IN THE SUPREME COURT OF THE STATE OF NEVADA

PHONG T. VU,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE CHUCK WELLER, DISTRICT JUDGE, FAMILY DIVISION,
Respondents,
and,
RICHARD A. GAMMICK, DISTRICT ATTORNEY,
Real Party In Interest.
_____/

No. 65498

REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

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REPLY

Introduction

Real Party in Interest's Answer to Petition for Writ of Mandamus (Answer) offers a procedural and merits response to the petition. Part "A" below will reply to the two procedural challenges and demonstrate (1) that Mr. Gammick, as district attorney, is properly named as the real party in interest; and (2) that extraordinary writ relief is warranted because Mr. Vu has no other plain, speedy, and adequate remedy at law. Part "B" will address the merits response.

A.

Mr. Gammick, as the Washoe County District Attorney, is properly named as the "Real Party in Interest"

Mr. Gammick questions whether he is the proper real party in interest. Answer at 1 ("It would not appear that the District Attorney is a real party in interest in this case"). But, of course, he is. Mr. Gammick, as the District Attorney for Washoe County, (or his deputy) is, pursuant to NRS 433A.270(5), "responsible for the presentation of evidence, if any, in support of the involuntary court-ordered admission of a person to a mental health facility." This statutory obligation makes

Mr. Gammick the necessary real party in interest.[1] Additionally, his deputy, Blaine E. Cartlidge, prosecuted Mr. Vu's civil commitment below.

Mr. Vu's Petition for Writ of Mandamus is warranted as no other adequate remedy at law exists, including habeas relief

Mr. Gammick next argues that Mr. Vu has an adequate remedy at law such that his petition for writ of mandamus "should be rejected." Answer at 4-5. Generally, writ relief is available only when there is no plain, speedy, and adequate remedy at law. NRS 34.170; *Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Thus, this Court has held that the right to appeal is an adequate legal remedy precluding writ relief. See *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). However, the right to appeal does not exist here. Nor does the right to habeas relief exist.

1. No right to an appeal

Mr. Vu was involuntarily committed to a mental health facility pursuant to NRS 433A.310. Subsection (1)(b) of this statute provides that the involuntary commitment order "*must* be interlocutory and

[1] Because Mr. Gammick is the real party in interest, this Reply uses his name for readability purposes in the place of "Real Party in Interest."

must not become final if, within 30 days after the involuntary admission, the person is unconditionally released pursuant to NRS 433A.390." (Italics added.) Here, Mr. Vu was "unconditionally released" within twelve days of the entry of the commitment order. By the plain language of the statute, Mr. Vu's commitment order was an interlocutory order, not a final order. *Washoe County v. Otto*, 128 Nev. ____, ____, 282 P.3d 719, 725 (2012) ("The word 'must' generally imposes a mandatory requirement.") (citing *Pasillas v. HSBC Bank, USA*, 127 Nev. ____, ____, 255 P.3d 1281, 1285 (2011)).

This Court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. See *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984); *Wells Fargo Bank, N.A. v. O'Brien*, 129 Nev. ____, ____, 310 P.3d 581, 582 (2013) (noting appellate jurisdiction requires "finality of the decision" to be reviewed). No statute or court rule authorizes an appeal from an interlocutory involuntary civil commitment order. See NRAP 3A(b) (listing orders and judgments from which an appeal may be taken). Because Mr. Vu does not have a right to an appeal from an interlocutory civil commitment order, this writ petition is properly

before the Court. *Cf. State v. Second Judicial Dist. Ct.*, 121 Nev. 413, 416, 116 P.3d 834, 836 (2005) (writ is warranted where the State "does not have an adequate remedy at law because it cannot appeal from a judgment of conviction").

2. No right to habeas relief

Mr. Gammick asserts that "the state legislature has provided a direct, adequate and expeditious form of relief for any commitment issue," Answer at 4-5, and identifies that relief as NRS 433.464. This statute provides: "[t]he provisions of chapters 433 to 433C, inclusive, of NRS do not limit the right of any person detained hereunder to a writ of habeas corpus upon proper application made at any time by such person or any other person on his behalf." This statute offers habeas relief to "any person *detained*" under chapters 433 to 433C, inclusive. But, Mr. Vu is not detained, he was unconditionally released from the mental health hospital twelve days after the involuntary commitment order was entered. Thus, he cannot invoke either NRS 433.464 or the general habeas statute. See NRS 34.60 (providing "[e]very person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire

into the cause of such imprisonment or restraint"). When a habeas petition is successful, the judge must "discharge such party from the custody or restraint under which he is held." NRS 34.480. Clearly, habeas relief is available only to those persons subject to detention or restraint. Where a person has been unconditionally discharged from a mental health facility, that person is no longer under restraint or subject to detention. Mr. Vu was unconditionally discharged from NNAMHS. Thus, habeas relief is not possible here. *Cf. Cordova v. City of Reno*, 920 F.Supp.135, 138 (D. Nev. 1996) (noting that "habeas relief in Nevada is available only to persons subject to unlawful restraint" and "there is no reason to believe a Nevada would entertain a petition for a writ of habeas corpus from one who is no longer incarcerated or otherwise confined or retrained") (internal quotation marks omitted).[2]

Because Mr. Vu has no right of appeal and is no longer detained at a mental health facility pursuant to Chapter 433A, his petition for writ of mandamus is properly before this Court.

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[2] Mr. Gammick's reliance on *Dodd v. Hughes*, 81 Nev. 43, 398 P.2d 540 (1965), Answer at 5, is misplaced. There, Mr. Dodd was detained and unsuccessfully "sought his *release* from the Nevada State Hospital." 81 Nev. at 44-45, 398 P.2d at 541 (italics added).

B.

Mr. Vu's involuntary court-ordered commitment was a "basic needs" commitment

Mr. Gammick states that Mr. Vu's initial hold was proper because he presented a clear and present danger that "had nothing to do with [his] food, shelter, or financial needs." Answer at 6. That concern, however, no longer existed at the time of the court hearing. In Nevada, there are three types of admission to mental health facilities: voluntary admission; emergency admission; and involuntary court-ordered admission. See NRS 433A.120. An "emergency admission" can become an "involuntary court-ordered admission" if the mentally ill person is not released within 72 hours of the emergency admission.[3] This requires that a "written petition for involuntary court-ordered admission [be] filed with the clerk of the district court" before the expiration of the 72 hours. See NRS 433A.150(2). Such a petition was filed in this case. See PA 1-11. While this form petition initially alleged that Mr. Vu "pose[d] a risk of imminent harm to himself or others," PA 2, that allegation was

[3] NRS 433A.150(2) states in relevant part: "a person detained pursuant to subsection 1 must be released within 72 hours, including weekends and holidays, ... unless, before the close of the business day on which the 72 hours expires, a written petition for an involuntary court-ordered admission is filed with the clerk of the district court ... ."

not pursued at the hearing and it was not the basis of the district court's order. This case was presented and resolved as a "basic needs" case. See NRS 433A.115(2). Compare PA 70 ("The petition for involuntary admission should be **GRANTED** for the following reasons:

__X__ 1. The patient is mentally ill and unable to meet his or her basic needs under NRS 433A.115 and NRS 433A.310") (Order in Response to Request for Court Ordered Involuntary Admission). Accordingly, this Court can disregard much of the "facts" supplied by Mr. Gammick as they conflate Mr. Vu's "emergency" admission with his "involuntary court-ordered" admission. Answer at 6-7. The instant petition for writ of mandamus challenges only Mr. Vu's court-ordered involuntary civil commitment.

Mr. Cartlidge failed to present sufficient clear and convincing evidence on necessary elements of a basic needs commitment and Judge Weller erred in committing Mr. Vu

The first issue presented by Mr. Vu's Petition is whether the basic needs commitment order was supported by substantial evidence. Petition at 11. Mr. Gammick's response to the petition consists almost entirely of references to the "routine" practice of the court appointed doctors, and the "summary manner" of their testimony. Answer at 8-9.

Mr. Gammick states that their consideration of basic needs criteria always includes consideration of "death, serious bodily injury or physical debilitation occurring within the next 30 days." Answer at 9-10. But, as noted in the petition, Dr. Piasecki did not testify concerning this element and to the extent Dr. Lewis did, it was only to say he considered it in every case—he did not specifically testify on the element as it related to Mr. Vu. Petition at 7 n. 3, *Id.* at 20-21. Even Judge Weller noted the paucity of the evidence:

> THE COURT [addressing Mr. Cartlidge]: Counsel, I don't understand and I want to take a moment to talk about your presentation here today. The only reason I'm going to do it is because I've done it before and it doesn't seem to have any effect.
>
> If the only question you need to ask the doctors is does the patient meet criteria and your case is over, I could get that, but I've heard hundreds of questions here today, and the criteria are a cookbook. There are only a couple of them and one of them is is there a reasonable probability that his or her death or serious bodily injury or physical debilitation will occur within the next 30 days unless admitted to a mental health facility.
>
> Apparently, you want me to glean that information, it only came out from you outside the scope of direct [sic] examination on your

> second doctor witness[4] and I frankly don't understand why you don't ask that question. Why you don't look at the criteria and ask that question.
>
> I'm making this record because I've talked to you about it before, and I don't understand. If you don't give me a good case, I can't grant the relief you're wanting ... .

PA 58-59 (footnote added). Here, Mr. Cartlidge did not give Judge Weller "a good case" but Judge Weller nonetheless gleaned a result and committed Mr. Vu. This was error because the record on this element, as well as the "danger-to-self" element—, which rested solely on the doctors' speculation on possible, negative responses from third persons[5]—did not support Judge Weller's findings. See Petition at 17-21. This Court may set aside a district court's findings of fact when they are either "clearly erroneous" or where no evidence supports the findings. *Sierra Nevada Stagelines, Inc. v. Rossi*, 111 Nev. 360, 363, 892 P.2d 592, 594 (1995); *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007). "A writ of mandamus is available to compel the performance

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[4] Here, Judge Weller credits Dr. Lewis's testimony more than is justified by the testimony itself.

[5] Also resurrected in the Answer at 12 ("He placed himself at high risk of harm to self *because of others* [sic] *defensive reactions.*") (italics added).

of an act the law requires or to control a manifest abuse of discretion." *Int'l Fid. Ins. Co. ex rel. Blackjack Bonding, Inc. v. State*, 122 Nev. 39, 42, 126 P.3d 1133, 1134 (2006). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Ct.*, 127 Nev. ____, ____, 267 P.3d 777, 780 (2011) (internal quotation marks omitted). Here Judge Weller's findings are unsupported by the record. Thus, this Court should grant the requested writ relief and vacate Judge Weller's commitment order.

The commitment order identified in NRS 433A.310(1)(b) is the same order identified in NRS 433A.310(5)

"Generally, identical words used in different parts of the same statute are ... presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (internal quotation marks omitted). An "order" in subsection 5 of NRS 433A.310 is always the same "order" as that identified in subsection (1)(b) of the same statute. And that "order" is an interlocutory order unless and until certain events identified in the statute occur. An interlocutory order is an order on some "intermediate matter" as opposed to a final order, which is a "dispositive" order. See Bryan A. Garner, Garner's

Dictionary of Legal Usage 640 (3rd ed. 2011). Reading the statute as a whole, only final orders should be noticed to the central repository under subsection 5 because they are they only dispositive orders.

Against this reading of the statute as a whole, Mr. Gammick claims that such a reading would "render the central repository registration statute nugatory while making Nevada's laws inconsistent with federal law and place federal funding into jeopardy." Answer at 13. Mr. Gammick offers no textual support for this claim, and he does not refer this Court to any legislative history demonstrating that requiring only final commitment orders be noticed to the central repository is (1) "inconsistent" with federal law, or (2) would "jeopardize" federal funding.[6] Conversely, allowing subsection 5 to embrace both interlocutory and final commitment orders renders nugatory the interlocutory command of subsection 1(b).

Mr. Gammick also takes issue with the 30-day time requirement of NRS 433A.310(1)(b) because "Northern Nevada's mental health inpatient treatment averages less than 2 weeks." Answer at 18.

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[6] Mr. Gammick does refer to some legislative history. Answer at 17. But a review of the entire legislative history shows that the specific interlocutory order command of 433A.310(1)(b) is never specifically mentioned or discussed or evaluated.

However, if Mr. Gammick believes the period set out in the statute is too long, he should attempt to convince the Legislature to amend the statute. The 78th session of the Nevada Legislature starts on February 2, 2015. This Court should not change or rewrite a statute. *Holiday Retirement Corporation v. State*, 128 Nev. ____, ____, 274 P.3d 759, 761 (2012) (noting that it "is the prerogative of the Legislature, not this court, to change or rewrite a statute") (citation omitted).

Conclusion

For the reasons set out in this reply and in the original petition for writ of mandamus, this Court should grant the requested relief. This Court should find that Judge Weller acted arbitrarily and capriciously and therefore manifestly abused his discretion. This Court should issue a writ of mandamus.

Respectfully submitted, this 11th day of June, 2014.

By: *John Reese Petty*
JOHN REESE PETTY
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By: *Kathleen M. O'Leary*
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