No. 20-5166

IN THE

Supreme Court of the United States

J.J.H.,

Petitioner,

v.

WAUKESHA COUNTY, WISCONSIN

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Wisconsin

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

There are over 48 million deaf and hard of hearing people in the United States.[1] And each year there are an estimated 1 million emergency psychiatric detentions, which require court hearings on short notice. (Pet. 2).[2] Contrary to Respondent's assertion that the circumstances of this case "defy repetition," they are likely recurring in commitment cases across the country. There is little case law directly on point because, like Wisconsin, state appellate courts can dismiss appeals from expired commitment orders as moot, just as courts dismissed appeals from convictions with short sentences as moot before *Sibron v. New York*, 392 U.S. 40 (1968).

Respondent does not deny that this Court has never squarely addressed whether deaf people have a due process right to interpretation for any kind of court case. Nor does Respondent deny that there are gaps in the existing patchwork of state interpreter statutes. Petitioner does not ask this court to dictate the terms of these statutes. As in *Addington v. Texas*, 441 U.S. 418 (1979), she only asks this Court to establish the foundational principle: a deaf person has a due process right to understand and participate in her commitment hearing. A United States Supreme Court holding on this point will simply provide the mandate and the compass for states and courts to implement this right.

1. Statement of case. There are three undisputed facts that make this case worthy of review: (1) a trial court held a hearing, (2) where it denied a deaf person

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[1] *See* Brief of *Amicus Curiae* at 1.

[2] This is a federal due process right codified in Wis. Stat. §51.20(7)(a). *See* Dodge *County v. Ryan E.M.*, 2002 WI App. 71, ¶11, 252 Wis. 2d 490, 642 N.W.2d 592.

interpreters, (3) resulting in an order for her restraint at the state psychiatric hospital.[3] Respondent loads its brief with many extraneous facts, but those are the legally significant ones.

Respondent also makes statements that require correction, starting with the nature of the circuit court proceeding. Waukesha County filed a three-party petition for examination, pursuant to Wis. Stat. §51.20 of Wisconsin's Mental Health Act. (Pet. App. 70a). The circuit court issued a notice of a "probable cause" hearing to occur on September 15, 2017 at 11:00 a.m. (Pet. App. 67a).

At 12 p.m. that day, a court commissioner called the case for a probable cause hearing. (Pet. App. 16a, 56a). After the examining physician testified, the county switched course. It did not ask the court to find probable cause. Instead, it asked the court to enter a §51.67 30-day temporary placement and guardianship. (Pet. App. 42a). A §51.67 order is one of several types of final orders a court may enter to dispose of a proceeding under Chapter 51. *See* Wis. Stat. §51.20(13)(a)1-5. Thus, while the circuit court called this case for a probable cause hearing, the hearing ended with a final order for J.J.H.'s involuntary confinement in a locked ward at the state psychiatric hospital. (Pet. 1-2; Pet. App. 6a, 52a).

Respondent's brief also asserts: "With J.J.H.'s refusal to postpone the hearing, and no safe alternative placement options where J.J.H. could have received effective treatment, the court proceeded to take testimony from J.J.H.'s treating physician and concluded that

[3] The nomenclature for the restraint is irrelevant. A court might order a person confined, committed, placed, or detained at a state mental hospital. The important point is that the person is restrained there against her will.

temporary placement for 30 days was necessary to protect J.J.H.'s mental health and safety." (BIO 1).

Respondent ignores that there were two "placements" being discussed at this hearing: the place where J.J.H. could be detained for 72 hours until another probable cause hearing could be held and the place where she could be "protectively placed" for 30 days. The county had not yet found a suitable facility for the 30-day placement and treatment. This was no surprise because the county petitioned for a mental commitment but during the probable cause hearing decided instead to ask for a 30-day protective placement under §51.67. (Pet. App. 42a, 70a).

Furthermore, J.J.H. did not "refuse" to postpone the probable cause hearing. Her counsel repeatedly agreed with the county's own proposal to dismiss the case, take J.J.H. into custody under a Chapter 55 mental protective placement, and hold a new probable cause hearing in another 72 hours. (Pet. App. 21a-22a, 27a, 43a-44a).

There was in fact a "safe alternative placement option" for this 72-hour period. J.J.H. was in the custody of the Department of Health and Human Services, whose representative, Jeff Sturberg, was at the hearing. (Pet. App. 15a). He told corporation counsel, who told the court: "At this time the department has informed me that if the court chooses to dismiss this matter he will detain her under Chapter 55 in an emergency protective placement basis" and "have her taken to Waukesha Memorial," which is a private hospital. (Pet. App. 43a; *see also* 21a). Dr. Pinkonsly testified that J.J.H. was taking her prescribed medications. (Pet. App. 37a). There was no legitimate concern that she would not receive effective treatment for the next 72 hours.

Respondent admits that it did not call a single witness to corroborate the hearsay allegations of the petition and police report that were used to lock J.J.H. at the state psychiatric hospital. Rather, it blames J.J.H.'s counsel for not calling any witnesses, including the petitioners, to testify. (BIO 12-13). Respondent forgets that J.J.H. is *deaf* and did not have interpreters. It would have been foolish for her counsel to call the petitioners adversely because she could not hear them or help undermine their testimony, and she could not testify against them.

Respondent suggests that a public defender who was signing to J.J.H. was sufficient. (BIO 13). Again, the circuit court record is clear.[4] The public defender said she was neither able nor certified to interpret court proceedings. She was trying to relay communications between J.J.H. and her lawyer, Laura Sette. (Pet app. 16a, 47a-48a). J.J.H. needed and requested two relay interpreters for the hearing, and the court commissioner authorized them. (Pet. App. 47a, 61a, 63a). The county never contested this point.

The circuit court tried to secure interpreters in Wisconsin and neighboring states, but it announced that it could not find them at 5:10 p.m. on September 14th—the day before the hearing. (Pet. App. 65a). The commissioner called the case at noon on September 15th. The deadline for a probable cause hearing expired at 5:59 p.m. on September 15th—72 hours after J.J.H. was detained. (Pet. App. 56a, 73a). September 15th was Dr. Pinkonsly's day off, and he had "other plans" for the afternoon. So the court proceeded to conduct the hearing without interpreters. (Pet. App. 23a-24a, 27a-28a).

[4] The entire circuit court record, excluding duplicates, is included in the appendix to the Petition.

2. Supreme court proceedings. After counsel filed the petition for review one day late, the state supreme court dismissed it. The State Public Defender filed a routine habeas petition to reinstate the petition for review based on ineffective assistance of counsel. Waukesha County was an interested party to that proceeding as indicated on the supreme court's order. (Pet. App. 11a).

3. Mootness. A case is not moot where the alleged injury is likely to recur unless the Court addresses it. *Washington v. Harper*, 494 U.S. 210, 219 (1990)(citing *Vitek v. Jones*, 445 U.S. 480, 486-487 (1980)). It is undisputed that J.J.H. is congenitally deaf and disabled. If this court accepts Respondent's arguments that the circuit court could not find interpreters on short notice and that J.J.H.'s condition is such that she required protective placement, then there is a reasonable expectation that she will suffer the same injury again unless this Court steps in. The Wisconsin court of appeals and supreme court refused to address her claim that the circuit court infringed her due process right to understand and participate in her hearing. It is impossible to file a notice of appeal, get a transcript, fully brief an appeal, and receive an appellate decision in 6 months let alone 30 days.[5] This Court is J.J.H.'s last hope.

This case also presents a live controversy because commitment to a mental hospital has collateral consequences. One is that it is highly stigmatizing. The Court has repeatedly declared this an "indisputable" fact. *See e.g. Addington*, 441 U.S. at 425-426 (1979); *Vitek*, 445

[5] Respondent notes Wisconsin's "expedited appeals" procedure. (BIO 26) According to the court of appeals, it takes from 167-186 days to decide an expedited appeal, so it is worthless to the subject of a 30-day or 6-month commitment. *See* https://wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=239772 (last visited 8/27/20).

U.S. at 492. This Court has not yet held that *Sibron*, which recognized that the reputational damage of a conviction prevents the dismissal of a criminal appeal for mootness, applies to appeals from expired commitment orders. *Sibron*, 392 U.S. at 56. This case allows the Court to connect *Addington* and *Sibron*.

A second collateral consequence is that Wisconsin authorizes the government to use Chapter 51 records and orders against the individual in future legal proceedings. *See* Wis. Stat. §51.30(3)(b) and (4)(b)(11). Here, the circuit court conducted a Chapter 51 proceeding and entered a §51.67 order against her, so her commitment to the state mental hospital may be used in future cases. She need not prove that this will occur. Under *Sibron*, the mere possibility allows her to avoid dismissal for mootness. *Sibron*, 392 U.S. at 55.

A third collateral consequence from a mental commitment is loss of the right to possess a firearm. Respondent argues that J.J.H. was not "committed" to the state psychiatric hospital. She was sent there under a §51.67 temporary protective placement, so no firearm restriction results. (BIO 24). The label of the order is irrelevant. Under 18 U.S.C. §922(g)(4), it is the fact that a court adjudicates the person "a mental defective" or commits the person "to a mental institution" that makes it unlawful to possess a firearm. That restriction applies to all states regardless of their nomenclature for involuntary restraint at a mental institution.

Fourth, Respondent does not dispute that in many jurisdictions an adjudication of mental illness can cause restrictions on the right to dispose of property, the right to vote, the right to possess a driver's license, the right to execute contracts and so forth. *See In the Matter of Naomi*

B., 435 P.3d 918, 925 (AK 2019); *In re Ballay*, 482 F.2d 648, 651-652 (D.C. Cir. 1973).

Instead, Respondent's primary argument on mootness is that an appeal from an expired commitment order is like an order revoking parole, which requires proof of actual collateral effects under *Spencer v. Kemna*, 523 U.S. 1, 13 (1998). (BIO 20-23). That is incorrect. A person has a liberty interest in avoiding being labeled mentally ill and sent to a mental institution. *Addington*, 441 U.S. at 425-426; *Vitek*, 445 U.S. at 492. Also, an adjudication of mental illness results in a loss of civil rights. *Sibron* applies. *Spencer* does not.

4. Vehicle. Petitioner appreciates the differences between a criminal trial and a civil commitment. (BIO 28-29) (citing *Addington* and *Allen v. Illinois*, 478 U.S. 364 (1986)). Respondent ignores the significance of *Vitek v. Jones*, where this Court listed the due process rights for persons undergoing a *civil* commitment. The Court held that the person has due process rights to notice, to a hearing, to be present at the hearing, to be informed of the government's evidence, and to confront and cross examine witnesses. *Vitek*, 445 U.S. at 495-496. The point is, a deaf person who lacks effective interpretation is "not present" in court, cannot hear the evidence, and cannot confront and cross-examine witnesses. Without interpreters, she is denied her due process right to understand and participate in her commitment hearing.

Importantly, Respondent does not deny that Petitioner objected to the due process violation in the circuit court and renewed the objection in the state court of appeals and supreme court. This case is a good vehicle for addressing the issue.

5. Due process infringement. Respondent defends the circuit court's decision to proceed without interpreters on the grounds that it also had to consider other important interests such as J.J.H.'s right to a hearing within 72 hours, her right to treatment, and the public's right to safety. (BIO 35-36). But J.J.H. repeatedly agreed to the county's proposal to dismiss and hold a new probable cause hearing in 72 hours, which would have bought time to find interpreters. (Pet. App. 21a-22a, 27a, 43a-44a). The Department, through its corporation counsel, assured the court that J.J.H. could be placed at a private hospital until the new hearing, so there was no concern about public safety. (Pet. App. 21a, 43a). And Dr. Pinkonsly testified that J.J.H. was accepting medication, so there was no concern about effective treatment for the next 72 hours. (Pet. App. 37a).

Due process is flexible depending on the situation. *Mathews v. Eldridge*, 429 U.S. 319, 335 (1976). However, the analysis requires consideration of two factors the circuit court skipped in this case: (1) the risk that without interpreters it would have only the county's version of events and could erroneously deny J.J.H.'s liberty interests, and (2) the absence of any undue burden on the government given that the county itself proposed—and J.J.H. accepted—postponing the hearing for another 72 hours. The circuit court plainly and unnecessarily violated J.J.H.'s due process right to understand and participate in her commitment hearing.

Respondent claims both that Petitioner seeks a ruling so sweeping that it will upend interpreter statutes across the county and that the ruling would not make any difference in this case. (BIO 1, 37-38). Petitioner only asks this Court to hold that the due process rights listed in *Vitek v. Jones* extend to deaf people. The ruling would establish that courts cannot pay lip service to a deaf

person's right to understand and participate in her commitment hearing, as the circuit court did here. The ruling would require the amendment of statutes that do not guarantee those minimum rights. The ruling would require courts to educate themselves on the full range of interpreting services available and potentially necessary depending on the deaf person's needs, so that it can conduct timely, constitutionally compliant commitment hearings. The ruling would mark the first time this Court has declared that due process is not just for hearing people. It is for deaf people too. This case is a good place to start.

CONCLUSION

For the forgoing reasons, the Court should grant this petition for writ of certiorari.

Dated this 1st day of September, 2020

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