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)

BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this 3
day of March, 2015

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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(2)

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.

IV. JURISDICTIONAL STATEMENT

Appellant, H.R., appeals to the Alaska Supreme Court from the December 5/9, 2015, Order Authorizing Hospitalization for Evaluation (*Ex Parté* Order).[1] Notice of Appeal was timely filed January 5, 2015. This court has jurisdiction under AS 22.05.010(a)&(b).

V. PARTIES

The parties to this appeal are H.R., Appellant, and the Seacliff Condominium Association, Appellee.

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred by failing to conduct or order a screening investigation as required by AS 47.30.700(a)?

2. Whether there was a constitutionally sufficient exigency or emergency to justify the failure to provide Appellant with notice and an opportunity to be heard?

3. Whether the Superior Court erred by failing to consider a less restrictive alternative?

4. Whether the purported facts presented at the *ex parté* hearing were sufficient to issue the *Ex Parté* Order?

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[1] The *Ex Parté* Order was signed by Superior Court Master Stanley on December 5, 2014, Exc. 7, but not approved by Superior Court Judge Olson until December 9, 2014, Exc. 15.

VII. STATEMENT OF THE CASE

A. Brief Description of Case

Following years of deteriorating relations between Appellant, H.R., and other owners in her condominium project and its association's board of directors, on December 5, 2014, Robert Schmidt, the association's attorney, without notice to Appellant, H.R., filed a Petition for Order Authorizing Hospitalization for Evaluation (*Ex Parté* Petition). Exc. 1 & 3.[2]

Instead of conducting or ordering the screening investigation mandated by AS 47.30.700(a), or considering whether it was the least restrictive alternative as required by the United States and Alaska constitutions, based upon the Master's recommendation at the end of a hearing at which only witnesses for the petitioner testified, H.R. was taken into custody by the police and delivered for confinement at the Alaska Psychiatric Institute for psychiatric evaluation. Tr. 5-64; Exc. 6-10.

There was no testimony regarding any immediate threat, other than perhaps the fear that H.R.'s dog might harm someone, which fear was not new. Tr. 5-54;

Appellant was thus subjected to being picked up by the police without any notice and delivered for confinement at the Alaska Psychiatric Institute for psychiatric evaluation without having a chance to present her side, and without there being any reason for H.R. not being allowed to tell her side. Tr. 5-64; Exc. 1-10.

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[2] The Petition was signed on Tuesday, December 2, 2014, but not filed until 1:12 p.m., on Friday, December 5, 2014.

The *Ex Parté* Order should be reversed and vacated for the failure of the Superior Court to follow AS 47.30.700(a)'s mandate that prior to such an order being issued, the Court must conduct or order a screening investigation.

The issuance of the *Ex Parté* Order should also be reversed and vacated because it violated Due Process as there was no justification warranting dispensing with notice and an opportunity to be heard under the constitutions of the United States and State of Alaska.

In addition, the *Ex Parté* Order should be reversed and vacated because the Superior Court failed to consider whether its issuance was the least restrictive alternative. The one-sided testimony presented a picture of someone who was in conflict with other condominium owners, but there were many measures short of psychiatric confinement to which resort could and should have been taken before psychiatric confinement was even considered. The transcript is more clear than the written order that the basis for the *Ex Parté* Order was the concern of harm by H.R.'s dog.[3] Psychiatric confinement of H.R. for this reason was certainly not the least restrictive alternative as required by the Alaska and United States constitutions.

Finally, the testimony adduced at the *ex parté* hearing was insufficient to grant the *Ex Parté* Order.

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[3] Tr. 61.

B. Course of Proceedings

On December 5, 2014, at 1:12 p.m., through its attorney filing as petitioner, the Condominium Association for the condominium project in which Appellant lives filed a Petition for Order Authorizing Hospitalization for Evaluation (Petition).[4] Approximately an hour later, Superior Court Master Stanley held a hearing at the end of which he orally stated he was granting the Petition.[5] The Master issued a written recommendation that the Superior Court grant the Petition about an hour and a half later.[6]

That same evening, December 5, 2014, H.R. was taken into custody by the Anchorage Police Department based on the Master's recommendation,[7] and at 7:41 p.m., delivered to the Alaska Psychiatric Institute (API).[8]

On December 8, 2014, API released Appellant because she did not meet the criteria for hospitalization or commitment.[9]

The next day, on December 9, 2014, which was 4 days after she had been taken into custody based on the Master's recommendation, and a day after she had been released for not meeting hospitalization or commitment criteria, Judge Olson approved the Master's recommendation.[10]

This appeal followed on January 5, 2015.

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[4] Exc. 1.
[5] Tr. 3, 59-61.
[6] Exc. 7.
[7] Exc. 8.
[8] Exc. 9.
[9] Exc. 11.
[10] Exc. 15.

C. Statement of Facts

Hearing only testimony from the Petitioner's witnesses,[11] the Superior Court Master found that Appellant's mental condition had worsened over an 8 year period, and issued an Order Authorizing Hospitalization for Evaluation on December 5, 2014, based on his finding that H.R. was mentally impaired to an extent she cannot control her actions and statements.[12] The Master also found that H.R. cannot control her large dog, which placed fellow condominium dwellers in fear, and that to the extent H.R. is paranoid, she acts aggressively toward others.[13]

H.R. was taken into custody by the police that evening and delivered to the Alaska Psychiatric Institute for confinement pending its psychiatric evaluation.[14]

On December 8, 2014, API released H.R. because she did not meet hospitalization or commitment criteria.[15]

VIII. ARGUMENT

A. Summary of Argument

The *Ex Parté* Order must be reversed and vacated because the screening investigation mandated by AS 47.30.700(a) was not conducted.

The *Ex Parté* Order should be reversed and vacated because there was no justification, sufficient under either the Alaska or United States constitution, to dispense

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[11] Much of the testimony was hearsay to which H.R., was not allowed to object.
[12] Exc. 4.
[13] Exc. 5.
[14] Exc. 8 & 9.

with notice and an opportunity to be heard. Denial of notice and an opportunity to be heard are constitutionally permissible only when there is an emergency sufficient to override these fundamental elements of procedural due process.

The *Ex Parté* Order should also be reversed and vacated because the Superior Court did not consider whether the *Ex Parté* Order was the least restrictive alternative.

In addition, the testimony at the *ex parté* hearing was insufficient to support granting the *Ex Parté* Order.

With respect to whether this Court should consider this appeal on the merits,

(a) under the United States Constitution, this appeal is not moot,

(b) under this Court's jurisprudence:

(i) the collateral consequences doctrine applies, and/or

(ii) this Court should consider the appeal under the Public Interest exception to the Mootness Doctrine,

(c) should this Court decide not to consider this appeal on the merits, vacatur should issue,

and

(d) this Court should revisit mootness under *Wetherhorn*.

(Continued footnote)----------

[15] Exc. 11.

B. The Superior Court Erred by Failing to Conduct or Order a Screening Investigation as Required by AS 47.30.700(a)

(1) Standard of Review

The Court applies its independent judgment in matters of statutory construction. *McLeod v. Parnell*, 286 P.3d 509, 512 (Alaska 2012). This Court interprets Alaska Statutes according to reason, practicality, and common sense, "taking into account the plain meaning and purpose of the law as well as the intent of the drafters." *Alaska Department of Commerce, Community and Economic Development, Division of Insurance v. Progressive Casualty Insurance Company*, 165 P.3d 624, 628 (Alaska 2007).

(2) The Screening Investigation Is Mandatory

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

> (a) 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).

The statue's plain meaning is that a screening investigation is mandatory before an *ex parté* order may be issued. Below, H.R. argues that it is a violation of due process to deny her notice of the allegations against her and an opportunity to be heard where there is no emergency or exigency justifying it. The procedure employed by the Master and

approved by the Superior Court Judge was to hear and consider just the petitioner's side. By conducting or ordering a screening investigation at least a more neutral collection of the facts would have been obtained. This seems the clear intent of AS 47.30.700(a). AS 47.30.700(a) does not allow an *ex parté* order to be issued solely on the basis of the allegations and testimony of the Petitioner.

It is respectfully suggested the failure of the Superior Court to conduct or order a screening investigation as mandated in AS 47.30.700(a) is fatal to the propriety of the *Ex Parté* Order and requires that it be reversed and vacated.

C. The Ex Parté Order Violated H.R.'s Due Process Rights

(1) Standard of Review

Constitutional claims are questions of law to which this Court applies its independent judgment. *In re Tammy J.*, 270 P.3d 805, 809 (Alaska, 2012).

(2) There Was No Emergency Justifying Dispensing with Notice and an Opportunity to be Heard

There was not any testimony or evidence presented that there was any kind of emergency or exigency that justified depriving H.R. of notice of the allegations and proceedings against her and an opportunity to be heard. The testimony was that the situation had been deteriorating for 8 years, but there was nothing to suggest the situation had become so urgent that either H.R. or someone else was likely to suffer serious harm if H.R. was notified of the allegations against her and had a chance to be heard.

In *Humphrey v. Cady,* 405 U.S. 504, 508, 509, 92 S.Ct. 1048, 1052 (1972), the United States Supreme Court held that psychiatric confinement constitutes a "massive

curtailment of liberty" requiring compliance with procedural due process under the United States Constitution. In *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 379 (Alaska 2007) , citing *Humphrey*, this Court held involuntary commitment also implicates Alaska's constitutional guarantees of individual liberty and privacy requiring compliance with procedural due process under the Alaska Constitution. Even short periods of psychiatric confinement involve the massive curtailment of liberty requiring compliance with procedural due process. *In re Daniel G.*, 320 P.3d 262, 271 (Alaska 2014), citing to *Wetherhorn* (infringement of liberty rights begins the moment the respondent is detained involuntarily).

The hallmarks of due process under the United States Constitution are meaningful notice, and a meaningful opportunity to be heard.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' "

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-2649 (2004). Under the Alaska Constitution, in *Wetherhorn*, 156 P.3d at 380, this Court held:

> As a general principle, due process "requires that the notice of a hearing must be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the proceedings." Due process also requires that a respondent be notified in such a manner that respondent has a reasonable opportunity to prepare

(footnotes omitted).

In *Hoffman v. State*, 834 P.2d 1218, 1219 (Alaska 1992), this Court stated:

> We have consistently held that, except in emergencies, due process requires the State to afford a person an opportunity for a hearing before the State deprives that person of a protected property interest.

Certainly the due process protections from the "massive curtailment of liberty" represented by psychiatric confinement deserves at least as great protection.

In *Daniel G.*, this Court held that requiring notice and an opportunity to be heard when someone had already been taken into emergency custody under what is known as a Police Officer Application pursuant to AS 47.30.705 "would likely *lengthen* a respondent's unnecessary confinement beyond 72 hours." [16] In other words, there this Court found the failure to provide notice and an opportunity to be heard was more protective of the liberty interest at stake than providing notice and an opportunity to be heard. Here, it is providing notice and an opportunity to be heard that is more protective of the liberty interest.

Daniel G. held the *Mathews v. Eldridge*[17] balancing test applied there and would presumably hold the same here as follows:[18]

> [The] identification of the specific dictates of due process generally requires consideration of three distinct factors: First, 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 probable 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

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[16] 320 P.3d at 273. Emphasis in original.
[17] 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
[18] 320 P.3d at 271.

With respect to the first factor, in *Daniel G.*, this Court reiterated that psychiatric confinement is a "massive curtailment of liberty," and held that, "infringement of the respondent's liberty rights ... begins the moment the respondent is detained involuntarily."[19] The private interest involved here is of the highest order—freedom from confinement.

As to the second factor, in *Daniel G.*, this Court placed great weight on what it called the disinterested determination of medical staff at the psychiatric emergency room.[20] Here, the confinement was based solely on the testimony presented by the petitioner. The risk of an erroneous deprivation is great in such circumstances. While there are no doubt circumstances where there is sufficient *immediate* danger to justify dispensing with notice and an opportunity to be heard, in this case, there was no evidence presented of such an emergency. In fact, most of the incidents complained of were quite some time in the past, none were in the immediate past, and there was no testimony that the situation was urgent. In fact, the Petitioner waited 3 days after signing the *Ex Parté* Petition to file it, thus demonstrating there was no urgency.[21]

With respect to the third factor, the government's interest goes both ways; it has just as big an interest in preventing unnecessary psychiatric confinement, if not more, as it does in obtaining necessary psychiatric confinement. The additional administrative

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[19] 320 P.3d at 267 and 271, citing to *E.P. v. Alaska Psychiatric Institute*, 205 P.3d 1101 at 1106-08 (Alaska 2009) and *Wetherhorn v Alaska Psychiatric Institute*, 156 P.3d 371, 375 & 381 (Alaska 2007).
[20] 320 P.3d at 272.

and fiscal burden to the government of giving H.R. notice of the allegations against her and allowing her to be heard is minimal, if any, especially considering the cost of an unnecessary psychiatric hospitalization.[22] To the extent that unnecessary hospitalizations are prevented, the administrative burden and costs on the government will be reduced.

(3) The Superior Court Was Required to Consider Whether a Less Restrictive Alternative Was Available

It is a fundamental principle of United States constitutional law that when someone's fundamental right is being infringed the least restrictive means of achieving the governmental interest must be used. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51, 93 S.Ct. 1278, 1306 (1973). 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.

State v. Planned Parenthood of Alaska, 171 P.3d 577, 581 (Alaska 2007), footnotes omitted.

(Continued footnote)----------

[21] Ex. 1 & 3. A possible reason was that by filing it on Friday, it was almost certain that the H.R. would be confined in the psychiatric hospital over the weekend.

[22] Whether or not a psychiatric respondent is entitled to a court appointed attorney at that point is an open question. AS 47.30.700(a) only requires the appointment of an attorney after an order for a person to be taken into custody for evaluation is issued.

As set forth above, this Court has held that psychiatric confinement is a "massive curtailment of liberty" that "begins the moment the respondent is detained involuntarily." In *In re; Harris*, 654 P.2d 109, 287-288 (Washington 1982), the Washington Supreme Court made clear the least restrictive alternative applies in such situations:

> While a magistrate may not be any better than a mental health professional at predicting whether a person presents a substantial likelihood of physical harm to herself or others, we do feel a magistrate can play an important role in the predetention process. The potential curtailment of liberty requires the intervention of an impartial third party to ensure not only that probable dangerousness exists, but that sufficient investigation has occurred, and that commitment is the least restrictive alternative. These are uniquely judicial concerns that will ensure the system is not abused.

Here, the Superior Court failed to consider if there was a less restrictive alternative. This violated H.R.'s substantive due process rights.[23]

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

(1) Standard of Review

This Court reviews findings of fact for clear error, but whether the Superior Court's factual findings satisfies the applicable statute is a question of law that this Court

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[23] "This Court will narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature's intent." *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004). In this case, there is nothing inconsistent in AS 47.30.700(a) with requiring the Superior Court to determine whether the psychiatric confinement is the least restrictive alternative. In fact, in AS 47.30.655(2), the Legislature specifically states a guiding principle of the commitment laws, including AS 47.30.700(a), is that "persons be treated in the least restrictive environment." Presumably the mandated screening investigation requires consideration of less restrictive alternatives.

reviews *de novo*. *S.H. v. State, Dept. of Health & Social Services, Div. of Family & Youth Services*, 42 P.3d 1119, 1122-1123 (Alaska 2002).

(2) The Finding of Mental Illness Was Speculative and There re was No Evidence That Immediate Serious Harm to Self or Others Was Likely

In order to issue an order under AS 47.30.700(a) the court must conclude 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." AS 47.30.915(12), defines mental illness in pertinent part as:

> an organic, mental, or emotional impairment that has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand;

None of these conditions were satisfied.

In spite of the Master's probing, the testimony did not support a finding that H.R. was unable to exercise conscious control or perceive reality or to reason or understand:

> BY THE COURT: . . .
>
> Q Okay. Has she said anything that would suggest that she's not dealing with reality?
>
> A She has told me directly that she's head-damaged and that she has anger management issues.

Tr. 14: 5-8.

> BY THE COURT: . . .
>
> Q Does she ever say anything that seems to be fictional or delusional?
>
> A You know, just about everything she says is delusional. You know, I can't -- I can't recall one exact thing, . . . But I -- the other night when she went downstairs and jumped on Geri, I went down there and, yeah, she's very delusional. She was screaming at the top of her lungs.

Tr. 30: 15-25.

BY THE COURT: . . .

Q As you have observed, [H.R.] is a -- is she able to control her actions, versus being out of control?

A I -- is she able to control her actions? I think -- I think that -- I think she is fairly aware that what she's saying is inappropri- -- you know, not nice and inappropriate. I mean, like, are you -- if you're asking me if she's aware that she's causing trouble or, you know, she purposefully, like, getting in people's faces and causing arguments. I mean, I think that she -- to me, like what I have to say to get her to leave me alone is basically, you know, "I can't talk right now; I have to go somewhere." So in a sense she doesn't say, "Oh, I see you're busy," like a neighbor would, "I see you're busy and I'll come back later." So to me that would be, I guess, controlling your actions and being aware of somebody else's personal space and that kind of thing. So I'd say maybe in that way no, you have to sort of say no, that's it.

Tr. 39:19-40:13.

The closest it comes is the following:

BY THE COURT: . . .

Q Is -- is -- if you can answer, is she out of control at that time or.....

A She has moments where you feel like she's going to lose it. She's on the border.

Tr. 13:20-23.

It is respectfully suggested none of this testimony supports a finding of mental illness, even under the probable cause standard.[24] This is fatal to the appropriateness of the *Ex Parté* Order.

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[24] Without testimony from anyone qualified to give a diagnosis, the Master stated H.R. probably has some form of schizophrenia or schizoaffective disorder:

> Based upon the sworn testimony today, using the standard that we do at this stage, which is probable cause, I do find that Ms. Regen suffers from a mental illness using the probable cause standard, which is not particularly

----------(footnote continued)

Similarly, the testimony about H.R.'s dog, was insufficient to support the finding that H.R. represented a likelihood of serious harm to self or others in the immediate future.

Simply put, even the one-sided testimony presented at the *ex parté* hearing was insufficient to justify granting the *Ex Parté* Order.

E. This Court Should Review this Appeal on the Merits

(1) Standard of Review

Mootness is a matter of judicial policy and its application is a question of law; this Court adopts the rule of law that is most persuasive in light of precedent, reason, and policy. *In re Joan K.*, 273 P.3d 594, 595-596 (Alaska 2012).

(2) The Collateral Consequences Exception Applies

While the *Ex Parté* Order appealed from is not a 30 day commitment the same considerations in *Joan K.* apply here. In *Joan K.*, 273 P.3d at 598, this Court held that for first commitments, collateral consequences preclude application of the mootness doctrine. This Court also indicated that "some number of prior involuntary commitment

(Continued footnote)----------

> high, but that's the one that applies under the law here. I don't really -- I'm not a psychiatrist, I'm not a doctor, anything like that. We do hear enough of these on a daily basis to -- it sounds to me like there is probably -- you probably have some degree of schizophrenia or schizoaffective disorder.

Tr. 59-60. In addition to there being no basis in the record for such a diagnosis, that a person may be diagnosed with schizophrenia or schizoaffective disorder does not necessarily mean the person is unable to "exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand" as required in the mental illness prong of AS 47.30.700(a), as defined in AS 47.30.915(12).

orders would likely eliminate the possibility of additional collateral consequences, precluding the doctrine's application." *Id.* In this case, there is nothing in the record to indicate that H.R., has had any prior involuntary psychiatric hospitalizations, let alone numerous ones. It would be unfair in the extreme for this court to decline to consider whether H.R.'s massive curtailment of liberty was lawful because H.R. hadn't proven collateral consequences in a hearing at which she was not even allowed to participate.[25] In any event, (a) the *Ex Parté* Order found that there was probable cause to believe H.R. was mentally ill and that as a result H.R. was likely to seriously harm others, and (b) the Master stated on the record that H.R. probably had schizophrenia or schizoaffective disorder. These findings can cause H.R. problems, i.e., collateral consequences, far into the future.

(3) <u>The Public Interest Exception to the Mootness Doctrine Applies</u>

Should this Court decide the collateral consequences exception to the Mootness doctrine under *Joan K.* does not apply to this appeal, this Court should still review the Superior Court's grant of the *Ex Parté* Order under the public interest exception to the mootness doctrine. Under the public interest exception to the mootness doctrine this Court will review an otherwise moot appeal when:

> (1) the disputed issues are capable of repetition, (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.

Wetherhorn, 156 P.3d at 380-381. All three of these factors are present here.

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[25] *See* Part II of Justice Stowers' dissent in *Joan K.*

Daniel G. addressed these factors where Daniel G had been subjected to an *ex parté* order AS 47.30.710(b) after he was already in custody. With respect to the first factor this Court held:

> The question of the constitutionality of subjecting someone in custody under AS 47.30.705 to an ex parte proceeding arises every time that an evaluation petition is filed under AS 47.30.710(b).

320 P.3d at 268. The same is true under AS 47.30.700(a) of someone not in custody. This has not previously been addressed by this Court.

With respect to the second factor, this Court held in *Daniel G*:

> Second, due process challenges to evaluation orders under AS 47.30.710(b) will repeatedly circumvent review because the authorized 72–hour confinement period will have long since expired before an appeal can be heard.

Id., footnote omitted. That is exactly the same here.

With respect to the third, factor, this Court held:

> Daniel's due process claims do implicate the scope and interpretation of the statutory provisions that allow the State to curtail the liberty of members of the public. We thus conclude that Daniel's claims satisfy the third factor.

Id, footnoted omitted.

In *Daniel G* the issue was whether it was constitutional to dispense with notice and an opportunity to be heard when a person was already in custody and there was no emergency. There this Court decided it would be more protective of the liberty interest involved to dispense with notice and an opportunity to be heard because it would take longer to release an unnecessarily confined person if an adversary hearing was held.

This case presents the opposite situation, which is whether it is constitutional to lock someone up who is not already confined, on the basis of allegations of mental illness and dangerousness without notice and an opportunity to be heard when there is no indication that any harm would likely occur if such notice was given. This is also important to the public interest and should be decided by this Court.

(4) <u>If The Court Finds This Appeal Moot and Declines to Review It, The Ex Parté Order Should Be Vacated</u>

Vacating judgments when appeals become moot is a long-standing principle in both this Court and the United States Supreme Court. In *City of Valdez v. Gavora*, 692 P.2d 959, 960-961 (Alaska 1984), this Court adopted the federal rule vacating judgments when appeals become moot:

> [We] adopt the federal practice which is to reverse or vacate the judgment below and remand the case, with directions to dismiss the complaint. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36, 41 (1950). This practice is intended to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."

(footnotes omitted).

In *Peter A v. Alaska Dep't. of Health and Social Services*, 146 P.3d 991 (Alaska 2006), citing to *Gavora*, at footnote 25, this Court did note:

> We express no opinion about whether *Gavora's* seemingly broad assertion that a holding of mootness requires vacating the judgment below should be narrowed in light of the Supreme Court's discussion in *U.S. Bancorp*.[26]

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[26] *United States Bancorp Mortgage Co., v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386 (US 1994).

The United States Supreme Court in *U.S. Bancorp* did not back away from the requirement very far. In *U.S. Bancorp*, mootness arose because the parties settled. In those circumstances, the United States Supreme Court held *vacatur* was not warranted because the settling party voluntarily relinquished the right to correct a wrongly issued judgment.[27]

The United States Supreme Court stated in *U.S. Bancorp* that in other circumstances *vacatur* was required:

> [T]he judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.[28]

The United States Supreme Court recently reiterated this federal vacatur policy in *Camreta v. Greene,* __ U.S. __ 131 S.Ct. 2020, 2035, (2011).

It is respectfully suggested *Wetherhorn* is not actually contrary to this long-standing principle because this Court vacated the commitment order on rehearing. This Court's original opinion in *Wetherhorn* affirmed the commitment after it declined to review her evidentiary challenges because they were moot. Ms. Wetherhorn petitioned for rehearing on the grounds that this Court had not found the state proved she was gravely disabled under the newly announced constitutional standard that she was "incapable of surviving safely in freedom," and therefore the commitment order should be vacated. On rehearing this Court did exactly that.

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[27] 513 US at 25, 115 S.Ct. at 392.

In *Joan K.* this Court ordered oral argument on the mootness question, directing that the parties be prepared to discuss the authority and appropriateness of issuing a *vacatur* order to remedy possible collateral consequences arising from an otherwise moot commitment order, citing to a number of cases, including *Gavora*, *Camreta* and *Munsingwear*.[29] Ultimately, however, by holding the collateral consequences exception to the mootness doctrine applied and reviewing Joan K's appeal on the merits, this Court did not reach the question of whether *vacatur* should be ordered when involuntary commitment cases are not reviewed on the merits because of mootness.

Under both Alaska and United States Supreme Court precedent, should this Court decline to decide this appeal on the merits because of mootness, the *Ex Parté* Order should be vacated.

(5) <u>Mootness Under Wetherhorn Should Be Revisited</u>

In *Joan K.*, this Court stated:

> In *Wetherhorn v. Alaska Psychiatric Institute* we established that commitment-order appeals based on assertions of insufficient evidence are moot if the commitment period has passed, subject to the public interest exception.

273 P.3d at 596. This Court held it would not entertain overturning this *Wetherhorn* holding because this Court's order for supplemental briefing did not anticipate questioning it and Joan K did not address the standards this Court imposes for overturning its precedent. Instead, as set forth above, this Court then went on to hold the

(Continued footnote)----------

[28] 513 US at 25, 115 S.Ct. at 391, citations omitted.

collateral consequences exception to the mootness doctrine applies for first commitments at least, but also that "some number of prior involuntary commitment orders would likely eliminate the possibility of additional collateral consequences, precluding the doctrine's application." It is respectfully suggested this appeal presents an occasion to revisit *Wetherhorn's* mootness ruling as interpreted in *Joan K.*

As set forth at n. 10 of *Joan K*:

> We will overturn one of our prior decisions only when we are "clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."

(citations omitted).

To the extent *Wetherhorn* is interpreted to mean that commitment orders that are not reviewed on the merits because of mootness are to be left in place, it is respectfully suggested it was originally erroneous. As set forth above, this Court's and the United States Supreme Court's precedent is that such judgments should be vacated. *Wetherhorn* was decided in 2007 and there is not much precedent from which to depart if it were to be overturned. Thus, little or no harm would result by departing from *Wetherhorn* to the extent it is now interpreted to mean commitment orders that are not reviewed on the merits because of mootness are to be left in place.

However, H.R. believes the description in *Joan K.* of *Wetherhorn's* mootness holding is incomplete and therefore possibly misleading to the extent it is interpreted to

(Continued footnote)----------
[29] 273 P.3d at 596.

mean that involuntary commitment orders that are not reviewed on their merits because of mootness are to be left in place. As set forth in the preceding section, on rehearing this Court in *Wetherhorn* vacated the commitment order. It is respectfully suggested that, at a minimum, this Court should clarify that if involuntary commitment orders are not reviewed on the merits because of mootness, they should be vacated.

More than that, it is also respectfully suggested this case presents an occasion to hold that people subjected to orders authorizing hospitalization for evaluation under AS 47.30.700 have the right to have their appeals heard on the merits, regardless of whether they have demonstrated collateral consequences or the public interest exception to the mootness doctrine applies. Justice Stowers, dissenting in *Joan K.* would have addressed the issue for a 30 day commitment notwithstanding the failure of Joan K. to address the standards for overturning precedent:

> [A]ny order for involuntary commitment that is erroneously issued remains a "live controversy" for the respondent for the remainder of the respondent's life. Of first importance, the citizen's liberty has been alleged to have been wrongfully taken by court process; the court should afford the citizen the opportunity to prove the error and, if proven, obtain judicial acknowledgment that the order was erroneously issued. Giving the citizen this opportunity will assure the citizen that she will be heard, and that if a lower court has erred, that error will not go unnoticed or unremedied, at least to the extent that the erroneous order will be reversed and vacated. . . .
>
> I am at a loss to understand how a citizen can be ordered to be involuntarily committed for 30 days and be precluded from appealing this order merely because it is practically impossible to perfect an appeal of an order that by its terms will expire in 30 days.

273 P.3d at 607-608. While this appeal involves an order authorizing hospitalization for evaluation for up to 72 hours, the same principles apply. In this case, the *Ex Parté* Order expired in 72 hours, making it even more impossible to perfect an appeal during its term.

In addition to Justice Stowers' dissent, H.R. finds compelling Joan K's arguments that this Court should consider these appeals on the merits to provide guidance to the trial court and that psychiatric confinement proceedings will not focus on future collateral consequences, making the record available for appellate review inadequate.[30]

Moreover, it is respectfully suggested such appeals are not moot. *See, e.g.*, *Washington v. Harper*, 494 U.S. 210, 219, 110 S.Ct. 1028, 1035 (1990) (appeal of involuntary medication order not moot because of possibility that it would be sought in future). Without appellate review on the merits, the person can be subjected to multiple erroneous confinements, all of which are refused review on mootness grounds.

While the exact facts may be different in subsequent proceedings, there is the likelihood of similar facts for people who have been psychiatrically confined numerous times. It is therefore respectfully suggested that because of the possibility, or even probability, of additional psychiatric confinement proceedings against people whose "prior involuntary commitment orders would likely eliminate the possibility of additional collateral consequences," appeals of psychiatric confinement orders always present a "live controversy" and are not moot even if no collateral consequences are established in the Superior Court proceeding.

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[30] *See*, 273 P.3d at 597.

Because of this, but most importantly because people who have been subjected to psychiatric confinement orders should have the right to an appellate determination of whether the massive curtailment of liberty was lawful, it is respectfully suggested this Court should now consider holding that appeals of psychiatric confinement orders, whether full-blown commitments or for evaluation are not moot and will be heard on the merits.

IX. 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.