IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Trial Court Case No. 3AN 13-454PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE FRANK A. PFIFFNER, PRESIDING

REPLY BRIEF OF APPELLANT

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By: _____
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I. TABLE OF CONTENTS

II. TABLE OF CONSTITUTIONAL PROVISIONS, CASES, AND STATUTES

CONSTITUTIONAL PROVISIONS

CASES

STATUTES

III. ARGUMENT IN REPLY

A. D.G. Was Denied Due Process

The State starts off its Due Process argument,[1] with the misstatement that D.G. concedes there was no emergency. To the contrary, the entire basis of D.G.'s Due Process challenge is there can be no emergency justifying dispensing with notice and an opportunity to be heard when a person is in custody, presumptively safe and unable to harm anyone.

It has long been the law in Alaska that unless there is an emergency, notice and an opportunity to be heard must be provided prior to any deprivation. *Hoffman v. State*, 834 P.2d 1218, 1219 (Alaska 1992). This Court most recently reaffirmed this principle just last Friday, in *Patrick v. Municipality of Anchorage*, SP-6798, p 12, __ P.3d __, 2013 Westlaw 2013 WL 3787296, *5 (Alaska, July 19, 2013), holding a party is entitled notice and a hearing "*before*" the deprivation occurs, "absent an emergency situation or a public safety concern requiring summary action." (emphasis in original).

After misstating that D.G. conceded there was no emergency, the State argues that D.G. did not address the *Mathews v. Eldridge* [2] factors in his opening brief. However, one does not reach the *Mathews v. Eldridge* factors in this case because there was no emergency to justify failing to give D.G. notice and an opportunity to be heard.

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[1] Section III of its brief.

[2] 424 U.S. 319 (1976).

The United States Supreme Court has similarly held that a predeprivation hearing is constitutionally required if the State can reasonably provide one. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).[3]

D.G. was denied due process of law.

B. The *Ex Parté* Order is Appealable

In Section I of its Brief the State argues that the *Ex Parté* Order was not appealable because (1) the "[*Ex Parté]* Order was not a final judgment, and (2) "the superior court proceedings ultimately resolved in [D.G.'s] favor." Both contentions are erroneous.

This Court has repeatedly held:

> The finality rule "does not necessarily require the entry of a final judgment." To determine finality, "the reviewing court should look to the substance and effect, rather than form, of the rendering court's judgment...." A final, appealable "judgment" is one that, however denominated, "disposes of the entire case and ends the litigation on the merits."

Denali Federal Credit Union v. Lange, 924 P.2d 429, 431 (Alaska 1996) (citations omitted). When the Superior Court denied D.G.'s Motion to Vacate *Ex Parté* Order, it ended the litigation. Just as in *Denali*, there was nothing further D. G. could do. The case was over and appealable.

The State also argues that because the Alaska Psychiatric Institute decided D.G. did not meet commitment criteria and declined to file a petition to detain him even

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[3] There the United States Supreme Court made clear that at least as much due process ----------(footnote continued)

further that means "the superior court proceedings resolved in his favor." This is untrue. D.G. lost the Petition for Involuntary Commitment for Evaluation (*Ex Parté* Petition).[4] There were no further proceedings.

The State analogizes the situation to when a person is arrested on probable cause, but released without any conviction, or a civil litigant who is denied summary judgment, but wins at trial. No authority is cited for either of these propositions, but in any event they are inapposite. First, in the probable cause arrest by the police situation, the court has not issued an order. There has been no court proceeding at that point. In the context of this case, the analogous action to an arrest by the police was when D.G. was taken by the police to the Providence Psychiatric Emergency Room under the authority of AS 47.30.705. Exc. 1-2. It is the later, *ex parté* court order, which violated D.G.'s right to Due Process.

In the summary judgment example, there is a subsequent court proceeding in which the movant prevailed. That is not the case here. Here, the Alaska Psychiatric Institute merely failed to file a further petition because D.G. did not meet commitment criteria.[5] Perhaps even more importantly, in the summary judgment situation, there was no court order depriving the movant of any property or liberty interest pending a final determination.

(Continued footnote)----------
protection is required for liberty deprivations as property deprivations. 474 U.S. at 132.

[4] Exc. 3-5.

[5] Exc. 16.

The *Ex Parté* Order is appealable.

C. D.G's Appeal Should be Heard on the Merits

In Section II of its brief, the State further argues this Court should decline to hear D.G's appeal on the merits for various reasons.

(1) The *Ex Parté* Order Spawns Collateral Consequences

In Section II.A., the State argues that *In re Joan K.* [6] does not apply because there are no collateral consequences. In *Joan K.*, this Court not only recognized social stigma, adverse employment restrictions, application in future legal proceedings, and restrictions on the right to possess firearms as recognized consequences from involuntary commitment orders, [7] but also that there are sufficient general collateral consequences, without the need for a particularized showingl from a person's first involuntary commitment order."[8] These same specific and generalized collateral consequences are applicable to 72 hour *ex parté* involuntary commitment orders as well as 30 day involuntary commitment orders.

The State argues the *Ex Parté* Order, which is titled "Order on Petition for Involuntary Commitment for Evaluation," and orders, "that the *Petition for Involuntary Commitment forEvaluation* is **GRANTED**"[9] is not really an involuntary commitment.

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[6] 273 P.3d 594 (Alaska 2012)

[7] 723 P.3d at 597.

[8] 723 P.3d at 598.

[9] Exc. 607. Emphasis in original.

This is a tortured interpretation, flying in the face of the text of the order, but even if it is correct, the language in the order causes collateral consequences. For example, 18 U.S.C. § 922(g)(4), provides:

> (g) It shall be unlawful for any person-- . . .
> (4) . . . who has been committed to a mental institution; . . .
> to . . . possess . . . any firearm or ammunition.

The *Ex Parté* Order says it is an involuntary commitment and even having to try to establish it is not a commitment order in such circumstances is a collateral consequence. Query: Would it be truthful for D.G. to answer "no" to a question about whether he was ever committed?

Ex parté orders under AS 47.30.700 cause collateral consequences and the logic of *Joan K.*, applies.

(2) <u>The Public Interest Exception to the Mootness Doctrine is Applicable</u>

In Section II.B. of its Brief, the State argues the public interest exception to the mootness doctrine does not apply because (a) D.G. only cursorily briefed the Due Process argument, and (b) this Court's impending decision in in *S.O. v. Bartlett Regional Hospital*, S-13764, "will likely address similar issues."

First, D.G.'s argument is not cursory; the violation of Due Process is established without extensive treatment. The law is clear that absent an emergency, notice and an opportunity to be heard must be given *before* a person can constitutionally be deprived of liberty. There was no emergency because D.G. was already confined and in custody. Since there was no emergency, there was no justification for failing to give D.G. notice and an opportunity to be heard. No more needs to be said.

Second, S.O. does not contest the validity of the *ex parte* order in his case. Instead, he contests his weeklong stay in the Haines jail in solitary confinement waiting for the weather to clear after an *ex parté* order was issued in his case.[10] In fact S.O. specifically declined to challenge the *ex parté* order, writing:

> The subsequent *ex parte* order holding S.O. for emergency examination and treatment and directing his transfer to Juneau was constitutional because the government may abrogate constitutional interests in emergencies.[11]

It seems extremely unlikely this Court will reach out in *S.O.* to decide the constitutional issue not presented there.

Whether or not someone who is already in custody, and therefore no emergency exists, is entitled to notice and an opportunity to be heard before the Superior Court issues an order for additional confinement (1) is capable of repetition,[12] (2) the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) the issues presented are so important to the public interest as to justify overriding the mootness doctrine. D.G. respectfully suggests if under no other rationale, this Court should hear his appear on the merits under the Public Interest Exception to the Mootness Doctrine.

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[10] Page 10 of Opening Brief of Appellant in *S.O. v. Bartlett Regional Hospital*, Alaska Supreme Court Case No. S-13764.

[11] *Id.*

[12] Occurring several times a week in Anchorage.

D. This Case Presents An Occasion to Revisit Mootness Under *Wetherhorn*

The State disagrees in Section II.C., that this case presents an occasion to revisit *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007) on the grounds that 72 hour involuntary commitments for evaluation (1) are not the same as the 30 day commitment involved in *Wetherhorn*, (2) are not appealable, and (3) have no effect beyond their expiration. None of these points are well taken as set forth above. D.G. has a strong interest in having this Court hear his claim that his confinement under the *Ex Parté* Order was unconstitutional. Moreover, it is critically important that the trial courts be given guidance as to when such *ex parté* commitment orders are or are not allowable.

E. If The Court Finds This Appeal Moot and Declines to Review It, The *Ex Parté* Order Should Be Vacated

The State asserts in Section II.D., that vacating the *Ex Parté* Order if this appeal is not heard on the merits "would be both unusual and pointless." As set forth in his Opening Brief, *vacatur* when an appeal is dismissed for mootness is not unusual; it is the law of the land. The State's argument that it is pointless mainly serves to reinforce it has a cavalier attitude towards obtaining court orders locking someone up who is accused of being mentally ill.

The State points out that this Court does not review summary judgment denials based on factual grounds, but this case is not based on factual grounds. This case is based on the constitutional principle that people are entitled to pre-deprivation notice and an opportunity to be heard absent an emergency. It is a legal, not factual question. Moreover, denial of summary judgment because the trial court determined there were

genuine issues as to a material fact(s) is not a determination on the merits. The *Ex Parté* Order was a determination on the merits.

The State also asserts that AS 47.30.850 provides a remedy, but AS 47.30.850 is (a) unavailable by its terms because here there is no "court order denying a petition for commitment," which is a prerequisite, and (b) imposes the 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."

The State also restates its argument that the *Ex Parté* Order is not appealable and D.G. will rely on his argument above with respect to that.

IV. CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court:

1. **REVERSE** the Superior Court's March 6, 2013, Order denying Appellant's Motion to Vacate *Ex Parte* Order, and

2. **REVERSE** and **VACATE** the Superior Court's February 26, 2013, Order on Petition for Involuntary Commitment for Evaluation.