

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MIDDLESEX, SS

Impounded Case
No. 2016-P-0117

IN RE: N. L.

Respondent-Appellant

On Appeal from the District Court Department
Cambridge Division

Brief of
The Center for Public Representation
and
The Mental Health Legal Advisors Committee
as Amici Curiae in Support of the Appellant

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Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, amicus curiae **Center for Public Representation** states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publically held corporation that issues stock. It has no parent corporation.

Pursuant to Supreme Judicial Court Rule 1:21, amicus curiae **Mental Health Legal Advisors Committee** states that it was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. It is not a corporation and issues no stock.

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Interest of Amici

The **Center for Public Representation** (the Center) is a national public interest law firm with offices in Northampton and Newton that advocates for the rights of individuals with disabilities, including individuals with mental health disabilities. Through its systemic activities and policy work during the past forty years, the Center has been a major force in protecting the rights of citizens with disabilities. The Center has represented clients in numerous civil commitment appeals including Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777 (2008); Acting Superintendent of BourneWood Hosp. v. Baker, 431 Mass. 101 (2000); and Hashimi v. Kalil, 388 Mass. 607 (1983).

The **Mental Health Legal Advisors Committee** (MHLAC) was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. MHLAC provides advice and assistance to individuals with mental illness, to their families and to other attorneys. One aspect of its obligations is to monitor legal issues before the courts affecting the interests of individuals with mental health disabilities. MHLAC has long advocated for rigorous procedural protections and substantive

standards and has a long history of weighing in on questions regarding the interpretation of the state mental health law statute.

Together or separately, CPR and MHLAC have served as amici in numerous cases involving the procedural rights of persons with mental health related disabilities,¹ utilizing the expertise gained from more than forty years of experience advocating for individuals with disabilities subject to civil commitment and involuntary treatment petitions. A focus of their work has been to protect and defend their clients' right to due process.

¹ These include: In re G.P., 473 Mass. 112 (2015) (procedural and substantive due process rights in proceedings for civil commitment for alcohol or substance abuse); Walden Behavioral Care v. K.I., 471 Mass. 150 (2015) (rights against self-incrimination in civil commitment proceedings); Guardianship of Erma, 459 Mass. 801 (2011) (due process in cases involving forced treatment with antipsychotic medications); Kenniston v. DYS, 453 Mass. 179 (2009) (standard of proof required for civilly committing juveniles within the juvenile justice system under G.L. c. 120); Boston Hous. Auth. v. Bridgewater, 452 Mass. 833 (2009) (reasonable accommodations in public housing appeals process); Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777 (2008) (emergency hearings access for involuntarily committed mental health patients); Andrews v. Bridgewater State Hosp., 449 Mass. 587 (2007) (standard of proof for an applicant in a substituted judgment treatment proceeding under G. L. c. 123, § 9 (b)); and Loffredo v. Ctr. for Addictive Behaviors, Inc., 426 Mass. 541 (1998) (whether there is a private right of action in a case challenging a drug treatment clinic's denial of patient admission).

Staff of both amici organizations were members of the special District Court Committee that drafted the legislation that is, in part, under review in this appeal. The outcome of this action is likely to have a profound impact on the ability of many of amici's clients to obtain due process in civil commitment hearings.

Statement of the Issues

Amici adopt the Statement of the Issues as set forth in the Appellant's opening brief.

Statement of the Case

Amici adopt the Statement of the Case as set forth in the Appellant's opening brief.

Statement of Facts

Amici adopt the Statement of Facts as set forth in the Appellant's opening brief.

Summary of Argument

The Cambridge District Court's refusal to grant Respondent N.L.'s request for a continuance to allow him to present the testimony of an independent psychiatrist in hearings on a petition for civil commitment and for involuntary treatment with antipsychotic medications denied him due process to which he is entitled under G.L. c. 123, § 5 and the

United States Constitution. Independent medical testimony is of pivotal importance in civil commitment hearings, for the respondent's mental status is the central focus of the court's inquiry. In recognition of this, the Legislature provided indigent respondents in civil commitment proceedings with access to independent medical experts at the State's expense. Infra at 7-11.

Principles of statutory interpretation support finding an absolute right to a continuance for hearings under G.L. c. 123, §§7 and 8B. First, this is the plain meaning of the statute, which provides that the "hearing shall be commenced within 5 days of the filing of the petition, unless a delay is requested by the person or her counsel." G.L. c. 123, § 7.² The plain meaning of "unless" is that it modifies "shall" and creates an exception to the five day rule. Infra at 12-14. Second, the statute must be read as a whole so that it is internally consistent. Accordingly, the request for the delay must be read in conjunction with the provision in G.L. c. 123, § 5 that establishes the respondent's right to

²See also G.L. c. 123, § 8B which includes parallel language.

present independent testimony. In order to meaningfully exercise this right, the respondent must have the ability to delay the hearing to ensure that the expert is prepared. Infra at 14-16,

Additionally, because the statute at issue involves a restraint on an individual's liberty, it must be interpreted narrowly in favor of protecting individual rights, which supports finding an absolute right to a continuance. Infra at 16-18.

Further, courts have rejected arguments that the petitioner hospital's interest in treatment overrides the patient's interests in personal autonomy. Petitioner's concerns are adequately addressed by the two exceptions to the informed consent doctrine that permit a hospital to involuntarily medicate an individual with antipsychotic medication in an emergency or when there is a serious risk of deterioration of mental health. Infra at 19-21.

Extensive available legislative history confirms that the Legislature intended to create an absolute right to a continuance to allow an independent expert to investigate and prepare testimony. The Legislature's primary purpose in amending the mental health code in 2000 and 2004 by requiring hearings

within five days of the filing of the petition was to protect the liberty interest of respondents, and not, as the Appellate Division of the District Court opined in this matter, to expedite treatment. Infra at 22-31.

Even if this Court finds there is not an absolute right to a continuance in these hearings, the trial court abused its discretion by denying the continuance to N.L. in these circumstances. N.L. was forced to request the continuance through no fault of his own because the hospital failed to provide records until the day before the hearing, making it impossible for his independent medical expert to prepare for the hearing and provide critical testimony. Going forward with the hearing without providing an opportunity to present independent medical testimony was an abuse of discretion. Infra at 31-37.

Argument

II. INDEPENDENT MEDICAL TESTIMONY IS OF PIVOTAL IMPORTANCE IN A CIVIL COMMITMENT CASE AND IN A PETITION FOR FORCED MENTAL HEALTH TREATMENT UNDER G.L. c. 123, AND THE ABSENCE OF AN OPPORTUNITY TO PRESENT SUCH TESTIMONY VIOLATES DUE PROCESS.

- A. The Supreme Court has held that independent psychiatric testimony is constitutionally required in a criminal case in which the defendant's mental health is at issue.

In Ake v. Oklahoma, 470 U.S. 68 (1986), the Supreme Court stated that "justice cannot be equal where . . . a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Id. at 76.

Accordingly, the Court held that when mental health is at issue in a criminal case an independent psychiatric examination desired by the defendant is required when a defendant's mental health is likely to be a "significant factor" at trial. Id. at 74.

In Ake, the Court went beyond requiring that an independent psychiatrist's assistance is permitted, and specifically found that the state must "provide access" to a psychiatrist if "the defendant cannot otherwise afford one." Id. at 74. The Court concluded that access to a psychiatrist is one of the "basic tools of an adequate defense." Id. at 77,

quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971). Indeed, the Ake Court found that without such assistance, given the need "to conduct a professional examination on issues relevant to the defense," to present testimony, and to prepare for "cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." Id. at 82.

The need for independent psychiatric access is no less significant in a civil commitment proceeding. The preparations are nearly the same as those described in the Ake opinion and the stakes -- loss of liberty and personal autonomy -- are just as high.

B. The Constitutional principles articulated in Ake have been recognized by the Supreme Court and the Supreme Judicial Court in non-criminal cases.

The Ake court also noted that the principle of "meaningful participation" and due process may apply in non-criminal cases. Id. at 76, citing Little v. Streater, 452 U.S. 1 (1981) (paternity cases). Other decisions from the Supreme Court and the Supreme Judicial Court confirm that civil commitment and administration of involuntary mental health treatment constitute a substantial deprivation of liberty,

thereby implicating the same or similar due process principles. See, e.g., Vitek v. Jones, 445 U.S. 480, 491-92 (1980) (civil commitment entails "massive curtailment of liberty"); Addington v. Texas, 441 U.S. 418, 425 (1979) (civil commitment for any purpose constitutes significant deprivation of liberty requiring due process protection); Washington v. Harper, 494 U.S. 210 (1990) (forced administration of antipsychotic medication constitutes substantial deprivation of liberty); Guardianship of Roe, 383 Mass. 415, 445 (1981) (few medical procedures are more intrusive than forcible injection of antipsychotic medication); Supt. of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 272 (1976) (grounds for civil commitment must be proved beyond a reasonable doubt).

In the context of civil commitment hearings, the Supreme Court has similarly emphasized the importance of independent medical testimony. In Addington, the Court emphasized that the determination whether a person is mentally ill and dangerous "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists" (emphasis in original). 441 U.S. at 429. Supreme Judicial Court

precedent is consistent. In Thompson v. Commonwealth, 386 Mass. 811 (1982) the Supreme Judicial Court stated that the statutory right to an independent medical examination was a "procedural safeguard" that kept the "genuine" risk that a person will be wrongfully retained in confinement to a minimum. Id. at 817-818. See also Rogers v. Comm'r of Dep't of Mental Health, 390 Mass. 489, 504 (1983) (in a hearing about forced treatment with antipsychotic medication "the opinions of experts [should be] gathered so that all views are available to the judge").

Given the importance that the high courts of this State and Nation have given to an independent psychiatric examination in civil commitment proceedings, the trial court's refusal to grant a continuance to allow one and to potentially prevent a wrongful loss of liberty was fundamentally unfair and in violation of due process. Here, N.L.'s mental status was the central issue. He needed the independent psychiatric evaluation to interpret the meaning of facts and to provide "investigation, interpretation, and testimony," Ake, 470 U.S. at 80, as well as "to assist in preparing the cross-examination of a State's psychiatric witnesses." Id.

at 82. Denial of the continuance violated N.L.'s rights under the Fourteenth Amendment of the United States Constitution. See id.

III. RESPONDENT HAS ABSOLUTE RIGHT TO A CONTINUANCE IN CIVIL COMMITMENT HEARINGS PURSUANT TO G.L. C. 123 §§ 7, 8, AND 8B.

The Constitutional imperative and practical importance of independent medical evaluations is reflected in G.L. c. 123, § 5, which establishes the right to such evaluations in civil commitment and forced mental health treatment proceedings. Section 5 provides that a respondent has the "right to present independent testimony" and that "[t]he court may provide an independent medical examination" for respondents who are indigent at the request of respondent's counsel or respondent if the respondent is unrepresented.

To implement this right, Massachusetts law confers an absolute right to a continuance of a hearing on a petition for commitment under G.L. c. 123, §§ 7 and 8 or on a petition for authorization for medical treatment under G.L. c. 123, § 8B. This reading of the statute is supported by the legislative history of Massachusetts civil commitment laws and by principles of statutory interpretation. Further, it is

necessary to read G.L. c. 123 in this fashion in order for it to be consistent with other relevant provisions of Massachusetts civil commitment law and to comply with principles of narrow construction that apply to statutes that limit liberty interests.

A. Principles of statutory interpretation require a finding that respondents have an absolute right to a continuance for hearings pursuant to G.L. c. 123 §§ 7, 8 and 8B.

1. The plain meaning of G.L. c. 123 is that there is an absolute right to a continuance in civil commitment proceedings under G.L. c. 123 §§ 7, 8 and 8B.

As the Supreme Judicial Court has often reiterated, if “the language of a statute is plain and unambiguous, it is conclusive as to legislative intent.” Sliney v. Previte, 473 Mass. 283 (2015), quoting Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008).

In fact, in Hashimi v. Kalil, 388 Mass. 607 (1983), the Supreme Judicial Court applied this principle of statutory interpretation to G.L. c. 123’s hearing timelines, holding that it was a violation of the law to hold a civil commitment hearing beyond the statutorily prescribed timeline. Id. at 609. Further,

in its analysis, the Court specifically observed that the respondent had not requested a delay and had objected at the hearing to the failure to hold the hearing within the statutory timeline. Id. at 608. As such, the Court's inquiry was not focused on the right to delay, but rather on adherence to the timeline when there was no request to delay.

Just as in Hashimi, the statutory interpretation principle of plain meaning must be applied when analyzing the statutory provisions relevant here. See id. at 609. The plain meaning of the G.L. c. 123, §§ 7 and 8B is that a person subject to civil commitment cannot be denied a requested continuance. General Laws c. 123, § 7 (c) provides that "the hearing shall be commenced within 5 days of the filing of the petition, unless a delay is requested by the person or his counsel" (emphasis added). See also G.L. c. 123, § 8B (c). The second clause of the quoted provision begins with "unless" and qualifies the hearing timeline mandate. Under the "plain meaning" of the provision, a request for delay renders the five day rule inoperable. The trial court's denial of a continuance in the instant matter because a delay

would extend the hearing date beyond five days of the petition's filing clearly violated the statute's plain meaning, which was to create an exception to this requirement.

Further, the court's acknowledgement in Hashimi that the respondent there had not requested a delay provides further supports that the timelines are not mandatory and that the Supreme Judicial Court viewed the statute as including an exception to timelines at a respondent's request. See Hashimi, 388 Mass. at 608.

2. Even if G.L. c. 123 was ambiguous, other sections of the civil commitment statute support the conclusion that § 7 and §8B are intended to give a person subject to civil commitment time to prepare a defense.

Under Supreme Judicial Court precedent, separate sections of statutes must be interpreted "as a whole, to produce internal consistency." Malloch v. Hanover, 472 Mass. 783, 791 (2015), citing Roberts v. Enterprise Rent-A-Car Co. of Boston, 438 Mass. 187, 194 (2002). Other provisions of G.L. c. 123 that pertain to the timing of hearings support the interpretation of G.L. c. 123, §§ 7 (c) and 8B (c)

advanced here -- that giving persons subject to civil commitment a fair opportunity to prepare an adequate defense is a paramount concern of the legislature.

First, G.L. c. 123, § 5 establishes the respondent's "right to present independent testimony." Without the absolute right to a continuance from G.L. c. 123, §§ 7 (c) and 8B (c), the respondent could not exercise the right to present independent testimony provided in G.L. c. 123, § 5. Thus, to achieve internal consistency within this chapter, G.L. c. 123, §§ 7 (c) and 8B (c) must be read to allow continuance as a right, so that these provisions are consistent with the right to present independent testimony in G.L. c. 123, § 5.

Second, the language about the delay in both G.L. c. 123, §§ 7 (c) and 8B (c) is equivalently unambiguous and is supported by a third provision from the statute. Both G.L. c. 123, §§ 7 (c) and 8B (c) are designed to ensure that a person is able to properly defend against civil commitment.

Additionally, there is a third expression of the right to delay in another provision of G.L. c. 123, § 5, which provides for a minimum of two days for newly

appointed counsel to prepare for hearing "unless counsel requests a delay" (emphasis added). The fact that the Legislature, in three separate provisions, offered opportunities for delay in order to allow counsel adequate time to prepare for hearing and to obtain independent medical testimony is inconsistent with what the Court below did in this case, as well as the notion that any interest in prompt treatment trumps the right to prepare a defense.

3. General Laws c. 123, §§ 7 and 8B must be narrowly construed to protect the respondent's right to prepare a defense to commitment.

When a court must interpret a law that involves loss of an individual's liberty, the statute should be narrowly construed against the Commonwealth and in favor of the citizen's liberty interest.

Commonwealth v. Gillis, 448 Mass. 354, 357 (2007).

Narrow construction of such statutes "helps ensure that individuals are not deprived of liberty without a clear statement of legislative intent to do so." Id. The Supreme Judicial Court applied this rule in analogous cases involving confinement, narrowly construing statutes to protect liberty interests. In

fact, Hashimi specifically addressed G.L. c 123, § 7 (c), holding that the court must keep in mind that “this statute provides a mechanism for a restraint on an individual’s personal liberty,” which compelled the court’s conclusion that timelines must be adhered to in a situation where the respondent did not request a delay. Hashimi, 388 Mass. at 390. See also, e.g., Commonwealth v. Gillis, 448 Mass. 354, 357-58 (2007) (narrowly construing the definition of “prisoner” in G.L. c. 123A); Commonwealth v. McLeod, 437 Mass. 286, 294 (2002) (refusing to expand scope of G.L. c. 123A to subject more individuals to sexually dangerous person civil commitment where the language did not “plainly and unambiguously” support the broader interpretation).

A narrow construction of G.L. c. 123, §§ 7 and 8B that ensures the preservation of liberty will not permit a judge discretion to mandate a hearing when there has been inadequate time to obtain an independent psychiatric evaluation and the respondent requested the delay. General Laws c. 123, § 7 (c) states that a hearing “shall” be held within five days “unless a delay is requested by the person or his counsel.” The mandatory “shall” is clearly modified

by the word "unless," and a request for more time vitiates the need for a hearing within five days.

Reading the statute in this way is protective of liberty. It keeps the person subject to the commitment petition from being detained beyond five days without judicial review, and yet provides the respondent the flexibility to delay beyond five days when more time is needed to prepare a defense, which protects against the potential for a wrongful detention.

Further, there is no "clear statement of legislative intent" in G.L. c. 123, §§ 7 or 8B to restrict a respondent's liberty interest.³ See Gillis, 448 Mass. at 357. Therefore, under the narrow construction rule, G.L. c. 123, §§ 7 and 8B must be read to require a judge to permit a continuance upon request, for this reading of the statute is more protective of the individual's liberty interest.

³In fact, as set forth in Section II. C. infra, legislative intent was quite the opposite.

- B. A hospital's interests in providing treatment should not be a factor when a continuance is requested, for courts have already found that a respondents' interests outweigh a hospital's interests in treatment and have created exceptions to informed consent to reflect these competing interests.

In Rogers v. Comm'r of Dep't of Mental Health, the Supreme Judicial Court established two exceptions to the general rule that a person may not be treated with antipsychotic medication without either consent or a court order. 390 Mass. 489, 511-512 (1983). In this decision, the Supreme Judicial Court specifically rejected the very argument advanced by the Appellate Division here -- that delay in treatment occasioned by procedural fairness impairs a hospital's ability to treat patients. Id. at 507. See Appellate Division of the District Ct. Op. 4. The court in Rogers found any such governmental interest "not controlling" in light of "a patient's right of self-determination," which will generally trump "institutional considerations." Rogers, 390 Mass. at 507, citing Comm'r of Correction v. Myers, 379 Mass. 255, 266 (1979).

The Rogers opinion identified two situations in which a hospital could administer antipsychotic

medications against the patients' wishes without prior court authorization. A hospital may force antipsychotic drugs on a patient "if a patient poses an imminent threat of harm to himself or others" and there is "no less intrusive alternative." Id. at 510. Additionally, the Court held that "[a] patient may be treated against his will to prevent the immediate, substantial, and irreversible deterioration of a serious mental illness, . . . in cases in which 'even the smallest of avoidable delays would be intolerable.'" Id. at 511-512, citing Roe, 383 Mass. at 441 (internal quotation marks deleted).

The Rogers opinion weighed the hospital's interests in treatment against the individual's interests in autonomy and deprivation of liberty. See id. at 510-512. The Court struck the balance between these interests by establishing the two exceptions to the informed consent doctrine. Id. As such, a hospital cannot point to its interest in treatment as a basis for not allowing a continuance for the Supreme Judicial Court has already rejected this rationale and found that the patients' interests are greater. See id. at 507. Therefore, under established precedent, the generalized concern about delay expressed by the

Appellate Division decision below cannot defeat the petitioner's interest in avoiding an erroneous deprivation of liberty or justify denying the requested continuance. See Appellate Division of the District Ct. Op. 4. In this case, the Appellate Division erred when it relied on the hospital's interest as a rationale for denying a continuance.

Further, while there is no assertion that either of the two exceptions to informed consent apply in this case, the Rogers decision made these two exceptions available to hospital's precisely to address the hospital's interest in treatment. See Rogers, 390 Mass. at 510-512. Given that the hospital's interest has already been addressed and these exceptions made available to facilities in true emergency scenarios, this further undermines any claims by a hospital that a continuance impairs the ability to treat, particularly given that the respondent will remain involuntarily detained while awaiting the hearing.

- C. The legislative history of civil commitment reforms in 2000 supports the statutory interpretation that the continuance provision creates an absolute right.

In 2000, the Massachusetts Legislature substantially shortened the time for which an individual could be involuntarily held in a psychiatric facility prior to judicial review. There is a rich legislative history of this reform, including numerous statements from legislators, other government officials, and experts, revealing that the motivation was to protect detainees' due process rights. This history demonstrates clearly that it was concern about individual rights abuses and not any need to facilitate prompt treatment that motivated the change in G.L. c. 123, § 7, which requires commitment hearings within five days "unless" the person subject to confinement or counsel requests delay. In enacting this provision, the Legislature was attempting to protect these persons' rights, not force them into a speedy hearing unprepared.

Before the 2000 statutory changes, a person could be held under an emergency psychiatric admission for

twenty-four days before receiving a judicial hearing.⁴ The then-applicable law, enacted in 1986, allowed a facility to hold an involuntarily confined person for up to ten days before filing a petition for commitment or releasing the individual. G.L. c. 123, § 12 (d), inserted by St. 1986, c. 599, § 38. Once the petition was filed, the individual could be held another fourteen days prior to hearing, unless a delay was requested by the person or her or her counsel. G.L. c. 123, § 7 (c), inserted by St. 1986, c. 599, § 38.

These statutory time frames gained sudden attention due to a May 1997 Boston Globe Spotlight Series focused on the financial incentives of private psychiatric hospitals to hold patients and the plight of individuals held involuntarily. O'Neill & Kong, Locked Wards Open Door to Booming Business, The Boston

⁴ In 1832, when Massachusetts enacted its first law authorizing civil commitment of the mentally ill, the law required a judicial order for an emergency admission. St. 1832, c. 163, § 3. Subsequent versions of Massachusetts civil commitment law relaxed protections, allowing for increasingly long periods of involuntary treatment before judicial review. By 1970, civil commitment law allowed for retention for up to ten days prior to the filing of a commitment petition. G.L. c. 123, § 12 (c), inserted by St. 1970, c. 888, § 4. A provision of the 1970 law in § 12(b) requiring facilities to notify district courts of emergency admissions and provide evidence of the need for hospitalization was deleted in 1971. St. 1971, c. 760, § 9.

Globe, May 11, 1997, at A1; Zuckoff, Flawed Law Turns Patients into Prisoners: 'Section 12' admissions fuel a booming hospital business, The Boston Globe, May 12, 1997, at A1 [hereinafter Zuckoff, Flawed Law].

Detailing the experiences of former psychiatric patients, the Globe exposed for the general public both the painful loss of liberty experienced by persons involuntarily committed and the unfairness of the procedures in place, including the lack of judicial oversight.⁵ The Globe reported that Massachusetts' § 12 ten-day duration was "two to three times as long as most other states allow their residents to be held against their will before a court reviews the case" and that the law then permitted a further period of fourteen days, totaling twenty-four, before a court would consider the necessity for the

⁵ The Globe report indicated that there was little recourse even when an "emergency" lock-up was transparently improper. One woman was confined to a hospital for one week without due process after her husband, apparently offended by her resistance to performing household duties, contacted police and reported she was acting "eccentrically." Zuckoff, Flawed Law, supra. She, as well as others whisked into hospitals and held for long periods without any attorney assistance, judicial process, or later recourse, suffered long-lasting trauma due to their experiences.

confinement. Id. The series triggered a strong response from officials across state government.

Legislators immediately called upon their peers to redress the lack of due process. On the very day the second article of the series was published a number of legislators publicly "expressed support ... for shortening Massachusetts' longest in-the-nation period of emergency involuntary commitment of psychiatric patients." Aucoin & Zuckoff, Reform of Emergency Committals Urged: Lawmakers push for patients' rights after series exposes abuses of law, The Boston Globe, May 13, 1997, at B1 ("Aucoin & Zuckoff, Reform"). Legislators explicitly identified that the reason for shortening the time frames was to provide procedures that better protected individual rights:

"Where are people's rights?" asked Senator Therese Murray . . . cochairwoman of the Legislature's Human Services Committee. "They're being trampled. Anyone who is involuntarily committed should have an immediate review." . . . Added Senator Cheryl A. Jacques . . . chairwoman of the Senate Post Audit Committee . . . : "That seems like an excessive amount of time to restrain someone against their will without an impartial review"

Id. Similarly, Rep. James H. Fagan, Chair of the House Post Audit Committee, remarked that the series

awakened "concerns over the ability we have to interrupt somebody's freedom without sufficient and speedy independent review." Id.

The following week, Senate President Thomas F. Birmingham and House Speaker Thomas M. Finneran joined the chorus of legislators calling for reform. "The Globe story revealed abuses in the area of basic civil rights and civil liberties that most of us in the Legislature were frankly unaware of," Birmingham said." Zuckoff, Top Legislators Back Psychiatric Reform: Finneran, Birmingham cite involuntary commitments, The Boston Globe, May 21, 1997, at A1. The legislators' concern was the lack of prompt judicial scrutiny: "Birmingham and Finneran also said they want legislators to examine potential benefits of shortening the length of time someone can be held as mentally ill without court review." Id.

Prominent members of the executive branch expressed similar concerns about procedural unfairness. Then Commissioner of the Department of Mental Health, Marylou Sudders, urged the Legislature to launch a study with "particular attention paid to the length of emergency, involuntary commitments before court review." Aucoin & Zuckoff, Reform.

In the midst of the furor, the judiciary was also moved to action. On May 20, 1997, the Chief Justice of the District Court Department, Samuel E. Zoll, appointed an Ad Hoc Committee to examine the issue. Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12, at 1 (Oct. 21, 1997). Chaired by District Court Judge Maurice H. Richardson and composed of judges, clinicians, administrators, and attorneys representing hospitals and patient interests, the Committee was charged with considering reforms that would address the abuses exposed by the Globe. Id.⁶

After eight meetings in summer and fall of 1997, the Ad Hoc Committee presented its recommendations to the Legislature's Subcommittee on Involuntary Commitment and Mental Health Services on October 21, 1997. The Ad Hoc Committee Chair and minority members

⁶ The Committee produced two final reports. The Majority Report was signed by all but the counsel for patient interests. Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12 (Oct. 21, 1997). The Minority Report was signed by those three counsel: staff of the Committee for Public Counsel Services, the Mental Health Legal Advisors Committee, and the Center for Public Representation. These Committee members recommended more substantial patient protections, including adjustments to practice to allow for shorter time frames before judicial hearing. Minority Report of the Ad Hoc Committee to Review G. 123, § 12, at 3 (Oct. 21, 1997).

all urged the Legislature to condense time frames to protect patient due process rights. See Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12, at 4 (Oct. 21, 1997); S. Goldman, Minority Position (Oct. 21, 1997); Testimony of J. Honig (Oct. 21, 1997); Testimony of S. Schwartz (Oct. 21, 1997); Testimony of R. D. Fleischner (Oct. 21, 1997).⁷

Based on the Ad Hoc Committee's recommendations, on August 16, 2000, the Legislature enacted the sought-after reform, shortening the period during which a person could be held under § 12 without a petition from ten to four days and the period within which a commitment hearing must be held once a petition was filed from fourteen to four days. G. L. c. 123, §§ 7, 12, as amended through St. 2000, c. 249, §§ 1-9.⁸ Further tinkering by the General Court in

⁷ The Committee Chair presaged the ultimate result. Consistent with the Majority Report, he urged shortening the ten-day period prior to petition to three business days and the fourteen day period between petition and hearing to five business days. Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12, at 4 (Oct. 21, 1997).

⁸ Representative Michael Cahill, who led the legislative subcommittee tasked with this issue, filed the first version of legislation to effect this reform in February 1998. 1998 House Bill No. 5402. The version ultimately enacted was 1999 House Bill 4216, as amended by House Floor Amendment to 1999 House Bill No. 4216, House Journal 2352 (Aug. 3, 2000).

2004 resulted in the current time frames: three days to file a petition and five for the subsequent hearing.⁹ G.L. c. 123, § 12, as amended through St. 2004, c. 410, § 2; G.L. c. 123, § 7(c), as amended through St. 2004, c. 410, § 1.

While the Appellate Division suggests that the 2000 civil commitment reform was responsive to a "perceived necessity to render speedy treatment and medication for those in need of it," Appellate Division of the District Ct. Op. 4, this explanation for the reforms is completely at odds with the legislative history. Instead, the record reflects that hastening "treatment and medication" was not at all a concern of the Ad Hoc Committee. In fact, neither of the Committee's reports makes mention of this issue. See Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12 (Oct. 21, 1997); Minority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12 (Oct. 21, 1997).

Even the representatives of hospitals that served on the Committee did not argue that speedy judicial proceedings were necessary to allow for prompt

⁹ These time frames were consistent with the 1997 Ad Hoc Committee's original suggestions.

treatment. Id. Rather, these hospital representatives sought to ensure that, as time frames were condensed to protect liberty interests, adequate time was provided to conduct clinical evaluations of the need for further hospitalization. The Ad Hoc Committee report includes substantial discussion of how to determine and provide for the "minimum amount of time that hospital clinicians require to evaluate a patient's need for continued hospitalization." Majority Report of the Ad Hoc Committee to Review G.L. c. 123, § 12, at 4 (Oct. 21, 1997).

Thus, the Committee did consider the interests raised by facility representatives, but the facility representatives' pressing concern at the time was preserving clinical ability to conduct the evaluations necessary for the judicial proceeding. Id. at 4-5. Facility representatives did not press for faster access to treatment. And, as detailed above, the evidence is abundant that the Legislature was motivated by the many voices, including from within its own chambers, urging greater protections of individual liberty. There is literally no media or legislative document that gives support to the

Appellate Division's interpretation of the history underlying the 2000 reforms.

The history should not be stood on its head. While there is perhaps inevitable tension in the balance between speediness and procedures that can take some time in order to be fair, the Legislature struck this balance in G.L. c. 123 § 7: requiring prompt proceedings, but allowing delay upon the request of the person that will potentially be committed. Putting it mildly, it will be an unfortunate irony if the terms of the current § 7, which arose in the wake of a storm of concern around rights violations, were used to deny N.L. the chance to develop expert testimony in defense of civil commitment and forced medication.

IV. EVEN IF THERE IS NOT AN ABSOLUTE RIGHT TO A CONTINUANCE, FAILURE TO GRANT ONE IN THIS MATTER WAS AN ABUSE OF DISCRETION BECAUSE OF THE IMPORTANCE OF THE INDEPENDENT TESTIMONY, THE FACT THAT N.L. PLAYED NO ROLE IN THE CIRCUMSTANCES NECESSITATING THE CONTINUANCE, AND THE GRAVITY OF THE CONSEQUENCES AT STAKE.

Even if this Court were to find that the trial court had discretion to deny the continuance requested by N.L., this discretion was abused in the circumstances presented here. Forcing N.L. to proceed with the hearings without independent medical

testimony infringed on N.L.'s ability to defend his liberty, privacy, and autonomy.

A court abuses its discretion when there is “‘a clear error of judgment in weighing’ the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives.” L.L. v. Commonwealth, 470 Mass. 169, 185 (2014), quoting Picciotto v. Continental Casualty Co., 512 F.3d 9, 15 (1st Cir. 2008).¹⁰ “There is no ‘mechanical test’ for determining whether the denial of a continuance constitutes an abuse of discretion.” Commonwealth v. Pena, 462 Mass. 183, 190 (2012). Instead, the reviewing court must “examine the unique circumstances of each case, particularly the reasons underlying the request.” Id.

Denying a continuance can constitute reversible error. In a case close to point, the Supreme Judicial Court, applying the stricter pre-2014 abuse of discretion standard, held that a trial court judge abused discretion when the judge denied the

¹⁰ The Supreme Judicial Court adopted this new standard of review for abuse of discretion in 2014. L.L., 470 Mass. at 185. It replaces the less stringent “no conscientious judge” standard, which the Supreme Judicial Court described as “so deferential that, if actually applied, an abuse of discretion would be as rare as flying pigs.” Id.

Commonwealth a continuance in a criminal case. Commonwealth v. Dotson, 402 Mass. 185 (1988). The request was tendered midway through trial to allow counsel to prepare a psychiatrist to rebut a defense expert's testimony regarding defendant's mental competency and criminal responsibility, where the defendant had raised the competency issue for the first time at trial. Id. at 188-189. Rather than granting the continuance to the Commonwealth to prepare its own medical expert on the issue, the trial court limited the scope of testimony of the defendant's psychiatrist. Id.

On appeal, the Supreme Judicial Court found that the trial court judge's action was an abuse of discretion, observing that "a continuance would have provided the Commonwealth with sufficient time to secure rebuttal evidence, while allowing the defendant to introduce expert testimony." Id. at 189. See also, e.g., Commonwealth v. Nester, 32 Mass. App. Ct. 983, 986 (1992) (abuse of discretion where defendant was denied a one-day continuance to obtain an expert to counter unexpected evidence that surprised counsel "through no fault of his own"); Commonwealth v. Pyne, 35 Mass. App. Ct. 36, 39-40 (1993) (denying defense

counsel's request for a brief continuance or for leave to conduct voir dire examination to determine truth of information a witness disclosed for the first time during trial was an abuse of discretion). Contrast Commonwealth v. Bettencourt, 361 Mass. 515, 518 (1972) (denial of continuance not an abuse of discretion where requesting a party had a month to raise the underlying concern but failed to do so until day of trial).

In something akin to a harmless error analysis, when evaluating the appropriateness of trial court continuance denials that involved expert testimony, the Supreme Judicial Court has considered the relevance of the testimony. In Commonwealth v. Bryer, 398 Mass. 9 (1986), the court found no abuse of discretion for denial of a continuance where "[e]xpert testimony would not have measurably contributed to [the jurors] ability to resolve" the issue before the court. Id. at 15. The court also observed that the defendant had failed to demonstrate a need for "any significantly new evidence." Id., quoting

Commonwealth v. Gilcrest, 364 Mass. 272, 274 (1973).¹¹

Application of the criteria set forth in these cases generates the conclusion that the trial court abused its discretion. N.L. was forced to request the continuance through "no fault of his own." See Nester, 32 Mass. App. Ct. at 986. Here, the hospital failed to make records necessary to the independent evaluation available until the day before trial.¹² Resp't Br. 6-7. Just as in Dotson, factors outside of respondents' control prevented N.L. and his counsel from preparing for hearing and from presenting independent medical testimony.

¹¹ In a footnote in In re G.P., 473 Mass. 112 (2015) the Supreme Judicial Court observed that in a G.L. c. 123, § 35 pre-detainment hearing "to ensure that a respondent's right to present independent expert testimony is not chimerical, if a respondent seeks a continuance in order to present such evidence, a judge should give careful consideration to the request in light of the circumstances presented." Id. at 122 n. 15. If a continuance could not be granted because of the "emergency nature" of the § 35 hearing, the judge could invite a later motion for reconsideration supported by expert testimony. Id. However, this reasoning would not be relevant in § 7 or § 8B hearings because they are non-emergency and the individual will remain detained during the continuance.

¹² N.L. bore no responsibility for the fact that a three-day continuance was required by the schedule of the trial court, which only sits at the hospital on Tuesdays and Thursdays. Resp't Br. 17. The request was made on a Thursday. Id.

CONCLUSION

For the reasons explained above, this Court should reverse the trial court's denial of the Respondent's request for a continuance.

Respectfully submitted,
Amici Curiae, by their
attorneys,

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**Certification of Compliance with
Rules of Court Pursuant to Rule 16 (k)**

I, Robert D. Fleischner, certify that the brief of the amici curiae complies with the rules of the Court that pertain to the filing of briefs including but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings), 16(f) (reproduction of statutes, rules, regulations, 16(h) (length of brief), and 20 (form of brief and other papers).

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