IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

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

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

BRIEF OF APPELLANT

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I. TABLE OF CONTENTS

II. TABLE OF CONSTITUTIONAL PROVISIONS, CASES, AND STATUTES

CONSTITUTIONAL PROVISIONS

CASES

STATUTES

III. CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES PRINCIPALLY RELIED UPON

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.

IV. JURISDICTIONAL STATEMENT

Appellant, L.M, appeals to the Alaska Supreme Court from the August 30, 2016, oral order granting the Petition for 90-Day Commitment filed against Appellant by the Alaska Psychiatric Institute. Notice of Appeal was timely filed September 26, 2016. This court has jurisdiction under AS 22.05.010(a) & (b).

V. PARTIES

The parties to this appeal are L.M, Appellant, and the Alaska Psychiatric Institute, Appellee.

VI. STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. May the State constitutionally confine someone in a psychiatric hospital when there is a feasible less restrictive alternative?

VII. STATEMENT OF THE CASE

A. Brief Description of Case

L.M., was involuntarily committed to the Alaska Psychiatric Institute for 90 days after (1) a jury found her to be a danger to others,[1] and (2) the Court orally found there was no less restrictive alternative.[2] There was unrebutted expert testimony that a program called Soteria-Alaska, which was closed due to insufficient state funding, was a

[1] Tr. 4.

[2] Exc. 6, Tr. 150.

feasible less restrictive alternative.[3] In orally determining there was no less restrictive alternative the Court held that it was up to the Legislature to decide whether to fund a less restrictive alternative and that requiring the legislature to fund a less restrictive alternative would violate the separations of powers doctrine.[4] This misses the point. The point is that under both the State and Federal Constitutions the State cannot psychiatrically confine someone if there is a feasible less restrictive alternative.

B. Course of Proceedings

On August 10, 2016, a Petition for 90-Day Commitment was filed against Appellant, L.M.[5]

A jury trial was held August 22-25, 2016, on whether L.M., was mentally ill and dangerous to others, at the end of which the jury returned a verdict that she was.[6]

The Superior Court then held a hearing on August 30, 2016, on whether there was a less restrictive alternative to the Alaska Psychiatric Institute,[7] at the end of which the Superior Court found there was not.[8]

This appeal was then timely filed on September 26, 2016.

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[3] Tr. 72-73.

[4] Exc. 6, Tr. 150.

[5] Exc. 1.

[6] Tr. 4.

[7] Tr. 4.

[8] Exc. 6, Tr. 150.

C. Statement of Facts

Dr. Aron Wolf, was qualified as an expert in clinical psychiatry without objection,[9] and, after *voir dire* examination,[10] also as an expert in less restrictive alternatives to psychiatric hospitalization.[11]

There was unrebutted testimony from Dr. Wolf that Soteria-Alaska, a successful program, would have been a less restrictive alternative for L.M., had it not been closed due to insufficient funding from the State the year before.[12]

In her closing, citing *Matter of Mark V.*,[13] and *Bigley v. Alaska Psychiatric Institute*,[14] L.M. argued:

> As a constitutional matter, that the state cannot de-fund Soteria-Alaska and then say that because we haven't funded it, there is no less restrictive alternative.[15]

The Superior Court rejected this in its oral ruling:

> I reject the idea that there's a constitutional right that would require the state to fund particular kinds of programs. There would be separation of powers issues, I believe.[16]

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[9] Tr. 64.

[10] Tr. 64-67.

[11] Tr. 67.

[12] Tr. 72-73.

[13] 375 P.3d 51 (Alaska 2016).

[14] 208 P.3d 168 (Alaska 2009).

[15] Tr. 147.

[16] Tr. 150.

VIII. ARGUMENT

A. Summary of Argument

When the government infringes upon a fundamental constitutional right, it has to do so in the least restrictive manner. Under both the Alaska and Federal Constitutions, a person may not be involuntarily committed if there is a less restrictive alternative. In this case, the Superior Court rejected this principle, holding that it could not direct the Legislature to spend money on a less restrictive alternative to psychiatric incarceration.[17] However, that is not the issue. The issue is that the state may not constitutionally psychiatrically incarcerate someone when a less intrusive alternative is feasible--even if the State has chosen not to fund the alternative. It is a question of the constitutional limits on the government's power to infringe the fundamental right of someone to be free from confinement, not the obligation of the state to spend money on a less restrictive alternative.

B. Standard of Review

This Court applies its independent judgment to questions of constitutional law and reviews *de novo* the construction of the Alaska and Federal Constitutions. *State, Dept. of Revenue v. Andrade*.[18]

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[17] Exc. 6, Tr. 150.

[18] 23 P.3d 58, 65 (Alaska 2001).

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

It is a core principle of United States constitutional law that when someone's fundamental constitutional right is being infringed the least restrictive means of achieving the governmental interest must be used.[19] *San Antonio Independent Sch. Dist. v. Rodriguez*.[20] The same is true under the Alaska Constitution:

> Under our case law, we begin our analysis in cases such as the one at hand by measuring the weight and depth of the individual right at stake so as to determine the proper level of scrutiny with which to review the challenged legislation. If this individual right proves to be fundamental, we must then review the challenged legislation strictly, allowing the law to survive only if the State can establish that it advances a compelling state interest using the least restrictive means available.

(emphasis added). *State v. Planned Parenthood of Alaska*,[21] footnotes omitted.

In *Wetherhorn v. Alaska Psychiatric Institute*,[22] citing *Humphrey v. Cady*,[23] and *Addington v. Texas*,[24] this Court held that involuntary commitment is " 'a massive curtailment of liberty' that cannot be accomplished without due process of law." In *Mark*

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[19] In *In re Reid K.*, 357 P.3d 776, 782-783 (Alaska 2015), this Court directed that in future appeals from involuntary commitments, if the State believes the appeal is moot and no mootness exception is readily apparent, it should move to dismiss the appeal as moot prior to briefing. Since this appeal presents a constitutional issue not involving the sufficiency of the evidence, the public interest exception to the mootness doctrine is readily apparent. Presumably that is why the State did not file a motion to dismiss prior to briefing.

[20] 411 U.S. 1, 51, 93 S.Ct. 1278, 1306 (1973).

[21] 171 P.3d 577, 581 (Alaska 2007).

[22] 156 P.3d 371, 375-376 (Alaska 2007).

[23] 405 U.S. 504, 509, 92 S.Ct. 1048 (1972).

[24] 441 U.S. 418, 425, 99 S.Ct. 1804 (1979).

V. citing *Wetherhorn*,[25] this Court held, "Finding that no less restrictive alternative exists is a constitutional prerequisite to involuntary hospitalization."

In *Myers v. Alaska Psychiatric Institute*,[26] with respect to the analogous fundamental constitutional right to be free of unwanted psychiatric medication, this Court held:

> "When no emergency exists, ... the state may override a mental patient's right to refuse psychotropic medication only when necessary to advance a compelling state interest and only if no less intrusive alternative exists."[27]

In *Bigley*,[28] this Court held such a less intrusive alternative exists when "it is feasible and would actually satisfy the compelling state interests that justify the proposed state action." This Court then specifically addressed the constitutional limitation of least restrictive means as distinct from the right to receive a certain form of treatment:

> If that *Myers* inquiry had lead us to conclude that API's proposed treatment was constitutionally barred, that would not give rise to a legal obligation on API's part to provide Bigley's less intrusive alternative. API could attempt to offer some other form of treatment that was not constitutionally invalid, or could simply release Bigley without treatment (which is what happened in this case).

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[25] 375 P.3d at 59.

[26] 138 P.3d 238, 248 (Alaska 2006).

[27] The emergency situation to which this Court was referring is under AS 47.30.838 which statutorily allows the State to psychiatrically drug someone against his or her will for no more than three 24 hour time periods without court approval only if:

> there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person.

[28] 208 P.3d at 185.

Since the state must release a patient if it fails to provide a feasible less intrusive alternative with respect to forcing someone to take a drug against their will, surely the same must be true with respect to the least restrictive alternative requirement for involuntary commitment. Again, it is not a question of whether the State is obligated to provide the less restrictive alternative, but that it cannot constitutionally confine the person if it does not provide it. It is a constitutional limitation on the power of the State to confine someone.

As held by this Court in *Myers*, before the State may file a petition to drug a person against their will, the person must have first been committed for being mentally ill and, as a result, likely to cause harm to themselves or others.[29] So, in both situations the constitutional least restrictive means limitation applies to people who have been adjudicated a danger to themselves or others. Even with such an adjudication, the State simply is not constitutionally allowed to confine someone for being mentally ill if there is a feasible less restrictive alternative. That they have been found to be a danger to themselves or others does not obviate the constitutional least restrictive alternative requirement. People who are known to be dangerous and not adjudicated mentally ill are not confined unless they have been charged or convicted of a crime. People who are known to be dangerous are let out of prison at the end of their terms. The constitutional authority to confine someone who has been found to be mentally ill and, as a result, a danger to self or others, is limited by the least restrictive alternative requirement.

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[29] 138 P.3d at 242.

The Superior Court's holding that it would not find Soteria-Alaska a less restrictive alternative because the Court could not force the State to fund it is erroneous.[30]

IX. CONCLUSION

For the foregoing reasons, Appellant L.M. respectfully requests this Court to (1) **Reverse** the Superior Court's holding that the State's failure to fund a feasible less restrictive alternative did not prevent the state from constitutionally involuntarily committing L.M., and (2) **Vacate**, the August 30, 2016, oral order for 90-day commitment.

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[30] Alaska statutes do have provisions relating to less restrictive alternatives, but they are constitutionally insufficient to protect L.M.'s Due Process rights because they only apply to funded programs. *See*, AS 47.30.740(a), AS 47.30.730(a), AS 47.30.755(b), and AS 47.30.915(11).