IN THE SUPREME COURT OF 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-16-01656 PR**

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

BRIEF OF APPELLEE STATE OF ALASKA

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ALASKA STATUTES:

AS 47.30.740. Procedure for 90-day commitment following 30-day commitment

(a) 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"; and

> (1) allege that the respondent has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation, or that the respondent was committed initially as a result of conduct in which the respondent attempted or inflicted serious bodily harm upon the respondent or another, or that the respondent continues to be gravely disabled, or that the respondent demonstrates a current intent to carry out plans of serious harm to the respondent or another;
>
> (2) allege that the respondent has received appropriate and adequate care and treatment during the respondent's 30-day commitment;
>
> (3) be verified by the professional person in charge, or that person's professional designee, during the 30-day commitment.

(b) The court shall have copies of the petition for 90-day commitment served upon the respondent, the respondent's attorney, and the respondent's guardian, if any. The petition for 90-day commitment and proofs of service shall be filed with the clerk of the court, and a date for hearing shall be set, by the end of the next judicial day, for not later than five judicial days from the date of filing of the petition. The clerk shall notify the respondent, the respondent's attorney, and the petitioner of the hearing date at least three judicial days in advance of the hearing.

(c) Findings of fact relating to the respondent's behavior made at a 30-day commitment hearing under AS 47.30.735 shall be admitted as evidence and may not be rebutted except that newly discovered evidence may be used for the purpose of rebutting the findings.

AS 47.30.745. 90-day commitment hearing rights; continued commitment

(a) A respondent subject to a petition for 90-day commitment has, in addition to the rights specified elsewhere in this chapter, or otherwise applicable, the rights enumerated in this section. Written notice of these rights shall be served on the respondent and the respondent's attorney and guardian, if any, and may be served on an adult designated by the respondent at the time the petition for 90-day commitment is served. An attempt shall

be made by oral explanation to ensure that the respondent understands the rights enumerated in the notice. If the respondent does not understand English, the explanation shall be given in a language the respondent understands.

(b) Unless the respondent is released or is admitted voluntarily following the filing of a petition and before the hearing, the respondent is entitled to a judicial hearing within five judicial days of the filing of the petition as set out in AS 47.30.740(b) to determine if the respondent is mentally ill and as a result is likely to cause harm to self or others, or if the respondent is gravely disabled. If the respondent is admitted voluntarily following the filing of the petition, the voluntary admission constitutes a waiver of any hearing rights under AS 47.30.740 or under AS 47.30.685. If at any time during the respondent's voluntary admission under this subsection, the respondent submits to the facility a written request to leave, the professional person in charge may file with the court a petition for a 180-day commitment of the respondent under AS 47.30.770. The 180-day commitment hearing shall be scheduled for a date not later than 90 days after the respondent's voluntary admission.

(c) The respondent is entitled to a jury trial upon request filed with the court if the request is made at least two judicial days before the hearing. If the respondent requests a jury trial, the hearing may be continued for no more than 10 calendar days. The jury shall consist of six persons.

(d) If a jury trial is not requested, the court may still continue the hearing at the respondent's request for no more than 10 calendar days.

(e) The respondent has a right to retain an independent licensed physician or other mental health professional to examine the respondent and to testify on the respondent's behalf. Upon request by an indigent respondent, the court shall appoint an independent licensed physician or other mental health professional to examine the respondent and testify on the respondent's behalf. The court shall consider an indigent respondent's request for a specific physician or mental health professional. A motion for the appointment may be filed in court at any reasonable time before the hearing and shall be acted upon promptly. Reasonable fees and expenses for expert examiners shall be determined by the rules of court.

(f) The proceeding shall in all respects be in accord with constitutional guarantees of due process and, except as otherwise specifically provided in AS 47.30.700 - 47.30.915, the rules of evidence and procedure in civil proceedings.

(g) Until the court issues a final decision, the respondent shall continue to be treated at the treatment facility unless the petition for 90-day commitment is withdrawn. If a decision has not been made within 20 days of filing of the petition, not including extensions of time due to jury trial or other requests by the respondent, the respondent shall be released.

PARTIES

The appellant is Linda M.[1] The appellee is the State of Alaska.

ISSUES PRESENTED

1. *Mootness.* Linda's ninety-day commitment order has expired and Linda has been released from the Alaska Psychiatric Institute (API). Is Linda's appeal moot, and if so, does it fall within any of the exceptions to the mootness doctrine?

2. *Least restrictive alternative.* A jury found that Linda was mentally ill and a danger to others. API was the only existing, secure facility that could provide Linda with 24/7 supervision, which the court found she needed. Soteria-Alaska—a different facility that one witness thought might have been appropriate for Linda—no longer exists. Did the superior court err in concluding that commitment at API was the least restrictive alternative for Linda?

INTRODUCTION

Linda experiences paranoid and persecutory delusions, believing people are following her, poisoning her, and harming her in her sleep. She caused a car accident by running a red light while fleeing from perceived pursuit, and she was criminally charged after assaulting her mother and a police officer. At API, Linda was diagnosed with schizophrenia. The superior court committed her to API for thirty days, and then—after a jury found her to be mentally ill and a danger to others—for another ninety days.

Linda has since been released from API, meaning her appeal is technically moot, but the Court may wish to consider it under an exception to the mootness doctrine.

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

Linda makes only one argument on appeal: that the superior court erred in finding that API was the least restrictive alternative for her because a facility called Soteria-Alaska would have been less restrictive. But Soteria-Alaska no longer exists. To be considered a less restrictive alternative, "the alternative *must actually be available*, meaning that it is *feasible* and would actually satisfy the compelling state interests that justify the proposed state action."[2] Because Soteria-Alaska is closed, it is neither "available" nor "feasible." Linda blames the State for the closure, but the evidence falls short of showing that it was the State's fault. And even if Soteria-Alaska could be resurrected, that would take time, so Linda still could not have been placed there instead of API. Finally, the brief testimony about Soteria-Alaska does not establish that it would be *both* less restrictive than API *and* sufficiently protective of the State's compelling interests, given that Linda needed a secure facility with 24/7 supervision.

The Court should affirm the ninety-day commitment order.

STATEMENT OF THE CASE

I. Linda has a history of mental health difficulties.

Linda's parents divorced when she was young, and she was abused by her father. [Tr. 237-38, 242] She may have developed post-traumatic stress disorder. [Tr. 241-43, 212-13] But when Linda was an adult, her mother began worrying that she was having other mental health problems too. [Tr. 243] Once, Linda asked her mother if she was part of a reality TV show in which she was constantly followed around and filmed. [Tr. 243]

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[2] *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 185 (Alaska 2009) (emphasis added).

On another occasion, Linda had a bad reaction to some soup her mother prepared, and accused her mother of deliberately poisoning it. [Tr. 243-44]

Linda's symptoms began escalating around June of 2015. [Tr. 249] When Linda misplaced things around her mother's house—where she was living—she accused her mother of letting people come in and take her things. [Tr. 247] And Linda thought people were hiding in her mother's attic and harming her while she slept by filing her teeth off or altering her voice. [Tr. 247] She got angry at her mother for allowing this to happen. [Tr. 247] She also accused people of sneaking things into her food, spitting in her food, or urinating and defecating in her food. [Tr. 273] When Linda and her mother went out in public, Linda would think that random strangers were actually spies in a coordinated scheme based on the colors of their clothing. [Tr. 250] And Linda accused everybody, including her supervisors at work and her underage cousins, of trying to steal her boyfriend. [Tr. 249] After her boyfriend assaulted her, she insisted it hadn't been him, but instead somebody who looked just like him. [Tr. 249]

Linda began to act out more aggressively after she was administratively discharged from her job with the State of Alaska in April 2016. [Tr. 252] She spit on her dentist's wife because she thought her dentist was filing her teeth off. [Tr. 248] She threw water at a bus driver for not helping her get her bike off the bus. [Tr. 253] She threw something at a security guard and ran from the troopers. [Tr. 252] She kicked in her mother's stove door with heavy boots, damaged her mother's dishwasher, and threw her mother's medication and plants around the house. [Tr. 247, 254] She threw and kicked

her mother's purse. [Tr. 261] Linda's mother felt personally threatened by Linda several times every month. [Tr. 258-59]

II. Linda's assaultive behavior led to her arrest.

The Anchorage Police Department crisis intervention team responded to Linda's mother's house several times, usually because Linda's mother reported that Linda was threatening her. [Tr. 171-72] The officers on the team are trained to try to de-escalate situations involving people with mental illnesses. [Tr. 186-87] When officers responded to Linda's mother's house, Linda was usually "agitated" and "very volatile." [Tr. 173] Sometimes Linda would seem normal and articulate, but then "just like that she'll switch and she's angry, yelling at everybody, mostly her mom." [Tr. 174] She would "snap" and "act like she's going to assault somebody." [Tr. 175]

On one occasion, Linda's mother called the crisis intervention team because Linda spat on her and was threatening her with a shovel. [Tr. 176, 262-63] When the team arrived at the house, an officer saw Linda holding a long shovel and walking towards him. [Tr. 177] He yelled at Linda to drop the shovel, but she looked at him and raised the shovel as if she was about to attack him. [Tr. 177] He pulled out his taser and repeated his instruction to drop the shovel; a few seconds later, Linda dropped it. [Tr. 177] Because the officer was familiar with Linda and had transported her to the hospital before, he did not immediately handcuff her, but instead tried to talk to her. [Tr. 177-78]

After talking to Linda and her mother, the officers decided to arrest Linda for threatening her mother with the shovel and spitting on her. [Tr. 178] When the officers handcuffed Linda and tried to put her in a police vehicle, she began kicking the vehicle

and then turned around, stepped towards an officer, and kicked him in the knee. [Tr. 179] The officer fell to the ground in pain, and his hyperextended knee remained sore for three days, causing him to limp. [Tr. 179] Linda was criminally charged. [R. 325]

At the time, Linda was already facing a criminal charge for reckless driving in connection with a car accident that she caused. [Tr. 458-65, 138-39, 437] In a later attempt to explain how this accident occurred, Linda said she "had been poisoned four times in 24 hours" at Bear Tooth with "deadly toxic poisons" and "almost died of a heart attack." [Tr. 460] Then, as she drove to Fred Meyer to buy a new phone charger, she saw "12 cars" chasing her, which were driven by "ex-police officers that chase [her] around making sure that [she] won't date any more guys that they don't approve of." [Tr. 461] Trying to escape, she ran a red light and was hit by another car. [Tr. 464] She thought the police "may have been watching at the time" because "they stopped the light early." [Tr. 464] She got out of her car and yelled "F the police." [Tr. 465]

III. Linda continued her assaultive behavior at the Alaska Psychiatric Institute.

To resolve questions about Linda's competency to stand trial in her two criminal cases, Linda was sent to API. [R. 325, 717; Exc. 40 n.6; Tr. 157-58, 11] When Linda first arrived at API, she was "very agitated"; she made "frequent verbal threats against staff members," including threatening to kill them. [Tr. 230, 293, 298-99] When she took medication, API staff "saw a slight calming in her behavior." [Tr. 230, 294] But when she stopped taking medication, her demeanor reverted to its initial, agitated state. [Tr. 230-31] API filed a petition to commit Linda for thirty days, and a hearing was held on the petition in mid-July 2016. [R. 802-03; Exc. 10-33]

Psychiatric nurse practitioner Gerald Martone at API diagnosed Linda with "schizophrenia, unspecified," which is "a psychotic disorder" that is "manifested by hallucinations, delusions, impaired cognition, and extreme mood swings." [Tr. 189, 194-98] A medical doctor and two clinical psychologists concurred in this diagnosis. [Tr. 215] According to Jamey Burris-Fish, also a psychiatric nurse practitioner, API later shifted Linda's diagnosis from "schizophrenia, unspecified," to "schizophrenia, paranoid type," due to Linda's paranoid and persecutory delusions. [Tr. 286, 289-90] Ms. Burris-Fish worried that Linda would act out, possibly in a confrontational, accusatory, physically aggressive way, to protect herself from the perceived persecution. [Tr. 295]

Linda harbors "a lot of delusions and a lot of paranoia and persecutory ideas." [Tr. 199] Linda thought she was at API because people were jealous of her and wanted to hurt her. [Tr. 291] She made daily comments about staff members poisoning her food or contaminating it with semen or spit. [Tr. 199, 291, 295] Although Linda was gluten intolerant, her statements about poisoned food were not limited to fears of gluten—for example, she said she knew people were putting rat poison in her food because it was clumping together. [Tr. 291-92] Linda also claimed people were coming in at night and sexually assaulting her at API. [Tr. 200, 291, 295]

Linda's own testimony at her thirty-day commitment hearing reflected her paranoid and delusional thought process. [Exc. 15-17] For example, she testified that members of a "drug cartel" had attempted to poison her because they "believed that [she] had somehow caused death in their families." [Exc. 16] She said she has "a lot of ex-boyfriends who are in the military" who "have done cocaine and were chasing [her]

around with different cocaine cartels, from all over the world," and "are chasing people around in Anchorage." [Exc. 16] She said she "was put on an FBI watch list as a result" and her "phones were tapped illegally by the NSA." [Exc. 16-17]

After the thirty-day commitment hearing, the court found that Linda had a mental illness and as a result posed "a substantial risk of harm to others." [Exc. 18-19] The court ordered Linda committed to API for up to thirty days. [Exc. 19, 34-43]

In late July 2016, during Linda's stay at API, Mr. Martone entered Linda's room and she swore at him, threatened him, and quickly lunged towards him with a cordless phone in her hand. [Tr. 201-03] He was surprised and momentarily afraid. [Tr. 203] He jumped out of the way and slammed the door to protect himself. [Tr. 203]

Later that day, Linda began yelling and threatening staff members and other patients, leading staff to radio for backup. [Tr. 224-25] As this was going on, Mr. Martone walked up and Linda swung towards his head with a closed fist, almost hitting him. [Tr. 204-05, 225] To an observing staff member, this "seemed like a serious effort to attack Mr. Martone." [Tr. 226] Mr. Martone was afraid and surprised, and other staff came and held Linda back as she continued to threaten, swear, and yell. [Tr. 205] Then, although her arms were restrained, Linda was able to kick Mr. Martone in his leg. [Tr. 205-06] Mr. Martone considered these incidents to be "symptomatic of her acute exacerbation of psychosis." [Tr. 207] Mr. Martone also heard Linda make verbal threats about what she would do to people when she got out of API. [Tr. 210-11]

In August 2016, Linda lunged at Dr. Kaichen McRae, a post-doctorate mental health clinician, during a discussion about her mental health. [Tr. 223, 226-27] Linda was

telling Dr. McRae about her persecutory delusions. [Tr. 226-27] "Throughout the discussion [Linda] became increasingly adamant about these things, increasingly agitated, was having difficulty making a lot of sense." [Tr. 227] After Dr. McRae gave Linda an opinion about her current mental functioning, Linda stared intently at her, said "That is why I do this to you," stood up, and lunged across the table with her hands raised in closed fists. [Tr. 227] Dr. McRae got up from her chair and moved away to avoid being hit; she then asked Linda to leave the room, and Linda did. [Tr. 227-29] After this incident, Dr. McRae saw Linda pacing back and forth and glaring at her. [Tr. 227] Dr. McRae was concerned about the unpredictability of Linda's behavior. [Tr. 229]

IV. After a trial, a jury found that Linda was mentally ill and a danger to others.

API filed a petition to commit Linda for another ninety days, and Linda requested a jury trial. [Exc. 44-45; R. 440] A jury trial was held in late August 2016. [Tr. 156-559]

Early in the trial, Linda had an outburst in front of the jury. [Tr. 184-85] Her attorney touched her, and she reacted by yelling "Fuck you" and "I am really tired of you trying to manipulate that shit. I don't want to be touched by men." [Tr. 184-85, 220] As later described by the judge for the record, Linda stood up during this outburst and "took her pen or pencil and made a stabbing motion downward on the table next to Mr. Gottstein," her attorney. [Tr. 219] She did not hit him, but the judge said that given the force she used, "it's my belief that had she struck him with that pen or pencil, he could have been seriously, he would have been seriously injured." [Tr. 219] The outburst prompted the in-court clerk to hit the courtroom's panic button. [Tr. 219]

Later in the trial, Linda testified in a rambling fashion, revealing that her paranoid delusions persisted. [Tr. 422-75] She spoke of "gangs following [her] around, scary military members, and police who are part of those military gangs." [Tr. 430, 441-42, 447-48] She said people "were harassing my boyfriend and I with online multi-player video games by sending their friends around to harass us at every location that we would go to due to their jealousy." [Tr. 433] They "send real people to go to the places that you go to to harass you and make it so that you don't get to watch entertainment that you like, so that they get rid of the bands you like, they put them out of business, they put your friends' businesses out of business." [Tr. 448] She asserted "There have been other people impersonating my boyfriend, and those people are much scarier than my boyfriend because they are likely to use deadly and scary force." [Tr. 433, 451] She said "They break into people's houses and they look like him, and he's been getting blamed." [Tr. 433, 451] She said "[T]he military has been playing a game where if you follow one of those women who my ex-boyfriend was dating, that means that he has to marry that person. So they're trying to get me diagnosed with schizophrenia so that it's okay." [Tr. 435, 455] She described other implausible conspiracy scenarios. [Tr. 451-59]

After the trial, the jury returned a special verdict, unanimously answering "yes" to the two questions "[H]as the State proven by clear and convincing evidence that [Linda] is mentally ill?" and "[H]as the State proven by clear and convincing evidence that, as a result of mental illness, [Linda] is likely to cause harm to others?" [Exc. 46-47]

V. After a further hearing, the superior court found that there was no less restrictive alternative to commitment at the Alaska Psychiatric Institute.

A few days after the jury's decision, the superior court held an evidentiary hearing on whether there was any less restrictive alternative for Linda than commitment at API. [Tr. 1-152] Ms. Burris-Fish from API testified that Linda's condition had not significantly improved or changed since the jury trial. [Tr. 18, 17, 26-28, 33]

The primary alternative to API that witnesses discussed at the evidentiary hearing was the "CHOICES" community behavioral health program. [Tr. 37, 46-54, 57, 70-72, 92-112] This program provides its clients with community support in the form of periodic check-ins, phone calls, and a crisis hotline; it does not have much staff or an office. [Tr. 47, 49] The program offers services to its clients but does not force them to participate. [Tr. 98] Clients are not monitored 24/7 and are free to come and go in the community. [Tr. 99, 105] CHOICES does not have its own housing facility—instead, clients are housed around the community in hotels and single-room occupancy lodging—so Linda would need some sort of housing if she enrolled in CHOICES. [Tr. 47]

Dr. Aron Wolf, a clinical psychiatrist who evaluated Linda, testified on her behalf and opined that she could be discharged to CHOICES if a safe housing situation for her were prearranged, such as an assisted living home or other place with professional staff on the premises. [Tr. 71-72, 82] The court asked Dr. Wolf how this arrangement would protect the public given the jury's finding that Linda was a danger to others. [Tr. 75-76] Dr. Wolf said that perhaps if Linda became agitated in an assisted living home the staff could restrain her and calm her down or return her to API if necessary. [Tr. 76-77]

But API's witnesses disagreed that this would be a workable plan for Linda. Aretha Tyus, a mental health clinician at API and licensed clinical social worker recognized as an expert in API discharge planning, explained that Linda had not been—and would not be—accepted into any licensed, publicly funded assisted living homes in Alaska. [Tr. 44] Such homes require that a client be medication compliant if she has a history with API and a diagnosis that would benefit from medication. [Tr. 44] Ms. Tyus opined that private, non-licensed homes also likely would not accept Linda because of her unpredictability and aggressiveness. [Tr. 45] Ms. Tyus also did not think Henry House—a halfway house for criminals—would provide an appropriate housing situation for Linda in conjunction with CHOICES. [Tr. 61, 57] Ms. Tyus testified that discharging Linda to CHOICES in her current state would not be consistent with the standards of practice of a licensed clinical social worker. [Tr. 49, 53-54, 40-43]

Ms. Burris-Fish similarly opined that the standard of care for Linda would be to stabilize her at API with medication before releasing her to an outpatient setting. [Tr. 31-32] She thought CHOICES would work for Linda "once she's stable." [Tr. 37] She explained that Linda's behavior remained "unpredictable" and that she still needed 24/7 supervision. [Tr. 25] She thought Linda's delusions needed to be brought under control before Linda could be treated on an outpatient basis. [Tr. 21-22] She surmised that because Linda still did not believe she was mentally ill, Linda would not cooperate with an outpatient mental health provider. [Tr. 18-20] She opined that Linda "would be setting herself up to fail if she were put into a community setting at this time." [Tr. 21]

Another alternative to API that was mentioned at the hearing—though only very briefly—was Soteria-Alaska. [Tr. 65-66, 72, 79] Soteria-Alaska was a treatment facility that closed in 2015. [Tr. 72-73] Linda's witness Dr. Wolf thought Soteria-Alaska would have been a good option for Linda because it had 24/7 supervision. [Tr. 72, 79] He asserted that it closed in part because "the model didn't fit . . . the kind of Medicaid billing that the state wished." [Tr. 72-73] He acknowledged, though, that a former patient murdered another former patient at the facility while the victim was volunteering there. [Tr. 79] He did not provide any further details about Soteria-Alaska or why it closed.

In closing argument, Linda's attorney asserted that Linda "has the constitutional right to a Soteria-like setting." [Tr. 147] He argued that "as a constitutional matter . . . the state cannot de-fund Soteria Alaska and then say that because we haven't funded it, there is no less-restrictive alternative." [Tr. 147] In response, the court said, "I reject the idea that there's a constitutional right that would require the state to fund particular kinds of programs." [Tr. 150] The court also said, "I certainly do not believe I've had sufficient evidence that would suggest to me all the reasons that that facility was de-funded, went out of business, whatsoever, but it no longer exists." [Tr. 150]

In the end, the court found that "none of the less-restrictive alternatives that have been proposed by the respondent or would otherwise be available will protect and be able to protect the . . . public from the danger to others that [Linda] currently [poses]." [Tr. 149] The court reasoned that "[w]hile CHOICES, once she stabilizes, may be able to do that, while un-stabilized they are unable to do that. They can't watch her 24/7." [Tr. 149] A lesser level of supervision would not "protect the public from the harm of

delusions where [Linda] might believe she's being chased by others and cause traffic accidents by her belief that others are out to get her and she reacts in a physical manner that's led to the assault charges." [Tr. 149] The court observed that "when [Linda] become[s] agitated, she becomes agitated rapidly, and calling [crisis] lines and other things are not sufficient to protect the public from outcomes that might occur when she becomes rapidly agitated and reacts." [Tr. 149] Thus, the court concluded, "other than a facility like API that is locked and it provides 24/7 care, I do not believe that there is less restrictive alternative under her current status." [Tr. 149-50]

STANDARDS OF REVIEW

The Court applies its independent judgment to questions of mootness.[3]

Whether there is a less intrusive alternative to commitment is a mixed question of fact and law.[4] "Assessing the feasibility and likely effectiveness of a proposed alternative is in large part an evidence-based factual inquiry by the trial court."[5] This Court reviews a trial court's factual findings for clear error, but reviews de novo the trial court's application of the law to the facts.[6]

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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.").

4 *Bigley*, 208 P.3d at 185.

5 *Id.*

6 *See Resurrection Bay Auto Parts, Inc. v. Alder*, 338 P.3d 305, 307 (Alaska 2014).

ARGUMENT

I. This case is technically moot, but the Court may wish to hear it under the public interest exception to mootness.

Because the ninety-day commitment order that Linda appeals has already expired and Linda has already been released from API, her appeal is technically moot. But the Court may wish to hear her appeal on the merits under a mootness exception.

The collateral consequences exception to mootness—under which the Court will hear a moot appeal of a person's first involuntary commitment[7]—does not appear to be applicable here. Linda was already involuntarily committed under a thirty-day order before the court entered the ninety-day order that she now appeals. [R. 630, 792-801] No apparent additional collateral consequences attach to the ninety-day commitment order that would not already attach to the unappealed thirty-day commitment order.[8] The collateral consequences exception to mootness does not apply to Linda's case unless she can articulate additional consequences that attach to the ninety-day order.[9]

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[7] *See In re Joan K.*, 273 P.3d 594, 598 (Alaska 2012) (concluding "that there are sufficient general collateral consequences, without the need for a particularized showing, to apply the [collateral consequences exception to mootness] in an otherwise-moot appeal from a person's first involuntary commitment order").

[8] *Cf. In re Reid K.*, 357 P.3d 776, 782 (Alaska 2015) ("[A]ny consequences arising from Reid's 30-day commitment order are subsumed within his subsequent 90-day commitment order, which were both adjudicated orders.").

[9] *Cf. In re Mark V.*, 324 P.3d 840, 845 (Alaska 2014) (refusing to apply collateral consequences exception because appellant "has not convinced us that the disputed order could have resulted in any additional collateral consequences. We are also unconvinced that the mere possibility of additional but unparticularized collateral consequences automatically justifies substantive review of every subsequent involuntary commitment order entered against a respondent.").

The Court may nonetheless decide to hear Linda's appeal under the public interest exception to mootness.[10] The issue Linda raises—whether a defunct facility can constitute a "less restrictive alternative" precluding a civil commitment—is capable of repetition and, like all issues in civil commitment cases, would evade review if the mootness doctrine were applied. Whether this issue is "so important to the public interest as to justify overriding the mootness doctrine"[11] is less clear, as the State believes Linda's arguments lack merit. But because civil commitment is significant and because the issue Linda raises may be generalizable to other cases, the Court may wish to consider it.

II. The superior court did not err in finding that there was no less restrictive alternative for Linda than commitment at the Alaska Psychiatric Institute.

"Finding that no less restrictive alternative exists is a constitutional prerequisite to involuntary hospitalization."[12] Linda argues not that a less restrictive facility *actually exists* that would have worked for her instead of API, but that such a facility *used to exist*. The State, however, must deal with an acute and dangerous psychiatric situation like Linda's using the options that are available at the time the situation arises. The superior court did not err in finding that no less restrictive alternative existed for Linda.

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10 *See In re Tracy C.*, 249 P.3d 1085, 1090 (Alaska 2011) ("Whether the public interest exception applies depends on three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.") (internal quotation marks omitted).

11 *See Id.*

12 *Matter of Mark V.*, 375 P.3d 51, 59 (Alaska 2016).

In looking at alternatives for a psychiatric patient, the superior court must balance the fundamental liberty and privacy interests of the patient against the compelling interests that justify the State's intervention.[13] Given the jury's findings that Linda was mentally ill and, as a result, likely to cause harm to others, the State had compelling interests both in protecting the public from Linda (implicating its police power)[14] and in helping Linda by treating her mental illness (implicating its *parens patriae* power).[15] Linda harbored persistent, paranoid delusions that caused her to act out in unpredictable and aggressive ways, even after she was hospitalized at API.[16] Linda has not appealed the jury's findings that she was mentally ill and dangerous to others, so it is undisputed that the State had compelling police power and *parens patriae* interests at stake.

To conduct the required balancing of Linda's liberty interests against the State's interests, the superior court had to evaluate whether Linda's proposed alternatives to API would be "feasible and effective in promoting the same compelling state interests" that justified the State's proposed treatment at API.[17] In other words, the court had to evaluate whether Linda's proposed alternatives to API would be "feasible and effective" in both

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13 *See Bigley*, 208 P.3d at 185.

14 *Cf. Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 248 (Alaska 2006) (noting that "the state's power of civil commitment sufficed to meet its police-power interest" in protecting the public and the patient from the danger to herself or others that a patient posed).

15 *Cf. Bigley*, 208 P.3d at 186 (describing "the state's *parens patriae* power" as "the inherent power and authority of the state to protect the person and property of an individual who lacks legal age or capacity") (internal quotation marks and alteration omitted).

16 *See supra* pp. 3-7.

17 *See Bigley*, 208 P.3d at 185.

protecting the public from the danger posed by Linda and helping Linda by treating her mental illness. "Assessing the feasibility and likely effectiveness of a proposed alternative is in large part an evidence-based factual inquiry by the trial court."[18]

The superior court correctly rejected all of the *existing* less restrictive alternatives to API that were discussed in testimony, like the CHOICES program. [Tr. 148-50, 37, 46-61, 70-73, 79-81, 93-112] The court found that "other than a facility like API that is locked and it provides 24/7 care, I do not believe that there is less restrictive alternative under her current status." [Tr. 149-50] The evidence showed that existing programs were inappropriate for Linda at that time because, among other shortcomings, they would not provide her 24/7 supervision. [Tr. 101, 25, 43] Linda does not argue on appeal that any existing program discussed at the hearing was a viable alternative for her or that she did not, in fact, need a locked facility with 24/7 supervision.

Instead, Linda argues that a *nonexistent* program—Soteria-Alaska—was a less restrictive alternative to API that would have worked for her. But the court's task is to consider "*available* treatment options and facilities."[19] To be considered a less restrictive alternative, "the alternative *must actually be available*, meaning that it is *feasible* and would actually satisfy the compelling state interests that justify the proposed state action."[20] Linda does not dispute that Soteria-Alaska closed over a year ago. Because Soteria-Alaska is closed, it is neither "available" nor "feasible" as an option for Linda.

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18 *Id.*

19 *In re Jacob S.*, 384 P.3d 758, 768 (Alaska 2016) (emphasis added).

20 *Bigley*, 208 P.3d at 185 (emphasis added).

Thus, like the treatment alternative proposed by the appellant in *Bigley*, Linda's "proposed alternative face[s] practical obstacles to being implemented at all."[21] The "practical obstacle" is that Soteria-Alaska does not exist. Indeed, Linda's witness Dr. Wolf acknowledged that Soteria-Alaska was not actually an option for her: when asked "Would Soteria Alaska have been a good option?" he responded, "*[I]f* it had been around—*if* it were still around, then yes, it would have." [Tr. 72 (emphasis added)]

Linda appears to blame the State for the closing of Soteria-Alaska and to assume that the State could induce the defunct program to reopen by simply providing more funding, but the evidence falls short of showing this. The only witness who testified about Soteria-Alaska was Dr. Wolf, and he did so only briefly. [Tr. 65-66, 72-73, 79] He was not very specific when describing why Soteria-Alaska shut down; he said only that it closed due to "funding issues from the state" because "the model didn't fit the—the kind of Medicaid billing that the state wished." [Tr. 72] He did not explain why the model "didn't fit" the State's Medicaid billing or what could have been done to remedy this billing issue. Nor did he testify that Soteria-Alaska would reopen if more state funding were provided. He also acknowledged that one former patient murdered another former patient at Soteria-Alaska while the victim was volunteering there. [Tr. 79] Dr. Wolf's scant testimony does not establish either that the State was at fault for Soteria-Alaska's closure or that the State could make the program reopen by providing more funding.

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21 *Id.* at 186.

And even if the State could induce Soteria-Alaska to reopen, this would take time. The program would need to find an appropriate space, secure permits, hire staff members, and develop rules and procedures for its operations. But Linda was mentally ill and a danger to others *at the time of the hearing in this case*, and the State needed to address that problem *then and there*, not at some uncertain future date when Soteria-Alaska could be brought back up and running. Thus even if the State could itself induce Soteria-Alaska to reopen by providing more funding, that would not have addressed Linda's situation.

The Court should reject as unworkable Linda's position that the State cannot commit a person to API if the court can imagine a less restrictive alternative that could be created, but does not exist. The range of treatment and housing options that could be created—in an ideal world with no practical constraints—is infinite. The State would be unable to protect the public if the Court held that the State cannot commit a dangerous patient if any one of these infinite, nonexistent options would be preferable to API.

And finally, even if Soteria-Alaska must be considered as an option for Linda despite its nonexistence, Dr. Wolf's brief testimony does not actually establish that it would be *both* less restrictive than API *and* sufficiently protective of the State's compelling interests. The superior court found—and Linda does not now contest—that the State's compelling interests required that she be placed in a facility "that is locked and . . . provides 24/7 care." [Tr. 149-50] Dr. Wolf testified that Soteria-Alaska had 24/7 supervision, but he did not testify about whether it was locked or whether patients were allowed to come and go freely. [Tr. 72, 79] If Soteria-Alaska was not in fact locked—which the testimony does not reveal, because the facility no longer exists—it would not

have met the court's requirements for Linda. And if Soteria-Alaska was in fact locked in addition to providing 24/7 supervision, it is not clear why it should be considered "less restrictive" than API. API is a proper facility for an actively delusional, assaultive patient who has been found to be dangerous and to need a locked facility with 24/7 supervision. If Soteria-Alaska was in fact comparably secure, then it was not truly less restrictive.

Accordingly, the superior court did not err in finding that there was no less restrictive alternative for Linda than commitment to API.

CONCLUSION

For these reasons, the Court should affirm the ninety-day commitment order.

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IN THE SUPREME COURT OF 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-16-01656 PR**

CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on this date I served, by first class mail, a true and correct copy of the ***Brief of Appellee State of Alaska, Appellee's Confidential Excerpt of Record (Volume 1 of 1)*** and this ***Certificate of Service*** in this proceeding on the following:

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I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.

3/16/17

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