IN THE SUPREME COURT OF THE STATE OF ALASKA

NATIVE VILLAGE OF KWINHAGAK, Appellant, v. STATE OF ALASKA, OCS, DHSS, Appellee.	Supreme Court No. S-18481

Trial Case No. 4BE-19-00046CN

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
HONORABLE TERRENCE HAAS, JUDGE

BRIEF OF APPELLEE E.G.

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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.

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STATUTES

Alaska Statute 47.30.700 provides:

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.

Alaska Statute 47.10.087 provides:

Placement in secure residential psychiatric treatment centers

(a) The court may authorize the department to place a child who is in the custody of the department under AS 47.10.080(c)(1) or (3) or 47.10.142 in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that

(1) the child is gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person;

(2) there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment or that less restrictive alternatives have been tried and have failed; and

(3) there is reason to believe that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.

(b) A court shall review a placement made under this section at least once every 90 days. The court may authorize the department to continue the placement of the child in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that the conditions or symptoms that resulted in the initial order have not ameliorated to such an extent that the child's needs can be met in a less restrictive setting and that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.

(c) The department shall transfer a child from a secure residential psychiatric treatment center to another appropriate placement if the mental health professional responsible for the child's treatment determines that the child would no longer benefit from the course of treatment or that the child's treatment needs could be met in a less restrictive setting. The department shall notify the child, the child's parents or guardian, and the child's guardian ad litem of a determination and transfer made under this subsection.

(d) In this section, “likely to cause serious harm” has the meaning given in AS 47.30.915.

Alaska Statute 47.30.705 provides:

Emergency detention for evaluation

(a) A peace officer, health officer, mental health professional, or physician assistant licensed by the State Medical Board to practice in this state who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody by a peace officer or health officer and delivered to the nearest crisis stabilization center, crisis residential center, evaluation facility, or treatment facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a crisis stabilization center, crisis residential center, evaluation facility, or treatment

facility. However, protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer, health officer, mental health professional, or physician assistant shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the crisis stabilization center, crisis residential center, evaluation facility, or treatment facility.

(b) In this section, "minor" means an individual who is under 18 years of age.

(c) When delivering a person to a crisis stabilization center, crisis residential center, evaluation facility, or treatment facility under (a) of this section, a peace officer or health officer shall give priority to a crisis stabilization center or crisis residential center if one exists in the service area served by the peace officer or health officer.

(d) When a crisis stabilization center, crisis residential center, evaluation facility, or treatment facility admits a minor under this section, the center or facility shall inform the parent or guardian that the minor has been admitted as soon as possible after the arrival of the minor at the facility. When a crisis stabilization center, crisis residential center, evaluation facility, or treatment facility admits an adult for whom a guardian has been appointed and the center or facility is aware of the appointment, the center or facility shall inform the guardian that the adult has been admitted as soon as possible.

Former Alaska Statute 47.30.710 provides:

Examination; Hospitalization

(a) A respondent who is delivered under AS 47.30.700--47.30.705 to an evaluation facility, except for delivery to a crisis stabilization center as defined in AS 47.32.900, for emergency examination and treatment shall be examined and evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility. A respondent who is delivered under AS 47.30.705 to a crisis stabilization center shall be examined by a mental health professional as defined in AS 47.30.915 within three hours after arriving at the center.

(b) If the mental health professional who performs the emergency examination has reason to believe that the respondent is (1) mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, and (2) is in need of care or treatment, the mental health professional may hospitalize the respondent, or arrange for hospitalization, on an emergency basis. If a judicial order has not been obtained under AS 47.30.700, the mental health professional shall apply for an ex parte order authorizing hospitalization for evaluation.

Alaska Statute 47.30.715 provides:

Procedure after order

When a facility receives a proper order for evaluation, it shall accept the order and the respondent for an evaluation period not to exceed 72 hours. The facility shall promptly notify the court of the date and time of the respondent's arrival. The court shall set a date, time, and place for a 30-day commitment hearing, to be held if needed within 72 hours after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent.

Alaska Statute 47.30.725 provides:

Rights; notification

(a) When a respondent is detained for evaluation under AS 47.30.660 - 47.30.915, the respondent shall be immediately notified orally and in writing of the rights under this section. Notification must be in a language understood by the respondent. The respondent's guardian, if any, and if the respondent requests, an adult designated by the respondent, shall also be notified of the respondent's rights under this section.

(b) Unless a respondent is released or voluntarily admitted for treatment within 72 hours of arrival at the facility or, if the respondent is evaluated by evaluation personnel, within 72 hours from the beginning of the respondent's meeting with evaluation personnel, the respondent is entitled to a court hearing to be set for not later than the end of that 72-hour period to determine whether there is cause for detention after the 72 hours have expired for up to an additional 30 days on the grounds that the respondent is mentally ill, and as a result presents a likelihood of serious harm to the respondent or others, or is gravely disabled. The facility or evaluation personnel shall give notice to the court of the releases and voluntary admissions under AS 47.30.700 - 47.30.815.

(c) The respondent has a right to communicate immediately, at the department's expense, with the respondent's guardian, if any, or an adult designated by the respondent and the attorney designated in the ex parte order, or an attorney of the respondent's choice.

(d) The respondent has the right to be represented by an attorney, to present evidence, and to cross-examine witnesses who testify against the respondent at the hearing.

(e) The respondent has the right to be free of the effects of medication and other forms of treatment to the maximum extent possible before the 30-day commitment hearing; however, the facility or evaluation personnel may treat the respondent with medication under prescription by a licensed physician or by a less restrictive alternative of the respondent's preference if, in the opinion of a licensed physician in the case of medication, or of a mental health professional in the case of alternative treatment, the treatment is necessary to

(1) prevent bodily harm to the respondent or others;

(2) prevent such deterioration of the respondent's mental condition that subsequent treatment might not enable the respondent to recover; or

(3) allow the respondent to prepare for and participate in the proceedings.

(f) A respondent, if represented by counsel, may waive, orally or in writing, the 72-hour time limit on the 30-day commitment hearing and have the hearing set for a date no more than seven calendar days after arrival at the facility. The respondent's counsel shall immediately notify the court of the waiver.

Alaska Staute 47.30.730 provides:

Petition for 30-day commitment

(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must

(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;

(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;

(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;

(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;

(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;

(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and

(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

Alaska Statute 47.30.735 provides:

30-day commitment; hearing

(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.

(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 - 47.30.915, the respondent has the right

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;

(2) to view and copy all petitions and reports in the court file of the respondent's case;

(3) to have the hearing open or closed to the public as the respondent elects;

(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;

(5) to have an interpreter if the respondent does not understand English;

(6) to present evidence on the respondent's behalf;

(7) to cross-examine witnesses who testify against the respondent;

(8) to remain silent;

(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

Former Alaska Statute 47.30.915 provides:

Definitions

. . .

(5) “designated treatment facility” or “treatment facility” means a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670--47.30.915 but does not include correctional institutions;

. . .

(7) “evaluation facility” means a health care facility that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660--47.30.915, or a medical facility licensed under AS 47.32 or operated by the federal government;

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I Section 7 provides:

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.

PARTIES

Appellant is the Native Village of Kwinhagak. The appellees are the State of Alaska, Department of Health and Social Services, Office of Children's Services (OCS); the guardian ad litem; the minor, Mira J.; and the mother, Elaine.

ISSUES PRESENTED FOR REVIEW

1. Did Mira's detention at Sitka Community Hospital and North Star Hospital for a combined period of 27 days without a hearing violate her procedural due process rights?
2. Did the court err in concluding that Mira's detention was governed by Alaska Statute 47.10.087 rather than the civil commitment statutory scheme?

STATEMENT OF THE CASE

A. Facts

Elaine is the mother of Mira J., an Indian child within the meaning of the Indian Child Welfare Act. OCS took emergency custody of Mira in August 2019 and filed a petition alleging she was a child in need of aid due to allegations of substance abuse, physical harm, and neglect by her mother. [Exc. 1-5; R. 464-66] The Native Village of Kwinhagak ("the Tribe") intervened in the CINA proceeding. [R. 339-40]

In August of 2021 Mira entered Raven's Way, a residential substance abuse treatment facility. [Tr. 37] [1] She successfully completed the program and was discharged on November 18, 2021. [Tr. 37]

On December 13, 2021, OCS informed the parties that Mira had been placed at Sitka Community Hospital on December 3, 2021, for drinking alcohol. [R. 91] OCS then moved Mira to North Star Hospital on December 20, 2021. [Tr. 9] OCS did not request a hearing or a court order with respect to either of these hospitalizations.

On December 23, the Tribe filed a motion to review Mira's placement pursuant to AS 47.30.700 *et seq.*, the statutory framework regulating involuntary civil commitments, and requested that the court appoint counsel for Mira. [Exc. 18-21]

The court appointed the Public Defender Agency to represent Mira on December 27. [Exc. 33] On December 30, the court held a hearing on the Tribe's motion. OCS asserted that, under an injunction issued by Anchorage Superior Court

[1] All citations to the transcript refer to the hearing held on January 18, 2021, unless otherwise noted.

Judge Erin Marston in *Hooper Bay et al. v. Lawton*, *et al.* (3AN-14-05238CI) in 2015, an ".087-type hearing" was required within 30 days of admission to North Star Hospital. [Dec. 30, 2021 Tr. 4][2] OCS noted that the 30-day deadline for the hearing had not yet passed, because Mira had entered North Star on December 21.[3] [Dec. 30, 2021 Tr. 4] The court granted OCS's request for a continuance because the Tribe was not present and because OCS was unable to obtain a mental health professional to testify. [Dec. 30, 2021 Tr. 4-5]

On January 7, the court held another hearing on Mira's hospitalization. The public defender representing the mother noted that Mira had not yet been assigned an attorney because the Alaska Public Defender Agency had a conflict. [Jan. 7, 2022 Tr. 9] The court granted the mother's request for a continuance so that Mira could obtain counsel from the Office of Public Advocacy. [Jan. 7, 2022 Tr. 12]

Prior to the next hearing, OCS filed an affidavit from Gennifer Moreau-Johnson, Director of the Division of Behavioral Health within the Department of Health and Social Services. [Exc. 36] Moreau-Johnson attested that she had personal knowledge of which facilities were "designated evaluation and stabilization facilities," "designated

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[2] In that case, two tribes filed for a preliminary injunction to prevent OCS from placing minors in state custody at North Star Hospital without a judicial hearing. [Exc. 104] Judge Marston held that minors placed at North Star Hospital were not entitled to a hearing under AS 47.10.087 because that statute only governs placements at secure residential psychiatric treatment centers. [Exc. 109-13] However, the court also enjoined OCS from placing minors at acute psychiatric hospitals, which it differentiated from secure residential psychiatric centers, for longer than 30 days without an ".087 type of hearing." [Exc. 119-21]

[3] Testimony from the director of North Star at the January 18 evidentiary hearing indicated that Mira was transferred on December 20, not December 21. [Tr. 9]

treatment facilities," and "treatment facilities" for purposes of the civil commitment statutes.[4] [Exc. 36] She attested that North Star Hospital "is not 'designated' in any way." [Exc. 36]

An evidentiary hearing was held on January 18, 2022. OCS called Dannon Mims to testify. Mims was a licensed professional counselor who directed both the acute hospital program and the residential treatment center for female youths at North Star. [Exc. 50, 63-64] Mims stated that Mira had been diagnosed by a North Star psychiatrist with alcohol use disorder, dysthymic disorder, post-traumatic stress disorder, generalized anxiety disorder, overanxious disorder of childhood, oppositional defiant disorder, attention deficit hyperactivity disorder, and a cognitive disorder. [Exc. 52] Mims testified Mira had been verbally aggressive with her peers and that staff were worried that she would become physically aggressive. [Exc. 53-54] She also stated that a doctor had placed Mira on suicide precautions based on Mira's statements that she did not want to live anymore. [Exc. 54-55]

Mims acknowledged that she had minimal experience counseling Mira. [Exc. 58-59] Mira's primary therapist was out of town, and Mims had attempted to hold a therapy session with Mira the week prior to the hearing, but Mira had refused to meet

[4] These designations are relevant because, at the time of the hearing, an initial examination for civil commitment had to occur at an "evaluation facility" or a "crisis stabilization facility" that was designated as such by the state. Former AS 47.30.710; Former AS 47.30.915(7). Additionally, at the conclusion of a 30-day commitment hearing, a court may commit the respondent to a "treatment facility" for not more than 30 days. AS 47.30.735(c). A "treatment facility" is statutorily defined as a "health care facility that has been designated or is operated by the department to perform the evaluations described in AS 47.30.670-47.30.915". AS 47.30.915(5).

with her. [Exc. 58] Mims also stated that she had attended one of Mira's family therapy sessions. [Exc. 58] Mims testified that she believed less restrictive residential placements would be appropriate for Mira and that she had applied on Mira's behalf to several other programs, but she had not heard back from any of these programs at the time of the hearing. [Exc. 70-71]

When asked by the Tribe's attorney when OCS first contacted North Star regarding Mira, Mims responded that she didn't have that information because the intake department is in a separate building and such information is found on a different "call sheet." [Exc. 60-61] Mims also explained that she did not have Mira's chart in front of her because the chart was currently "with [a] nurse" who "needed it." [Exc. 61] When asked whether hospital staff had involuntarily administered any medication to Mira, Mims responded, "not to my knowledge," and said that type information could be found in Mira's chart. [Exc. 63] Mims also stated that she had not had a conversation with Mira regarding what treatment she was willing to participate in and that, based on her review of the previous counselor's notes, it was not apparent that Mira's previous counselor had discussed the issue with Mira either. [Exc. 68-69]

The OCS caseworker assigned to Elaine's and Mira's case, Amanda Meppen, also testified. She stated that she was on vacation when her supervisor made the decision to transfer Mira to North Star Hospital. [Exc. 76-77] She also testified that Mira had told her that she was not happy at North Star and that she wanted to leave the facility. [Exc. 78]

Mira and her mother opposed Mira's confinement at North Star in closing arguments. [Exc. 82-89] The Tribe argued that the court should treat Mira's hospitalization as an involuntary civil commitment. [Exc. 90-91]

The state opposed application of the civil commitment statutes, arguing they were inapplicable because no commitment petition had been filed. OCS also argued that it had proven that Mira met the standards for commitment under AS 47.10.087. [Exc. 92]

The trial court concluded that Mira's hospitalization was governed by AS 47.10.087 and authorized Mira's placement at North Star Hospital for 90 days. [Exc. 97-103] The court made the requisite findings under AS 47.10.087: it found that Mira suffered from mental illness, that she was likely to cause harm to herself, and that there were no less restrictive alternatives available. [Exc. 93-98] The court found that Mira's condition would deteriorate if she were not placed at North Star, but it also found that North Star was not the appropriate placement for the treatment Mira needed. [Exc. 98] Although the court authorized the placement for 90 days, it scheduled a hearing in 30 days to receive an update on Mira's placement. [Exc. 100]

STANDARDS OF REVIEW

This court applies its independent judgment to the interpretation of the Alaska Constitution and statutes, adopting the rule of law that is most persuasive in light of precedent, reason, and policy.[5]

[5] *In re Hospitalization of Heather R.*, 366 P.3d 530, 531-32 (Alaska 2016).

ARGUMENT

I. The Trial Court's Delayed Review of Mira's Hospitalization Violated Her Due Process Rights.

The tribe argues Mira's constitutional rights were violated by the procedures used in this case. [At. Br. at 28-47] The mother agrees.[6] Involuntary hospitalization implicates Alaska's constitutional guarantees of individual liberty and privacy and therefore entitles the respondent to due process protections.[7] To that end, Alaska law provides procedures the state must follow when it seeks to detain and treat individuals with mental illness on an involuntary basis. Among other protections, those provisions require prompt judicial review.

Here, Mira was involuntarily hospitalized for 27 days[8] without any judicial review. Although the trial court approved the process used based upon its erroneous perception that it lacked authority to do otherwise, the trial court should have found Mira's due process rights were violated. Thus, this court should vacate the lower court's order.

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[6] The mother also agrees with the Tribe that Mira's substantive due process rights were violated [At. Br. 43-46] and that AS 47.1.0.087 violates Mira's right to equal protection. [At. Br. 29-31] These claims are not discussed further in this brief.

[7] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 379 (Alaska 2007), *overruled on other grounds by In re Hospitalization of Naomi B.*, 435 P.3d 918 (Alaska 2019); *see Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

[8] The Tribe asserts that Mira was not afforded due process because a hearing on Mira's commitment was not held for 46 days. [At. Br. at 29, 44] However, the trial court initially held a hearing on December 30. Due to continuance requests made by OCS and the mother, both of which were granted, the evidentiary hearing was not held until January 18. Whether these two continuances violated Mira's due process rights is not addressed in this brief.

The due process implications of involuntary hospitalization are well-established. Accordingly, as this court has noted, Alaska has adopted strict timelines for emergency psychiatric detention and evaluation which reflect the legislative concern for the liberty interests at stake.[9] Under Alaska's statutory framework, a court can issue an ex parte order to take a respondent into custody for evaluation if there is probable cause to believe the respondent is mentally ill and their mental illness causes them to be gravely disabled or likely to harm themselves or others.[10] Alternatively, a person may be admitted to an evaluation facility on an emergency basis.[11] An evaluation facility may then detain the respondent for a 72-hour period to conduct an involuntary psychiatric evaluation.[12] If during that period a mental health professional determines that the respondent meets the criteria for involuntary civil commitment, he may file a petition for 30-day involuntary commitment; a hearing on the 30-day petition must occur within 72 hours of the respondent's arrival at the facility.[13]

In *Daniel G.*, this court examined the constitutionality of the procedures for emergency hospitalization and detention.[14] The court's analysis provides a helpful framework for analyzing Mira's detention.

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9 *In re Hospitalization of Daniel G.*, 320 P.3d 262, 269 (Alaska 2014).

10 AS 47.30.700(a).

11 AS 47.30.705.

12 AS 47.30.715.

13 *Id.*; AS 47.30.725(b).

14 *Daniel G.*, 320 P.3d at 269-273.

Daniel G., a minor, was subject to an emergency detention and involuntary psychiatric evaluation pursuant to an ex parte order.[15] A petition for civil commitment was not filed, however, because the evaluation personnel determined he did not meet the statutory criteria for involuntary commitment.[16] Daniel appealed the evaluation order, arguing that his due process rights were violated because he was not afforded notice and a hearing prior to issuance of the order.[17]

In analyzing his constitutional claim, this court considered the three factors articulated in *Mathews v. Eldridge*[18] and found that the absence of a hearing during the initial 72-hour evaluation period did not violate due process.[19] This court found that the minor had an interest in an "accurate and expedited emergency evaluation and prompt judicial review of his emergency detention and evaluation."[20] But it concluded that the risk of an erroneous deprivation was low because the petition was filed by disinterested medical staff and was promptly reviewed by a magistrate judge.[21] It also recognized the State's strong interest in obtaining prompt psychiatric evaluations for individuals detained on an emergency basis to determine if further civil commitment is warranted.[22] Balancing these considerations, this court held that the

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15 *Id.* at 264-65.

16 *Id.* at 265.

17 *Id.* at 269.

18 424 U.S. 319 (1976).

19 320 P.3d at 271-73.

20 *Id.* at 272.

21 *Id.*

22 *Id.* at 273.

statutory scheme controlling the ex parte orders for detention and evaluation complied with due process.[23]

While a person detained for an involuntary psychiatric evaluation is not entitled by right to a hearing before the 72-hour evaluation period has elapsed, the protections afforded to a person subject to an emergency detention for psychiatric evaluation nonetheless stand in sharp contrast to those afforded Mira. Here, OCS placed Mira at Sitka Community Hospital on December 3, 2021, and informed the parties 10 days later of the placement. [R. 91] OCS then moved Mira to North Star Hospital on December 20. [Tr. 9] A hearing was scheduled to review Mira's hospitalization only after the Tribe requested one, and this hearing was first held on December 30. [R. 88-90]

Although the trial court found that the involuntary civil commitment framework did not apply here, and while a petition for civil commitment was never filed, Mira's involuntary emergency hospitalization implicated her due process rights and dictated that she be afforded prompt judicial review following her confinement.[24] Applying the *Mathews v. Eldridge* factors, it is clear Mira's hospitalization for 27 days without judicial review was unconstitutional.

First, like Daniel G. (and all individuals subject to involuntary hospitalization) Mira has an "interest in an accurate and expedited emergency evaluation and prompt

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[23] *Id.*

[24] *See id.* at 269 (noting that although respondent was not subject to civil commitment, his emergency detention and subsequent hospitalization implicated due process protections).

judicial review" of her detention, and this liberty interest was implicated at the moment she was involuntarily detained.[25] Second, unlike in *Daniel G.*, the risk of erroneous deprivation was quite high, as there was no review by a judicial officer prior to, or even shortly after, Mira's detention, and because decisions regarding Mira's placement were made by OCS staff, rather than by disinterested medical professionals.[26] Finally, although OCS has a strong interest in hospitalizing minors with mental illness who pose a threat of harm to others or themselves and likewise a strong interest in "obtaining a prompt psychiatric evaluation" for a minor who is detained on an emergency basis, OCS does not have an interest in detaining these individuals for weeks without any judicial review.[27]

At the evidentiary hearing, the parties disagreed about which hospitalization was at issue. The Tribe argued that Mira's hospitalization started at the time she was placed at Sitka Community Hospital. [R. 88-90] OCS argued that, because Mira was placed at North Star Hospital on December 20, a hearing needed to be held within 30 days of that date to comply with the *Hooper Bay* injunction. [Dec. 30, 2021 Tr. 4] But

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[25] *Id.* at 272. At the evidentiary hearing, Mims testified that all hospitalizations at North Star Hospital are "voluntary." OCS, as Mira's custodian, may have viewed itself as authorized to admit Mira on a voluntary basis. This position is subject to question in light of this court's decision in *April S.* finding OCS may not utilize the voluntary parental admission statute, AS 47.30.690, to admit minors in OCS custody to treatment facilities and must instead follow the statutes governing the involuntary commitment of minors. *In re Hospitalization of April S.*, 499 P.3d 1011, 1020-21 (Alaska 2021).

[26] See *Daniel G.*, 320 P.3d at 272.

[27] *Cf. Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 249-50 (Alaska 2006) (rejecting API's argument that judicial review of decision to administer involuntary medications was unnecessary given doctor's involvement).

even if this Court agrees with OCS's position as to which admission date was controlling, Mira's detention at North Star without a hearing for 10 days still violated her due process rights. Mira should have been afforded protections equivalent to those provided in AS 47.30. *et seq.*, including prompt judicial review. Because she was not, this court should vacate the trial court's order.

II. The Trial Court Should Have Applied Alaska's Involuntary Commitment Statutes, AS 47.30 *et seq.*, to Mira's Involuntary Hospitalization.

The affidavit from Moreau-Johnson seems to imply that the civil commitment statutes do not apply when OCS seeks to confine a minor in its custody to an acute psychiatric hospital that has not been designated as an evaluation or treatment facility. AS 47.30 *et seq.* provides that respondents can be committed for treatment only to facilities that have been specifically designated by the Department of Health and Social Services for evaluation and/or treatment, and "North Star Hospital is not 'designated' in any way." [R. 71][28] Similarly, in the *Hooper Bay* case, OCS argued (and the trial court agreed) that AS 47.10.087 also does not apply in this scenario because the legislative history suggests that the statute is only applicable to secure residential psychiatric treatment facilities (rather than an acute psychiatric hospitals). [Exc. 109-13][29]

[28] Former AS 47.30.915(5) (defining "treatment facility" as a "hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under" the commitment statutes).

[29] The tribe also agrees with this reading of AS 47.10.087. [At. Br. 26]

The tribe argues persuasively that North Star Hospital meets many of the statutory criteria for an "evaluation and treatment facility," [At. Br. 14-19], and it is clear from Mims' testimony that OCS placed Mira at North Star Hospital, at least in part, for evaluation and treatment of her mental illness. [Exc. 52 (listing diagnoses made by North Star psychiatrist), 58 (describing treatment plan)]

Regardless, as the Tribe argues, when OCS seeks to admit a minor in its custody to a hospital like North Star or Sitka Community, it should be required to do so pursuant to the procedures set forth in AS 47.30 *et seq.* or some like framework. [At. Br. 14-18] That is, the question of what procedures are due should not turn solely on whether a particular medical facility falls within the statutory definitions of "evaluation and treatment facility" or "treatment facility." When a minor is placed by the government in a facility that is functionally the equivalent of those already designated, they should be afforded like protections.

This conclusion follows from the fact that placement in non-designated psychiatric facilities still implicates a minor's due process rights. As discussed in the previous section, Mira's involuntary hospitalization was a "massive curtailment of liberty."[30] "Even a small risk of erroneous commitment is great cause for concern and weighs in favor of stronger protections to reduce risk."[31] The procedures governing civil commitment should apply in cases such as Mira's because they adequately

[30] *In re Hospitalization of Naomi B.*, 435 P.3d 918, 928 (Alaska 2019) (quoting *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 375 (Alaska 2007)).

[31] *In re Hospitalization of Carl S.*, 510 P.3d 486, 494 (Alaska 2022).

safeguard a minor's due process rights.[32] Furthermore, as the Tribe argued in its opening brief, there is no sound basis for providing fewer due process protections to minors in OCS custody. [At. Br. 29-31] To the contrary, minors in the child welfare system need enhanced protections.

Although the standards for commitment are identical in AS 47.10.087 and AS 47.30 *et seq.*, the procedural protections contained in the civil commitment statutes are much greater and act as important safeguards against the wrongful institutionalization of minors. In a civil commitment case, the state must file a petition. A commitment petition serves several important functions. First, it must be signed by two mental health professionals who have examined the respondent [33] This requirement "is an important procedural protection" because it "ensures that patients are not further deprived of their liberty based on the unchallenged opinion of a single mental health professional."[34] Second, a petition must list the "facts and specific behavior" of the respondent that support the state's claim that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely

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[32] Even if this court were to find that Mira's hospitalization is governed by AS 47.10.087, that statute contemplates a minor's placement at a secure residential psychiatric treatment center *after* a court makes the requisite findings. Thus, the commitment order should still be vacated based on OCS's failure to follow AS 47.10.087.

[33] AS 47.30.730(a).

[34] *Carl S.*, 510 P.3d at 492.

disabled.[35] This requirement guarantees that a respondent is notified of the proceedings "in such a manner that allows for a reasonable opportunity to prepare."[36]

Here, OCS did not file any petition, so OCS did not have to provide the opinion of any medical professionals at the time Mira was hospitalized—an important safeguard for minors who might otherwise languish unnecessarily in a hospital due to lack of sufficient oversight by qualified medical professionals. Furthermore, there was no written notice of the facts and specific behaviors of Mira that formed the basis of her commitment, increasing the risk Mira did not actually meet the pertinent legal standards and that she would not be able to muster information in her defense.

Additionally, the civil commitment statutes require that an attorney be appointed to a respondent at the time of detention or upon the issuance of an ex parte order for evaluation, whichever comes first,[37] and that a hearing be held within 72 hours after the respondent's arrival at an evaluation facility.[38] Here, Mira did not have an attorney when she was placed at Sitka Community Hospital, and it wasn't until more than a week after she arrived at North Star that the court appointed counsel. [R. 88-90] Nor did Mira receive a prompt hearing—no hearing was scheduled until the Tribe requested one. [R. 88-90]

Because Alaska's civil commitment statutes better safeguard the constitutional rights of minors in OCS custody, this court should reverse the trial court's finding that

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35 AS 47.30.730(a)(7).

36 *Carl S.*, 510 P.3d at 493.

37 AS 47.30.700(a); AS 47.30.725.

38 AS 47.30.715; AS 47.30.735(a).

Mira's hospitalization was governed by AS 47.10.087 and clarify that AS 47.30 *et seq.* apply when OCS seeks to admit minors to hospitals for psychiatric treatment.

CONCLUSION

Based on the foregoing argument and authority establishing a violation of Mira's due process rights, Mira asks this court to vacate the trial court's order authorizing her confinement pursuant to AS 47.10.087.

SIGNED on November 23, 2022, at Anchorage, Alaska.

ALASKA PUBLIC DEFENDER AGENCY

__/s/ Justin Gillette_____
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