IN THE SUPREME COURT FOR THE STATE OF ALASKA

ITMO the Hospitalization of H.R.	)	Supreme Court No. S-15793

Trial Court Case No. 3AN 14-02936PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PAUL E. OLSEN, PRESIDING
(JAMES T. STANLEY, MASTER)

REPLY BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment (Due Process)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Alaska Const., Article 1, § 7. Due Process

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

STATUTES

AS 47.30.655

Sec. 47.30.655 Purpose of major revision.

The purpose of the 1981 major revision of Alaska civil commitment statutes (AS 47.30.660 and 47.30.670 - 47.30.915) is to more adequately protect the legal rights of persons suffering from mental illness. The legislature has attempted to balance the individual's constitutional right to physical liberty and the state's interest in protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves by providing due process safeguards at all stages of commitment proceedings. In addition, the following principles of modern mental health care have guided this revision:

(1) that persons be given every reasonable opportunity to accept voluntary treatment before involvement with the judicial system;

(2) that persons be treated in the least restrictive alternative environment consistent with their treatment needs; . . .

AS § 47.30.700

§ 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 47.30.915(17)

(17) "screening investigation" means the investigation and review of facts that have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

IV. ARGUMENT IN REPLY

A. Overview

H.R. appeals the December 5/9, 2014, *ex parté order* to have her taken into custody by the police and delivered to the Alaska Psychiatric Institute (API) for emergency psychiatric evaluation (*Ex Parté* Order)[1] on the grounds that:

(a) the mandatory screening investigation required by AS 47.30.700(a) was not conducted,

(b) the procedures employed violated her Due Process rights in that:

(i) there was no emergency justifying *ex parté* proceedings, and

(ii) the Court did not consider whether a less restrictive alternative means was available,

and

(c) the purported facts were not sufficient to properly issue the *ex parté* order.

API discharged H.R. without filing a petition for commitment because she did not meet commitment criteria.[2] If the screening investigation mandated by AS 47.30.700(a) had been conducted and/or H.R. had been allowed to tell her side of the story, she

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[1] H.R. was picked up by the police after Master Stanley recommended approval on December 15, 2014, although Superior Court Judge Paul E. Olson did not approve until December 9, 2014, Exc. 15, which was after H.R. had already been released for not meeting commitment criteria. Exc. 11. The State points out that H.R. did not brief the issue of the Master's authority to have someone taken into custody before the order was approved by the Superior Court. H.R. has indeed decided to focus on the other issues in this case and dropped that point.

[2] Exc. 11.

believes her unnecessary psychiatric hospitalization and its concomitant trauma would have been avoided. It is her position that the failure to conduct the required screening investigation, *in itself*, is fatal to the propriety of the *Ex Parté* Order. It is also H.R.'s position that the failure of the Superior Court to follow the clear mandate of AS 47.30.700(a), violated her Due Process Constitutional rights to meaningful notice and opportunity to be heard, as well as consideration of the least restrictive means. If none of these grounds are sufficient to reverse the *Ex Parté* Order, H.R. asks this Court to conclude the testimony presented did not justify issuance of the *Ex Parté* Order.

Without objection, the State of Alaska has been permitted to file an a*micus brief* (State Brief). The State's interest is in defending the constitutionality of its statutes and the interpretation of the civil commitment statutes.[3] The State agrees the screening investigation under AS 47.30.700(a) is mandatory,[4] but wants this Court to interpret AS 47.30.700 & AS 47.30.915(17) as giving the court the flexibility to decide how much investigation is necessary.[5] The State does not assert the mandatory screening investigation was satisfied by the *ex parté* hearing.[6]

The State argues AS 47.30.700 is constitutional because it only allows issuance of an *ex parté* order when the court has probable cause to believe dire circumstances

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[3] State Brief at 1.

[4] State Brief at 3.

[5] State Brief at 5.

[6] State Brief at 3.

constituting an emergency exist.[7] This can only be true, however, if the statute is interpreted to require that before an *ex parté* order may be properly issued the trial court must find such dire consequences constituting an emergency exist. It is precisely H.R.'s point that because there was no showing of such dire consequences, the *ex parté* proceedings were unconstitutional. Finally, with respect to H.R.'s point that the least restrictive means must be utilized, the State argues that if the evidence suggests a respondent has a dangerous mental health condition and should be committed, the only effective way to resolve the issue is an evaluation by a mental health professional.[8] This assumes the conclusion and is not necessarily true. An accurate assessment should include the screening investigation and consideration of the least restrictive means, which very well might reveal psychiatric confinement for evaluation is not necessary. One does not need to be confined in a psychiatric hospital to be evaluated. Only when there is no less restrictive means is such psychiatric confinement constitutional.

The appellee, Seacliff Condominium Association (Seacliff), was not going to participate in this appeal, but finally filed its appellee's brief (Seacliff Brief) because H.R. counterclaimed against Seacliff and board members in a *lawsuit Seacliff filed after this appeal was filed.*[9] Seacliff's interest in this appeal is explicitly to obtain an advantage in the case it filed against H.R. by having this Court affirm that the testimony presented at

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[7] State Brief at 8.

[8] State Brief at 12.

[9] Seacliff Brief, pages 3 & 4.

the *ex parté* hearing was sufficient to justify the *Ex Parté* Order issued in this case.[10] Seacliff even asks this Court in this case to grant review in its separate case against H.R. on whether AS 47.30.815 creates a private cause of action for a bad faith mental health commitment petition.[11] It was bad enough that H.R. was not allowed to present her side below[12] and this Court should decline Seacliff's attempt to gain an advantage in the other case *it brought* against H.R. by giving its imprimatur to the *Ex Parté* Order and disputed Seacliff testimony.

B. The Screening Investigation under AS 47.30.700(a) Is Mandatory and Should Be Interpreted in a Way that Satisfies Due Process.

As pertinent to this section, AS 47.30.700(a) provides:

> Upon petition of any adult, *a judge shall immediately conduct a screening investigation or direct a local mental health professional . . . 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. . . .

(Emphasis added).

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[10] Seacliff Brief, page 4.

[11] Seacliff Brief, note 1.

[12] H.R. strenuously disputes the *ex parté* testimony presented by Seacliff.

As described in the Overview, the State acknowledges the screening investigation is required. Seacliff does not dispute that it is mandatory. The State also points out that AS 47.30.915(17) defines "screening investigation" as follows:

> (17) "screening investigation" means the *investigation and review of facts that have been alleged* to warrant *emergency* examination or treatment, *including interviews with* the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, *if possible, the respondent*, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

(Emphasis added).

The first point to be made about the definition of the required screening investigation is that the one-sided testimony of the petitioner at the *ex parté* hearing does not satisfy the requirements. Thus, the *ex parté* hearing conducted in this case cannot qualify as the mandatory screening investigation.

Another point to be made about the definition of the required screening investigation is that it requires interviewing the respondent, if possible. It is respectfully suggested that compliance with this requirement prior to issuance of an *ex parté* order is the minimum necessary to comport with Due Process. Even if Due Process does not require obtaining the respondent's side, the statute's requirement to do so should be enforced by this Court.

Another point to be made about the definition of screening investigation is the investigation and review of the alleged facts is to include whether they "warrant emergency examination." It is only through compliance with this requirement that the State's assertion AS 47.30.700(a) satisfies Due Process because it only allows issuance of

an *ex parté* order when the court has probable cause to believe dire circumstances constituting an emergency exist can be effectuated.[13]

Moreover, AS 47.30.700(a) only provides that after the mandatory screening investigation is conducted, the court *may* issue an *ex parté* order. It is respectfully suggested this should be read in conjunction with the definition of screening investigation under AS 47.30.915(17) as only allowing an order be issued *ex parté* if the investigation and review of facts that have been alleged warrant *emergency* examination or treatment.[14] In other words, only if the screening investigation, after investigation of the allegations and reliability and credibility of the petitioner, warrants emergency examination or treatment, are *ex parté* proceedings permissible. This is required to comport with Due Process.

To buttress this point, AS 47.30.655, Purpose of major revision, provides in pertinent part that:

> The legislature has attempted to balance the individual's constitutional right to physical liberty and the state's interest in protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves by providing due process safeguards at all stages of commitment proceedings.

At page 8 of its Brief, the State cites the Court of Appeals in *MacDonald v. State*, 997 P.2d 1187, 1189 (Alaska App. 2000) for the proposition that "the issuance of ex parte

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[13] State Brief at 8.

[14] In connection with this, in her Opening Brief, at page 11, H.R., pointed out that Seacliff's waiting three days after signing the *Ex Parté* Petition demonstrated there was no urgency justifying an *ex parté* proceeding. Seacliff does not address this point, essentially conceding it.

orders in not an unusual procedure. Courts issue ex parte orders in a variety of situations." However, the State fails to note that the next sentence is, "The issuance of such an order is an emergency procedure and is only appropriate when the applicant is in need of immediate relief." Due Process requires an emergency or exigency sufficient to justify dispensing with notice and an opportunity to be heard.

This Court allowed *ex parté* proceedings in *In re Daniel G.*, 320 P.3d 262, 272, 273 (Alaska 2014) because (a) the *ex parté* petition was filed by *disinterested medical staff* who determined the respondent was in need of a full psychiatric evaluation,[15] and (b) concern that contested proceedings would *lengthen* a respondent's unnecessary confinement. Neither of these conditions exist here. Both of these considerations weigh heavily in favor of H.R.'s right to notice and an opportunity to be heard, especially in light of the lack of urgency.

Even if Due Process does not require the screening investigation to warrant *emergency* examination for *ex parté* proceedings to properly be conducted, it is respectfully suggested this Court should hold it is required to comply with the statute.

C. The Court Should Interpret AS 47.30.700(a) As Requiring Consideration of the Least Restrictive Means

As set forth in H.R.'s Opening Brief, a fundamental tenet of both the United States and Alaska constitutions is that deprivations of fundamental rights must use the least

[15] This included Daniel G. having an opportunity to present his side to the disinterested medical staff.

restrictive means. If AS 47.30.700(a), including AS 47.30.915(17)'s definition of screening investigation, does not require consideration of the least restrictive means, it would be unconstitutional. Under this Court's jurisprudence, "[c]ourts should construe enactments to avoid a finding of unconstitutionality to the extent possible." *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011), citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

Surely the AS 47.30.915(17) definition of screening investigation, including whether the investigation and review of facts that have been alleged warrant emergency examination can include the constitutionally required least restrictive means requirement. In other words, if there are less restrictive means, then emergency (i.e. *ex parté*) examination or treatment is not warranted. Whether this is constitutionally mandated or not, H.R. respectfully suggests this Court should interpret the screening investigation under AS 47.30.700(a) as requiring consideration of less restrictive means.

D. The Testimony Presented to the Superior Court Did Not Justify Issuance of the *Ex Parté* Order

Seacliff asserts that the testimony it presented justified the issuance of the *Ex Parté* Order, but does not dispute that it delayed filing the *Ex Parté* Petition for three days after signing the *Ex Parté* Petition, essentially admitting there was no exigency justifying dispensing with notice and an opportunity to be heard.

H.R. disputes the facts alleged by Seacliff, but of course was not allowed to present her side, including any witnesses. For example, H.R.'s API records show that her sister supports H.R.'s version of the facts and the PhD psychologist she had been seeing

once a week for four or five months was stunned to find out she had been admitted to API.

In *Kansas v. Crane*, 534 U.S. 407, 409, 122 S.Ct. 867, 869 (2002), the United States Supreme Court reiterated that civil commitment requires proper evidentiary standards. In this case, a substantial amount of the testimony upon which the *Ex Parté* Order is based was hearsay, or a result of leading questions, or even prompted by the petitioner's attorney. In addition, witnesses were allowed to hear other witnesses' testimony before they testified.

Hearsay. Examples of hearsay include:

- Tr. 9: 14-19
- Tr. 10: 2
- Tr. 11: 16-18.
- Tr. 12: 8-9.
- Tr. 13:8-10.
- Tr. 48:3-4.
- Tr. 48: 13-15.
- Tr. 49:5-8.
- Tr. 51: 23-25.
- Tr. 52:1-5.

Leading. Examples of leading the witnesses include:

- Tr. 21: 7-11.
- Tr. 52: 8-9.

Prompting. Examples of the Petitioner's prompting witnesses include:

- Tr. 25: 1.
- Tr. 31:16-17
- Tr. 34: 24
- Tr. 55: 6.

Another evidentiary impropriety was a witness being directed to look at his notes to determine if there were more things to which to testify. Tr. 10: 17-18.

The testimony presented by Seacliff is extremely suspect and there is little doubt that a different picture would have emerged if H.R. had been allowed to present her side. The *ex parté* hearing was not conducted pursuant to proper evidentiary standards as required by *Kansas v. Crane*. It is respectfully suggested that AS 47.30.700(a) stating that the court *may* issue an *ex parté* incorporates the Due Process requirement of sufficient reasons to dispense with notice and an opportunity to be heard before such an order may properly be issued. The testimony presented by Seacliff does not satisfy this requirement.

V. CONCLUSION

For the foregoing reasons, Appellant H.R. respectfully requests this Court to **Reverse** and **Vacate**, the December 5/9, 2015, Order Authorizing Hospitalization for Evaluation below.