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

PETITIONER'S SUPPLEMENTAL BRIEF

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Introduction

In its order directing supplemental briefing this Court noted that because of the "constitutionally mandated heightened evidentiary level of proof that controls the district court's decision" to involuntary commit a person—*i.e.* proof by clear and convincing evidence—other jurisdictions "factor this heightened level of proof into their appellate review of involuntary admission proceedings." And requested supplemental briefing limited to the following question: What is the proper standard of review for the Court to apply when reviewing the involuntary court-ordered admission of a person to a mental health facility under NRS 433A.310?

This appears to be a question of first impression in Nevada. But it can be easily answered. In order to satisfy the due process liberty interest at stake in involuntary civil commitment proceedings, this Court, when reviewing district court involuntary civil commitment orders, must apply a heightened or elevated standard of review—whether it is a "clearly erroneous" standard or a standard of "against the manifest weight of the evidence."

Discussion

A.

"The liberty interest at stake in a civil commitment proceeding goes beyond a loss of one's physical freedom, and given the serious stigma and adverse social consequences that accompany such physical confinement, a proceeding for an involuntary civil commitment is subject to due process requirements." *Civil Commitment of T.K. v. Dept. of Veterans Affairs*, 27 N.E.3d 271, 272 (Ind. 2015) (citing *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)). "To satisfy the requirements of due process, the facts justifying an involuntary commitment must be shown 'by clear and convincing evidence ... [which] not only communicates the relative importance our legal system attaches to a decision ordering involuntary commitment, but ... also has the function of reducing the chance of inappropriate commitments.'" *Id.* (ellipsis and alteration in the original, citation omitted). See also *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 377 n.26 (Alaska 2007).

The clear and convincing evidence standard "imposes a 'heavy burden' on the state that is 'the product of a fundamental recognition of the priority of preserving personal liberties.' It requires the state to

'produce evidence that is of extraordinary persuasiveness and makes the facts at issue highly probable.'" *State v. A.D.S.*, 308 P.3d 365, 367 (Or. App. 2013) (citations omitted); *In re T.B.*, 37 So.3d 576, 579 (La. Ct. App. 2010) ("Under this 'clear and convincing' standard, the existence of the disputed fact must be highly probable, or more probable than not.") (citation omitted). Indeed, the clear and convincing standard "is employed in cases where the wisdom of experience has demonstrated the need for greater certainty, and where this high standard is required to sustain claims which have serious social consequences or harsh or far reaching effects on individuals." *Civil Commitment of T.K.*, 27 N.E.3d at 276 (internal quotation marks and citations omitted). Tellingly, this standard of proof is not met where a commitment order is affirmed merely because "such order 'represents a conclusion that a reasonable person could have drawn, even if other reasonable conclusions are possible.'" *Id.* at 274 (citations omitted) (disapproving a line of intermediate appellate court cases).

B.

Generally, appellate courts "must give great weight to factual findings by the trial court. However, in cases where a person is deprived

of liberty by involuntary commitment, the evidence must be reviewed for strict adherence to the high standard of proof required by constitutional and statutory law." *In re T.B.*, 37 So.3d at 579 (citation omitted). Consistent with the cases cited in this Court's supplemental briefing order—*In re B.W.*, 566 So.2d 1094 (La. Ct. App. 1990), *In re Walter R.*, 850 A.2d 346 (Me. 2004), and *In re K.L.*, 713 N.W.2d 537 (N.D. 2006)—other courts require a heightened or elevated standard of review of involuntary civil commitment orders. For example, in Oregon appellate courts generally "review whether the state presented sufficient evidence to support a civil commitment for legal error," *State v. E.D.*, 331 P.3d 1032, 1032 (Or. App. 2014) (citations omitted), but can in exceptional cases "review [a civil commitment] matter *de novo*." *State v. D.M.*, 263 P.3d 1086, 1087 (Or. App. 2011) (footnote omitted, alteration and italics in the original); see *State v. A.D.S.*, 308 P.3d 365, 366 (Or.App. 2013) (stating that neither party requested *de novo* review and the record did not demonstrate exceptional need for *de novo* review). Where review is not *de novo*, the "clear and convincing" evidence standard "is a rigorous one, requiring evidence that is of extraordinary persuasiveness, and which makes the facts at issue

highly probable." *State v. E.D.*, 331 P.3d at 1033-34 (internal quotation marks and citation omitted). As stated in *State v. D.M.*, 263 P.3d at 470-71, this standard "applies in civil commitment hearings in order to protect the strong personal and liberty interests at stake. ... [T]he standard is 'not merely abstract or precatory. Rather, [it is] the product of a fundamental recognition of 'the priority of preserving personal liberties in [civil commitment cases].'") (citations omitted, second and third alterations in the original).

Like Oregon, the Supreme Court of Iowa reviews "challenges to the sufficiency of the evidence in involuntary commitment proceedings for errors of law." *In re B.B.*, 826 N.W.2d 425, 428 (Iowa 2013) (citing *In Interest of J.P.*, 574 N.W.2d 340, 342 (Iowa 1998). Because the allegations made in an application for involuntary commitment must be proven by clear and convincing evidence, "there must be *no serious or substantial doubt* about the correctness of a particular conclusion drawn from the evidence." *Id.* (italics added, internal quotation marks and citation omitted).

In Illinois a trial court's decision to enter an involuntary commitment order will be overturned on review if it is against the

"manifest weight of the evidence." A judgment "is considered against the manifest weight of the evidence ... when the opposite conclusion is apparent *or* when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *In re Deborah S.*, 26 N.E.3d 922, 931 (Ill. App. 2015) (italics added, citation omitted); *In re Elizabeth McN.*, 855 N.E.2d 588, 590 (Ill. App. 2006) (same).[1]

In Montana, like North Dakota,[2] the court "review[s] a district court's order of commitment to determine whether the court's findings

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[1] For example, in *In re Elizabeth McN.*, Elizabeth was involuntarily committed not because she would harm herself, but because the testifying doctor "believed other people might become upset with her and may harm her." The State presented no evidence that she had been victimized. The appellate court reversed stating in part, "[m]ere speculation that others might harm [her] fails to satisfy the State's burden for involuntary admission. Thus, the trial court erred in granting the petition for involuntary admission." 855 N.E.2d at 789-90.

[2] See *In re S.R.B.*, 830 N.W.2d 565, 567 (N.D. 2013) ("On appeal from an order for hospitalization and treatment, we review procedures, findings, and conclusions of the trial court. A trial court's findings are subject to a more probing clearly erroneous standard of review. A finding is clearly erroneous if it is induced by an erroneous view of the law, it is not supported by the evidence, or this Court is left with a definite and firm conviction a mistake has been made.") (internal quotation marks and citations omitted). Stated differently, a "finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire record this Court is left with a definite and firm conviction it is not supported by clear and convincing evidence." *In re W.J.C.A.*, 810 N.W.2d 327, 330 (N.D. 2012) (internal quotation marks and citation omitted).

are clearly erroneous and its conclusions of law are correct. A finding of fact is clearly erroneous if it is not supported by substantial evidence *or* if, after review of the entire record, [the court] is left with the definite and firm conviction that a mistake has been made." *In re B.O.T.*, 342 P.3d 981, 984 (Mont. 2015) (italics added); *In re S.L.*, 339 P.3d 73, 78 (Mont. 2014) (same).[3] Alaska, Arizona, and Pennsylvania use a similar standard. See *In re Stephen O.*, 314 P.3d 1185, 1190 (Alaska 2013) ("Factual findings in involuntary commitment proceedings are reviewed for clear error, and we overturn these findings only where a review of the record leaves us with a definite and firm conviction that a mistake has been made.") (internal quotation marks and footnote omitted)[4]; *In re MH2009-002120*, 237 P.3d 637, 643 (Ariz. App. 2010) ("We view the facts in a light most favorable to upholding the court's ruling and will not reverse an order for involuntary treatment unless it is clearly erroneous and unsupported by any credible evidence.") (internal

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[3] The Montana Supreme Court requires "strict adherence to the statutory scheme governing involuntary commitment due to the critical importance of the constitution rights at stake." *In re S.L.*, 339 P.3d at 78 (internal quotation marks and citations omitted).

[4] Elsewhere the supreme court characterized the burden of proof in order to justify an involuntary commitment, as a "high standard," 314 P.3d at 1193, and as an "elevated" one. 314 P.3d at 1195.

quotation marks and citation omitted); *Com. ex rel. Gibson v. DiGiacinto*, 439 A.2d 105, 107 (Pa. 1981) ("The function of this Court is not to find facts but to determine whether there is evidence in the record to justify the hearing court's findings. However, we are not bound by the hearing court's legal conclusions and must reverse if the evidence does not justify the hearing court's decision.").

C.

Given the due process liberty interest inherent in Nevada's involuntary civil commitment process coupled with the statutory mandate of proof by clear and convincing evidence, NRS 433A.310(1), this Court should utilize a heighten or elevated standard of review when reviewing a district court's involuntary civil commitment order. As noted above, the clear and convincing evidence standard is a "rigorous one." It imposes a "heavy burden" on the party seeking involuntary commitment. It requires evidence "that is of extraordinary persuasiveness" and which makes the facts at issue probable.

When met, it establishes certainty; there should be "no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence." When met courts should not have any

"definite and firm conviction that a mistake has been made." When met it is not merely "a conclusion [among many] that a reasonable person could have drawn, even if other conclusions are possible." When met due process is satisfied.

Conclusion

For the reasons set out above, whether this Court adopts a clearly erroneous standard of review, or reviews the district court's findings and legal conclusions as applied against the manifest weight of the evidence, when reviewing a district court's involuntary civil commitment order, this Court must factor into its review the constitutionally mandated heightened evidentiary level of proof that governs the district court's decision.

This Court's order directing supplemental briefing on the limited question presented did not invite new merit arguments. However, because Judge Weller's commitment order is not supported by evidence in the record, it cannot *a fortiori*, withstand this Court's scrutiny under a

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heighted or elevated standard of review, and this Court must reverse.

Respectfully submitted, this 20th day of July 2015.

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JOHN REESE PETTY
Chief Deputy

By: *Kathleen M. O'Leary*
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Chief Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,978 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of July 2015.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of July 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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