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IN THE SUPREME COURT OF THE STATE OF ALASKA

ITMO the Hospitalization of D.G.) Supreme Court No.: **S-15100**

Trial Court Case No: **3AN-13-00454 PR**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE FRANK PFIFFNER, JUDGE

BRIEF OF APPELLEE THE STATE OF ALASKA

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:
Laura Fox (0905015)
Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

AUTHORITIES PRINCIPALLY RELIED UPON i

PARTIES 1

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STANDARDS OF REVIEW 3

ARGUMENT 4

I. Daniel is not entitled to appeal as of right because a 72-hour evaluation order is not a final appealable judgment and Daniel prevailed below. 4

II. Daniel's appeal of his 72-hour evaluation order is moot because he has been released and the order spawns no legal consequences. 6

A. The collateral consequences exception to mootness does not apply because the 72-hour evaluation order spawns no legal consequences. 7

B. The public interest exception to mootness does not apply because this case is not an appropriate vehicle to decide issues of broad importance. 9

C. This case does not present an opportunity to overrule *Wetherhorn v. Alaska Psychiatric Institute*. 11

D. The Court need not vacate Daniel's 72-hour evaluation order due to the mootness of this appeal because doing so would serve no purpose. 11

III. Daniel, who does not challenge the procedure for his initial emergency detention and who was released after two days, was not denied due process. 12

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Akpik v. State, Office of Mgmt. & Budget, 115 P.3d 532 (Alaska 2005) 3

Brandal v. State, Commercial Fisheries Entry Comm'n, 128 P.3d 732 (Alaska 2006).... 13

Fairbanks Fire Fighters Assoc., Local 1324 v. City of Fairbanks,
48 P.3d 1165 (Alaska 2002) 10

F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980) 13

Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972) .. 5

Hoffman v. State, 834 P.2d 1218 (Alaska 1992) 13

Homer v. State, Dep't of Natural Res., 566 P.2d 1314 (Alaska 1977) 13

In re Joan K. 273 P.3d 594 (Alaska 2012) 7, 8, 9, 11,

Kodiak Seafood Processors Ass'n v. State, 900 P.2d 1191 (Alaska 1995) 10

Larson v. Benediktsson, 152 P.3d 1159 (Alaska 2007) 12

Martech Const. Co., Inc. v. Ogden Envtl. Servs., Inc.,
852 P.2d 1146 (Alaska 1993) 5

Mathews v. Eldridge, 424 U.S. 319 (1976) 13, 14, 15, 16

Petrolane Inc. v. Robles, 154 P.3d 1014 (Alaska 2007) 4

State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.,
116 P.3d 580 (Alaska 2005) 13

Weiner v. Burr, Pease & Kurtz, P.C., 221 P.3d 1 (Alaska 2009) 3

Wetherhorn v. Alaska Psychiatric Institute, 156 P.3d 371 (Alaska 2007) 11

Statutes

AS 47.30.700 .... 2, 5

AS 47.30.705 1,

AS 47.30.710 ..... 5, 15

AS 47.30.715 6

AS 47.30.720 15

AS 47.30.725 6

AS 47.30.730 ..... 6, 15

AS 47.30.735 ..... 6, 15

AS 47.30.740 6

AS 47.30.765 ..... 5, 6, 11

AS 47.30.850 12

Court Rules

Appellate Rule 202 4,

Other Authorities

5 AM. Jur. 2d Appellate Review § 243 6

AUTHORITIES PRINCIPALLY RELIED UPON

STATUTES

AS 47.30.700. Initial involuntary commitment procedures

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.705. Emergency detention for evaluation

(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination

of the person in custody and be interviewed by a mental health professional at the facility.

(b) In this section, "minor" means an individual who is under 18 years of age.

AS 47.30.710. Examination; hospitalization

(a) A respondent who is delivered under AS 47.30.700 - 47.30.705 to an evaluation facility for emergency examination and treatment shall be examined and evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility.

(b) If the mental health professional who performs the emergency examination has reason to believe that the respondent is (1) mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, and (2) is in need of care or treatment, the mental health professional may hospitalize the respondent, or arrange for hospitalization, on an emergency basis. If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an ex parte order authorizing hospitalization for evaluation.

AS 47.30.715. Procedure after order

When a facility receives a proper order for evaluation, it shall accept the order and the respondent for an evaluation period not to exceed 72 hours. The facility shall promptly notify the court of the date and time of the respondent's arrival. The court shall set a date, time, and place for a 30-day commitment hearing, to be held if needed within 72 hours after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent.

AS 47.30.720. Release before expiration of 72-hour period

If at any time in the course of the 72-hour period the mental health professionals conducting the evaluation determine that the respondent does not meet the standards for commitment specified in AS 47.30.700, the respondent shall be discharged from the facility or the place of evaluation by evaluation personnel and the petitioner and the court so notified.

AS 47.30.725. Rights; notification

(a) When a respondent is detained for evaluation under AS 47.30.660 - 47.30.915, the respondent shall be immediately notified orally and in writing of the rights under this section. Notification must be in a language understood by the respondent. The

respondent's guardian, if any, and if the respondent requests, an adult designated by the respondent, shall also be notified of the respondent's rights under this section.

(b) Unless a respondent is released or voluntarily admitted for treatment within 72 hours of arrival at the facility or, if the respondent is evaluated by evaluation personnel, within 72 hours from the beginning of the respondent's meeting with evaluation personnel, the respondent is entitled to a court hearing to be set for not later than the end of that 72-hour period to determine whether there is cause for detention after the 72 hours have expired for up to an additional 30 days on the grounds that the respondent is mentally ill, and as a result presents a likelihood of serious harm to the respondent or others, or is gravely disabled. The facility or evaluation personnel shall give notice to the court of the releases and voluntary admissions under AS 47.30.700 - 47.30.815.

(c) The respondent has a right to communicate immediately, at the department's expense, with the respondent's guardian, if any, or an adult designated by the respondent and the attorney designated in the ex parte order, or an attorney of the respondent's choice.

(d) The respondent has the right to be represented by an attorney, to present evidence, and to cross-examine witnesses who testify against the respondent at the hearing.

(e) The respondent has the right to be free of the effects of medication and other forms of treatment to the maximum extent possible before the 30-day commitment hearing; however, the facility or evaluation personnel may treat the respondent with medication under prescription by a licensed physician or by a less restrictive alternative of the respondent's preference if, in the opinion of a licensed physician in the case of medication, or of a mental health professional in the case of alternative treatment, the treatment is necessary to

(1) prevent bodily harm to the respondent or others;

(2) prevent such deterioration of the respondent's mental condition that subsequent treatment might not enable the respondent to recover; or

(3) allow the respondent to prepare for and participate in the proceedings.

(f) A respondent, if represented by counsel, may waive, orally or in writing, the 72-hour time limit on the 30-day commitment hearing and have the hearing set for a date no more than seven calendar days after arrival at the facility. The respondent's counsel shall immediately notify the court of the waiver.

AS 47.30.765. Appeal

The respondent has the right to an appeal from an order of involuntary commitment. The court shall inform the respondent of this right.

AS 47.30.850. Expunging or sealing records

Following the discharge of a respondent from a treatment facility or the issuance of a court order denying a petition for commitment, the respondent may at any time move to have all court records pertaining to the proceedings expunged on condition that the respondent file a full release of all claims of whatever nature arising out of the proceedings and the statements and actions of persons and facilities in connection with the proceedings. Upon the filing of the motion and full release, the court shall order the court records either expunged or sealed, whichever the court considers appropriate under the circumstances.

PARTIES

D.G. ("Daniel")[1] is the appellant and the State of Alaska is the appellee.

ISSUES PRESENTED

1. Daniel was hospitalized on an emergency basis, detained under a 72-hour psychiatric evaluation order, and released after two days without being committed. May Daniel appeal the evaluation order as of right even though it is not a final judgment and even though Daniel prevailed in the proceedings below?

2. Daniel has been released and the evaluation order has expired. Given that the expired order has no legal consequences and the Court's review is purely discretionary, should the Court consider Daniel's moot appeal?

3. If the Court dismisses Daniel's appeal as moot, should it vacate the evaluation order even though doing so would serve no purpose and even though Daniel has a statutory remedy if he is concerned about court records of the proceedings below?

4. Daniel does not challenge his initial emergency detention, and he was released after two days. Was Daniel denied due process when, partway through his brief hospitalization, the superior court issued an order authorizing a psychiatric evaluation without first affording Daniel a contested hearing and appointed counsel?

STATEMENT OF THE CASE

On February 26, 2013, at 8:50 a.m., a police officer took emergency custody of Daniel under AS 47.30.705. [Exc. 2] The officer had probable cause to believe that

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[1] The State uses a pseudonym for D.G. to protect confidentiality.

Daniel was likely to cause serious harm to himself because Daniel's father reported that Daniel was threatening suicide. [Exc. 1]

The officer immediately transported Daniel to the emergency department at Providence Hospital in Anchorage. [Exc. 1-5] The officer gave Providence staff a "Notice of Emergency Detention and Application for Evaluation" explaining that he had taken Daniel into emergency custody because of his suicide threats. [Exc. 1-2]

After receiving Daniel in the emergency department, that afternoon Providence staff filed a "Petition for Involuntary Commitment for Evaluation" under AS 47.30.700, asking the superior court to authorize detention of Daniel at API for 72 hours for a psychiatric evaluation. [Exc. 6-9]

Superior Court Master Jonathon H. Lack signed the 72-hour evaluation order that afternoon at 3:45 p.m. [Exc. 6-9] The order authorized transport of Daniel to API for evaluation. [Exc. 7] The order required API to have Daniel evaluated by a mental health professional and a physician within 24 hours of his arrival. [*Id.*] Daniel was admitted to API later that day. [Exc. 16]

The next day, on February 27 at 3:03 p.m., Superior Court Judge Frank Pfiffner approved and signed the master's order. [R. 18] The superior court scheduled a 30-day commitment hearing for February 28 at 1:30 p.m., to be held if a commitment petition was filed during Daniel's detention. [Exc. 20] The superior court gave Daniel and the Public Defender's Office notice of the scheduled hearing. [*Id.*]

On the morning of February 28, two days after Daniel was taken into custody, he filed a motion to vacate the 72-hour evaluation order. [Exc. 10-15] Daniel raised several

arguments, contending that (1) the order violated due process because it was issued ex parte; (2) the order should not have been implemented before it was signed by the superior court judge; (3) the order was issued without a sufficiently searching inquiry; (4) the findings were insufficient to support the order; (5) the order impermissibly relied on hearsay; and (5) the petition filed by Providence staff was defective. [*Id.*]

Later on the morning of February 28, at 11:25 a.m., API personnel released Daniel, having determined based on their evaluation that he did not meet the statutory standard for commitment. [Exc. 16] Because of Daniel's release, the commitment hearing scheduled for that afternoon at 1:30 p.m. did not occur. [Exc. 20]

On March 6, the superior court denied Daniel's motion to vacate the 72-hour evaluation order, noting that it was moot in light of Daniel's release. [Exc. 17]

Daniel appeals the 72-hour evaluation order and the superior court's denial of his motion to vacate the order. On appeal, Daniel renews only his argument that the order violated due process because it was issued ex parte.[2] [At. Br. 5-6]

STANDARDS OF REVIEW

The Court applies its independent judgment to questions of mootness.[3] The Court applies the de novo standard of review to questions of law, adopting the rule of law most

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2 The other issues Daniel raised below are waived due to Daniel's failure to brief them. *See Weiner v. Burr, Pease & Kurtz, P.C.*, 221 P.3d 1, 6 n.14 (Alaska 2009).

3 *Akpik v. State, Office of Mgmt. & Budget*, 115 P.3d 532, 534 (Alaska 2005) ("We apply our independent judgment in determining mootness because, as a matter of judicial policy, mootness is a question of law.").

persuasive in light of precedent, reason, and policy.[4]

ARGUMENT

Because the 72-hour evaluation order was an interlocutory order and not an appealable final judgment, and because Daniel ultimately prevailed in the proceedings below when he was released without being committed, he may not appeal as of right from the evaluation order. And regardless, Daniel's release renders his appeal moot, and no exception to the mootness doctrine applies to warrant the Court's discretionary review. If the Court reaches the merits of Daniel's due process argument despite these deficiencies in his appeal, it should hold that Daniel, who does not challenge his initial emergency detention and who was released after two days, was not denied due process.

I. Daniel is not entitled to appeal as of right because a 72-hour evaluation order is not a final appealable judgment and Daniel prevailed below.

Appellate Rule 202(a) requires a "final judgment" before a party has a right to appeal to this Court from the superior court. Because Daniel's 72-hour evaluation order was not a "final judgment," and because the superior court proceedings ultimately resolved in Daniel's favor when he was released without issuance of an order of commitment, Daniel is not entitled to appeal as of right. Accordingly, the Court should dismiss his appeal as improperly brought.

A 72-hour evaluation order is not a "final judgment" appealable to this Court because it does not resolve a civil commitment proceeding—indeed, it is only an early

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[4] *Petrolane Inc. v. Robles*, 154 P.3d 1014, 1018 (Alaska 2007).

step in the process. "The basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case, '... one which ends litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[5] A 72-hour evaluation order does not "dispose of the entire [commitment] case," "end[] litigation on the merits" regarding whether the respondent should be committed, or "leave nothing for the court to do but execute [a] judgment." On the contrary, a 72-hour evaluation order specifically contemplates further proceedings in which the respondent's mental health status and the necessity of commitment will be litigated. The entire purpose of a 72-hour evaluation order is to allow the State and the court to obtain a professional medical opinion on whether a commitment order is warranted. A 72-hour evaluation order will often be followed by a commitment hearing and a 30-day commitment order from which a respondent may appeal. But until that point, no final appealable judgment exists.

Alaska Statute 47.30.765 provides that a respondent "has a right to appeal from an order of involuntary commitment," but a 72-hour evaluation order is not "an order of involuntary commitment" appealable under this statute. Form order MC-305—which was used in Daniel's case—includes the words "involuntary commitment," but the commitment statutes pointedly omit such language when referring to a 72-hour evaluation order. [Exc. 6] Alaska Statute 47.30.700(a) calls it an "ex parte order." Alaska Statute 47.30.710(b) calls it "an ex parte order authorizing hospitalization for evaluation."

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[5] *Martech Const. Co., Inc. v. Ogden Envtl. Servs., Inc.*, 852 P.2d 1146, 1153 (Alaska 1993) (quoting *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030 (Alaska 1972)).

Alaska Statute 47.30.715 calls it an "order for evaluation." And AS 47.30.725 refers to a respondent like Daniel as "detained for evaluation," not as "committed." By contrast, the statutes discussing 30- and 90-day orders all specifically use the term "commitment."[6] These statutes, rather than the court system's form order, control what constitutes an "order of involuntary commitment" appealable under AS 47.30.765.

Finally, Daniel is not entitled to appeal for the simple reason that the superior court proceedings resolved in his favor when he was released without being committed. A prevailing party generally may not appeal a favorable outcome.[7] Like a criminal defendant who is arrested on probable cause but released without any conviction, or a civil litigant who is denied summary judgment but wins at trial, Daniel prevailed completely in the end and therefore has no right to appeal.

Accordingly, the Court should dismiss Daniel's appeal as improperly brought.

II. Daniel's appeal of his 72-hour evaluation order is moot because he has been released and the order spawns no legal consequences.

Because Daniel's 72-hour evaluation order has long since expired—and indeed, he was released less than 48 hours into the evaluation period—his appeal is moot even if properly brought. And because the evaluation order has no further consequences, the collateral consequences exception to the mootness doctrine does not apply. Nor does the public interest exception, given the facts of this case and Daniel's cursory briefing of his

6 *See, e.g.*, AS 47.30.730, AS 47.30.735, AS 47.30.740.

7 *See* 5 Am. Jur. 2d Appellate Review § 243.

due process argument. Finally, because the evaluation order is without any further effect, vacating it due to the mootness of this appeal would accomplish nothing.

A. The collateral consequences exception to mootness does not apply because the 72-hour evaluation order spawns no legal consequences.

Contrary to Daniel's position, the limited "collateral consequences" exception to the mootness doctrine established in *In re Joan K.* does not apply here because Daniel was not actually committed—he was detained for an evaluation to determine whether commitment was necessary. [Exc. 7-8] API determined that it was not. [Exc. 16] Daniel does not point to any collateral consequences— real or hypothetical—of the evaluation order that would warrant applying the collateral consequences exception here.

In *In re Joan K.*, the Court adopted a collateral consequences exception to the mootness doctrine for some civil commitment cases.[8] The Court noted that a commitment order may have collateral consequences that survive its expiration, including social stigma, adverse employment restrictions, application in future legal proceedings, and restrictions on the right to possess firearms.[9] The Court held that given these generally applicable collateral consequences, the Court will review "an otherwise-moot appeal from a person's first involuntary commitment order" without the need for the respondent to demonstrate that she will suffer specific consequences from the order.[10]

Daniel asserts that *Joan K.* requires review here because he has not previously been committed. [At. Br. 8] But *Joan K.*'s holding about collateral consequences applies

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[8] 273 P.3d 594, 598 (Alaska 2012).

[9] *Id.* at 597.

[10] *Id.* at 598.

to appeals from 30-day commitment orders, not 72-hour evaluation orders. Daniel does not explain why *Joan K.* should be extended to also require the Court to hear moot appeals of 72-hour evaluation orders. [At. Br. 7-8] For several reasons, it should not.

First, as a matter of semantics, *Joan K.* applies only to "commitment" orders, and a 72-hour evaluation order is not actually a "commitment" order. [At. Br. 8] As explained above, the applicable statutes specifically avoid the word "commitment" when discussing 72-hour evaluation orders.[11] The use of the word "commitment" on the court system's form order does not obliterate the distinction between the two very different types of orders or bring 72-hour evaluation orders within the ambit of *Joan K.* [Exc. 6]

Second, a 72-hour evaluation order and a 30-day commitment order differ not just in duration and terminology, but also in purpose and meaning. The purpose of a 30-day commitment order is to protect the respondent and the public from danger and to ensure treatment of the respondent's mental illness. The meaning of such an order is that the court has found by clear and convincing evidence that the respondent is mentally ill and gravely disabled or a danger to himself or others.[12] The purpose of a 72-hour evaluation order, by contrast, is simply to obtain a professional medical opinion on whether commitment is needed. Such evaluation orders are necessary for the functioning of the civil commitment system: a court would rarely be able to find by clear and convincing

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[11] *See supra* subsection I.

[12] *See id.* at 598 ("To involuntarily commit someone to a treatment facility for up to 30 days, a court must first find, by clear and convincing evidence, that the person 'is mentally ill and as a result is likely to cause harm to [self] or others or is gravely disabled.'").

evidence that a respondent is mentally ill without the opinion of an informed health professional, and would rarely be able to obtain such an opinion without granting authority to briefly detain an individual for evaluation. But although 72-hour evaluation orders are necessary for the functioning of the civil commitment system, they do not mean that the court has definitively ruled on the respondent's condition. In this way, a 72-hour evaluation order followed by a release without a 30-day commitment order is analogous to an arrest on probable cause followed by a release with no criminal charges filed—neither represents a final resolution against the defendant/respondent.

Finally, Daniel has listed no collateral consequences—real or hypothetical—that stem from an expired 72-hour evaluation order under which the respondent was ultimately found not to meet the standard for commitment. [At. Br. 7] His bare assertion that "it would appear the same considerations in play in *Joan K.* apply here" is insufficient. [At. Br. 7] To justify extending *Joan K.* to an appeal of a 72-hour evaluation order, Daniel must explain why such an order—which is merely an early step in the commitment process—carries the same social and legal consequences as a 30-day commitment order—which is a definitive adjudication of mental illness.

For these reasons, the Court should not extend *Joan K.* to require it to hear moot appeals from 72-hour evaluation orders like Daniel's.

B. The public interest exception to mootness does not apply because this case is not an appropriate vehicle to decide issues of broad importance.

Daniel also contends that the public interest exception to the mootness doctrine warrants consideration of his appeal, but this is not an appropriate case for such

discretionary review given the facts of this case, Daniel's cursory briefing, and the Court's impending decision in *S.O. v. Bartlett Regional Hospital*, S-13764, which will likely address similar issues. [At. Br. 8-9]

"[T]he court uses its discretion to determine whether the public interest dictates that immediate review of a moot issue is appropriate."[13] The Court should not exercise that discretion here because this case does not provide a good vehicle for deciding issues of broad importance. Daniel has raised only a very abbreviated due process argument which, as explained below, lacks merit given his short detention and swift release. [At. Br. 5-6] This case thus does not warrant discretionary review.

Additionally, the public interest does not warrant consideration of Daniel's appeal given the imminent arrival of the Court's decision in *S.O. v. Bartlett Regional Hospital*, S-13764, which is likely to resolve related issues on a fuller and more appropriate record. Like Daniel, S.O. challenged, on due process grounds, the procedures under which he was detained and held for emergency psychiatric evaluation. The S.O. case has been pending since oral argument was held more than two years ago, and according to the Court's case management website, a draft decision is circulating.

For these reasons, the public interest exception to the mootness doctrine does not support consideration of Daniel's moot appeal.

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13 *Fairbanks Fire Fighters Assoc., Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (quoting *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995)) (internal alterations omitted).

C. This case does not present an opportunity to overrule *Wetherhorn v. Alaska Psychiatric Institute.*

Daniel argues that the Court should overrule *Wetherhorn v. Alaska Psychiatric Institute*[14] by holding, as proposed by the dissent in *Joan K.*, that no involuntary commitment appeals are moot and all must be heard on the merits. [At. Br. 14-16] But this case does not provide an occasion to overrule *Wetherhorn* because, as explained above, this is not an appeal of an involuntary commitment.[15] Even if the policy concerns Daniel cites favor considering all 30-day commitment order appeals on the merits, the same is not true for 72-hour evaluation orders. As explained above, evaluation orders serve a very different purpose from commitment orders, are not appealable under AS 47.30.765, and have no identified effect beyond their expiration.[16] The Court thus need not consider overruling *Wetherhorn* here.

D. The Court need not vacate Daniel's 72-hour evaluation order due to the mootness of this appeal because doing so would serve no purpose.

Daniel asks the Court to vacate his 72-hour evaluation order if it considers his appeal moot. [At. Br. 9-12] But vacatur would be both unusual and pointless.

First, a 72-hour evaluation order is a non-final, interlocutory order—as explained above[17]—and courts do not simply vacate such orders whenever appellate review is unavailable. For example, an order denying summary judgment on factual grounds is

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14 156 P.3d 371, 380 (Alaska 2007).

15 *See supra* subsections I, II(A).

16 *See supra* subsection II(A).

17 *See supra* subsection I.

unreviewable on appeal after a trial,[18] but that does not mean that the appellate court declining to review the order will instead vacate it. Daniel cites authority that an appellant should not be forced to "acquiesce in [a] judgment" that has been rendered unappealable by mootness. [At. Br. 10] But because the 72-hour evaluation order is not a "judgment," but rather an interlocutory order, this authority does not apply.

And because the expired order has no current effect or meaning, vacating it is unnecessary and will serve no purpose. Vacatur would not mean that the order was invalid or erroneous at the time it was issued, or that Daniel's detention for evaluation was illegal. Nor would vacatur cause court records of the order to be destroyed—and in any event, such records are already confidential.

Moreover, if court records are Daniel's concern, Alaska's statutes provide an avenue for dealing with such records in completed commitment cases. Under AS 47.30.850, a respondent may seek to have court records expunged or sealed following discharge from a treatment facility. Daniel should utilize this statutory procedure if he wishes to limit access to court records of his brief hospitalization, rather than attempting to obtain a meaningless order of vacatur through a moot appeal.

III. Daniel, who does not challenge the procedure for his initial emergency detention and who was released after two days, was not denied due process.

Because Daniel was confined for only 48 hours, for emergency reasons he apparently concedes were legitimate, his right to due process was not violated. Indeed, the procedures he complains about are the very procedures that ensured that he was

[18] *See Larson v. Benediktsson*, 152 P.3d 1159, 1170 (Alaska 2007).

quickly released and not unnecessarily committed. Accordingly, if the Court considers Daniel's due process claim, the Court should reject it.

Daniel cites *Hoffman v. State*[19] for the proposition that due process requires pre-deprivation hearings except in emergencies. [At. Br. 6] But Daniel's detention *was* an emergency—something he does not challenge—meaning that under *Hoffman*, "due process requires the State to provide an opportunity for a post-seizure hearing at a meaningful time to minimize possible injury."[20] The superior court scheduled a 30-day commitment hearing to be held two days after Daniel's initial detention, but Daniel was released before this hearing could even occur. [Exc. 20] The procedures in place thus operated effectively to minimize possible injury to Daniel.

Daniel's briefing is cursory and does not apply the foundational *Mathews v. Eldridge* test that determines whether government action violates due process.[21] [At. Br. 5-6] Under this test, the Court balances several factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[22]

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19 834 P.2d 1218, 1219 (Alaska 1992).

20 *Id.* (citing *F/V American Eagle v. State*, 620 P.2d 657, 666-67 (Alaska 1980)).

21 424 U.S. 319, 334-35 (1976) (adopted as the standard for due process under Alaska Constitution in *Homer v. State, Dep't of Natural Res.*, 566 P.2d 1314, 1319 (Alaska 1977)).

22 *Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732, 738 (Alaska 2006) (quoting *State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 583 (Alaska 2005)).

Daniel's failure to apply *Mathews v. Eldridge* renders his due process argument unclear, as he does not parse out the private interest at stake or the alternative procedures (and alternative timeframe) he demands.

Application of the *Mathews v. Eldridge* balancing test to this case demonstrates that Daniel's due process rights were not violated, that the State's commitment procedures worked efficiently and effectively, and that the additional protections Daniel advocates would likely *lengthen* unnecessary confinement.

First, although at first glance it might seem that the "private interest" anchoring Daniel's due process argument is a personal liberty interest of the highest order—freedom from confinement—in fact a somewhat lesser interest is at stake. Daniel challenges only his 72-hour evaluation order, not his emergency hospitalization, which he apparently concedes was legitimate.[23] [At. Br. 5-6] The private interest at stake when the evaluation order was issued was not Daniel's interest in freedom—because he was already legitimately confined—but rather his interest in not being subjected to further psychiatric evaluation under a 72-hour evaluation order. Although this is a recognizable private interest, it is not of the same magnitude. This case is thus distinguishable from the out-of-state authorities Daniel cites. [At. Br. 5-6]

Applying the second *Mathews v. Eldridge* prong, the "risk of an erroneous deprivation" of this private interest through the procedures used is relatively low. In

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[23] Daniel's due process argument rests on the fact that he was already in custody at the time the 72-hour evaluation order was issued. [At. Br. 5-6] He articulates no challenge to the manner in which the police officer brought him into emergency custody.

Daniel's case, disinterested medical staff filed a petition after determining that he was in need of a full psychiatric evaluation. [Exc. 3-5] Such preliminary determinations of medical staff may not always be correct, and unnecessary evaluations may sometimes result. But on the other hand, the evaluation period under a 72-hour order may not even last 72 hours, and the result of the evaluation may be immediate freedom. Under AS 47.30.710(a), a facility must evaluate the respondent within 24 hours of his arrival, and under AS 47.30.720, if at any time the facility determines that a respondent no longer meets the standard for commitment, he must be released. Indeed, Daniel was released before his 72-hour evaluation order expired. And if a respondent's detention continues beyond the 72-hour evaluation period, the respondent receives ample procedural protections through notice and a contested hearing with appointed counsel.[24]

Applying the third *Mathews v. Eldridge* prong, the "value, if any, of additional or substitute procedural safeguards" at the 72-hour evaluation order stage is low. In fact, if a respondent were entitled to counsel and a contested hearing prior to issuance of a 72-hour evaluation order, such a procedure would likely *extend* the respondent's potential unnecessary confinement. A swift psychiatric evaluation under an expeditiously issued ex parte order—as occurred in this case—is more likely to result in the prompt release of a respondent who does not meet the standard for commitment than a procedure under which a full evaluation does not occur until after a contested hearing with appointed

[24] *See* AS 47.30.730-.735.

counsel. [At. Br. 6 n.3] Daniel does not propose a timeframe for such hearings, but practically speaking they could not occur as fast as ex parte orders.

Finally, the government's interests and the "fiscal and administrative burdens" of an alternative procedure also weigh against Daniel's due process argument. Where a respondent has been hospitalized on an emergency basis—concededly justifiably—the government has a strong interest in obtaining a prompt professional evaluation to determine if civil commitment is warranted. Creating additional procedural hurdles to delay such an evaluation would damage this interest, burden the Alaska Court System and the Public Defender's Office with additional hearings on short notice, and provide little perceivable benefit to the respondent.[25]

On balance, the *Mathews v. Eldridge* factors weigh strongly against Daniel's due process claim, and the Court should thus reject it.

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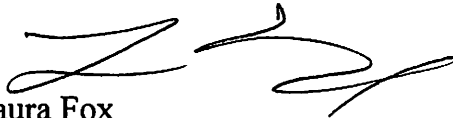
25 The governmental entities that would bear most of the burden of the additional procedural safeguards Daniel seems to advocate are the Alaska Court System and the Public Defender's Office, neither of which is a represented party to this appeal. Accordingly, if the Court considers Daniel's due process argument, the Court should invite those entities to submit briefing.

CONCLUSION

Based on the foregoing, this Court should either dismiss this appeal as improperly brought or moot, or affirm the superior court's orders.

DATED July 3, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: 
Laura Fox
Assistant Attorney General
Alaska Bar No. 0905015