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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the Necessity for the Hospitalization of: N.B.	)	Supreme Court No. S-15859
Trial Case No. 3AN-15-00204 PR		
In the Matter of the Necessity for the Hospitalization of: L.M.	)	Supreme Court No. S-16467
Trial Case No. 3AN-16-01656 PR		

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE, JOHN SUDDOCK JUDGE

SUPPLEMENTAL BRIEF OF APPELLANT N.B.

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Filed in the Supreme Court
of the State of Alaska
_____, 2017

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Appellate Courts

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VRA CERTIFICATION AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

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I. INTRODUCTION

In her initial briefing to this court, Naomi argued for merits-based review of the expired commitment and medication orders in her case pursuant to her statutory right to appeal and as a matter of state and federal due process. [At. Br. 29-40] Alternatively, Naomi argued this court should overrule its mootness holding in *Wetherhorn v. Alaska Psychiatric Institute*[1] or conclude that Naomi's case qualifies for review under an existing mootness exception. [At. Br. 41-48] The state opposed review. [Ae. Br. 11-19]

This court has requested supplemental briefing in Naomi's case and another pending commitment appeal, L.M., S-16467, posing four questions: (1) should *Wetherhorn*'s mootness holding be overruled; (2) does this court's mootness jurisprudence deprive trial courts of significant precedent and guidance; (3) does the public interest exception to the mootness doctrine meaningfully protect the right of appeal; and (4) does the collateral consequences exception meaningfully protect the right of appeal.

Naomi will address the court's questions in accordance with this court's *stare decisis* framework. "Stare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt

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[1] 156 P.3d 371 (Alaska 2007). *Wetherhorn* determined that expired commitment orders are moot, and that, while certain questions arising in this context may be reviewed under the public interest exception to mootness, sufficiency of the evidence claims fail to qualify for such review. *Id.* at 380-81.

those norms to society's changing demands."[2] Accordingly, this court approaches overruling one of its prior decisions carefully[3] and will overrule a prior decision only when "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."[4]

As set forth below, this court should overrule *Wetherhorn* both because it was originally erroneous and because intervening changes in this practice area have eliminated the economy that typically attends application of the mootness doctrine. Although this court has formulated two exceptions that permit appellate review for certain types of claims or people, these exceptions create unfair distinctions, and litigation concerning their applicability needlessly drains resources. Overruling *Wetherhorn* will do more good than harm, as it will resolve these concerns, honor the legislature's creation of a right of appeal from all involuntary commitment orders—a right not afforded adequate protection through application of exceptions to the mootness doctrine—and give trial courts beneficial guidance concerning the procedural and substantive standards courts must apply before hospitalizing and medicating individuals involuntarily.

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2 *Young v. State*, 374 P.3d 395, 413 (Alaska 2016) (citing *State v. Carlin*, 249 P.3d 752, 757 (Alaska 2011) (alteration omitted) (quoting *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175 (Alaska 1993)).

3 *State v. Carlin*, 249 P.3d at 757.

4 *Id.*; *In re Joan K.*, 273 P.3d 594, 597 n. 10 (Alaska 2012) (internal citations and quotations omitted); *State v. Fremgren*, 914 P.2d 1244, 1245 (Alaska 1996).

II. *WETHERHORN*'S MOOTNESS HOLDING WAS ORIGINALLY ERRONEOUS

A decision may be originally erroneous when it rests upon incorrect assumptions or misconstrues existing authority[5] or if it "proves to be unworkable in practice."[6] Because *Wetherhorn* reasoned from inapposite case law and incorrectly concluded that release from confinement is the only form of relief available on appeal, *Wetherhorn* was originally erroneous.[7]

Wetherhorn reasoned that a lapsed commitment order moots the question of whether the evidence was sufficient to support it.[8] Although it does not appear that

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5 *See, e.g., Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 303 P.3d 431, 446-450 (Alaska 2013), *order vacated in part,* 334 P.3d 165 (Alaska 2014) (overruling prior cases applying preponderance standard to ICWA placement preference deviations given the absence of previous detailed consideration of the issue and this court's closer examination of Congressional intent and other ICWA provisions); *State v. Coon*, 974 P.2d 386, 394 (Alaska 1999) (overruling *Contreras v. State*, 718 P.2d 129 (Alaska 1986), because it incorrectly assumed that changes to the Federal Rules of Evidence did not modify the *Frye* standard concerning the admissibility of scientific evidence and ignored the distinction between the language of Alaska's evidence rule and the *Frye* standard); *State v. Semancik*, 99 P.3d 538, 541-43 (Alaska 1999) (overruling *Adkins v. State,* 389 P.2d 915 (Alaska 1964), regarding ability to challenge burglary indictment for failure to enumerate target crime for first time on appeal because it failed to account for the specific language of Alaska's burglary statute and instead relied on the "weight of authority" from jurisdictions that define the crime differently from Alaska); *State v. Dunlop*, 721 P.2d 604, 608-09 (Alaska 1986) (overruling *Thessen v. State,* 508 P.2d 1192 (Alaska 1973), regarding imposition of multiple punishments for a single act because it rested upon flawed reasoning).

6 *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992)).

7 Although this court's supplemental briefing order suggested Naomi did not argue for *Wetherhorn* to be overruled, *see* Order of July 26, 2017, at 5, Naomi argued for overruling in her opening brief. [At. Br. 41-43]

8 *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 380 (Alaska 2007) ("But the thirty-day period for which Wetherhorn was committed has long since passed, and the question is thus moot").

the parties briefed the applicability of the mootness doctrine,[9] *Wetherhorn* quoted *Fairbanks Fire Fighters Ass'n, Local 1324*[10] for the proposition that "[a] claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[11] *Wetherhorn* did not further explain why the circumstances in *Fairbanks*—an appeal brought by a prevailing party—supported its mootness holding. But the posture of the litigants and the reasoning of *Fairbanks* undermines *Wetherhorn*'s reliance on the case.

The appellant in *Fairbanks* was a union that had already won below and sought to "appeal a decision in its favor simply because it was dissatisfied with the reasoning of the superior court."[12] Addressing the justiciability of the union's claim, the *Fairbanks* court explained that "in most cases, mootness is found because the party raising an appeal cannot be given the remedy it seeks even if the court agrees with its legal position. In this case, the union has already been given the remedy it seeks, and we cannot give it any further relief even if we agree with the union's legal argument."[13] Noting that it had previously found issues moot where the party had secured alternative relief, this court determined that the union's appeal was therefore moot.[14]

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9 *Cf. Tununak*, 303 P.3d at 447 n. 68 (identifying lack of prior in depth treatment as support for overruling).

10 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks* (hereinafter *Fairbanks*), 48 P.3d 1165 (Alaska 2002).

11 *Wetherhorn*, 156 P.3d at 380 (quoting *Fairbanks*, 48 P.3d at 1167).

12 *Fairbanks*, 48 P.3d at 1167.

13 *Id.* at 1168.

14 *Id.* Although moot, this court ultimately reviewed the case under the public interest exception. *Id.*

This rationale does not support the conclusion that a weight-of-the-evidence claim from an involuntary commitment proceeding is moot. A respondent seeking appellate review of the sufficiency of the evidence used to commit her invokes the "error-correction" function of this court.[15] Unlike the union in *Fairbanks*, she has not prevailed below or secured relief from the legal determination that she was mentally ill and either gravely disabled or a danger to herself or others. There has been no judicial acknowledgment of error, leaving intact the "injury inflicted by an erroneously issued order of involuntary commitment."[16] [At. Br. 41-43]

Nor is a respondent in such circumstances seeking an advisory opinion—another rationale this court has suggested supports avoiding review of sufficiency claims. In *Mark V. I*,[17] this court rejected an argument that the statutory right of appeal[18] should be interpreted to supersede the mootness doctrine,[19] reiterating its

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15 *See Halbert v. Michigan*, 545 U.S. 605, 619 (2005) (distinguishing the exercise of discretionary review, i.e., resolving questions of "significant public interest" from instances where the appellate court sits in its "error-correction instance" and resolves issues before it on the merits).

16 *In re Joan K.*, 273 P.3d 594, 608 (Alaska 2012) (Stowers, J., dissenting).

17 *In re Mark V.* (*Mark V. I*), 324 P.3d 840 (Alaska 2014).

18 AS 47.30.765.

19 In her opening brief, Naomi argued that this holding should be overruled. [At. Br. 29-39] Naomi asserted that *Mark V. I* relied on inapposite case law to determine that the statutory right of appeal does not supersede mootness [At. Br. 29-31]; that *Mark V. I* improperly narrowed the scope of the statutory right to appeal in contravention of limitations on this court's power to interfere with substantive rights created by the legislature and in conflict with the legislative history of the right of appeal [At. Br. 31-34]; and that *Mark V. I*'s holding violates federal due process. [At. Br. 34-38] Naomi further argued that she has a due process right to review under the Alaska constitution. [At. Br. 40-41] All of these arguments also support the conclusion that *Wetherhorn* was originally erroneous and Naomi hereby incorporates them for purposes of responding to this court's supplemental briefing order.

policy to "avoid needlessly deciding issues in cases in which there is no actual controversy and which would effectively result in advisory opinions."[20] But determining whether the evidence was sufficient to support a commitment finding does not implicate this concern.[21] [At. Reply Br. 15] To the contrary, such claims invoke this court's traditional reviewing power—to ascertain whether the evidence presented met the applicable legal standard.[22] [At. Reply Br. 15]

Wetherhorn mistakenly adopted the reasoning of *Fairbanks* and erroneously equated release from the hospital with obtaining relief from an erroneously-issued commitment order. This court's subsequent cases have affirmed *Wetherhorn*'s mootness holding without analyzing in detail its core assumptions—namely, that the expiration of a commitment order means there is no longer a live case or controversy and that this court can afford the respondent no relief.[23] Given these flaws, *Wetherhorn*'s holding was originally erroneous.

III. *WETHERHORN* IS NO LONGER SOUND DUE TO INTERVENING CHANGES

A prior decision may be "abandoned because of 'changed conditions' if related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be

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20 *Mark V. I*, 324 P.3d at 848.

21 *Cf. Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995) (noting difference between litigation seeking declaratory relief, which creates an "added risk that the party is seeking an advisory opinion," and "definite and concrete" disputes with adverse legal parties).

22 *In re Stephen O.*, 314 P.3d 1185, 1194 n. 26 (Alaska 2013).

23 In *Joan K.*, 273 P.3d at 596-97, for example, this court expressly declined to reconsider whether *Wetherhorn* misconstrued the form of relief available to respondents on appeal based, in part, on Joan's failure to address *stare decisis*.

seen so differently, as to have robbed the old rule of significant application."[24] As discussed below, even assuming *Wetherhorn* was originally sound, the time and effort spent litigating application of the mootness doctrine and its various exceptions in the intervening years warrants departing from *Wetherhorn* and adopting a rule that allows for merits-based review in all commitment appeals.

A. Litigating mootness has needlessly drained resources.

Wetherhorn recognized that commitment proceedings may raise issues warranting review under the public interest exception to mootness.[25] This exception permits review of an otherwise moot question when the issue in dispute is capable of repetition, is likely to evade review, and is important to the public interest.[26] *Wetherhorn* concluded that the exception does not apply to sufficiency claims, however, because they are fact-dependent and thus not capable of repetition.[27] Several years later, in *Joan K.*,[28] this court recognized a second exception—the collateral consequences exception—permitting review of otherwise-moot cases where a commitment is the person's first.[29]

While carving out exceptions to the mootness doctrine appropriately recognizes that commitment and medication appeals warrant review, this practice has simultaneously undermined the efficiency rationale of the mootness doctrine.

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24 *Id.* (internal quotations omitted) (alteration in original).
25 *Wetherhorn*, 156 P.3d at 380.
26 *Id.* at 380-81.
27 *Id.*
28 *In re Joan K.*, 273 P.3d 594 (Alaska 2012).
29 *Id.* at 597-98.

Mootness is "meant to promote expediency and judicial economy."[30] Since *Wetherhorn*, however, rather than briefing only the merit issues, the parties have often expended significant resources briefing the applicability of the mootness doctrine itself.

According to the online Appellate Case Management System, approximately 46 commitment appeals have been filed since *Wetherhorn*.[31] Not all of these appeals have proceeded to full briefing.[32] Approximately 10 are currently in or nearing the briefing stage.[33] But in the 22 cases where briefing has been completed, mootness has played a prominent role either as an issue raised by the parties or by this court.

In some cases this court has addressed mootness even when the parties have not briefed it.[34] In two others, it is not clear from the public database or this

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30 *In re Dakota K.*, 354 P.3d 1068, 1070 (Alaska 2015).

31 This number is based upon a review of the online Alaska Appellate Courts Case Management System as of August 2017 and may not capture every commitment or medication appeal filed since *Wetherhorn* despite counsel's best effort to compile such information. In addition, this number reflects the number of appeals with discrete "S-numbers" rather than the number of respondents. In some instances, an appeal pertaining to one respondent has multiple "S-numbers" because the appeal involves multiple orders that have been consolidated. *See, e.g.*, S-12853, S-12934, S-13004, all of which pertain to one respondent, E.P.

32 It appears 14 appeals have been dismissed after partial briefing or no briefing. *See* S-13015, S-13353, S-13408, S-13642, S-13750, S-13914, S-14166, S-14556, S-14612, S-15036, S-15483, S-15570, S-15689, S-15680.

33 S-16474 (D.F.), S-16524 (D.M.), S-16535 (R.N.), S-16537 (J.M.), S-16588 (A.M.G.), S-16654 (L.G.), S-16657 (M.V.), S-16665 (D.B.), S-16697 (L.G.M.), S-16750 (B.A.).

34 *Wayne B. v. Alaska Psychiatric Inst.*, 192 P.3d 989 (Alaska 2008) (reviewing issue regarding compliance with transcript requirement under public interest exception and vacating commitment and medication orders) (S-12677); *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101 (Alaska 2009) (reviewing whether a person

court's opinion whether this court received briefing on mootness.[35] In the remaining 16 cases with completed briefing, including the instant matters, the parties have addressed mootness either in the initial round of briefing,[36] in supplemental briefing,[37] or both.[38] And in a number of these appeals, this court has devoted

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found dangerous to himself may be committed absent a finding that he will improve with treatment under the public interest exception to mootness and affirming commitment) (S-12853, S-12934, S-13004).

35 *Wetherhorn v. Alaska Psychiatric Inst.* (*Wetherhorn II*), 167 P.3d 701 (Alaska 2007) (reaching question regarding propriety of awarding attorney's fees without addressing mootness) (S-12249); *In re Heather R.*, 366 P.3d 530 (Alaska 2016) (reviewing claim regarding screening investigation requirements under public interest exception) (S-15793).

36 *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168 (Alaska 2009) (reviewing issues under public interest exception following briefing regarding mootness by parties and issuing declaratory relief) (S-13116); *In re Tracy C.*, 249 P.3d 1085 (Alaska 2011) (reviewing issues under public interest exception following briefing asking for adoption of collateral consequences exception and affirming commitment while also asserting evidentiary issues are moot) (S-13719); *In re Gabriel C.*, 324 P.3d 835 (Alaska 2014) (reviewing and affirming commitment without specifying applicable exception but declining to review medication order under either exception) (S-14256); *In re Jeffrey E.*, 281 P.3d 84 (Alaska 2012) (reviewing and affirming under collateral consequences exception) (S-14419); *In re Mark V.* (*Mark V I*), 324 P.3d 840 (Alaska 2014) (dismissing appeal as moot) (S-14534); *In re Daniel G.*, 320 P.3d 262 (Alaska 2014) (reviewing and affirming under public interest exception) (S-15100); *In re Reid K.*, 357 P.3d 776 (Alaska 2015) (dismissing appeal as moot) (S-15328); *In re Dakota K.*, 354 P.3d 1068 (Alaska 2015) (dismissing appeal as moot) (S-15428); *In re Mark V.* (*Mark V. II*), 375 P.3d 51 (Alaska 2016) (reviewing and affirming under public interest exception); *In re Jacob S.*, 384 P.3d 758 (Alaska 2016) (reviewing and affirming commitment without identifying applicable exception and reviewing and affirming medication order under public interest exception) (S-15847, S-15868).

37 *In re Joan K.*, 273 P.3d 594 (Alaska 2012) (adopting collateral consequences exception to mootness doctrine for first commitments after receiving supplemental briefing and argument and affirming sufficiency of evidence) (S-13750); *In re Stephen O.*, 314 P.3d 1185 (Alaska 2013) (reviewing sufficiency claim under collateral consequences exception after supplemental briefing on mootness and reversing based upon insufficient evidence to support commitment) (S-13764).

38 In the matters pending before this court, N.B., L.M., and the state argued mootness in the initial rounds of briefing.

significant attention to mootness issues at oral argument and in the court's opinions.[39] In short, in 21 of the 22 cases with completed briefing, either the parties or this court have devoted admittedly "scarce public attorney and judicial resources"[40] to the topic of mootness. *Wetherhorn II* appears to be the outlier.

B. Recent changes to the mootness doctrine are unlikely to result in the preservation of resources.

The current dedication of resources to litigating mootness is likely to persist in spite of this court's efforts to refine application of the mootness doctrine so as to preserve resources. In two recent cases, *Dakota K.*[41] and *Reid K.*,[42] this court crafted new rules related to the mootness doctrine and its exceptions. But these rules have yet to curb litigation related to mootness and may ultimately lead to its increase.

In the first case, *Dakota K.*, this court held that it is the patient's responsibility to "establish the fact of collateral consequences,"[43] meaning the patient must make an evidentiary showing "at least raising a genuine issue of material fact" that the commitment is the patient's first or that some other collateral consequence applies before this court will review an appeal on its merits under this exception.[44] *Dakota K.* proposed two avenues for making such a showing. Recognizing the potential

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39 *E.g., E.P.*, 205 P.3d at 1106-08; *Joan K.*, 273 P.3d at 595-98; *id.* at 607-08 (Stowers, J., dissenting) *Mark V. I*, 324 P.3d at 843-48; *id.* at 848-50 (Stowers and Maassen, J.J., dissenting); *Reid K.*, 357 P.3d at 780-83; *In re Dakota K.*, 354 P.3d at 1070-73.

40 *Reid K.*, 357 P.3d at 783.

41 *In re Dakota K.*, 354 P.3d 1068 (Alaska 2015).

42 *In re Reid K.*, 357 P.3d 776 (Alaska 2015).

43 354 P.3d at 1072.

44 *Id.*

difficulty of marshalling a case for collateral consequences in the commitment proceeding itself, this court stated "it would be entirely appropriate for the respondent to seek an evidentiary hearing in the superior court on the issue of collateral consequences" after the commitment proceeding.[45] Alternatively, if the respondent does not obtain a hearing initially but ultimately files a sufficiency-of-the-evidence appeal that the state challenges as moot, the respondent still bears the burden of making "some evidentiary showing" concerning collateral consequences.[46] In such cases, it might be necessary to remand the case to the superior court for an evidentiary hearing.[47] Presumably there are others, however, where the respondent can meet her burden to raise a genuine issue of material fact based upon the appellate record.

In the second case, *Reid K.*, this court clarified the proper procedure for addressing mootness on appeal. Noting that "procedural challenges" occur when the respondent bears the burden to establish collateral consequences but the state does not assert mootness until its appellee brief, this court instructed the state to move to dismiss appeals of commitment orders before briefing commences "when no mootness exception is readily apparent."[48] Upon the filing of a motion to dismiss, the respondent then bears the burden of establishing an exception to the mootness doctrine before briefing the underlying substantive issues.[49] This court expressed

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45 *Id.*
46 *Id.*
47 *Id.*
48 *Reid K.*, 357 P.3d at 782-83.
49 *Id.*

hope that such a practice would preserve "scarce public attorney and judicial resources by avoiding merits-based briefing when appeals must ultimately be dismissed on procedural mootness grounds."[50]

Naomi's case illustrates the false economy of these rules. As an initial matter, the state did not move to dismiss Naomi's appeal as contemplated by *Reid K.*, meaning Naomi briefed the substantive issues, as did the state. Nor does it appear that the rules announced in *Reid K.* and *Dakota K.* have meaningfully reduced the resources devoted to mootness in other appeals pending before this court. In many of the appeals currently in the briefing stage,[51] mootness litigation continues in conjunction with merits-based briefing.[52] Thus far in appeals involving the Public Defender Agency, it does not appear that the *Reid K.* rule has been utilized at all.

But even had the state moved to dismiss in Naomi's case or others before this court, it is not clear that scarce public attorney and judicial resources would have been saved by virtue of this procedure. Rather than attempting to establish that this

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50 *Id.* at 783.

51 The following appeals appear to be in or near the briefing/decision stage: S-16474 (D.F.) (stay requested pending outcome of this litigation); S-16524 (D.M.) (briefing completed); S-16536 (R.N.) (state's brief due); S-16537 (J.M.) (state's brief due); S-16588 (A.M.G.) (state's brief due); S-16654 (L.G.) (briefing completed); S-16657 (M.V.) (opening brief due); S-16665 (D.B.) (briefing stayed pending outcome of this litigation); S-16697 (L.G.M.) (state's brief due); S-16750 (B.A.) (motion for appeal at public expense pending).

52 *See, e.g.,* D.F., S-16474 (mootness asserted in state's opposing brief; stay requested pending outcome of this litigation); D.M., S-16524 (state suggests public interest exception applies); J.M., S-16537 (mootness exceptions argued in opening brief); A.M.G., S-16588 (mootness exceptions argued in opening brief); D.B., S-16665 (mootness exceptions argued in opening brief; state argues against exceptions; stay requested pending outcome of this litigation); L.G.M., S-16697 (mootness exception argued in opening brief).

was her first commitment, Naomi pursued relief under the public interest exception. Presumably, to survive a motion to dismiss under *Reid K.*, Naomi must establish the applicability of this exception—a process that entails reviewing the record, researching the relevant issues, and filing a detailed response to the dismissal motion that is not unlike a merits-based brief. Given the additional attention this court will expend evaluating the applicability of the public interest exception,[53] the *Reid K.* procedure shifts resources to an earlier stage in the case but does not meaningfully save them.

Alternatively, if this court rejects Naomi's argument that Alaska's treatment payment statute creates a collateral consequence justifying review as a matter of law [At. Br. 43-46], litigants like Naomi will be forced to request a *Dakota K.* evidentiary hearing to establish the fact of first commitment or other incrementally significant consequences. For some respondents, it will make sense to seek a judicial finding in the proceeding below that the commitment is the respondent's first. But this comes at the cost of additional trial time and distracts from the issues of relevance in a commitment hearing.[54] For others seeking to meet the *Dakota K.* threshold, it will be necessary to engage in the potentially time-consuming process of obtaining records—records that may not be readily available and that can be confusing to parse—and then litigating the question of whether the records satisfy

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53 *In re Mark V. I*, 324 P. 840, 849 (Alaska 2014) (Stowers and Maassen, J.J., dissenting) (recognizing that determining the applicability of a mootness exception requires "quasi-substantive appellate review" that defeats the purposes of the mootness doctrine).

54 *Mark V. I*, 324 P.3d at 849-50 (Stowers and Maassen, J.J., dissenting).

the respondent's evidentiary burden.[55] And even then, despite the best efforts of counsel, the *Dakota K.* rule risks depriving appellate review for individuals who may, in fact, have been subject to a first commitment but whose counsel is unable to establish this fact, as well as for those who experience the delayed imposition of an actual collateral consequence. Contrary to their intent, the *Reid K.* and *Dakota K.* rules do not appear to be preserving resources and will likely only increase litigation in time.

C. Given the right of appeal and concomitant right to counsel, application of the mootness doctrine is unlikely to result in dismissal of these appeals.

Furthermore, additional modifications to the mootness doctrine will likely only shift the litigation in this context in a different direction, not end it. However the mootness doctrine evolves, the right of appeal[56] and right to counsel[57] afforded respondents,[58] as well as the ethical obligations of counsel, suggest limits on the

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55 This procedure is already unfolding in another appeal pending in front of this court. In D.B.'s commitment appeal, S-16665, the state argued that D.B.'s appeal was moot and that the treatment payment statute does not give rise to a collateral consequence by operation of law. Given this argument—not made until the appellee brief notwithstanding this court's instruction in *Reid K.*—D.B. has now obtained a stay based, in part, on the need to determine whether to have an evidentiary hearing to establish the collateral consequence of treatment costs. This is a drain on agency and court system resources.

56 AS 47.30.765.

57 AS 47.30.725(d).

58 This court has recognized that the right to counsel is constitutional, not just statutory. *Wetherhorn*, 156 P.3d at 383-84. Although it has not explicitly extended the constitutional right to the effective assistance of counsel to the direct appeal stage of mental health commitments, this court should conclude that, as a matter of due process, the effective assistance of counsel encompasses the appellate stage of litigation. *Cf. Halbert v. Michigan*, 545 U.S. 605, 609-24 (2005) (clarifying that right to counsel attaches when defendant is seeking access to first-tier, error-correcting appellate review).

ability of an attorney to dismiss an appeal based upon the belief that it is moot.[59] Indeed, although the *Anders-Robbins* line of cases only explicitly protects the appellate rights of indigent criminal defendants, Alaska courts have generally erred on the side of increasing protection for appellate rights rather than limiting them,[60] suggesting that *Anders-Robbins* represents the constitutional floor[61] for addressing

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59 *Cf. Anders v. California*, 386 U.S. 738 (1967); *Smith v. Robbins*, 528 U.S. 259 (2000) (requiring states to adopt prophylactic procedures to ensure attorneys, who are bound by ethical rules to avoid advancing frivolous claims, do not prematurely abandon their clients on appeal). As *Robbins* explains, the constitutional right to appellate counsel "does not include a right to present frivolous arguments to the court." 528 U.S. at 272. But while counsel may thus "properly refuse to brief a frivolous issue and a court may just as properly deny leave to take a frivolous appeal, there needs to some reasonable assurance that the lawyer has not relaxed his partisan instinct prior to refusing." *Id.* at 294 (Souter, J., dissenting). *Anders* suggests court-appointed appellate counsel may request to withdraw from litigating a wholly frivolous appeal but she must also submit a brief identifying anything in the record that might arguably support the appeal. *Anders,* 386 U.S. at 744. In response, the court should then conduct an independent examination of the record to determine if the case is wholly frivolous. *Id.* If so, counsel may be permitted to withdraw and the appeal may be dismissed or decided on the merits; if not, the court should provide counsel to litigate the appeal. *Id. Robbins* clarifies that states may depart from the specifics of *Anders* but only provided they protect the right to "adequate and effective appellate review" through a procedure that "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Robbins*, 528 U.S. at 276-77.

60 *See, e.g., Grinols v. State,* 74 P.3d 889 (Alaska 2003) (concluding that right to counsel in a first application for post-conviction relief is constitutional); *Griffin v. State,* 18 P.3d 71 (Alaska App. 2001) (interpreting Criminal Rule 35.1 to require attorneys seeking to withdraw as counsel in post-conviction relief proceedings to provide the court with a "full explanation of all the claims the attorney has considered" but rejected as frivolous); *Stone v. State,* 255 P.3d 979 (Alaska 2011) (concluding that petition for discretionary review of excessive sentence was "first-tier appellate review" under *Halbert v. Michigan* that entitled defendant to the assistance of counsel in filing such a petition); *Wassilie v. State*, 331 P.3d 1285 (Alaska App. 2014) (concluding that defendants are entitled to appointed counsel for purpose of appealing superior court's dismissal of a post-conviction relief petition as frivolous).

61 *Anders-Robbins* rests upon due process and equal protection concerns, thus Alaska could apply the cases in this context under that rubric. *See generally* Joseph

such questions in the commitment context, as well. That is, even if this court maintains its current determination that sufficiency appeals are moot, counsel cannot simply dismiss a respondent's appeal without taking additional steps to protect her client's interests—steps that may require this court to review the respondent's claims on the merits and devote more, rather than less, time to these appeals.

In sum, even assuming *Wetherhorn* was originally correct, it has failed to curtail the litigation of sufficiency claims and has instead triggered significant litigation concerning the application of the mootness doctrine. Rather than crafting additional rules in the hope of salvaging the economy it seeks to promote, this court should conclude that *Wetherhorn* is no longer sound.

IV. MORE GOOD THAN HARM WILL ACCOMPANY OVERRULING *WETHERHORN.*

Finally, overruling *Wetherhorn* in favor of reviewing claims arising from expired commitment and medication orders on the merits will result in more good than harm.[62] This element requires balancing "the benefits of adopting a new rule against the benefits of stare decisis: providing guidance for the conduct of individuals, creating efficiency in litigation by avoiding the relitigation of decided

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Frueh, Note, *The Anders Brief in Appeals from Civil Commitment,* 118 Yale L.J. 272, 277-300 (2008) (arguing that the protections of *Anders* should be applied to civil commitment appeals since the right to the effective assistance of counsel stems not just from the Sixth Amendment but also from the due process clause of the Fourteenth Amendment).

62 *State v. Carlin*, 249 P.3d 752, 761-62 (Alaska 2011) (discussing final element of stare decisis analysis).

issues, and maintaining public faith in the judiciary."[63]

Here, the benefits of stare decisis are few. First, this court's mootness jurisprudence is not a lodestar for individuals deciding to pursue an appeal. To the contrary, because they often face other challenges that make understanding the intricacies of this court's mootness jurisprudence difficult, and because they often hold strong feelings about the procedures used to commit and medicate them, this court's approach to mootness is unlikely to influence the decision to appeal.[64] Second, *Wetherhorn* and subsequent cases have not promoted efficient litigation in this context. As discussed previously, mootness has nearly eclipsed litigation on the merits; even when dismissing a case as moot, this court has expended significant resources discussing the issue.[65] Further, the unique circumstances surrounding these appeals make it unlikely that abandoning *Wetherhorn* will have far-reaching consequences in other contexts. It is difficult to imagine another type of case that implicates substantive liberty interests, triggers the protections guaranteed by the right to counsel, and always expires before an appeal can be perfected. These distinctions justify approaching these appeals differently.[66] Third, abandoning *Wetherhorn* will promote public faith in the judiciary by ensuring that errors are corrected as opposed to overlooked because a person has been committed multiple

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63 *Id.*

64 *Cf. id.* (rejecting idea that old rule providing for abatement of a conviction when a defendant dies during the pendency of a criminal appeal influenced the likelihood of a person deciding to commit a crime).

65 *See Mark V. I*, 324 P.3d 840 (Alaska 2014); *Dakota K.*, 354 P.3d 1068 (Alaska 2015); *Reid K.*, 357 P.3d 776 (Alaska 2015).

66 *Mark V. I*, 324 P.3d at 849-50 (Stowers and Maassen, J.J., dissenting).

times in the past.[67]

Indeed, adopting a rule that provides for merits-based review of expired commitment and medication orders is more consistent with the broad right of appeal contemplated by the legislature and dictated by demands of due process[68] than a rule that ties review to the types of issues raised or to the number of times a person has been committed. As currently formulated, the exceptions create unfair distinctions. Cognitive biases in judicial decision-making[69] increase the likelihood that, once committed, the chronically mentally ill may be repeatedly confined even when circumstances do not warrant it. These individuals should not be deprived of judicial review merely because of their chronic mental illness. Further, in some cases review will depend on the motivation and creativity of counsel, either in identifying procedural irregularities that may justify review under the public interest exception[70] or in establishing a collateral consequence. Correction of errors should

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67 *See Carlin*, 249 P.3d at 762 (allowing appeals to continue after death of defendant will protect both victims and defendants by ensuring criminal cases are fully litigated and decided).

68 Naomi discussed the importance of the right of appeal in her initial briefing and incorporates that discussion for purposes of responding to this court's supplemental briefing order. [At. Br. 31-39] *See also Joan K.*, 273 P.3d at 607-08 (Stowers, J., dissenting) (arguing for right of review based upon statutory right of appeal and due process); *Mark V I*, 324 P.3d at 849-50 (Stowers and Maassen, J.J., dissenting) (same).

69 *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 19-33 (2007) (discussing prevalence of intuitive decision-making and its risks).

70 Reviewing issues only as a matter of discretion, as under the public interest exception, is unfair to the extent it means certain individuals are deprived of the benefit of a rule that later evolves in their favor. *See, e.g., In re Reid K.*, 357 P.3d 776 (Alaska 2015) (appeal dismissed as moot even though Reid argued for rule regarding application of least restrictive alternative later adopted in *Mark V. II*).

not turn on the talents of counsel.

Finally, plenary review will promote fair and accurate decision-making and provide guidance in an area where courts sometimes make mistakes even as to the sufficiency of the evidence presented.[71] The common law system depends on judicial review as a means of enhancing accountability and developing appropriate standards. This remains true even with respect to evidentiary claims. Absent review, trial courts may reach disparate results when faced with highly similar factual scenarios or make repeated mistakes that go uncorrected until this court happens to review such an appeal under the collateral consequences exception.[72] This court's review benefits both lower courts and practitioners when it offers direction concerning whether certain factual scenarios meet the requisite legal standards in this highly fact-driven context.

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a separate kind of unfairness

71 *See, e.g., In re Stephen O.*, 314 P.3d 1185 (Alaska 2013) (reversing commitment due to insufficient evidence).

72 *Id.*

CONCLUSION

For the foregoing reasons as well as those articulated in Naomi's initial briefing, this court should overrule *Wetherhorn*'s mootness holding and adopt a rule permitting merits-based review of expired commitment and medication orders. Such a rule will preserve resources, honor the broad right of appeal and due process interests of patients subjected to involuntary commitment and forced medication, and provide beneficial guidance to lower courts.

DATED at Anchorage, Alaska, this 13 day of September, 2017.

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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the Necessity for the Hospitalization of: N.B.	Supreme Court No. S-15859
Trial Case No. 3AN-15-00204 PR	
In the Matter of the Necessity for the Hospitalization of: L.M.	Supreme Court No. S-16467
Trial Case No. 3AN-16-01656 PR	

CERTIFICATE OF SERVICE

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

Ross T. Klein certifies that: I am a Paralegal employed by the Alaska Public Defender Agency, 900 West 5th Avenue, Suite 200, Anchorage, Alaska 99501. On **September 13, 2017**, I **mailed** a copy of the **Supplemental Brief of Appellant N.B.** to:

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