**STATE OF MAINE**
**SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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**DOCKET NUMBER LIN-20-117**

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**A.S.,**

**APPELLANT**

**v.**

**LINCOLN HEALTH, et al.**

**APPELLEE.**

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**ON APPEAL FROM THE LINCOLN COUNTY SUPERIOR COURT**

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# BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION IN SUPPORT OF APPELLANT

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## INTERESTS OF THE AMICUS CURIAE

The American Civil Liberties Union of Maine Foundation (the "ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure that constitutional and statutory civil rights, including the right to be free from discrimination based on disability, are protected, especially when core liberty interests like freedom from restraint are implicated. The ACLU of Maine submits this brief to provide information about statutory and due process protections for patients with disabilities who are involuntarily detained in emergency rooms and hospitals.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACLU of Maine adopts the Procedural History and Statement of Facts as set forth in the Brief of Appellant. (Blue Br. 1-11.)

## STATEMENT OF THE ISSUES

I. Whether the trial court erred as a matter of law by disregarding the detailed involuntary hospitalization statute in evaluating whether A.S. was unlawfully deprived of his personal liberty.

   A. Whether the involuntary hospitalization statute requires an application for involuntary hospitalization to be immediately

submitted to a judge even if no accepting psychiatric placement has yet been confirmed.

B. Whether the trial court erred as a matter of law when it determined that the statute 34-B M.R.S. § 3863 permits involuntary emergency hospitalization in excess of 120 hours.

II. Whether the trial court should have applied the "clear and convincing" standard of proof in reviewing whether the Hospital sufficiently justified its indefinite detention of A.S.

III. Whether the mootness exceptions for matters of public interest and matters susceptible to repeat presentation yet evading review, apply in this appeal.

## SUMMARY OF THE ARGUMENT

One of the fundamental principles underlying our legal system is that human beings have inherent dignity and individual liberty. Our laws do not permit police officers, hospital administrators, lawyers, or judges to substitute their own judgment about what is in a person's best interest over that person's own wishes, except in certain narrow, clearly defined circumstances. As the United States Supreme Court recognized forty years ago, "commitment to a mental hospital produces a massive curtailment of

liberty and in consequence requires due process protection." *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). This is so, because "the loss of liberty produced by an involuntary commitment is more than a loss of freedom"—it also can also engender stigma, with long-term adverse social consequences. *Id.* at 492.

Indeed, restraining a person "by force from leaving [a hospital] facility" involves "a complete deprivation of a person's liberty." *In re Hughes*, 1998 ME 186, ¶ 11, 715 A.2d 919. A person who is forced to remain in such an institutionalized setting cannot "earn a living, can see visitors only at the discretion of hospital staff, and is prevented from engaging in virtually all everyday activities most of us take for granted." *Id.* "Such a deprivation of rights reasonably can be termed the most severe deprivation short of imprisonment." *Id.*; *Clifford v. Me. Gen. Med. Ctr.*, 2014 ME 60, ¶ 58, 91 A.3d 567 ("Involuntary commitment is a grave deprivation of a person's fundamental liberty interest"). The severity of such a deprivation means that stringent procedural protections are required to effect it. *Addington v. Texas*, 441 U.S. 418, 431 (1979) (requiring justification for indefinite commitment to be proven by "clear and convincing" evidence).

Maine's statute on involuntary hospitalization and commitment is "designed to provide the necessary constitutional process" to ensure that these deprivations are justified and compliant with due process concerns. *Clifford*, 2014 ME at ¶ 59, 91 A.3d 567. In the case of involuntary hospitalization (at issue in this case), these procedural protections include: **(1)** the requirement to "immediately" seek judicial endorsement of the application for admission to a psychiatric hospital, 34-B M.R.S. § 3863(3)(B)(2) (2019); **(2)** the short and tightly structured period of time during which a person may be involuntarily hospitalized, limited to 120 hours in total, *id.* § 3863(3)(B), (D), (E); and **(3)** the guarantee that, absent compliance with the above procedures, "[a] person may not be held against the person's will in a hospital under this section," *id.* § 3863(3)(B).

In violation of these statutory mandates, the Hospital never sought judicial endorsement of its application for involuntary hospitalization for A.S., (Blue Br. 6-7); forced A.S. to remain hospitalized under the supervision of an armed guard for 25 days, (Blue Br. 17); and continues to assert the authority to detain patients indefinitely so long as a physician completes a certifying examination every couple of days, (Red Br. 31-39). The trial court legally erred by disregarding the statutory and due process protections guaranteed to patients in this position, and fashioning a new

scheme in which any detention is permissible so long as the Blue Paper criteria "could be met" by a preponderance of the evidence. (H.T. 123, 175.) The trial court's decision is contrary to statute, this Court's prior decisions, and due process protections, and should be reversed.

Finally, regarding the Hospital's claims of mootness, this Court has routinely applied the public interest exception and repeat presentation exception to mootness in similar cases and should do so here.

## ARGUMENT

### I. The trial court erred as a matter of law by disregarding the detailed procedural rights in the involuntary hospitalization statute in evaluating whether A.S. was unlawfully deprived of his personal liberty.

In denying habeas relief, the trial court erred by disregarding the detailed statutory scheme in 34-B M.R.S. § 3863, and substituting a different procedure at odds with the statute and with due process protections. Any person involuntarily detained under sections 3863 or 3864 "is entitled to the writ of habeas corpus," 34-B M.R.S. § 3804, which extends to "[e]very person unlawfully deprived of his personal liberty by the act of another," 14 M.R.S. § 5501(2019). A person who is detained without necessary procedural protections is entitled to the writ. *See, e.g.*, *In re Marcia E.*, 2012 ME 139, ¶¶ 8-9, 58 A.3d 1115 (stating that Marcia "could have challenged" her emergency detention by the hospital "by seeking a writ of habeas

corpus" when the hospital failed "to comply with the procedural requirements for Marcia's emergency admission").

In the decision below, the trial court appeared to acknowledge that the Hospital had failed to comply with the statutory protections, yet disregarded these procedural violations in holding that the sole question was "whether as of now, an application for emergency involuntary admission to a psychiatric hospital could be granted[.]" (H.T. 175.) Such reasoning contradicts the statute, which provides that "[a] person may not be held against the person's will in a hospital under this section" unless the strict time limits and other requirements are satisfied. 34-B M.R.S. § 3863(3)(B). Because, as discussed below, the Hospital failed to comply with these procedures, it cannot support its involuntary detention of A.S. under section 3863, and it cites no other statutory authority for the deprivation. Under such circumstances, A.S. was "unlawfully deprived of his personal liberty by the act of another," and entitled to the writ. *See* 14 M.R.S. § 5501.[1]

[1] This Court can leave for another day the question of whether, as in the release from involuntary hospitalization ordered by *Doe v. Concord Hospital*, "[n]o principle of res judicata or collateral estoppel would bar [the hospital] from filing another new Petition for a Certificate of Involuntary Emergency Admission," so long as the statutory procedures were complied with. *Doe v. Concord Hosp.*, NO. 2018-cv-00448 (Aug., 9 2018) (attached in supplement of legal authority).

### A. The involuntary hospitalization statute requires prompt judicial review of an application for involuntary hospitalization.

The plain language of the statute demonstrates that the Hospital was required to "immediately" submit the Blue Paper application to the judge "upon execution of the certificate by the examiner." 34-B M.R.S. § 3863(3)(B)(2). To the extent the Hospital seeks to displace this clear statutory language by resort to the instructions on an administrative form, it is unavailing. (Red Br. at 27-28).

Statutory meaning is determined by looking to the "plain language" of the statute. *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, ¶ 7, __ A.3d __. Only if the statute is susceptible to different meanings and therefore ambiguous does the Court then "look to extrinsic indicia of legislative intent, such as the legislative history of the statute, to ascertain the Legislature's intent in enacting the statute." *20 Thames St. LLC v. Ocean State Job Lot of Me. 2017, LLC*, 2020 ME ¶ 8, __ A.3d __.

In this case, it is unambiguous that the person seeking involuntary admission (here, the Hospital) must submit "[t]he application and accompanying certificate" for review and eventual endorsement by a judicial officer, 34-B M.R.S. § 3863(3), and must "undertake to secure the [judicial] endorsement *immediately* upon execution of the certificate by the examiner,"

§ 3863(3)(B)(2) (emphasis added). Indeed, this Court interpreted a prior version of the statute as follows: "Before an individual can be committed against her or his will, a medical professional must examine the individual and certify that the person is mentally ill and poses a 'likelihood of serious harm.'" *Doe v. Graham*, 2009 ME 88, ¶ 24, 977 A.2d 391 (quoting 34-B M.R.S. § 3863(2) (2008)). "If this initial diagnosis is made, *a court is required to review the application and certificate within twenty-four hours*[.]" *Id.* (quoting 34-B M.R.S. § 3863(3) (2008)) (emphasis added).

Although the statute was amended after *Doe* to provide additional flexibility of up to four days "pending judicial endorsement," the relevant language of the statute has not changed. *Compare* 34-B M.R.S. § 3863(3)(B) (2008) (providing that a person "may not be held against the person's will in a hospital under this section, except that a person for whom an examiner has executed the certificate under subsection 2 may be detained in a hospital for a reasonable period of time, not to exceed 24 hours, *pending endorsement by a judge or justice*") (emphasis added), *with* 34-B M.R.S. § 3863(3)(B) (2019) (same). Then, as now, the application must be promptly submitted to a judicial officer for review.

The Hospital violated this obligation when, instead of submitting the application "immediately" after getting the examiner's certificate, it failed to

submit any application over the course of a 25-day involuntary detention of A.S. (Blue Br. 6 n.5.) Indeed, the parties stipulated that, although the Hospital completed 16 executed Blue Paper applications, it submitted none for judicial approval. (*Id.*)

Contrary to the Appellee's argument, a hospital need not wait to submit the Blue Paper until it "has located a psychiatric hospital available to admit the patient." (Red Br. 26-27.) The Hospital argues that, until the admitting psychiatric hospital has been confirmed, the judicial officer cannot "endorse" (*i.e.*, grant) the application, nor "promptly" send the application and certificate to the admitting hospital. (Red Br. 27.) But the fact that an application might not be *granted* is no basis for violating the statutory obligation to *submit* it "immediately" after the certification is completed. *See* 34-B M.R.S. § 3863(3)(B)(2). To the contrary, the requirement for judicial oversight facilitates the important conditions required for each additional 48-hour period—for the hospital to notify the Department of Health and Human Services ("DHHS"), and for DHHS to provide its "best efforts" to find an inpatient psychiatric hospital or other appropriate alternative. *Id.* § 3863(3)(C), (D). Accordingly, the fact that the application remains

"pending judicial endorsement" while these obligations are performed is part of the system's design, not a bug.[2]

Indefinitely detaining someone without judicial review by serially restarting (but never completing) the Blue Paper process not only violates the statute, it also violates due process. This Court previously rejected, as a violation of due process, a detention statute purporting to authorize up to 35 days of detention without judicial review, based only on the certificate by a physician. *In re Sleeper*, 147 Me. 302, 312, 87 A.2d 115, 120 (1952).[3] As

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[2] For the same reason, the fact that the Judicial Branch Mental Health Working Group decided against requiring separate endorsements the additional 48-hour period, has no bearing on the obligation to timely submit the application to a judge for approval. *See Recommendations for Improving the Involuntary Commitment Process* (hereinafter, "Working Group Recommendations") (Dec. 15, 2014) (available at http://www.themha.org/policy-advocacy/State-Current-Legislation/Final-MH-Wkg-Grp-Rpt-12-15-2014.aspx). After all, the additional 48-hour periods recommended by the Working Group merely "extend[ed]" the original 24-hour period without undoing any of the underlying obligations associated with it. *Id.* at 4.

[3] The procedure at issue in *Sleeper* was as follows:

> The superintendent or head of the hospital to which the mentally ill person is sent, or his duly appointed substitute, shall receive and detain such person for observation and treatment for a period of not more than 35 days, provided that such person is accompanied by the petition and physician's certificate duly executed as set forth in section 104. Prior to the expiration of 25 days of the observation period the superintendent, head of the hospital, or his duly appointed substitute, or any justice of the peace or any notary public may certify, in a petition addressed to the probate court situated in the county from which said mentally ill person was admitted, that the alleged mentally ill person requires further care and treatment for an indefinite period.'

*In re Sleeper*, 147 Me. 302, 307, 87 A.2d 115, 118 (1952). If anything, the procedure in *Sleeper* contained *more* protections than the process here because the hospital was required to pursue judicial review at the 25-day mark. Here, by contrast, the Hospital claims the ability to "restart" the process every couple of days, for an indefinite period of time (potentially far longer than 25 days), without pursuing judicial review.

the Court explained, "Immediate detention without notice and an opportunity to be heard can only be justified when the immediacy of such action is required for the safety of either the person restrained or for the safety of others." *Id.*, 87 A.2d at120. Because the statutory procedures at issue allowed for detention "for a period of thirty-five days," "without affording [the] opportunity to be heard" and "with no opportunity afforded him by the state to test the continuance of his confinement either the validity or present necessity thereof" (among other reasons), the Court declared these statutory procedures "unconstitutional and void." *Id.* at 313, 87 A.2d at 121.

Although the Court in *Sleeper* acknowledged that common law habeas was available, this did not cure the unconstitutional statutory scheme. As the Court explained, the availability of habeas corpus "is not the equivalent of requiring a legal order imposing restraint prior to commitment; nor does the fact that one may test the validity of his restraint by habeas corpus make an otherwise illegal restraint a legal one." *Id.* at 314, 87 A.2d at 121.[4] This makes sense; outside of exceptional cases like this one where the patient

[4] In *dicta*, the Court in *Sleeper* stated that "[i]n habeas corpus proceedings to obtain the release of an insane person the court not only inquires into the legality of the restraint but the necessity therefor, and if the person is found to be actually insane and a menace either to himself or to the safety of others, he is not entitled to discharge on habeas corpus." *In re Sleeper*, 147 Me. at 313, 87 A.2d at 121 (citations omitted). But such a rule has no application where the Legislature has enacted a statute specifying that "a person may not be held" in violation of the statutory requirements. *See* 34-B M.R.S. § 3863(3)(B).

happens to have a lawyer, someone who is involuntarily hospitalized is unlikely to have the resources to make meaningful use of the complicated habeas remedy. Providing common law habeas as the sole opportunity for judicial review of involuntary hospitalization leaves a high risk of unlawful deprivation, in violation of due process.

In an advisory opinion to the Legislature several years after *Sleeper*, the Court again held unconstitutional another statutory scheme that was marginally better than the one in *Sleeper*, but still did not provide judicial review. As the Court explained, "[t]here is no language in the new bill which attempts in any way to provide any method by which the person under temporary restraint may test the necessity thereof," and, as such, "the proposed bill tends to deprive persons of their liberty without due process of law in contravention of Section 6 of Article I of the Constitution of Maine." *See In re Op. of the Justices I*, 151 Me. 1, 10, 117 A.2d 53, 57 (1955). There again, the background remedy of common law habeas was not sufficient to save the proposed bill.

It was not until the Court reviewed yet another statutory scheme, which required the hospital (or other applicant) to obtain prompt judicial review, that the Court approved the scheme as constitutional. *See In re Op. of the Justices II*, 151 Me. 24, 35, 117 A.2d 57, 62 (1955) ("deem[ing] that

thereby the constitutional rights of citizens are adequately protected" when the statute provided "two prompt and effective methods" for judicial review).

In sum, Maine's involuntary hospitalization statute plainly requires prompt judicial review of the application and certificate. *See* 34-B M.R.S. § 3863(3). The Hospital's failure to obtain judicial review for its lengthy involuntary hospitalization of A.S. not only violates the statute, but also contravenes constitutional due process protections under both the Federal and State Constitutions. *See* U.S. Const. amend. XIV; Me. Const. art. I, § 6. This basis alone is sufficient to reverse the trial court's holding.

### B. The trial court erred in finding that 34-B M.R.S. § 3863 permits involuntary emergency hospitalization in excess of 120 hours.

The trial court also erred by disregarding the clear and delineable timeframes—not to exceed 120 hours from admission—during which a person may be held against their will in the absence of judicial endorsement. *See* 34-B M.R.S. § 3863(3)(B), (D), (E).

First, the hospital may involuntarily detain a person "for a reasonable period of time, not to exceed 24 hours," so long as the application is promptly submitted to the judicial officer. 34-B M.R.S. § 3863(3)(B)(2). Second, a hospital may further detain a person "for a *reasonable* additional period of

time, *not to exceed* 48 hours" if further evaluation and efforts are made to both designate the person as a risk, locate an available inpatient bed, and notify DHHS of the situation. *Id.* § 3863(3)(D)(1)-(2) (emphasis added). Finally, after the expiration of the initial 24-hour emergency hold period and the on 48-hour extended hold, the detaining hospital is authorized to continue detention of the person for "*one additional* 48-hour period." *Id.* § 3863(3)(E) (emphasis added).

The Hospital erroneously argues that there is another acceptable use of the § 3863 process: indefinite "blue papering" without any pursuit of judicial endorsement and without any procedural protections for patients with mental illnesses. (Red. Br. 32). But this argument is contrary to the plain language of the statute, which authorizes detention for a period "not to exceed" 24 hours, a "reasonable" additional 48-hour hold, and, finally, "one additional" 48-hour hold. 34-B M.R.S. § 3863(3)(B), (D), (E). Under similar circumstances, this Court interpreted the prior 24-hour limit as a hard stop, stating that "[u]nder no circumstances may a hospital hold a person against his or her will for longer than twenty-four hours unless the hospital has obtained a judge's endorsement." *In re Marcia E.*, 2012 ME 139, ¶ 6-7, 58 A.3d 1115; *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (acknowledging that, under a prior version of section 2863, "hospitalization

is limited to a few days unless voluntarily extended by the subject or extended by a court under protective procedures") (citation omitted).[5] "A person may not be held against a person's will in a hospital under this section" except in compliance with these time periods. 34-B M.R.S. § 3863(B).

The argument that the Emergency Medical Treatment and Labor Act ("EMTALA") authorizes or requires the detention of A.S. is without merit. *See* Me. Hosp. Ass'n Br. 10-18. Congress enacted EMTALA because it was "'concerned about the increasing number of reports that hospital emergency rooms are refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance.'" *Correa v. Hosp. S.F.*, 69 F.3d 1184, 1189 (1st Cir.1995) (quoting H.R. Rep. No. 241(I), 99th Cong., 1st Sess. 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 42, 605), *cert. denied*, 517 U.S. 1136 (1996). Nothing in EMTALA requires forcible treatment or prohibits patients from leaving the hospital "without the permission" of the hospital. 42 C.F.R. § 489.24(b) (2019). As to preemption, federal law

[5] This case is thus different than *Massachusetts General Hospital v. C.R.*, in which the court determined there were no set time limits for emergency hospitalization. 484 Mass. 472, 475, 142 N.E.3d 545, 548 (2020) (acknowledging there was no statutory time limit for emergency hospitalization, but "strongly encourag[ing] the Legislature to identify a [statutory] time deadline to clarify the statute and avoid future constitutional difficulties and to do so as expeditiously as possible").

mandates that the provisions of EMTALA "*do not* preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." *See* 42 U.S.C. § 1395dd(f) (2018) (emphasis added). Because no provision of EMTALA requires involuntary hospitalization—including by stationing an armed guard to prevent a patient from leaving (as was done here)—nothing in EMTALA is inconsistent with effectuating the procedural and substantive protections of 34-B M.R.S. § 3863.

Finally, there is no doubt that hospitals are placed in a difficult position, particularly when necessary assistance from DHHS is not forthcoming. *See, e.g.*, *Doe v. Concord Hosp.* at 5, Case No. 217-2018-CV-448 (Aug. 9, 2018) (stating "[t]he Court is not unsympathetic to Concord Hospital; it is between Scylla and Charybdis"). Nevertheless, the "loss of liberty and social stigmatization" associated with involuntary hospitalization "are substantial" and the statutory procedures enacted to protect patients' rights must be respected. *See id.* at 5-6.

## II. The trial court should have applied the "clear and convincing" evidence standard in reviewing whether Lincoln Health had shown the necessity of what had become an indefinite detention.

In the alternative, the clear and convincing standard of proof is required to support an involuntary hospitalization that has, in effect, become

indefinite. As the Hospital concedes, the trial court indicated that it might have reached a different decision under the clear and convincing standard, yet did not apply that standard of proof. (Red Br. 19-20.).

The clear and convincing standard of proof is required to "commit an individual involuntarily for an indefinite period to a state mental hospital." *Addington v. Texas*, 441 U.S. 418, 419-20, 425 (1979). The heightened clear and convincing standard is required because "the preponderance standard creates the risk of increasing the number of individuals erroneously committed." *Id.* at 426. In this case, because the Hospital's method of "restarting" the Blue Paper process every couple of days resulted in a lengthy and indefinite period of involuntary hospitalization, the standard in *Addington* must apply. *Id.* at 425.

Logistically, it is fair to require the hospital to satisfy clear and convincing evidence at the habeas posture. That is especially true in this case, in which A.S. had been in the hospital's custody for weeks by the time of the trial court hearing. That is an even longer period than the Maine statute contemplates before "White Paper" proceedings that undisputedly must satisfy the clear and convincing standard. *See* 34-B M.R.S. § 3864(6)(A)(1).

## III. The Court should adjudicate A.S.'s appeal under the public interest and repeat presentation exceptions to mootness.

Although A.S. is no longer subject to involuntary hospitalization, it remains important for the Court to resolve the weighty issues on appeal. This Court has frequently adjudicated cases regarding involuntary hospitalization and commitment under the public interest exception to mootness. *See, e.g. In re Marcia E.*, 2012 ME 139, ¶ 4 n.1, 58 A.3d 1115; *In re Christopher H.*, 2011 ME 13, ¶ 12, 12 A.3d 64; *In re Walter R.*, 2004 ME 77, ¶ 12, 850 A.2d 346. The same interests support review in this case.

Additionally, the "repeat presentation exception to mootness" has been routinely applied to commitment proceedings "[b]ecause of the 'brief length of . . . commitment,'" and because it is likely the issues "'will be repeatedly presented'" yet evade review. *In re Christopher H.*, 2011 ME at ¶ 13, 12 A.3d 64 (quoting *In re Faucher*, 558 A.2d 705, 706 (1989)). These concerns are even more apt in the involuntary hospitalization stage, which is designed to be brief and limited to no more than 120 hours.

## CONCLUSION

For the foregoing reasons, the ACLU of Maine respectfully requests that the Court reverse the lower court's decision in this habeas petition.

Respectfully submitted,

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Dated: July 14, 2020

## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on July 14, 2020, she caused to be sent by email and regular U.S. mail a copy of the above Brief of Amicus Curiae ACLU of Maine, by emailing a pdf copy of said brief to counsel for Appellant, Appellee, and Amicus Curiae Maine Hospital Association, and by depositing two copies of said brief to them by U.S. mail, first class, at their respective mailing and email addresses at:

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. LIN-20-117

A.S., Appellant

v.

Lincoln Health, Appellee

**CERTIFICATE OF SIGNATURE**

**You must file this certificate if you do not sign at least one paper copy of your brief. This form may be used only by an attorney representing a party.**

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

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No signature is required on this document. The electronic transmission of this document to the Clerk serves as the attorney's signature.

# SUPPLEMENT OF LEGAL AUTHORITY

JOHN DOE v. CONCORD HOSPITAL

CASE NO. 217-2018-CV-00448

MERRIMACK SUPERIOR COURT

NEW HAMPSHIRE

AUGUST 9, 2018 ORDER

# The State of New Hampshire

**MERRIMACK, SS** **SUPERIOR COURT**

John Doe
[redacted]

**v.**

**Concord Hospital**

**No. 2018-CV-448**

**ORDER**

John Doe
[redacted] filed a Petition for a Writ of Habeas Corpus in this Court on August 3, 2018. He alleges, in substance, that he is being held unlawfully at Concord Hospital, and seeks release. At the hearing held on August 3, 2018, the parties represented that the Petition under which Mr. Doe [redacted] is being held would expire on that date. Under these circumstances, the Petition seeking release from his present confinement is MOOT and the Court need not issue the Writ. However, in light of the representations made by the parties at the hearing on August 3, 2018, the Court must address Petitioner's prospective rights. No principle of res judicata or collateral estoppel would bar Concord Hospital from filing another new Petition for a Certificate of Involuntary Emergency Admission ("IEA"). But if Concord Hospital files a Petition for a new IEA Certificate, the provisions of RSA 135-C: 31, I must be complied with. After 3 days, Petitioner must be released or provided the hearing provided by statute. Concord Hospital may not simply file a new Petition for IEA Certificate or "renew" the pending Certificate after the initial Petition expires.

I

A hearing was held on the afternoon of August 3, 2018, the date the Petition was filed. No evidence was presented, and the parties proceeded by offer of proof. However, it does not appear that there is any dispute as to facts relevant to the procedural claim made by Petitioner.

On July 20, 2018 Doe voluntarily admitted himself to the Concord Hospital psychiatric unit. On July 25, 2018 Doe became dissatisfied with the treatment services he was receiving and sought to discharge himself from Concord Hospital. Staff and other members of Concord Hospital staff drafted a Petition for a Certificate for Involuntary Emergency Admission ("IEA"). A copy of the Petition signed by Kavitha Kittu, M.D. was appended to Doe's Petition for a Writ of Habeas Corpus. Dr. Kittu certified that the Doe was in such mental condition as a result of mental illness that he posed a serious danger to himself or others, and thereby satisfied the criteria for involuntary admission set by RSA 135-C: 27. The narrative medical report recites that Doe presented to Concord Hospital with anxiety and distorted cognition. He reported that he has thought about suicide all his life with no specific plan or intent and that he has had some homicidal thoughts without regard to any specific people. He also reported that he has been a paranoid person all his life. The report states that Doe worked as a butcher and has a collection of knives and that he engaged in knife sharpening as a hobby. Doe reported that he has a collection of violent images of crime scenes and actions that he keeps in a separate folder in his computer, that he likes the hunter-gather lifestyle and that he owns a number of guns.

Doe's pleading also contains documents from Concord Hospital which reflect

that on July 28, 2018 his IEA was "renewed." The IEA was "renewed" once again on July 31, 2018. The narrative report for that involuntary admission states that [redacted] had "suicidal and homicidal ideation". The July 31, 2018 IEA Certificate stated that the Petitioner "will remain on IEA status due to lack of ability to care for self." Petitioner alleges that he does not represent a danger to himself or others and that his continued confinement is unlawful and in violation of his right to due process of law. Petition, ¶ 17. He alleges that as of the date of the filing, he had not been afforded a hearing to make a determination of whether there was probable cause for an involuntary commitment. Petition, ¶ 11.

Concord Hospital did not dispute that the Petitioner has been held since July 25, 2018 without having been provided a hearing which would allow an independent finder of fact to determine whether or not there is probable cause for an involuntary commitment. It represented, by offer of proof, that its medical staff believes that the Petitioner is in fact dangerous, and that he is examined on a daily basis in order to determine his continued dangerousness. Concord Hospital represented that it has a practice of filing new Petitions for an IEA Certificate every three days, to avoid the necessity for the hearing required by RSA 135-C:31, I because, as explained *infra*, there is no space available in facilities which care for those individuals who have been found by a court to meet the criteria for involuntary commitment.

II

The criteria for an involuntary emergency admission are set out in RSA 135-C: 27. By statute, the involuntary emergency admission of a person shall be to the State mental health services system under the supervision of the Commissioner of the Department of

Health and Human Services. RSA 135-C: 28. However, because an involuntary emergency admission results in a drastic curtailment of an individual's liberty, the Legislature has provided for procedural oversight of such admission. Under RSA-C: 31, I:

> Within 3 days after an involuntary emergency admission, not including Sundays and holidays, and subject to the notice requirements of RSA 135-C: 24, there shall be a probable cause hearing in the District Court to determine if there was probable cause for involuntary emergency admission. The burden shall be on the petitioner to show that probable cause existed. The court shall render its written decision as soon as possible after the close of the hearing, by not later than the end of the court's next regular business day.

Concord Hospital conceded that it has never provided Petitioner a hearing pursuant to RSA 135-C: 31, I even though he has been held on successive IEA certificates since July 25, 2018. It stated that it has not done so, because if the Petitioner were determined by the District Court to be subject to involuntary admission, he would need to be sent to a "Designated Receiving Facility".[1] Concord Hospital is not a Designated Receiving Facility, and all of the Designated Receiving Facilities in the State are full.

Concord Hospital represented that there is currently a backlog of 60 patients awaiting a bed in a Designated Receiving Facility and that it is understood in the health care community that the specific language of the statute cannot be complied with because of the lack of space in Designated Receiving Facilities. According to Concord Hospital, because of the inability to house those subject to involuntary admission in Designated Receiving Facilities, a practice has developed among health care providers to file IEA Certificates every 3 days, thus resulting in confinement of a person subject to a Petition for a Certificate of IEA for longer than 3 days without the person ever having the hearing

[1] A "Designated Receiving Facility" is defined in the New Hampshire DHHS Regulations as "a hospital-based psychiatric unit or a non-hospital based residential treatment program designated by the

required by RSA 135-C: 31, I.

Concord Hospital represented that it is necessary for it to proceed in this way, because its staff has determined that Petitioner is potentially homicidal or suicidal, thus presenting a risk to the public and arguably subjecting it to civil liability if it releases him. It also represented that to ensure that the Petitioner is not unreasonably confined, it is conducting daily evaluations of Petitioner to determine if he is still dangerous.

The Court is not unsympathetic to Concord Hospital; it is between Scylla and Charybdis; it must either release an individual it believes to be potentially suicidal and/or homicidal, resulting in potential harm to Petitioner and the community and exposing itself to potential civil liability, or it must violate the text, although not the intent, of the statute. However, the interests at stake in civil commitment proceedings- loss of liberty and social stigmatization- are substantial, and parallel those at risk in the criminal context. In re Scott L., 124 N.H. 327, 331 (1983). The New Hampshire Supreme Court has recognized that the liberty interest at stake in civil commitment procedures implicate the requirements of due process of law. In re Richard A., 146 N.H. 295, 298 (2001). It is true that persons subject to civil commitment are not entitled to the same level of due process protection from erroneous deprivation of liberty as individuals subject to incarceration for criminal wrongdoing, because the primary focus of an involuntary commitment proceeding is the mental condition and dangerousness of the person sought to be committed rather than determination of guilt or innocence. In re Scott L., 124 N.H at 331. Nonetheless, the provisions of RSA 135-C:31, which allow a person whose involuntary emergency admission is sought to have hearing at which a neutral and detached fact finder

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commissioner to provide care, custody and treatment to persons involuntarily admitted to the State health

can consider whether he should be deprived of his liberty, are of constitutional dimension.

In order to comport with the State and federal requirements of due process, the New Hampshire Legislature has created a statutory scheme which allows an individual to contest erroneous deprivation of his liberty interest. The fundamental point of the procedures created by the Legislature is the individual's ability to challenge the commitment before an independent fact finder. In re Richard A., 146 N.H at 298-297. The procedure followed by Concord Hospital deprives the Petitioner of that right, albeit in Concord Hospital's view, for his own good, by depriving him of a hearing within 3 days of the involuntary admission. The Legislature has established a procedure for a person subject to an IEA to challenge that commitment; if, after the procedure is followed a court orders that an individual be placed in a Designated Receiving Facility, it is the obligation of the Executive Branch to see that the legislative mandate is carried out.

At the hearing held on Friday, August 3, 2018, it appeared that the IEA involving Petitioner had expired. Under these circumstances, the Petition seeking release from his present confinement is moot. However, the question of mootness in New Hampshire is not subject to rigid rules, but is regarded as one of convenience and discretion. Batchelder v. Town of Plymouth Zoning Board of Adjustment, 160 N.H. 253, 255-56 (2010). Where a case presents an issue capable of repetition, yet evading review, a New Hampshire Court may conclude that it is not moot and will be decided on the merits. Fischer v. Superintendent, Strafford County House of Corrections, 163 N.H. 515, 518 (2012). Courts will review a question which is no longer a justiciable controversy where the issue involves a significant constitutional question or issue a significant public concern. Petition of

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services system. DHHS regulations, Part He-M 405.02(f).

Thayer, 145 N.H. 177, 182 (2000). This Petition raises such questions and concerns.

No principle of res judicata or collateral estoppel would bar Concord Hospital from filing another new Petition for a Certificate of IEA or for that matter, continuing to file new Petitions for an IEA Certificates every 3 days, thereby denying Petitioner his right to the hearing guaranteed by RSA 135-C:31, I. But the Petitioner's statutory and constitutional rights may not be vitiated by such a procedure. If Concord Hospital files a new Petition for an IEA Certificate, the provisions of RSA 135-C: 31, I must be complied with. After 3 days Petitioner must be released or provided the hearing provided by statute. Concord Hospital may not simply file a new IEA certificate or "renew" the pending Certificate.

**SO ORDERED**

8/9/18
DATE

Richard B. McNamara,
Presiding Justice

RBM/