of fact for clear error and questions of law and statutory interpretation *de novo*.<sup>71</sup>

The court first dealt with the disparity in the language of sections 47.30.655 and 47.30.730 of the Alaska Statutes.<sup>72</sup> Section 47.30.655 was added in 1981 and is the preamble that applies to the other sections of the Alaska Statutes that govern civil commitments.<sup>73</sup> It states that "persons who are mentally ill *but not dangerous to others* [can] be committed only if there is reasonable expectation of improving their mental condition."<sup>74</sup> On the other hand, section 47.30.730, which governs thirty-day commitments, only requires the State to show that there is reasonable expectation of improvement for individuals who are gravely disabled.<sup>75</sup> The plain reading of section 47.30.655 suggests that the State must show a likelihood of improvement for persons who are dangerous to themselves and persons who are gravely disabled, but section 47.30.730 imposes this requirement only when the person is gravely disabled.<sup>76</sup> The court held that the substantive statute (section 47.30.730) controls over the preamble (section 47.30.655), so the State needs to show likelihood of improvement only for individuals who are gravely disabled.<sup>77</sup>

The problem was that E.P. was committed because he was a danger to himself<sup>78</sup> and the statutes were unclear as to whether a showing of potential improvement was required.<sup>79</sup> The court rejected E.P.'s argument that the Legislature intended for those who are likely to harm themselves to be treated equally to gravely disabled individuals.<sup>80</sup> The court reasoned that the opinion from *Wetherhorn v. Alaska Psychiatric*

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70. *Id.* at 1106-08 (citing *Akpik v. State*, 115 P.3d 532, 536 (Alaska 2005) (articulating three factors courts consider when deciding whether to hear moot cases)).

71. *Id.* at 1106.

72. *Id.* at 1108.

73. *Id.* The statute was revised by 1981 Alaska Sess. Laws ch. 84, § 1.

74. ALASKA STAT. § 47.30.655(6) (2010) (emphasis added).

75. § 47.30.730.

76. *See* §§ 47.30.655(6), 47.30.730.

77. *E.P.*, 205 P.3d at 1108-09.

78. *See id.*

79. *See* §§ 47.30.655(6), 47.30.730(3).

80. *E.P.*, 205 P.3d at 1108-09, 1112.

*Institute*<sup>81</sup> distinguished the two groups, explaining that whereas “danger to self” is concerned with active inclinations to inflict harm, “grave disability” is more concerned with an inability to function.<sup>82</sup> Therefore, the court concluded that if E.P. was committed because he was a danger to himself, API did not have to show that he would probably improve with treatment at the facility.<sup>83</sup>

The court then analyzed whether API had met its burden in showing that E.P.’s commitment was necessary.<sup>84</sup> API first needed to prove by clear and convincing evidence that E.P. was afflicted with a mental illness.<sup>85</sup> It did so by showing that E.P.’s organic brain damage qualified as a separate mental illness from his drug addiction and impaired his ability to exercise judgment.<sup>86</sup>

Next, the court analyzed whether API had met its burden of proving by clear and convincing evidence that E.P. was likely to cause harm to himself or others.<sup>87</sup> Section 47.30.735(c) of the Alaska Statutes allows commitment of people who are “likely to cause harm to [self] or others” but does not define what “likely to cause harm” means.<sup>88</sup> The court relied on the following definition of “likely to cause serious harm” from a different section of the statute:<sup>89</sup>

A person who (A) poses a substantial risk of bodily harm to that person’s self, as manifested by recent behavior causing, attempting, or threatening that harm; (B) poses a substantial risk of harm to others as manifested by recent behavior causing, attempting, or threatening harm, and is likely in the near future to cause physical injury, physical abuse, or substantial property damage to another person; or (C) manifests a current intent to carry out plans of serious harm to that person’s self or another.<sup>90</sup>

The court concluded that E.P.’s intent to continue to huff substances qualified as recent behavior causing a substantial risk of

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81. 156 P.3d 371 (Alaska 2007).

82. *E.P.*, 205 P.3d at 1109 (quoting *Wetherhorn*, 156 P.3d at 376).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1110.

88. ALASKA STAT. § 47.30.735(c) (2010).

89. *E.P.*, 205 P.3d at 1110 (citing ALASKA STAT. § 47.30.915(10) (2008)).

90. § 47.30.915(10).

bodily harm to self and a current intent to carry out plans of serious harm.<sup>91</sup>

The court found no need to address the issue of whether E.P. was a danger to others because it found that he was a danger to himself.<sup>92</sup> Affirming all of E.P.'s commitments, the court held that the statutes did not require API to show that E.P. was likely to improve with treatment.<sup>93</sup>

### III. THE LEGAL BACKGROUND OF INVOLUNTARY COMMITMENT

Part IV will discuss specifically why the Alaska Supreme Court should not have affirmed E.P.'s commitment. However, it is important first to understand what involuntary commitments entail and how these commitments have previously been treated by the law.

#### A. Involuntary Commitments are a Substantial Deprivation of Liberty

"[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'"<sup>94</sup> Courts have acknowledged that involuntary commitments substantially deprive individuals of freedom in its most basic aspects<sup>95</sup> and are a "direct form of physical restraint."<sup>96</sup> This is the reason why the United States criminal justice system hinges on the maxim, "innocent until proven guilty," which requires the state to prove beyond a reasonable doubt that it is justified in incarcerating an individual and taking away his constitutionally protected liberties.<sup>97</sup>

Criminals are not the only individuals who are routinely committed to locked institutions against their will—states also often commit mentally ill individuals to mental hospitals. It is difficult to avoid the fact that civil commitments also result in the "destruction of an individual's personal freedoms" that are "scarcely less total than that effected by confinement in a penitentiary."<sup>98</sup> Like criminals, those civilly committed are often locked in small rooms, deprived of access to their own bank accounts, forced to conform to strict daily routines, and given

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91. *E.P.*, 205 P.3d at 1110.

92. *Id.* at 1111.

93. *Id.* at 1112.

94. *In re Gault*, 387 U.S. 1, 50 (1967).

95. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425–26 (1979).

96. *In re Roulet*, 590 P.2d 1, 7 (Cal. 1979) (citing *In re Roger S.*, 569 P.2d 1286, 1291 (Cal. 1977)).

97. *See, e.g., Addington*, 441 U.S. at 423–24.

98. *Roulet*, 590 P.2d at 4.

drugs against their will.<sup>99</sup> In addition, the stigmatizing consequences and the mandatory behavior modifications associated with mental hospitals amount to a “grievous loss” even to a prisoner being transferred from a prison to a mental hospital.<sup>100</sup>

Not only do individuals who are civilly committed suffer from physical restraints and the loss of important rights, they also suffer from severe social stigma, which in some cases is even more debilitating than the other consequences of involuntary commitments.<sup>101</sup> Many people have an “irrational fear of the mentally ill” and view them with “distrust and even loathing.”<sup>102</sup> The mentally ill are often victimized and treated as social outcasts, which lowers their confidence and self-esteem and affects their ability to obtain employment.<sup>103</sup> Furthermore, a significant portion of society assumes that all mentally ill individuals are dangerous.<sup>104</sup>

Because so many personal rights are at stake when a person is committed to a mental hospital, the Supreme Court of the United States held that a state may not commit an individual unless the length and type of commitment relate to the state’s reason for the commitment.<sup>105</sup> A state can civilly commit individuals under the reach of its *parens patriae* powers to provide care to citizens who are not able to care for themselves or under its police power to protect the public from particularly dangerous individuals when it is “reasonably necessary”

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99. *See id.* at 5–6.

100. *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

101. *Roulet*, 590 P.2d at 6–7; *Addington*, 441 U.S. at 425–26; *see also* Patrick W. Corrigan et al., *Structural Levels of Mental Illness Stigma and Discrimination*, 30 SCHIZOPHRENIA BULL. 481, 482–85, 489 (2004).

102. *Roulet*, 590 P.2d at 7 (internal quotation marks omitted); *see also* Peter Byrne, *Stigma of Mental Illness and Ways of Diminishing It*, 6 ADVANCES IN PSYCHIATRIC TREATMENT 65, 65–67 (2000); Jack K. Martin et al., *Of Fear and Loathing: The Role of 'Disturbing Behavior,' Labels, and Causal Attributions in Shaping Public Attitudes toward People with Mental Illness*, 41 J. HEALTH & SOC. BEHAV. 208, 215–20 (2000); Otto K. Wahl, *Mental Health Consumers' Experience of Stigma*, 25 SCHIZOPHRENIA BULL. 467, 470–71 (1999).

103. *See* *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 378 (Alaska 2007); *see also* Wahl, *supra* note 102, at 470–72.

104. Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1332–33 (1999); J.C. Phelen & B.G. Link, *The Growing Belief that People with Mental Illnesses are Violent: The Role of the Dangerousness Criterion for Civil Commitment*, 33 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY (SUPP.) S7, S7–S8, S10 (1998). In reality, according to a recent statistical study, severe mental illness alone is not a good predictor of violent behavior, although the relationship is complicated. *See* Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder*, 66 ARCHIVES GEN. PSYCHIATRY 152, 155–59 (2009) (“[S]evere mental illness is not a robust predictor of future violence....”).

105. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

and not “duly oppressive.”<sup>106</sup> However, these powers do not extend so far as to allow a state to commit an individual solely upon a finding that the individual is mentally ill.<sup>107</sup> Therefore, many states’ commitment statutes mandate a finding of both mental illness and either: (1) grave disability, in which case the state has *parens patriae* power<sup>108</sup> because the person is so debilitated that he cannot care for himself; or (2) some form of dangerousness, in which case the state has police power to protect the public from the individual.<sup>109</sup> Aside from these two government interests, the main purpose of civil commitment is to treat the mentally ill, not to punish them.<sup>110</sup>

Mentally ill individuals should be placed in outpatient treatment centers whenever doing so would still allow the state to achieve its goals because community treatment centers are usually “less restrictive” than mental hospitals.<sup>111</sup> Recognizing the importance of establishing outpatient treatment centers, President Jimmy Carter formed the Commission on Mental Health, the purpose of which was to create a large national network of community programs, including halfway houses, family and group homes, private hospitals, foster-care facilities, and community mental health centers.<sup>112</sup> The Commission recommended at least \$275 million from Congress be used to establish these community-based programs so that the number of patients in mental hospitals could be decreased.<sup>113</sup> Even though Congress eventually rejected this recommendation, the proposal provided a model for states to follow.<sup>114</sup> Further, the Americans with Disabilities Act<sup>115</sup> mandates that public entities must administer treatment programs in the most integrated setting possible while still meeting the needs of the mentally ill.<sup>116</sup>

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106. *Addington*, 441 U.S. at 426.

107. *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

108. *Parens patriae* is “[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

109. *See, e.g.*, ALASKA STAT. §§ 47.30.655–770 (2010); ALA. CODE § 22-52-37 (2010); ARK. CODE ANN. § 20-47-207 (2010); UTAH CODE ANN. § 62A-15-631 (West 2011).

110. *Hickey v. Morris*, 722 F.2d 543, 546–47 (9th Cir. 1983); *Addington*, 441 U.S. at 428.

111. *See Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

112. Meredith Karasch, Note, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California’s Mental Illness System*, 54 HASTINGS L.J. 493, 501 (2003).

113. *Id.* at 502.

114. *Id.*

115. 42 U.S.C. §§ 12181–12189 (2010).

116. *See id.*

The State of Alaska has also recognized the rights of the mentally ill through its civil commitment statutes<sup>117</sup> and three recent Alaska Supreme Court cases.<sup>118</sup> In *Myers*, the court ruled that drugs may not be administered to mentally ill individuals without consent unless the court finds that the medication is in the best interests of the patient and there are no less intrusive alternatives.<sup>119</sup> The *Wetherhorn* court held that in order to be involuntarily committed on a theory of grave disability, an individual must be so substantially incapacitated that he “is incapable of surviving safely in freedom.”<sup>120</sup> Finally, the court in *Wayne B.* ruled that a mentally ill individual has the right to transcripts from his commitment hearings and failure to provide these transcripts can result in reversible error.<sup>121</sup>

### **B. The Substantial Deprivation of Rights in Involuntary Commitments Triggers an Elevated Standard of Proof**

Under Alaska law, as required by the United States Supreme Court’s decision in *Addington v. Texas*,<sup>122</sup> the State always carries the burden of proving that a commitment is necessary, either because the individual is gravely disabled or because he is a danger.<sup>123</sup> In *Addington*, the Supreme Court confronted the problem of what standard of proof due process requires states to apply in civil commitment proceedings and decided that states must prove that the commitment is necessary by at least clear and convincing evidence.<sup>124</sup> The standard of proof must “reflect[] the value society places on individual liberty” and minimize the risk of a wrong judgment.<sup>125</sup> The Court reasoned that an individual’s interest in the outcome of a civil commitment proceeding is so grave that due process requires a standard that is higher than the preponderance of the evidence standard that is usually applied in civil cases.<sup>126</sup>

The Court considered using the beyond a reasonable doubt standard, which is applied in criminal cases,<sup>127</sup> but concluded that this

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117. ALASKA STAT. §§ 47.30.655–770 (2010).

118. *Wayne B. v. Alaska Psychiatric Inst.*, 192 P.3d 989 (Alaska 2008); *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371 (Alaska 2007); *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238 (Alaska 2006).

119. *Myers*, 138 P.3d at 239.

120. *Wetherhorn*, 156 P.3d at 384.

121. *Wayne B.*, 192 P.3d at 991.

122. 441 U.S. 418, 427 (1979).

123. ALASKA STAT. § 47.30.755(c) (2010).

124. *Addington*, 441 U.S. at 433.

125. *See id.* at 425 (citations omitted).

126. *Id.* at 427.

127. *Id.*

standard of proof is not necessary because in civil commitment proceedings, states do not exercise their power in a punitive sense. Additionally, erroneous commitments can be avoided by the “layers of professional review and observations of the patient’s condition, and the concern of family and friends.”<sup>128</sup> Further, it would be too difficult for states to prove the elements of a civil commitment beyond a reasonable doubt because the evidence usually consists only of psychologists’ and psychiatrists’ expert testimonies, which are fallible.<sup>129</sup> The Court settled on the clear and convincing standard as a minimum but left it to the states to decide whether to apply a higher standard.<sup>130</sup>

The Alaska Legislature adopted the clear and convincing evidence standard,<sup>131</sup> and the Alaska Supreme Court has recognized the importance of adhering to that standard because “there is a danger that the mentally ill may be confined merely because they are physically unattractive or socially eccentric.”<sup>132</sup> Further, the court realized that an individual could potentially be committed solely for displaying an abnormal behavior that is seen by some as a sign of a mental or emotional disorder even though it falls within the normal range of acceptable behavior.<sup>133</sup> The use of the clear and convincing standard helps ensure that only those who truly need to be committed are subject to the confines of mental hospitals.<sup>134</sup>

### C. The Difficulties of Defining “Dangerousness”

One aspect of commitment statutes that courts have struggled with is how to define “dangerousness.” The problem began when the Supreme Court of the United States found that a state cannot constitutionally confine a non-dangerous individual without proving why the commitment is necessary either for the individual or for society.<sup>135</sup>

This holding created a need for the states to define the dangerousness requirement. The dangerousness requirement varies by state, but there are three major categories of statutes: (1) those that

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128. *Id.* at 428–29.

129. *Id.* at 429.

130. *Id.* at 432–33.

131. ALASKA STAT. § 47.30.735(c) (2010).

132. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 378 (Alaska 2007) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)) (internal quotation marks omitted).

133. *Id.*

134. *Addington*, 441 U.S. at 425–26.

135. *O’Connor*, 422 U.S. at 576.



require evidence of a recent dangerous overt act; (2) those that require an imminent threat that the dangerous behavior is likely to occur again; and (3) those that require only that the person pose a substantial risk of harm to himself or others.<sup>136</sup> However, there are problems with all three standards. It is difficult to decide what kind of behavior constitutes a recent dangerous overt act. There is no evidence that a recent overt act makes a future one more likely, and basing a commitment on a recent overt act turns the commitment from a preventative measure into a punishment for past behavior.<sup>137</sup> The imminent threat requirement involves a large amount of speculation and is unreliable, and the substantial risk standard, which Alaska uses, is vague.<sup>138</sup> The overt act and imminent threat standards tend to be underinclusive—they do not encompass some individuals who are dangerous and should be committed. On the other hand, the substantial risk of harm standard tends to be overinclusive in that it allows some individuals to be committed when they are not dangerous.<sup>139</sup>

In most commitment hearings, the majority of the evidence presented comes from psychologists' expert testimonies.<sup>140</sup> Prediction of dangerousness involves two parts: identifying relevant risk factors and allocating the appropriate weight to each factor.<sup>141</sup> Studies have shown that people struggle greatly with objectively predicting dangerousness because humans allow preconceived notions to influence their perception of the data.<sup>142</sup> Other obstacles include "[o]verconfidence, hindsight bias, and the inability to assess covariation accurately."<sup>143</sup> Clinicians' predictions result in false positives, or commitment of those who are not dangerous, about fifty-four to eighty percent of the time and are no more accurate than flipping a coin.<sup>144</sup> Another study found that only one out of three people whom clinicians predicted to be dangerous actually engaged in dangerous behavior.<sup>145</sup>

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136. David T. Simpson, *Involuntary Civil Commitment: The Dangerousness Standard and its Problems*, 63 N.C. L. REV. 241, 247 (1984).

137. *Id.* at 249–51.

138. *Id.* at 250.

139. *See id.* at 252.

140. *See* *Addington v. Texas*, 441 U.S. 418, 429 (1979).

141. M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, 1194 (2008).

142. *Id.* at 1194–95.

143. *Id.* at 1195.

144. *See id.* at 1175.

145. Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REV. 43, 47 (1994).

Use of actuarial methods, which consist of plugging variables like past behavior and test responses into a formula, have consistently been more reliable than human judgment.<sup>146</sup> Even with these methods—the accuracy of which exceeds chance—many nonviolent individuals would need to be committed to stop one violent act.<sup>147</sup>

The unreliability of expert testimony regarding dangerousness is especially troublesome because juries, who are often impressed by these witnesses' credentials, may give special weight to experts' testimonies.<sup>148</sup> Further, juries are easily impressed by irrelevant factors such as the expert's appearance or speaking ability.<sup>149</sup> Contrary to popular opinion, the American Psychiatric Association itself concluded: "[N]either psychiatrists nor anyone else ha[s] demonstrated an ability to predict future violence or dangerousness," and "the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."<sup>150</sup> Along the same lines, Justice Blackmun once stated that mental health professionals' predictions of dangerousness are so unreliable that they should be constitutionally impermissible in capital cases.<sup>151</sup>

#### IV. E.P.: NOT TO COMMIT

Keeping in mind the severe effects of involuntary commitment, the high standard of proof that is required in commitment hearings, and the fact that it is difficult to define dangerousness and to predict whether someone will be dangerous, E.P. was wrongfully committed for three main reasons. First, E.P. was gravely disabled and not a danger to himself, but the State could not commit E.P. for being gravely disabled without showing that he would improve with treatment. Second, because the State was statutorily precluded from pursuing the gravely disabled theory, it was forced to pursue the theory that E.P. was a danger to himself and failed to meet its burden of proving his dangerousness with clear and convincing evidence. Third, even if E.P. was a danger to himself, the State was still required to show that he would likely improve with treatment during his commitment, and it failed to do so. Due to ambiguity in the statutes and the Alaska Supreme

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146. Browne & Harrison-Spoerl, *supra* note 141, at 1193, 1198; Alec Buchanan, *Risk of Violence by Psychiatric Patients: Beyond the "Actuarial Versus Clinical" Assessment Debate*, 59 PSYCHIATRIC SERVICES 184, 184 (2008).

147. Buchanan, *supra* note 146, at 188.

148. Browne & Harrison-Spoerl, *supra* note 141, at 1132-37.

149. *Id.* at 1136-37.

150. Otto, *supra* note 145, at 49 (citations omitted).

151. *Barefoot v. Estelle*, 463 U.S. 880, 923-24 (1983) (Blackmun, J., dissenting).

Court's misinterpretation of this ambiguity, the State was relieved of its burden of proving that E.P. would improve with treatment.

As the Supreme Court of the United States recognized, civil commitments are a "grievous loss" to the patient because of the stigmatizations and mandatory behavior modifications associated with mental hospitals.<sup>152</sup> In fact, E.P. may have been better off had he been charged with a crime because criminals are afforded several due process rights that are not available to those who are civilly committed.<sup>153</sup> For example, he would have had the right to have a maximum time limit to his commitment.<sup>154</sup> Instead, he was deprived of his due process rights and committed to API with little evidence and even less effort to help treat his illness through less restrictive means.<sup>155</sup> As a result, he was taken away from his family and forced to comply with hospital restrictions without receiving the benefit of treatment.<sup>156</sup>

#### **A. E.P. Was More Likely Gravely Disabled than a Danger to Himself**

The State of Alaska cannot commit mentally ill individuals unless it can show that they are either gravely disabled, a danger to themselves, or a danger to others.<sup>157</sup> Even though Master Brown,<sup>158</sup> who was the factfinder during E.P.'s first two hearings, found that E.P. was gravely disabled and refused to find that he was a danger,<sup>159</sup> the Alaska Supreme Court ultimately approved E.P.'s commitment because it held that the superior court was justified in finding that he was a danger to himself.<sup>160</sup> The State had more evidence showing E.P. was gravely disabled than it did showing he was a danger to himself or others.<sup>161</sup> However, the State chose to pursue the theory that E.P. was a danger because the State explicitly admitted that E.P. could not improve, and so it could not commit him for being gravely disabled.<sup>162</sup>

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152. *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

153. *See, e.g.*, ALASKA STAT. §§ 12.47.100, 12.47.110 (2010).

154. § 12.47.110.

155. *See* Brief of Appellant, *supra* note 40, at 14.

156. *See* E.P. v. Alaska Psychiatric Inst., 205 P.3d 1101, 1104 (Alaska 2009).

157. *See* ALASKA STAT. § 47.30.730 (2010).

158. This refers to Master Andrew Brown, who conducted the thirty-day hearings. Brief of Appellant, *supra* note 40, at 3. Master Jonathon Lack, who conducted the 180-day commitment hearing, found that E.P. was both gravely disabled and likely to harm himself. *Id.* at 14.

159. *E.P.*, 205 P.3d at 1104.

160. *Id.* at 1112.

161. *See id.* at 1104.

162. *See id.*

Even though the superior court and the Alaska Supreme Court had the right to review the standing master's findings,<sup>163</sup> appellate courts should nevertheless give some deference to the fact that the standing master was the only one who actually heard Dr. Khari and E.P. testify.<sup>164</sup> The standing master was in the best position to determine whether E.P. was gravely disabled or a danger based on E.P.'s demeanor in court and the doctor's testimony, and he concluded that E.P. was gravely disabled, *not a danger*.<sup>165</sup>

Master Brown was correct in his conclusion that E.P. was gravely disabled. According to section 47.30.915 of the Alaska Statutes, a person who is gravely disabled is in "danger of physical harm arising from complete neglect for . . . personal safety as to render serious accident, illness, or death highly probable if care by another is not taken" or, if not treated, will suffer from severe abnormal mental distress "associated with significant impairment of judgment, reason, or behavior."<sup>166</sup> E.P. fulfills not just one but both of these elements. First, he neglected his personal safety because he chose to huff even though it had already caused some brain damage.<sup>167</sup> Second, E.P. suffered from brain damage, which impaired his judgment.<sup>168</sup> For example, Master Brown found that E.P. "cannot perceive and understand reality" and "[h]is judgment is extremely poor and he is unable to make rational decisions."<sup>169</sup> Further, Dr. Khari, the witness for the State, testified that E.P. "lacks insight and judgment and cannot understand how huffing gas harms him."<sup>170</sup>

However, as E.P. pointed out to the superior court judge, he could not be committed for being gravely disabled because the extent of his brain damage precluded any improvement with treatment at API.<sup>171</sup> Both parties agreed that the Alaska Statutes<sup>172</sup> require the State to show that a person who is committed for being gravely disabled could improve with treatment,<sup>173</sup> whereas it was debated whether this requirement is present for those who are a danger to themselves.<sup>174</sup> Therefore, the State conceded E.P.'s point and decided to pursue the

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163. *See id.* at 1106.

164. *See id.* at 1104.

165. *See id.*

166. ALASKA STAT. § 47.30.915(7) (2010).

167. *E.P.*, 205 P.3d at 1104.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* ALASKA STAT. § 47.30.730(3) (2010).

173. *E.P.*, 205 P.3d at 1104.

174. *See id.* at 1108.

theory that E.P. was a danger to himself.<sup>175</sup> But this theory failed for two reasons: E.P. was not a danger to himself, and even if he was, the State still had to show that he could have improved with treatment.

**B. The State Failed to Meet its Burden of Proving that E.P. Was Likely to Harm Himself**

API failed to show that E.P. was a danger by clear and convincing evidence, which is the minimum standard of proof that is required by the U.S. Constitution<sup>176</sup> and section 47.30.755 of the Alaska Statutes. The only evidence that the State put forth was the testimony of Dr. Khari, a psychologist that worked at API, who repeatedly stated that E.P. displayed no dangerous behavior while he was committed (although she did say that he would resume huffing if released).<sup>177</sup> Further, the statutes do not clearly define “dangerousness,”<sup>178</sup> thus leaving a lot of discretion to the courts.

As a result of the dearth of evidence, there were several inconsistencies among the opinions of the standing masters, the superior court, and the Alaska Supreme Court, and among the findings for the thirty-, ninety-, and 180-day commitments. At the thirty- and ninety-day commitment hearings, the standing master found that E.P. was gravely disabled but did not find that he was a danger to himself or others.<sup>179</sup> At the 180-day commitment hearing, a different standing master found that E.P. was both gravely disabled and a danger to himself.<sup>180</sup> The superior court committed E.P. for thirty days without elaborating on whether it found him gravely disabled or a danger to himself or others.<sup>181</sup> For the ninety- and 180-day commitments, the superior court agreed that E.P. was a danger to himself and found that he was not gravely disabled.<sup>182</sup> The Alaska Supreme Court found all three commitments were justified because E.P. was a danger to himself.<sup>183</sup>

Dr. Khari’s testimony did not show that E.P. was a danger to himself by clear and convincing evidence. Dr. Khari did identify some risk factors during her testimony: E.P. had a history of huffing gas and using alcohol; he expressed a desire to continue engaging in these

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175. Brief of Appellant, *supra* note 40, at 11–12.

176. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

177. *See E.P.*, 205 P.3d at 1105.

178. *See ALASKA STAT. § 47.30.915* (2010).

179. *E.P.*, 205 P.3d at 1104–05.

180. *Id.* at 1105.

181. *Id.*

182. *Id.* at 1105–06.

183. *Id.* at 1112.

activities; and because of his brain damage, he lacked insight and judgment.<sup>184</sup> However, she also testified that E.P. exhibited no dangerous behavior<sup>185</sup> and that he was a model patient at API.<sup>186</sup> These statements taken together do not amount to clear and convincing evidence that E.P. was a danger to himself. As discussed above, fifty-four to eighty percent of the individuals that experts predict will be dangerous do not later exhibit any dangerous behavior at all.<sup>187</sup> Thus, reasonable doubts regarding predictions of a person's future dangerousness, like the doubts presented by Dr. Khari's testimony, should be resolved in favor of finding the person not dangerous.

One of the reasons why the Supreme Court of the United States concluded that a clear and convincing standard, rather than a higher standard, should be used in civil commitment hearings is that erroneous commitments can be avoided or corrected by "layers of professional review and observation[s] of the patient's condition, and the concern of family."<sup>188</sup> Here, E.P. was not given layers of professional review because only one doctor testified at all three of his hearings.<sup>189</sup> Concern of family did end up being a factor in E.P.'s case because E.P.'s family was willing to help; his sister was willing to take care of E.P. so that he would not have to live in a hospital.<sup>190</sup> However, this fact was actually used against E.P. because the courts believed that he would be a poor role model for his sister's children.<sup>191</sup> Therefore, not only did the State fail to meet its burden of proof, but the safeguards that the Supreme Court predicted would prevent wrongful commitments failed to protect E.P.<sup>192</sup>

### C. Those Who are Harmful to Themselves Can Be Committed Only When the State Shows They Will Improve With Treatment

Even if E.P. was a danger to himself, the State was statutorily required to show that there was a reasonable expectation that his mental condition would improve, which was a burden that the State failed to carry. The Alaska Legislature acknowledged that the rights of the mentally ill must be protected by ensuring that commitments are

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184. *Id.* at 1104.

185. *Id.* at 1105.

186. *Id.* at 1104.

187. Browne & Harrison-Spoerl, *supra* note 141, at 1175.

188. *Addington v. Texas*, 441 U.S. 418, 428-29 (1979).

189. *E.P.*, 205 P.3d at 1104-05.

190. *Id.* at 1104.

191. *Id.*

192. *See Addington*, 441 U.S. at 428-29.

primarily used for treatment unless the safety of others is at stake.<sup>193</sup> Therefore, it enacted section 47.30.655 of the Alaska Statutes (hereinafter “the preamble”), which states the principle “that persons who are mentally ill *but not dangerous to others* be committed only if there is reasonable expectation of improving their mental condition.”<sup>194</sup> This means that the State was required to show that E.P.’s condition would improve at the mental hospital because he was found to be a danger to himself, not to others. The parties agreed that E.P. would likely never improve with any kind of treatment and that the reason he was kept at API was to keep him from having access to gasoline.<sup>195</sup> E.P.’s commitment was a direct contradiction of the Legislature’s intent to protect the rights of mentally ill individuals who are not a danger to others.

The Alaska Supreme Court wrongly reasoned that section 47.30.730 of the Alaska Statutes, which requires the State to show that there is reasonable expectation of improvement only for individuals who are gravely disabled, trumps the preamble.<sup>196</sup> The relevant part of section 47.30.730 states: “[W]ith respect to a gravely disabled respondent [the State must show that] there is reason to believe that the respondent’s mental condition could be improved by the course of treatment sought.”<sup>197</sup> In other words, section 47.30.730 states that gravely disabled individuals must reasonably improve with treatment whereas the preamble states that all groups *except those who are dangerous to others* must reasonably improve with treatment.

The Alaska Supreme Court itself stated that “it is an established principle of statutory construction that all sections of an act are to be construed together so that all have meaning and no section conflicts with another.”<sup>198</sup> The two sections do not contradict each other because although section 47.30.730 does not specifically mention that those who are dangerous to themselves must reasonably improve with treatment, it does not preclude the requirement.<sup>199</sup> Further, the court has also stated that when a “section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible.”<sup>200</sup> Section 47.30.730 deals with the

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193. See ALASKA STAT. § 47.30.655 (2010).

194. § 47.30.655(6) (emphasis added).

195. *E.P.*, 205 P.3d at 1104.

196. *Id.* at 1108.

197. § 47.30.730(3).

198. *N. Alaska Envtl. Ctr. v. State, Dep’t of Natural Res.*, 2 P.3d 629, 635 (Alaska 2000) (quoting *In re Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978)).

199. See §§ 47.30.730, 47.30.655.

200. *N. Alaska Envtl. Ctr.*, 2 P.3d at 635 (quoting *Hutchinson*, 577 P.2d at 1075).

subject in specific terms because it mentions people who are gravely disabled in particular, whereas the preamble deals with the subject generally by encompassing all individuals besides those who are dangerous to others.<sup>201</sup> One can harmonize these two sections by reading them to mean that all individuals who are not dangerous to others (including those who are gravely disabled) must improve with treatment in order to be involuntarily committed.

The statutes should be read to require a showing of reasonable improvement for those who are dangerous to themselves because the Alaska Supreme Court seeks to “give effect to the intent of the Legislature.”<sup>202</sup> The Alaska Legislature wrote the preamble for a reason—to make its intent clear. The Legislature chose to write specifically that persons who are mentally ill but not dangerous to others must reasonably be expected to improve with treatment in order to be committed. The preamble clearly states in its first sentence that it applies to sections “47.30.660 and 47.30.670–47.30.915” of the Alaska Statutes, and section 47.30.730 falls within this range.<sup>203</sup> Therefore, the Alaska Legislature did not intend for section 47.30.730 to trump the preamble.

In *Wetherhorn*, the Alaska Supreme Court stated that it interprets the Alaska Statutes “in light of precedent, reason, and policy.”<sup>204</sup> Reading the Alaska Statutes to require a showing of probable improvement for those who are dangerous to themselves is consistent with precedent and policy.<sup>205</sup> In the three most recent cases regarding involuntary commitments, the Alaska Supreme Court construed the law in favor of expanding rights for the mentally ill.<sup>206</sup> The court’s reading of

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201. §§ 47.30.730, 47.30.655.

202. *See N. Alaska Envtl. Ctr.*, 2 P.3d at 634 (citing *In re Johnstone*, 2 P.3d 1226, 1231 (Alaska 2000)).

203. §§ 47.30.730, 47.30.655.

204. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 375 (Alaska 2007).

205. *Cf. Wayne B. v. Alaska Psychiatric Inst.*, 192 P.3d 989 (Alaska 2008); *Wetherhorn*, 156 P.3d 371; *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238 (Alaska 2006).

206. *See Wayne B.*, 192 P.3d at 990 (vacating orders committing a patient and requiring administration of psychotropic drugs on the grounds that the lower court erred in not transcribing the standing master’s original hearing on the matter); *Wetherhorn*, 156 P.3d at 374 (holding “that the definition of ‘gravely disabled’ in AS 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving safely in freedom”); *Myers*, 138 P.3d at 239 (holding that unless there is an emergency, a state may only administer psychotropic drugs to a non-consenting patient if a court determines that the “medication is in the best interests of the patient and no less intrusive alternative treatment is available”).



the statutes in this case directly contradicts the trend towards protecting the rights of individuals who have been involuntarily committed.

The Alaska Legislature recognized the importance of requiring the State to show that a person who is dangerous to himself will improve with treatment.<sup>207</sup> However, this requirement was ignored in E.P.'s case. API openly admitted that E.P.'s condition would not improve and that the sole purpose of his commitment was to keep him in a locked facility to prevent him from getting access to gasoline.<sup>208</sup> Had the commitment statutes been correctly interpreted, E.P.'s commitment would not stand because he was not being treated for his condition and because the State would not have been able to meet its burden of proving all of the requisite elements of a civil commitment.

A better way to treat E.P.'s condition would have been to put him in a specialty outpatient substance abuse program or treatment center. Treatments for inhalant addicts are complicated and require more resources than treatments for people addicted to other types of drugs.<sup>209</sup> However, there was no real effort to find E.P. an appropriate treatment center that could provide these resources either in Alaska or in another state.<sup>210</sup> The Alaska Statutes require that the commitment be the least restrictive possible,<sup>211</sup> and API was not the least restrictive alternative for E.P. In fact, Dr. Khari admitted that "the only benefit that API provided was the structure of a locked facility."<sup>212</sup> Furthermore, simply locking up inhalant addicts and providing no other treatment is not a recommended method of dealing with inhalant abuse.<sup>213</sup>

#### D. Suggested Alterations to the Current Commitment System

The wrongful commitment of E.P. should be used as an example to prevent future wrongful commitments. This case helped shed light on

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207. See § 47.30.655(6). This section requires "that persons who are mentally ill but not dangerous to others be committed only if there is a reasonable expectation of improving their mental condition." *Id.* This wording places mentally ill individuals into two groups: those who are dangerous to others and those who are not dangerous to others. Because the statute does not identify to which group those who are a danger to themselves belong, the literal reading suggests that they belong to the latter group. Thus, they can be committed only if there is a reasonable expectation of improving their mental condition.

208. E.P. v. Alaska Psychiatric Inst., 205 P.3d 1101, 1104 (Alaska 2009).

209. Ctr. for Substance Abuse Treatment, U.S. Dep't of Health and Human Serv., *Inhalants*, SUBSTANCE ABUSE TREATMENT ADVISORY, Mar. 2003, at 1, 3-5, available at [http://www.inhalants.org/Inhalants\\_March2003.pdf](http://www.inhalants.org/Inhalants_March2003.pdf).

210. Brief of Appellant, *supra* note 40, at 4.

211. § 47.30.655.

212. Brief of Appellant, *supra* note 40, at 4.

213. See *Inhalants*, *supra* note 209, at 3-5.

several areas that can be improved within the current civil commitment system in Alaska. First, the Alaska Legislature should more clearly define “dangerousness” within the specific sections that deal with civil commitments and should provide patients the right to be diagnosed by more than one mental health professional in regards to dangerousness. Second, the Legislature should specify that a showing of probable improvement is needed for commitments of individuals who are found to be dangerous to themselves. Last, the State should invest in more efficient outpatient treatment facilities and programs.

The lack of a definition of “likely to cause harm” in the relevant civil commitment statutes<sup>214</sup> led the Alaska Supreme Court to rely on a definition from another section of the statute.<sup>215</sup> It also caused disagreement among Master Brown, the superior court judge, and the Alaska Supreme Court regarding whether E.P. was likely to cause harm to himself.<sup>216</sup> Even if the Legislature intended for the definition from section 47.30.915 of the Alaska Statutes to apply to the sections that governed E.P.’s case, the given definition is still too vague. Section 47.30.915 defines a person who is “likely to cause serious harm” as one who “poses a substantial risk of bodily harm . . . as manifested by recent behavior causing, attempting, or threatening that harm” or “manifests a current intent to carry out plans of serious harm.”<sup>217</sup> This leaves a lot of discretion to the courts to decide what constitutes substantial risk—is smoking a pack of cigarettes a day substantial risk of bodily harm? What constitutes recent behavior—in the past week, month, year, or lifetime? Does mental harm qualify as bodily harm? How current must a current intent be, and does a person have to act to carry out that intent? Defining “likely to cause harm” more clearly would answer most of these concerns and make it easier for courts to make clear and confident decisions about whether a mentally ill individual should be committed.

Giving individuals the right to require the State to present more than one expert witness at their hearings would help prevent wrongful commitments, especially in cases where it is debatable whether the individual’s commitment is necessary. In E.P.’s case, only one doctor testified to his dangerousness.<sup>218</sup> Because studies have shown that psychologists’ predictions of dangerousness are unreliable,<sup>219</sup> providing

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214. See § 47.30.730.

215. *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101, 1110 (Alaska 2009) (using section 47.30.915 of the Alaska Statutes).

216. See *E.P.*, 205 P.3d at 1104.

217. ALASKA STAT. § 47.30.915(10) (2010).

218. See *id.* at 1105.

219. See *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting) (“The Court holds that psychiatric testimony about a defendant’s future

“layers of professional review and observation of the patient’s condition,” as the Supreme Court suggested,<sup>220</sup> would help make commitments more consistent. It seems clear in the preamble<sup>221</sup> to the Alaska civil commitment statutes that the Legislature intended for an individual who is a danger to himself to be committed only when the State can show that the individual will likely improve with treatment. However, the court was forced to rely on its own interpretation of the statute because this element was not expressly included in the substantive commitment statutes.<sup>222</sup> The Alaska Legislature should specify within the commitment statutes whether a showing of probable improvement is required for individuals who are shown to be a danger to themselves. This small action would have made E.P.’s commitment impossible because API repeatedly stated that E.P. would not improve at its facility.<sup>223</sup>

E.P. needed substance abuse treatment but was locked in API because the State believed it was necessary to restrict his access to inhalants, even though API does not provide any substance abuse treatment.<sup>224</sup> The record mentions that E.P. had tried an outpatient treatment center but “got bored” and left.<sup>225</sup> This indicates that perhaps the available treatment centers were not adequate for his needs. The Legislature has already expressed interest in funding more community programs.<sup>226</sup> The realization of these goals would provide efficient alternatives to the restrictive environment of API for people like E.P. who need treatment but do not need to be in a locked facility.

## CONCLUSION

In *E.P. v. Alaska Psychiatric Institute*,<sup>227</sup> the State did not want E.P. on the streets because he was likely to continue to huff. It found a loophole in the civil commitment statutes that allowed it to commit E.P. to API.

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dangerousness is admissible, despite the fact that such testimony is wrong two times out of three.”); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (noting the “fallibility of psychiatric diagnosis”); *Browne & Harrison-Spoerl*, *supra* note 141, at 1175; *Otto*, *supra* note 145, at 47; *cf.* *Buchanan*, *supra* note 146, at 184, 188 (stating that psychiatrists and psychologists can predict violence but that many nonviolent patients would have to be detained to prevent one violent act).

220. *Addington*, 441 U.S. at 428–29.

221. § 47.30.655

222. *See* § 47.30.730; *E.P.*, 205 P.3d at 1108.

223. *See E.P.*, 205 P.3d at 1104.

224. *See id.*

225. Brief of Appellant, *supra* note 40, at 2.

226. *See* S.B. 48, 27th Leg. (Alaska 2011), available at [http://www.legis.state.ak.us/basis/get\\_bill\\_text.asp?hsid=SB0048A&session=27](http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=SB0048A&session=27).

227. 205 P.3d 1101.

The State committed E.P. by claiming that he was a danger to himself when the more likely theory was that he was gravely disabled. But E.P. had to be committed under the theory that he was a danger to himself or he could not have been committed at all because API was unable to show that E.P. would improve with treatment. The commitment forced a man to spend his last days in a locked facility, separated from his family and friends and deprived of treatment—the signs of a commitment that serves as a punishment, not as a source of treatment.

*Criminal* commitments punish individuals; *civil* commitments should treat individuals. The State of Alaska has taken substantial steps in the last decade to recognize this distinction through its civil commitment statutes<sup>228</sup> and the three civil commitment cases that preceded E.P.'s case.<sup>229</sup> However, the wrongful commitment of E.P. shows why the Alaska civil commitment system still needs further improvement. The clarification of the civil commitment statutes and the creation of efficient halfway houses are concrete steps that can be taken to protect the rights of the mentally ill against wrongful commitments and to ensure that civil commitments serve their purpose of treating the mentally ill, not punishing them.

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228. See ALASKA STAT. § 47.30.655 (2010) (“The purpose of the 1981 major revision of Alaska civil commitment statutes...is to more adequately protect the legal rights of persons suffering from mental illness.”).

229. See cases cited *supra* note 206.