No. 1-13-0709

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In the Matter of **TORRY G.,** Alleged to be a person subject to involuntary medication Respondent-Appellant	Appeal from the Circuit Court of Cook County No. 2013 CoMH 142 Honorable David Skryd, Presiding Judge

REPLY BRIEF OF RESPONDENT-APPELLANT

Laurel Spahn, Staff Attorney

Veronique Baker, Director

LEGAL ADVOCACY SERVICE
Illinois Guardianship & Advocacy Commission
West Suburban Office
P.O. Box 7009
Hines, Illinois 60141-7009
708 338-7500

Counsel for Respondent-Appellant, Torry G.

Oral Argument Requested

ARGUMENT

I. The State effectively concedes the merits of this case by failing to address Torry G.'s substantive arguments related to application of the involuntary-medication statute, Sec. 2-107.1 of the Mental Health Code.

An appellee is considered to have waived any argument that it has not responded to in its brief. Sup. Ct. Rule 341(h)(7) and (i); *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1085, 1087-88 (1st Dist. 1995). Moreover, "[a]n appellee's failure to reply to an argument raised in appellant's brief is practically an admission that the trial court erred in its holding on the issue." *209 Lake Shore Drive Bldg. Corp. v. City of Chicago*, 3 Ill. App. 3d 46, 52 (1st Dist. 1971), *reh'g denied*. In fact, an appellee who fails "to meet and answer vital grounds for reversal urged by [appellant] confess[es] the error of the proceedings . . . ." *Stubbs v. Austin*, 285 Ill. App. 535, 2 N.E.2d 358, 360 (1st Dist. 1936).

Thus, this Court should accept Torry G.'s arguments (see Torry's opening brief at 8-25), unchallenged by the State, and reverse the trial court's order.

II. This Court should apply a mootness exception and decide the substantive issues Torry G. raises – and that the State does not challenge – on the merits.

A. The least-restrictive-alternative issue is a question of law that has not been answered by the Illinois Appellate Court: can a trial court order involuntary administration of medication to a person who admits to mental illness and is willing to take medication voluntarily. For this reason, the public-interest and capable-of-repetition exceptions apply.

A cornerstone of involuntary mental-health treatment is that due process requires evidence to show why seeking treatment voluntarily is *not* adequate and why an involuntary order is necessary. *In re Byrd*, 68 Ill. App. 3d 849, 854 (1st Dist. 1979). As explained in Torry G.'s opening brief, one of the reasons why our State Supreme Court upheld the constitutionality of the involuntary-treatment statute is that Section 2-107.1 of

the Mental Health Code requires clear and convincing proof that no less restrictive alternative to forced medication is appropriate. Torry G.'s opening brief at 22-23, citing to *In re C.E.*, 161 Ill. 2d 200, 219 (1994) (referring to what is now 405 ILCS 5/2-107.1(a-5)(4)(F) (2012).

With the State having adopted Torry G.'s Statement of Facts (State's brief at 1), the appeal here involves undisputed facts. Given the undisputed facts, this appeal involves the application of appropriate mental-health law to those facts. See Torry's opening brief at 8-25. Thus the question of whether it is a "less restrictive service" to take medication voluntarily as opposed to pursuant to an *involuntary* order is a question of statutory interpretation subject to *de novo* review. Torry G.'s opening brief at 23, *citing In re Mary Ann P.*, 202 Ill. 2d 393, 404 (2002); *see also In re Michelle J.*, 209 Ill. 2d 428, (2004) (what constitutes a personal examination under the Code is a question of statutory construction subject to *de novo* review).

As a question of law, this question of statutory interpretation is not a "sufficiency of the evidence" issue that is fact-specific and unique and thus precluded from review under the public-interest or capable-of-repetition-yet-avoiding-review exceptions to the mootness doctrine, as the State contends. State's brief at 3-6. Indeed, the State does not argue against application of the *de novo* standard of review to this question of law. State's brief at 3-6.

Instead, the State argues that the public-interest or capable-of-repetition exceptions do not apply because the issue of least-restrictive-alternative to involuntary treatment will not recur for mental-health respondents under the public-interest exception or for Torry G. under the capable-of-repetition exception. State's brief at 3-6. In asserting

this argument, the State relies on the mistaken premise that the facts in future cases would have to be the same as here, and that Torry would have to be subject to a future involuntary-medication order for the same reasons as here, for the exceptions to apply. However, the question when applying these exceptions is whether the *issue* – not the facts or reasons for treatment – is likely to arise in the future for Torry G. under the capable-of-repetition exception and for other respondents under the public-interest exception. In the words of the Illinois Supreme Court: "[s]imply stated, there must be a substantial likelihood that the *issue* presented in the instant case, and any resolution thereof, would have some bearing on a *similar issue* presented in a subsequent case." *In re Alfred H.H.*, 233 Ill. 2d 345, 360 (2009) (italics added). Thus, the proper question is whether *the issue* – does voluntarily taking medication constitute an appropriate least-restrictive alternative to court-ordered forced medication? – is likely to recur. If application of the mootness exceptions required the facts of each case to be the same, then the exceptions would almost never apply. Yet, rather than eliminating exceptions to the mootness doctrine as the State essentially urges, the Illinois Supreme Court found that one of the exceptions "will usually" apply to appeals under the Mental Health Code. *Alfred H.H.*, 233 Ill. 2d at 355.

As the issue of willingness to take medication as a least-restrictive alternative to court-ordered forced medication is likely to recur for Torry G., this issue satisfies the capable-of-repetition exception. As Torry argued in his opening brief, he is likely to again face a similar proceeding where, despite his willingness to take medication, a doctor nonetheless petitions for forced medication. Torry G.'s opening brief at 27; *see also In re Nicholas L.*, 407 Ill. App. 3d 1061, 1067-1068 (2nd Dist. 2011) (respondent

faced petition for involuntary medication although consenting to oral, but not injectable long-acting medication). And considering Torry's acknowledgement of his mental illness and search for a "reliable" medication that will address his symptoms, he is likely to again be willing to take medication voluntarily in the future. (S.98,117,125) The State concedes the other element of this exception is satisfied: that the 90-day involuntary-medication order is too short to permit review. State's brief at 6.

Under the public interest exception, the question of least-restrictive alternative is also likely to recur in future proceedings under the Code. The doctrine of least-restrictive alternative is, as explained in the first paragraph of this argument, a cornerstone of involuntary-treatment law and an issue of a public nature. See also Torry G.'s opening brief at 21-23, 26. There is a need for authoritative guidance as the question here has not been answered by the Illinois Appellate Court and is therefore a matter of first impression. *In re Shelby R.*, 2012 IL App (4th) 110191, ¶¶20-28. And there is a likelihood of future recurrence of the question because individuals who are willing to take medication can nonetheless find themselves facing a petition for *involuntary* medication. See Torry G.'s opening brief at 26, citing *Nicholas L.*, 407 Ill. App. 3d at 1067-1068.

This Court should apply either the public-interest or capable-of-repetition exception and decide this appeal on the merits. The capable-of-repetition exception also applies to Torry G.'s capacity issue, as discussed in Argument II, Part B of this reply brief. *In re Donald S.*, 2014 IL App (2d) 130044, ¶¶28-30 (applying the capable-of-repetition exception to capacity issue in involuntary-medication appeal).

Reviewing courts, however, sometimes note that more than one exception to mootness applies in a given case. Torry G.'s opening brief at 26, citing *In re Val Q.*, 396 Ill. App. 3d 155, 159-160 (2nd Dist. 2009) (reviewing court applied capable-of-repetition exception in addition to collateral-consequences exception).

B. The present order is Torry G.'s first-and-only mental health order entered against him, which caused collateral consequences to attach to his name and record for the first time.

The State admits that the forced-medication order at issue in this appeal marked the first time Torry G. was adjudicated as a person subject to an involuntary mental-health order. State's brief at 10. In fact, according to evidence at the involuntary-medication trial, 21-year-old Torry G. had been a good student and had never had an involuntary mental-health order entered against him before the March 2013 involuntary-medication order at issue here. (S.18,110, 116A[1]) Torry G. also has no criminal convictions. (S.1-128; C.1-92) Applying the Illinois Supreme Court's reasoning in *Alfred H.H.* for possible application of the collateral-consequences exception to mootness – that is, have collateral consequences already attached to the appellant (1) by virtue of a previous adjudication as a person subject to an involuntary mental-health order or (2) by virtue of a previous felony conviction – Torry G. meets requirements for application of this exception. *In re Alfred H.H.*, 233 Ill. 2d 345, 363 (2009).

If this Court declines to review Torry's involuntary-medication order, he will suffer collateral consequences from the order without an opportunity to have the order reversed despite the errors at trial that the State effectively concedes (see Argument I of

this reply brief). An order "will certainly be used in any subsequent [mental-health] proceedings" and may make it more likely that a subsequent involuntary order will be entered against Torry. *In re Ballay*, 482 F.2d 648, 652 (D.C. Cir. 1973) *cited by In re Sciara*, 21 Ill. App. 3d 889, 895 (1st Dist.1974).

Although the State seems to argue that Torry's order could not be used in future cases because it would be hearsay, the case the State cites explains "[a] prior judgment is not hearsay, however, to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties." *United States v. Boulware*, 384 F.3d 794, 806 (9th Cir. 2004); State Brief at 9. In other words, the legal effect of a prior judgment is not hearsay. *Boulware*, 384 F.3d at 807. Thus, the fact that Torry G. has been found subject to involuntary medication would not be hearsay in a future proceeding. Indeed, a circuit court could take judicial notice of Torry G.'s involuntary-medication order. *See In re Estate of Savio*, 388 Ill. App. 3d 242, 250 (3rd Dist. 2009) *citing Murdy v. Edgar*, 103 Ill. 2d 384, 394 (1984) (noting the trial court properly took judicial notice of a property-division order from divorce proceeding). Moreover, the State acknowledges that reversal of an involuntary-medication order could preclude mention of the order in future proceedings. State's brief at 8; *Alfred H.H.*, 233 Ill. 2d at 362.

In addition, Torry G.'s psychiatric diagnosis does not create collateral consequences to bar appellate review, as the State suggests. State Br. at 12. First, the Illinois Supreme Court outright rejected the Fourth District's reasoning – that it is the respondent's mental-health history that may follow him, not the adjudication – when the

---

[1] This page in the record does not have an appellate page number. Because it is the page after page no. 116 in the Supplemental Record, counsel is referring to the page here as 116A. (The number 113 is printed at the bottom middle of this page.)

Appellate Court tried to completely eliminate the collateral-consequences exception. *Alfred H.H.*, 233 Ill. 2d at 362. The Supreme Court found that while reversal of an involuntary mental-health order will not purge the respondent's mental-health records of admission or treatment for a mental illness, "that is not the same as saying that there is no effect whatsoever" from reversal of an involuntary order. *Id.* The Court noted "there are a host of potential legal benefits" to a reversal, including a motion in limine to bar mention of the order in future cases, and employment-related benefits. *Id.*

Second, the Illinois Supreme Court's application of the collateral-consequences exception shows that it *is the trial court's order*, not a person's mental illness, that creates collateral consequences. In the *Hays* case, the Court applied the collateral-consequences exception though the respondent had a significant mental-health history, having voluntarily admitted himself to mental-health facilities nine times. *In re Hays*, 102 Ill. 2d 314, 316 (1984). Thus, under Illinois Supreme Court precedent in *Hays* and *Alfred H.H.*, a respondent's mental illness alone cannot bar appellate review, contrary to the State's assertion.

Significantly, hospitalizations that are not *court-ordered* are either voluntary hospitalizations, *see* 405 ILCS 5/3-400 and 3/801 (2012), or they are admissions that have not resulted in court-ordered commitment – because the patient did not meet commitment criteria and was discharged by the facility or by the court, 405 ILCS 5/3-809 (2012). Notably, the State concedes here that Torry G.'s other hospitalizations during his recent and initial diagnosis of mental illness were voluntary. State's brief at 10. With voluntary hospitalizations – and both voluntary and informal admissions under the Mental Health Code are "voluntary" by involving no *involuntary* court-order, 405 ILCS

5/3-801 (2012) – no collateral consequences attach to the individual because no legal adjudication of subject-to-involuntary-mental-health admission or treatment was entered.

The collateral-consequences exception applies to Torry's appeal because as this is his first involuntary mental-health order, he has no collateral consequences that have already attached to preclude review under this exception.

The Illinois Supreme Court declined to apply the collateral-consequences exception when the respondent had several prior commitments and a felony conviction for murder because any collateral consequences stemming from the commitment order he was appealing already existed from his other commitment orders and from his criminal conviction. *Alfred H.H.*, 233 Ill. 2d at 363. In arguing that the collateral-consequences exception applies here because Torry G. has no previous collateral consequences, he is not asking this Court to presume collateral consequences, as the State contends. State's brief at 7. Instead, he is following the *Alfred H.H.* holding, which noted collateral consequences from an involuntary mental-health order in future proceedings. *Alfred H.H.*, 233 Ill. 2d at 362.

Had Torry G. relied on a presumption of collateral consequences, he would not have considered in his opening brief whether he has previous mental-health orders or felony convictions. *See Sibron v. New York*, 392 U.S. 40, 55 (1968) (in applying a presumption of collateral consequences from a conviction, finding "no relevance in the fact that Sibron is a multiple offender," and observing that "[i]t is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable"). While, as the State notes, the U.S. Supreme Court has declined to extend a presumption of collateral consequences beyond criminal convictions to

review of a moot parole revocation, this is because review of that issue would not change the conviction and its attendant collateral consequences. State's brief at 7; *Spencer v. Kemna*, 523 U.S. 1, 12 (1998). This is consistent with *Alfred H.H.* in that a felony conviction would preclude review of a mental-health order for the similar reason that review of the mental-health order would not affect the collateral consequences from the respondent's existing criminal conviction. *Alfred H.H.*, 233 Ill. 2d at 363.

Here, as noted, the current order could plague Torry G. in future proceedings. Moreover, should a mental-health order be pursued against Torry in the future, he may be precluded from raising a sufficiency-of-the-evidence issue on appeal of that order because these issues are viewed as too fact-specific to warrant review under the public-interest and capable-of-repetition exceptions. *In re Charles H.*, 409 Ill. App. 3d 1047, 1054 (4th Dist. 2011), *citing Alfred H.H.*, 233 Ill. 2d at 356-357, 359-360.

The Supreme Court reasoned that Alfred H.H., age 60, did not qualify for the collateral-consequences exception to mootness because he had a history of multiple past *involuntary* commitments and had served a sentence for a felony conviction. *Alfred H.H.*, 233 Ill. 2d at 347-348, 363. In stark contrast, Torry G. had just reached adulthood and, before that, had been a good student. (S.116A) Torry, at age 21, was at the start of managing an illness that had afflicted him through no fault of his own. Bruce Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B. C. L. Rev. 785 (2009). Torry has his entire life ahead of him, including pursuit of an education and a career (S.33,116) as opposed to Mr. H.H., a man in his 60s and a former convict. *Alfred H.H.*, 233 Ill. 2d at 347-348. Unlike Mr. H.H., Torry G. was at a crucial point in learning to manage his mental illness to be able to live a

full and productive life. *See, e.g., National Alliance on Mental Illness "Hearts and Minds Program,"* http://www.nami.org/template.cfm?section=hearts_and_minds (2011) (discussing the process of making choices that support a successful and healthy life for persons with mental illness).

This Court's review on the merits of Torry G.'s first-and-only involuntary-mental-health order can prevent the attachment of collateral consequences that would negatively affect this young man's future and career pursuits. *See In re Merrilee M.*, 409 Ill. App. 3d 983, 985 (2nd Dist. 2011), *appeal denied* ___ Ill. 2d ___, 955 N.E.2d 471 (2011) (court recognized that an involuntary mental-health order could affect a person's career). Otherwise, the mental-health equivalent of criminal law's "forever rule" – that a conviction will "stick" to a former criminal defendant *forever* regardless of that person's redemption – will apply to this young man regardless of how he manages or experiences recovery throughout the rest of his life. *See* Blumstein and Nakamura, *Paying a Price Long After the Crime*, New York Times, Jan. 9. 2012, accessed at http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?scp=1&sq=paying%20a%20price%20long%20after%20the%20crime&st=cse (discussing the negative effect of criminal convictions from people's early adulthood on their ability to find employment long after their involvement with the criminal justice system).

Even if this Court does not apply the collateral-consequences exception, this Court may review Torry G.'s capacity issue when reviewing his question of law. *See In re A.W.*, 381 Ill. App. 3d 950, 956 (4th Dist. 2008) (acknowledging that while routine sufficiency-of-the-evidence issues do not fall under the public-interest or capable-of-

repetition exceptions, reviewing respondent's sufficiency issue nevertheless: "because we are addressing the merits of respondent's statutory-compliance arguments under the public-interest exception, we also will consider the merits of respondent's sufficiency-of-the-evidence argument.") And, as noted in Argument II, part A, of this reply brief, this Court can apply the capable-of-repetition exception to Torry's capacity argument as the Second District did in the *Donald S.* case. *In re Donald S.*, 2014 IL App (2d) 130044, ¶¶28-30. In that case, the Second District found that the capacity to make a reasoned decision about psychotropic medication was likely to arise in the future, given that the respondent had a chronic mental illness and could be reasonably expected to face involuntary treatment again. *Donald S.*, 2014 IL App (2d) 130044, ¶30.

III. Contrary to the State's assertion, the evidence does not show that Torry G. had "25" hospitalizations.

The State provides, without citation to the record, that Torry had "25 separate hospitalizations." State's brief at 12. The record indicates four previous hospitalizations at Westlake Hospital, and "a couple" of other admissions to Riveredge – none by court order – but not 25. (R.14) The only reference to "25 hospitalizations" is in the State's closing argument. (R.119) The Assistant State's Attorney making the closing argument gave no reference to any fact in evidence to support her statement. (R.119)

IV. With the State effectively conceding that it did not prove the capacity and the least-restrictive elements of the involuntary-medication statute, the State should be as concerned as Torry G. with an appellate review of this case.

While effectively conceding the substantive merits of this appeal (see argument I, above), the State asks that this Court decline to apply a recognized mootness exception to the 90-day order entered by the trial court and to dismiss this appeal as moot. State's brief

at 2-12. But as representatives of the People of Illinois, the State should be as concerned as Torry G. in resolving the substantive questions in this matter relating to capacity and least-restrictive alternative. (Torry G.'s opening brief at 8-25)

"'Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers.'" *People v. Amaya*, 255 Ill. App. 3d 967, 973 (3rd Dist. 1994) (citation omitted). State's attorneys representing the government – as in involuntary mental-health proceedings, 405 ILCS 5/3-101(a) (2012) – must serve justice first, and give the individuals at issue a fair trial. *Amaya*, 255 Ill. App. 3d at 973. The Illinois Supreme Court has long recognized that the State's Attorneys are in a special position to those they prosecute in the criminal or civil sense: "it is the rule that the State's attorney in his official capacity is the representative of *all the people, including the defendant*, and it is as much his duty to safeguard the constitutional rights of the defendants as those of any other citizen." *People v. Odin*, 20 Ill. 2d 470, 483 (1960) (citation omitted) (italics added).

In addition to the State's Attorney's protection of the respondent's rights in a mental-health proceeding, the State also has the burden of proving the case for involuntary mental-health services by clear and convincing evidence. *In re Stephenson*, 67 Ill. 2d 544, 556-557 (1977); 405 ILCS 5/2-107.1 (a-5)(4) (2012) (involuntary treatment); 405 ILCS 5/3-808 (2012) (involuntary commitment).

When, as here – by not arguing in response to substantive issues raised by the respondent-appellant – the State effectively concedes that it did not prove its case at the trial level, the State should be as concerned as Torry G. that his case is reviewed and the merits properly addressed on appeal. This is because "[t]he prosecutor's job isn't just to

win, but to win fairly"; the function of the prosecutor "is not [so to speak] to tack as many skins of victims as possible to the wall" but "to vindicate the right of people as expressed in the laws . . . ." *Amaya*, 255 Ill. App. 3d at 973-974, *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649 (Douglas, J. dissenting). By conceding, but at the same time asking the court to dismiss the appeal of Torry G.'s one and only involuntary mental-health order without applying one of the appropriate mootness exceptions, the State is attempting to preserve its "win" at the trial level at Torry G.'s expense while at the same time likening him to a convicted felon with multiple past commitments whose appeal did not warrant application of a mootness exception. *In re Alfred H.H.*, 233 Ill. 2d 345, 347-348 (2009). 21-year-old Torry G. was no Alfred H.H.: Torry had been a good student and had never had an involuntary mental-health order entered against him before the March 2013 involuntary-medication order at issue here. (S.18,110, 116A[2]) Torry G. also has no criminal convictions. (S.1-128; C.1-92)

Torry G. is not a criminal, but a young man dealing with symptoms of an illness. As our State Supreme Court recognizes, "[m]ental illness is not a crime, and a person in need of mental treatment is not by reason thereof a criminal." *Stephenson*, 67 Ill. 2d at 556. Although the State may wish for a criminal conviction to stand despite errors at the trial level, there is no such incentive here. *See e.g. People v. Dodds*, 2014 IL App (1st) 122268, ¶¶21-22 (State conceded error but argued to uphold conviction of sex offender).

[2] This page in the record does not have an appellate page number. Because it is the page after page no. 116 in the Supplemental Record, counsel is referring to the page here as 116A. (The number 113 is printed at the bottom middle of this page.)

CONCLUSION

For the foregoing reasons, and for the reasons stated in Torry G.'s opening brief, Respondent-Appellant Torry G. respectfully requests that this Court apply an exception to mootness, decide this matter on the merits, and reverse the trial court's involuntary-medication order.

Respectfully submitted,
LEGAL ADVOCACY SERVICE

Laurel Spahn

One of Torry G.'s attorneys

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is **14** pages.

Laurel Spahn

Laurel Spahn, Staff Attorney

Veronique Baker, Director

LEGAL ADVOCACY SERVICE
Illinois Guardianship & Advocacy Commission
P.O. Box 7009
Hines, Illinois 60141-7009
708/338-7500

Counsel for Respondent-Appellant, Torry G.