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 REPLY BRIEF

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Introduction

"The function of a standard of proof, as the concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning *the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication*. The standard serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotation marks and citation omitted, italics added), abrogated on other grounds by *Jones v. United States*, 463 U.S. 354, 366-68 (1983). *Addington* concluded that because involuntary civil commitment "for any purpose constitutes a significant deprivation of liberty that required due process protection," *Id.*, 463 U.S. at 425 (citations omitted)[1], civil commitment proceedings required a "clear and convincing evidence" standard of proof. *Id.*, 463 U.S. at 431-33. As a

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[1] Accord *Scarbo v. Eighth Judicial District Ct.*, 125 Nev. 118, 124, 206 P.3d 975, 979 (2009) ("Commitment to a psychiatric facility constitutes a deprivation of liberty, regardless of whether the commitment occurs as a result of a court order or referral, *or an involuntary commitment proceeding*.") (citation omitted, italics added).

result, other jurisdictions now also factor this heightened level of proof into appellate review of involuntary admissions proceedings. Whether this Court should do so is a question of first impression, which should be answered affirmatively. Nothing in the Real Party in Interest's response invites or compels a different answer.

Though not "binding" the use of a heightened standard of appellate review for involuntary commitment by other courts is persuasive precedent

Real Party in Interest first argues that the application of a heighten standard of appellate review in involuntary civil commitment cases by other state appellate courts is not "binding on this Court." Response to Supplemental Brief Regarding Standard of Review (Response) at 1. True enough. However where, as here, this Court has not had the occasion (until now) to resolve the instant question of law, review of other state courts' practice is appropriate. Existing precedent that furnishes a basis for determining a *similar question of law* can be persuasive—even if not "binding"—see Bryan A. Garner, Garner's Dictionary of Legal Usage 696 (3rd ed., Oxford 2011), and should not be ignored. The authorities provided in Petitioner's Supplemental Brief demonstrate a trend that this Court should embrace. In contrast, the

Real Party in Interest did not provide one case—in the involuntary civil commitment context—that discussed the merits of an abuse of discretion standard of review.

Referencing the "rising number of cases involving the mentally ill and shootings," is not responsive to this Court's limited question for supplemental briefing and is, in the context of this case, disingenuous

This Court did not invite additional merit briefing; it requested briefing limited to the 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?" See Order Directing Supplemental Briefing at 2. Yet the Real Party in Interest spends two pages (Response at 2-4) rehearsing worst-case scenarios captured in the media—notably none from Reno or Washoe County, or even Nevada—that involved mass shootings by mentally ill persons. From this Real Party in Interest concludes that in light of "rising numbers of cases involving the mentally ill and shootings, both of others and the mentally ill individual being killed, *there is no need for any heightened scrutiny of an involuntary commitment on appeal.*" Response at 6 (italics added). This conclusion is a non sequitur; the conclusion does not derive from the premise. If anything, given the

stigma evinced in this statement, there is a special need for heightened scrutiny of involuntary commitment proceedings on appeal in order to reduce the chance of inappropriate commitments. *Addington v. Texas*, 441 U.S. at 427. Additionally, this statement is disingenuous because Mr. Vu's case did not involve guns; his commitment was an alleged "basic needs" commitment under NRS 433A.115(2)(a).

The existence of "protections for the individual's liberty interest built into" the statute does not lessen the need for heightened appellate review

The Real Party in Interest argues that there are "already numerous protections for the individual's liberty interest built into the statutory scheme," and then lists them. Response at 4-6. And concludes that the statute "eliminate[s] for the most part concerns about an individual suffering an inappropriate involuntary commitment or any stigma possibly attached to that commitment." Response at 6. What this conclusion has to do with appellate review is baffling. It is either at best nonresponsive on the question presented, or at worse, suggests that the district court involuntary civil commitment process need not be reviewed at all because the statute is, "for the most part," protective of the individual. We disagree. While the statute does provide due process

protections at the district court level, it is not self-policing; appellate review of district court judge's civil commitment orders remains essential to avoid improper commitments.

Standards of review in guardianship, child custody, and termination of parental rights cases are not applicable

The Real Party in Interest also jots through standards of review for other types of proceedings—none of which involves (unlike civil commitment proceedings) the deprivation of a person's liberty—*i.e.*, guardianship, child custody cases, and termination of parental rights cases.[2] And child custody and termination of parental rights cases are particularly inapt because they each have a different focus: the well-being of the child (or children) involved—*i.e.*, "best interest of the child," see *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 130 (2000). These cases are not applicable.

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[2] The Real Party in Interest notes that Mr. Vu was discharged "after just twelve (12) days," suggesting that his deprivation of liberty was just for a "limited duration." And reasons that "[n]o heightened standard of review is appropriate for this *temporary* deprivation." Response at 10 (italics added). We disagree. Under the Due Process Clause, any wrongful deprivation of liberty for whatever period of time, constitutes a significant deprivation of liberty that requires due process protection, and hence a heightened standard of review on appeal.

Mental health may be a specialized area of practice, but a deferential standard of review is not warranted here

Finally—in another merits argument—the Real Party in Interest seeks a deferential standard of review because Drs. Piasecki and Lewis are "experts" entitled to "special deference." Response at 10-11. Granted Drs. Piasecki and Lewis were court-appointed to evaluate Mr. Vu and render opinions as to whether he met the statutory criteria for involuntary civil commitment. However, Dr. Piasecki expressed no opinion on whether there was a reasonable probability that Mr. Vu would suffer serious bodily injury (or death) within the next 30 days if released, and to the extent Dr. Lewis expressed an opinion, it was not specific to Mr. Vu. It was a "yes" answer to a general question. See Petition for Writ of Mandamus at 7 & n. 3, 20-21. Thus, the record was devoid of evidence to support Judge Weller's order committing Mr. Vu. There was nothing in their testimony on this statutory requirement that warrants "special deference."

Conclusion

The limited question for supplemental briefing was whether this Court should adopt a heightened standard of review when reviewing a district court judge's involuntary commitment order. For the reasons set

out here and in Petitioner's Supplemental Brief that question should be answered in the affirmative.

Respectfully submitted, this 4th day of August 2015.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy

By: *Kathleen M. O'Leary*
KATHLEEN M. O'LEARY
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 1,559 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 4th day of August 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 4th day of August 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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