**IN THE SUPREME COURT OF THE STATE OF ALASKA**

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| In the Matter of the Necessity of the Hospitalization of N.B. | ) | RECEIVED OCT - 4 2017 |
| Trial Court Case No. **3AN-15-00204 PR** | ) | Supreme Court No. S-15859 |
| 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** | ) | |

# SUPPLEMENTAL REPLY BRIEF OF APPELLEE STATE OF ALASKA


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**AS 22.05.010. Jurisdiction.**

. . .

(c) A decision of the superior court on an appeal from an administrative agency decision may be appealed to the supreme court as a matter of right.

. . .

**AS 47.30.765. Appeal.**

The respondent has the right to an appeal from an order of involuntary commitment. The court shall inform the respondent of this right.

**AS 47.30.851. Relief from legal disability.**

(a) A person who is prohibited from possessing a firearm or ammunition under 18 U.S.C. 922(g)(4) as a result of an involuntary commitment or an adjudication of mental illness or mental incompetence that occurred in this state may, at any time, move to be relieved from the disability resulting from an involuntary commitment or an adjudication of mental illness or mental incompetence.

(b) In ruling on a motion under (a) of this section, the court

(1) shall consider

(A) the circumstances of the involuntary commitment or adjudication of mental illness or mental incompetence;

(B) the time that has elapsed since the involuntary commitment or adjudication of mental illness or mental incompetence;

(C) the person's reputation and mental health and criminal history records;

(D) any conduct by the person that would constitute a crime against a person under AS 11.41 or a violation of AS 11.61.190 - 11.61.250; and

(E) any changes in the person's condition or circumstances relevant to the relief sought; and

(2) shall grant relief from the disability resulting from an involuntary commitment or adjudication of mental illness or mental incompetence if the court finds, by a preponderance of the evidence, that

(A) the person is unlikely to act in a manner dangerous to self or to public safety; and

(B) granting the relief is not contrary to the public interest.

(c) The court shall order a hearing conducted under (b) of this section to be held open or closed to the public at the option of the person.

(d) A decision to grant or deny relief under this section may be appealed as provided in AS 22.05.010. In reviewing the decision of the superior court, the standard of review may be de novo.

**FEDERAL STATUTES:**

**18 U.S.C. § 922. Unlawful acts**

. . .

(g) It shall be unlawful for any person—

. . .

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## INTRODUCTION

Although the parties all agree that the Court can revisit *Wetherhorn*[1] and reach the merits of all civil commitment appeals, they do not necessarily agree on how exactly the Court should navigate to this result. The State therefore files this short reply to address a few issues raised by the appellants' supplemental briefs.

In revising its approach to civil commitment appeals, the Court should try to do as little damage to its mootness jurisprudence as possible. It should therefore reject the sweeping arguments advanced by N.B. and L.M. that would eliminate mootness for large categories of cases outside the civil commitment context, as well as L.M.'s argument that all moot orders should be vacated. Instead, if the Court decides to revisit *Wetherhorn*, it should simply hold that civil commitment appeals categorically fall within one of the existing exceptions to the mootness doctrine without the need for a specific showing. The Court can reach this result under existing law with only minor modifications.

## ARGUMENT

### I. The Court should not hold that a live controversy exists just because the appellate court could rule that the trial court erred.

The Court should reject N.B.'s argument that a civil commitment appeal remains live after the commitment order expires because the Court can still give the appellant "relief" in the form of a "judicial acknowledgment of error." [N.B. Supp. Br. 4-6] Adopting N.B.'s reasoning would eliminate the mootness doctrine altogether in all categories of appeals, not just civil commitment appeals. If the mere fact that an appellate

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1 *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007).

court could rule that the trial court was wrong—thereby giving the appellant a kind of "relief" on paper—were sufficient to create a live controversy, no appeal would ever be moot. The Court should not throw out its entire mootness doctrine in this way, and should instead adhere to the view that "[a] naked desire for vindication does not save an otherwise dead controversy from mootness."[2]

## II. The Court should not hold that a statutory right to appeal supersedes the mootness doctrine.

The Court should also reject L.M.'s argument that the statute providing a right to appeal an order of involuntary commitment, AS 47.30.765, supersedes the mootness doctrine. [L.M. Supp. Br. 5-6] The Court previously rejected this argument in *In re Mark V.* and should adhere to that aspect of its precedent.[3]

Accepting L.M.'s position would have implications beyond the civil commitment context, eliminating the mootness doctrine for many categories of cases and thereby wasting scarce judicial resources on fruitless disputes. As the Court observed in *Mark V.*, various provisions throughout the Alaska Statutes provide rights to appeal.[4] For example, AS 22.05.010(c) says that "[a] decision of the superior court on an appeal from an administrative agency decision may be appealed to the supreme court as a matter of right." But in *Alaska Community Action on Toxics v. Hartig*, this Court concluded that an administrative appeal of a superior court decision affirming a permit to spray pesticides

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2 *Jennifer L. v. State, Dep't of Health & Soc. Servs.*, 357 P.3d 110, 114 (Alaska 2015) (internal quotation marks omitted).

3 *In re Mark V.*, 324 P.3d 840, 847 (Alaska 2014).

4 *Id.*

was largely moot because the permit had since expired.[5] Of course, the Court in *Alaska Community Action on Toxics* was not confronted with, and did not rule on, a statutory argument against mootness. But if the Court were to accept L.M.'s position that a statutory right to appeal supersedes the mootness doctrine, the Court would have to spend its limited judicial resources deciding the merits of all moot administrative appeals like *Alaska Community Action on Toxics* in the future.

The Court need not throw out so much of its mootness doctrine to resolve the dilemma presented by its supplemental briefing questions. Instead, as described below, it can simply apply its existing mootness exceptions slightly differently.

## III. If the Court overrules *Wetherhorn*, it should hold that mootness exceptions justify appellate review of all commitment orders.

If the Court decides to overrule *Wetherhorn*'s mootness holding, it should simply hold that civil commitment appeals categorically fall within either the public interest or the collateral consequences exception to mootness.

The Court could conclude that the public interest exception always justifies appellate review of civil commitment orders. The public interest exception 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.[6] The second factor always favors review

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5 321 P.3d 360, 366 (Alaska 2014).

6 *See In re Tracy C.*, 249 P.3d 1085, 1090 (Alaska 2011).

because given the short timeframes involved, all issues in civil commitment cases would evade review if the mootness doctrine were applied. But under the Court's *Wetherhorn* approach to civil commitment appeals, the first factor does not favor review "when disputed issues turn on unique facts unlikely to be repeated."[7] If the Court changes its approach, however, it could conclude that any issue in a civil commitment appeal is "capable of repetition" because commitment cases are common, the same legal standards always apply, and similar fact-patterns sometimes reoccur. As for the third factor, the Court could conclude that it always favors review because a civil commitment is a serious curtailment of liberty and thus a matter of public concern.[8]

As an alternative option, the Court could hold that the collateral consequences exception always justifies appellate review of civil commitment orders absent a showing

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7 *E.P. v. Alaska Psychiatric Inst.*, 205 P.3d 1101, 1107 (Alaska 2009).

8 *Cf. Matter of Garcia*, 375 N.E.2d 557, 559 (Ill. 1978) ("[C]onsiderations of public importance ought not be defeated by short-term orders, capable of repetition, which are able to evade review."); *Bradshaw v. State*, 816 P.2d 986, 989 (Idaho 1991) ("[T]he issue of whether individuals will be required to receive medication against their will while committed is of similar public interest and concern. Accordingly, we will address this issue for future direction and guidance although it is technically moot in this instant action."); *In re M.T.*, 625 N.W.2d 702, 705 (Iowa 2001) ("The conduct of an involuntary civil commitment hearing is of public importance. Because such hearings are a daily occurrence, questions about the proper procedures to be followed when there is a question about the committee's ability to be present are likely to reoccur. Additionally, given the time for processing an appeal, and the probability that the commitment will not continue for that length of time, such appeals will often be moot before the appeal can be decided."); *Newton-Wellesley Hosp. v. Magrini*, 889 N.E.2d 929, 934 (Mass. 2008) ("Issues involving the commitment and treatment of mentally ill persons are generally considered matters of public importance and present classic examples of issues that are capable of repetition, yet evading review.") (internal quotation marks omitted).

that no collateral consequences are present.[9] In *In re Joan K.*, the Court held that "there are sufficient general collateral consequences" from a civil commitment to justify reaching the merits of "an otherwise-moot appeal from a person's first involuntary commitment order" but also said that "some number of prior involuntary commitment orders would likely eliminate the possibility of additional collateral consequences, precluding the doctrine's application."[10] Since *Joan K.*, the Court has declined to consider commitment appeals when appellants who had been committed before failed to show that their most recent orders carried additional collateral consequences.[11] But if the Court changes its approach, it could simply presume collateral consequences for all civil commitment orders, not just a person's first one. The Court could draw an analogy to a criminal appeal that does not reach the appellate court until the appellant has already served out the sentence. The U.S. Supreme Court has said that such an appeal merits review because criminal convictions generally carry collateral consequences, and a court

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9 *Cf. Mark V.*, 324 P.3d at 850 (Stowers, J., dissenting) ("[T]here are other alternatives far superior to this court's current approach. One such alternative is the one adopted in Minnesota: a rebuttable presumption that there will be collateral consequences from an involuntary commitment order that precludes mootness where 'real and substantial disabilities' result from a judgment.").

10 273 P.3d 594, 598 (Alaska 2012).

11 *See Mark V.*, 324 P.3d at 845 ("He 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."); *In re Dakota K.*, 354 P.3d 1068, 1072 (Alaska 2015) ("A respondent wishing to oppose the State, would have to allege, and make some evidentiary showing at least raising a genuine issue of material fact, that the commitment was a first involuntary commitment—or make an evidentiary showing attempting to establish some factual basis for a finding of collateral consequences.").

can presume that an appealed criminal conviction carries such consequences absent an affirmative showing to the contrary.[12] Some courts apply similar reasoning in the civil commitment context, and this Court could do the same here.[13]

A holding that civil commitment appeals categorically fall within one of these two existing exceptions to mootness would address the parties' concerns about *Wetherhorn* while doing minimal damage to the Court's general mootness jurisprudence.

## IV. The Court should not vacate a civil commitment order that was not erroneously entered.

L.M. argues that as an alternative to reaching the merits, the Court should simply vacate moot civil commitment orders, but such a rule is not appropriate. [L.M. Supp. Br. 2-6] Civil commitment orders should stand unless erroneously entered.

To regularly vacate commitment orders without assessing the merits would undermine all statutes and policies that tie collateral consequences to civil commitment orders—for instance, the statutes that protect public safety by restricting gun ownership

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12 *See Sibron v. New York*, 392 U.S. 40, 57 (1968) ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.").

13 *See, e.g., Matter of Garcia*, 375 N.E.2d 557, 559 (Ill. 1978) ("[I]it is difficult to determine at what point the number of commitments would render a person's reputation to be irredeemable. . . .We, therefore, hold that the mootness doctrine is not generally applicable to mental health cases and will review the merits of this case."); *In re Walter R.*, 850 A.2d 346, 349 (Maine 2004) ("Involuntary hospitalization commitments are similar to criminal convictions in that they not only result in a loss of liberty but they also carry collateral consequences."); *Bension v. Meredith*, 455 F. Supp. 662, 666 (D.D.C. 1978) ("So long as his record reflects the findings both of the magistrate and the Mental Health Commission that he is 'mentally ill,' it cannot be said that 'there is no possibility that any collateral legal consequence will be imposed' as a result of his detention."); *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980).

for people who have been committed[14] until they have been relieved of this legal disability via a specified procedure.[15] This system would not function if the Court were to regularly vacate commitment orders. The legislature and executive branch should be free to create collateral consequences for civil commitment if they so choose. So if the Court is concerned about the collateral consequences of a commitment order, that is a reason to hear an appeal on the merits, not a reason to vacate the order.

The Court's vacatur cases are distinguishable. In *Peter A. v. State, Department of Health and Social Services*, the Court vacated an adjudication order in a CINA case rather than reviewing it on the merits when the appeal of it became moot because the State voluntarily moved to dismiss the case at disposition.[16] Reasoning from federal cases, the Court explained that "principles of equity require vacatur" when "a prevailing party voluntarily moots a case, without the appellant's acquiescence, [and] the appellant, through no fault of his own, is prevented from obtaining appellate review of his claim."[17] But when a commitment appeal becomes moot, it is because the commitment order expired—which is something that happens in every case as a matter of course—not because the State took unilateral, voluntary action to moot the case.

Because commitment appeals always become moot as a matter of course—not due to unique and unpredictable circumstances like in *Peter A.*—regularly vacating

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14 *See* 18 U.S.C. § 922(g)(4).

15 *See* AS 47.30.851.

16 146 P.3d 991, 995 (Alaska 2006).

17 *Id.*

commitment orders without assessing the merits would create strange litigation incentives. Any person who is involuntarily committed would have an incentive to file an appeal and then assert that her own appeal is moot, requiring that her commitment order be automatically vacated. This could lead to all civil commitment orders being vacated regardless of their merits. That would not reflect reality and would upend the normal appeals process. Such concerns were not present in *Peter A.* and the cases it cites.

Accordingly, the Court should decline to adopt a rule that would lead to vacating many civil commitment orders without consideration of the merits. Instead, if the Court is concerned about the burden created by an expired commitment order, that is a reason to hear an appeal on the merits, not a reason to vacate the order.

## CONCLUSION

For these reasons and those explained in the State's opening supplemental brief, the State does not oppose the Court reconsidering *Wetherhorn*'s mootness holding and applying either the public interest or the collateral consequences exception to reach the merits of all civil commitment appeals.

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**Trial Court Case #: 3AN-16-01656 PR**

**CERTIFICATE OF SERVICE AND TYPEFACE**

I certify that on October 3, 2017 a true and correct copy of the **SUPPLEMENTAL REPLY BRIEF OF APPELLEE STATE OF ALASKA** and this **CERTIFICATE OF SERVICE** were served by U.S. Mail to the following:

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

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