IN THE SUPREME COURT OF FLORIDA

CHRISTINE SWIDA,

Petitioner,

vs. CASE NO. 79,070

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Christine Swida was the Respondent in the trial court below and the Appellant in the district court of appeal. She will be referred to as the Petitioner or by her name. The State of Florida was the Appellee below and will be referred to as the Respondent or as the State. The State will designate references to the record by the symbol "R" followed by the appropriate page number.

On January 2, 1992, this Court issued its opinion in two similar cases involving the identical question of great public importance as was certified by the First District Court of Appeal in the instant case, see Godwin v. State, Case No. 75,881, 17 FLW S24 (January 2, 1992), motion for reh. pending, and Sallas v. State, Case No. 77,074, 17 FLW S27 (January 2, 1992). The motion for rehearing in Godwin was filed by the Petitioner, Shirley Godwin, and this Court's holding regarding the effect of Section 402,33(8), F.S., has not been challenged by either party.

The unchallenged portion of the decision in Godwin is controlling in this case and establishes that Petitioner's appeal is not moot. Respondent concedes that the decision in Godwin requires that this case be remanded to the lower court for review of the legality of Swida's involuntary commitment. Therefore, there is no reason for this Court to consider the arguments set forth in Petitioner's initial brief. Likewise, there is no reason

for responding to Petitioner's initial brief due to the Godwin decision and Respondent's concession that Petitioner's appeal is not moot. However, in an abundance of caution, Respondent includes the following answer to the arguments raised in Petitioner's initial brief.

STATEMENT OF THE CASE AND FACTS

Pursuant to Rule 9.210(c), FL.R.A.P., Appellee adopts the Appellant's statement of case and facts except for certain noted points of disagreement set out below. Additionally, Appellee supplements Appellant's Statement of the Case and Facts with facts that were omitted by the Appellant.

Appellee adopts the first paragraph of Appellant's Statement of Case and Facts. As to the second paragraph, Appellee adopts the statements contained therein with the following exceptions. Regarding the Appellant's alleged diplomatic status and royal lineage, Dr. Solloway testified that he had been informed by his staff that Appellant possessed a document granting her some sort of diplomatic status (T:11) and further testified that Appellant's claims fit in with Appellant's mental illness because paranoid delusions almost always have some reference to fact (T:12). Regarding Appellant's unwillingness to eat, Solloway testified that while they have not had to force-feed Appellant, if Appellant is left to her own devices she does not bother to eat and that this apathy is part of her illness (T-16).

As to paragraph 3, Appellees adopts the statements contained therein with the following exceptions. Dr. Solloway's expert opinion that placement at an ACLF was not appropriate for

Appellant was based on a number of factors. Appellant has refused voluntary placement (T:8) and has steadfastly insisted that she is going to go home and take care of her elderly mother (Id.). Dr. Solloway and his staff have tried in the past to convince Appellant that placement at an ACLF or similar facility would be better for her than returning home but Appellant's resolve to go to such a place lasts only 12 to 24 hours before she charges her mind and states that she is going home (T:43). While Dr. Solloway did not know the exact details of the Appellant's departure from Renaissance, he knew that Renaissance was an open facility in which you can just walk out and that Appellant returned home because she did not like it there (Id.). Dr. Solloway also had a problem with the fact that an ACLF is not restrictive enough for Appellant because it would allow her to come and go (T: 44). Dr. Solloway was also concerned that even at an ACLF with a registered nurse on staff that Appellant would be non-compliant with medication (Id.) On previous discharges from MHRC, the MHRC staff, including the nurses, have explained to Appellant the necessity for taking her medication and have gotten agreements from Appellant that she would take the medication and do anything they said and then after the release, Appellant stopped taking her medication (T: 44-45). Dr. Solloway's final basis for finding that an ACLF would not be a reasonable alternative was Appellant's improved condition due to

the continuity of care that she had received during the month she was at MHRC indicating that further treatment might "bear more fruit" (T: 45). Dr. Solloway stated that the "revolving door" of short term admissions to MHRC is not doing Appellant any good and that since the first time Dr. Solloway had seen Appellant, she has deteriorated physically and that this deterioration is continuing to progress. (Id.)

As to Paragraph 4, Appellee adopts the statements contained therein with the following exceptions. Dr.Legum merely stated that the ACLF in St. Augustine had a 24 hour registered nurse and that there was round the clock supervision for the people that are there, he did not testify that the staff would ensure that Appellant would eat and would take her medication (T: 39).

As to Paragraphs 7-9, Appellee adopts the statements contained therein with the following exceptions. Appellant omitted the fact that Dr. Legum testified that if Appellant stopped taking her medication she might have some problems with eating and her thinking would become disorganized (T:34), and that Appellant has no understanding that she is mentally ill (T: 35). Dr. Legum's testimony regarding the effect of placement at NEFSH on Appellant was qualified by his statement "if she were to be there for any significant amount of time" (T:33).

Appellee adopts the remainder of Appellant's Statement of the Case and Facts.

On December 9, 1991, the First District dismissed Swida's appeal on the basis that Swida had been released from her involuntary commitment and certified the following question to the Supreme Court as one of great public importance:

> When an individual seeking review of an order of involuntary commitment has been released from that commitment prior to disposition of the appeal on the merits, what showing must she make to avoid dismissal of the appeal on the grounds of mootness?

This Court accepted jurisdiction on December 18, 1991.

SUMMARY OF THE ARGUMENT

This Court's most recent pronouncement regarding what collateral legal consequences flow out of an involuntary commitment is articulated in Godwin v. State,Case No. 75,881, 17 FLW S24, (January 2, 1992), motion for reh. pending. Godwin holds that Section 402.33(8), F.S., pertaining to the imposition of a lien by HRS against a commited inividual's property, absent a waiver by HRS of its right to impose such a lien, constitutes a collateral legal consequence which prevents an involuntary commitment appeal from being dismissed as moot. This Court's holding in Godwin is controlling in this case because HRS has not waived its right to impose a lien against Swida and therefore her appeal is not moot.

Based on Godwin, the decision below should be quashed and the case remanded to the First District Court of Appeal for further proceedings consistant with Godwin. This has already been done in the case of Sallas v. State, Case No. 77,074, 17 FLW S27 (January 2, 1992).

Petitioner's arguments in support of complete abrogation of the mootness doctrine regarding public policy and collateral social consequences are hypothetical and abstract in nature and have no application to the factual circumstances currently before this Court. Petitioner's arguments regarding the impact of this

Court's mootness doctrine on his liberty interests are also without merit.

The Florida judiciary's present application of the mootness doctrine to commitment appeals, including this Court's decision in Godwin, allows a case by case analysis that permits a balance to be reached between the interests of involuntary commitees, the judiciary, and the State and should thus be preserved.

ISSUE I

WHETHER RELEASE FROM INVOLUNTARY COMMITMENT DURING THE PENDENCY OF PETITIONER'S APPEAL RENDERED HER CASE MOOT.

This case is before this Court as a result of the First District Court of Appeal's certification of the following question as one of great public importance:

> When an individual seeking review of an Order of Involuntary Commitment has been Released from that commitment prior to disposition of the appeal on the merits, what showing must she make to avoid dismissal of the appeal on the grounds of mootness?

Swida v. State, Appeal No. 91-1300 (1st DCA 1991)

The State contends in this case as it contended in its answer brief in Godwin, supra, and Sallas, supra, that the current mootness doctrine in Florida, as it relates to involuntarily committed individuals, is appropriate and achieves the proper balance between the liberty interests impacted by involuntary commitment, the Judiciary's interest in limiting its review to actual controversies, rather than abstract or hypothetical legal questions, and the public's interest in efficiently utilizing the State's limited resources.

Petitioner's current position on the First District Court of Appeal's certified question as evidenced by Petitioner's Brief on the Merits is that she should not be required to make any showing to avoid application of the mootness doctrine because the

mootness doctrine should not apply to involuntary commitment appeals under any circumstances. Petitioner contends that the mootness doctrine previously adopted by this Court should be abrogated because (1) not allowing Petitioner to appeal his commitment impacts on his liberty interests and thus, public policy requires that he be allowed to pursue his appeal, (2) involuntary commitments create severe adverse social consequences, (3) involuntary commitment creates stigma which justifies an exception to mootness doctrine and (4) the issues presented in a commitment appeal are capable of repetition but evade review.

MOOTNESS

Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" Montgomery v. Dept. of Health and Rehabilitative Services, 468 So.2d 1014, 1016 (Fla. 1st DCA 1985). See also, U.S. Parole Commission v. Geraghty, 445 U.S. 388, 100 S.Ct. 1202 (1980). When an intervening event makes it impossible for the court to grant a party any effectual relief, the case becomes moot. Montgomery, supra at 1016. Cotrell v. Amerkan, 35 So.2d 383, 384 (Fla. 1948).

The rule underlying the mootness doctrine is derived from Article III of the United States Constitution, which requires the

existence of a case or controversy as a prerequisite for the exercise of judicial power. Liner v. Jafco, 375 U.S. 301, 306, 84 S.Ct. 391 (1964).

There are two main exceptions to the mootness doctrine that have been adopted by Florida courts. The first exception is triggered when the court determines that a case involves an issue that is of such importance that it should be decided irrespective of the lack of current controversy between the parties. The second exception is triggered when the court determines that a case involves issues which are capable of repetition but evading review.

A. The Current Mootness Doctrine in Florida As It Relates to Involuntary Commitment Appeals

Currently in this state, an appeal of an involuntary commitment will not be declared moot even though the appellant has been discharged if the appellant establishes any of the following: 1) that some collateral legal consequence arises from the commitment, Godwin, supra, Westlake v. State, 440 So.2d 74 (5th DCA 1983); 2) that a recommitment has been based on the appealed commitment, Everett v. State, 524 So.2d 1091 (1st DCA 1988); or 3) that an issue (other than the sufficiency of the evidence) is implicated which triggers the question of public importance or capable of repetition exception to the mootness doctrine, State v. Kinner, 398 So.2d 1360 (Fla. 1981).

The following cases have shaped the contours of the mootness doctrine in this state regarding involuntary commitment appeals: Godwin, supra, State v. Kinner, supra; Westlake v. State, supra; Madden v. State, 463 So.2d (Fla. 2d DCA 1984); Everett v. State, supra.

In Kinner, supra, this Court determined that an involuntary committee's release moots the issue of whether the evidence presented at the commitment hearing supported the committee's confinement. Kinner at 1363. The Court stated in Kinner that it would not "determine a controversy where issues have become moot, unless the questions presented are of general public interest and importance, or unless such judgment as this Court might enter would affect the rights of parties." Id. at 1362.

Kinner involved two issues: 1) the constitutionality of Section 393.063(22), Florida Statutes (1977), and 2) the sufficiency of the evidence presented to support the commitment. Id. This Court held that a subsequent amendment to the challenged statute did not moot the first issue because a significant number of persons were presently institutionalized pursuant to the application of the predecessor statute. Id. However, this Court also held that:

> Mr. Kinner's release renders the second issue, whether the evidence supported his confinement, moot. We, therefore, need not make a decision as to the findings of fact of the trial court.

Id. at 1363.

Petitioner, in her discussion of Kinner, completely ignores this aspect of the Court's holding. Contrary to the Petitioner's assertion that Kinner is supportive of her position that the mootness doctrine should never be applied to involuntary commitment appeals, Kinner instead establishes that the application of the mootness doctrine to the issue of the sufficiency of the evidence is proper even though the mootness doctrine clearly does not apply to constitutional challenges to the relevant commitment statute and arguably would not apply to any other issues affecting the liberty interests of committed individuals. Petitioner requests this Court to adopt the mootness and due process doctrines enunciated in Kinner. Respondent is in complete agreement with Petitioner on this point although it strongly disagrees with Petitioner's analysis of the Court's holding in Kinner.

This Court in Godwin, supra, specifically distinguishes Kinner, stating that the parties in that case did not raise collateral legal consequences and so that issue was not addressed by the Court. However, this Court's decision in Godwin, supra, does not undermine the holding in Kinner, but rather clarifies that if an individual suffers some collateral legal consequence from the involuntary commitment, their appeal will not be mooted by their release from custody.

Westlake v. State, supra, was the next case impacting on the mootness doctrine as applied to involuntary commitment appeals. In Westlake, the Fifth District Court of Appeal held that, given Westlake's release during the pendency of the appeal, the challenge of his involuntary commitment was governed by this Court's ruling in Kinner, supra. Id., 440 So.2d at 75. The court in Westlake noted that "counsel for the Appellant urged this Court that the case should not be considered moot because of the stigma attached to an involuntary commitment for treatment of mental illness". Id. The court specifically addressed the issue of stigma by stating:

> Although such stigma was judicially recognized by at least one federal court as the basis for determining the proper quantum of proof to be applied to civil commitment proceedings, that same court relied on the possibility of collateral legal, not social, consequences as a basis for rejecting the mootness argument presented there. In re Ballay, 482 F.2d 648 (D.C. Cir. 1973). No such collateral legal consequences (e.g., restriction of voting rights, jury service, driver's licenses or gun licenses) have been suggested to us in the instant case. We observe, moreover, that the most salutory relief available to a person wrongfully committed would be release pursuant to a timely petition for writ of habeas corpus, not an impractical appeal which cannot avert short-term confinement. In any event, we are governed by the precedent of the Florida Supreme Court (Kinner) rather than that of the federal courts in determining an issue such as mootness of an appeal. (emphasis supplied).

Id.

In Madden, supra, the Second District Court of Appeal offered further guidance regarding the scope of the "collateral legal consequences" exception forwarded in Westlake, supra. The appellant in that case was able to establish that despite his release during the pendency of his commitment appeal, he suffered collateral legal consequences (revocation of his medical certificate and suspension of his pilot's certificate) as a result of his involuntary commitment. The Second District Court of Appeal held that such consequences arose to the level of a legal collateral consequence. Madden, at 270-271.

In Everett, supra, the First District Court of Appeal further limited the scope of the mootness doctrine in those instances involving administrative continuation of involuntary placement after the original six month commitment order had expired. The Court held that "[i]f a circuit judge's order of initial involuntary placement is erroneous, subsequent administrative orders of continued involuntary placement, predicated as they are on the initial order, do not render challenges to that order moot". Id. at 1092-1093.

As discussed above, Petioner's appeal is not moot due to the Court's holding in Godwin that Section 402.33(8), F.S., allows the imposition of unpaid fees and that this constitutes a collateral legal consequence. While the Godwin decision recognizes that adverse social consequences may follow an

involuntary commitment, this Court held that these consequences, while significant, do not rise to the level of collateral legal consequences. The "severe adverse social consequences" Petitioner discusses regarding the impact that an involuntary commitment has on an individual after release from custody are of a hypothetical nature and have no application under the facts currently before this Court.

Based on the holing in Godwin, supra, Petitioner's appeal should be remanded to the lower court. However, based on the case law cited above, Petitioner's arguments regarding abolition of the mootness doctrine in all involuntary commitment cases should be rejected. Similar to the facts in Kinner, Petitioner's appeal involved a challenge to the sufficiency of the evidence after the appellant had already been discharged. In contrast to Kinner however, Petitioner's appeal to the First District Court of Appeal did not involve any other issues which were of great public importance.

Similar to Westlake, Petitioner argues that the social stigma attached to involuntary commitment should bar the application of the mootness doctrine. Westlake properly held that social stigma did not rise to the level of a collateral legal consequence. As Petitioner has failed to allege any actual or potential specific injury that could be cured by a reversal of his commitment, the First District Court of Appeal properly dismissed his appeal as moot.

Clearly, Everrett does not apply in Petitioner's case, as she was released rather than recommitted. However, Everett does highlight the fact that a previous involuntary commitment can only be used as the basis for a future involuntary commitment if the commitments are continuous. Except in the case of continuous commitments, the State must prove all of the criteria set out in Section 394.467, F.S., and the State can not rely on a previous involuntary commitment as the basis for a future involuntary commitment. Thus, in this state, there is no collateral legal consequence associated with a past commitment in regards to future commitment as is the case in other foreign jurisdictions. See State v. Lodge, 608 S.W. 2d 910, 911 (Tex. 1980) (Texas statute allowing involuntary commitment for indefinite period if individual is treated for at least 60 days pursuant to an order of temporary hospitalization within 12 months immediately proceeding the petition for indefinite involuntary commitment).

Petitioner states in her initial brief that "[p]rior commitments to a state hospital often serve as the basis for another future commitment". Petitioner's Brief on the Merits, p. 16. This is simply not the case in Florida. If a person does not meet the specific criteria of the Baker Act statute at the time of the involuntary commitment proceeding, that person will not be committed, no matter how many times he has been committed in the past.

PUBLIC POLICY SUPPORTS THE APPLICATION OF THE MOOTNESS DOCTRINE ON A CASE BY CASE BASIS

Public policy supports the case by case approach to the mootness doctrine currently practiced by this court and the district courts of appeal regarding involuntary commitment appeals. This case by case approach ensures that those individuals who suffer from the type of consequences that can be remedied or redressed by a reversal of the commitment will be given the opportunity to pursue their appeal after they have been released from the hospital. At the same time, this approach supports the judiciary's interest in hearing only those cases involving actual controversies and the state's interest in avoiding further overburdening of an already overtaxed legal system.

Under the current approach, an individual who has been released prior to the pendency of his appeal has the opportunity to respond to the State's motion to dismiss by presenting evidence and arguments regarding collateral legal consequences they have or will suffer. Evidence regarding impact on employment or future employment or impact on any other legal right that the individual enjoys could be presented to establish that the individual's case falls within one of the exceptions to the mootness doctrine. Of course, as noted previously, if the individual's appeal involves other issues beyond the mere sufficiency of the evidence, those issues could be heard irrespective of the lack of a showing of collateral legal consequences.

Petitioner has asserted that public policy supports complete abrogation of the mootness doctrine in the area of involuntary commitment and thus every individual who has been involuntarily committed should be able to appeal. This assertion is based mainly on the argument that social stigma is an unavoidable consequence of an involuntary commitment. Admittedly, those individuals who suffer collateral legal consequences due to this stigma should be permitted to pursue their appeal irrespective of their release. Collateral legal consequences by their very nature, would be remedied by a reversal of the involuntary commitment. In contrast, unspecific social stigma, without attendant collateral legal consequences, can not be remedied by reversal of the involuntary commitment.

Further, the United States Supreme Court has noted that it is the symptomatology of a mental or emotional illness that is "truly stigmatizing" Parham v. J.R., 442 U.S. 584, 602, 99 S.Ct. 2493, 2503 (1979) (citing to social science research finding that the stigma of mental hospitalization is not a major problem for the ex-patient" Id. at n.12) The Supreme Court has further noted that "[o]ne who is suffering from a debilitating mental illness and in need of treatment [i.e. not hospitalized or receiving treatment] is neither wholly at liberty or free from stigma." Addington v. Texas, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811 (1979).

The majority of involuntary commitment appeals, including the Petitioner's, do not challenge the determination that the

appellant is suffering from a mental illness, but instead concede the existence of a mental illness and challenge one of the further findings required by Chapter 394, F.S. For example, Petitioner did not challenge the court's ruling that she was mentally ill, instead she challenged the court's ruling that placement at the state hospital was the least restrictive alternative. Petitioner's Initial Brief in Swida v. State, Appeal No. 90-1300 (1st DCA). However, it is the mental illness diagnosis itself and the resultant behavioral symptoms of mental illness that are the root of societal stigma, not hospitalization. Hospitalization, whether voluntary or involuntary, and a subsequent release, may mitigate societal stigma due to the fact that the individual is perceived as being "healed".

It may be that the potential stigma associated with an involuntary commitment supports an argument that the mootness doctrine should not be applied summarily to commitment appeals without giving the appellant the opportunity to present evidence of collateral legal consequences that may result from stigma. Clearly the district court could issue an order to show cause providing the appellant with the opportunity to provide argument as to why this appeal should be heard. However, the potentiality of stigma is not an adequate basis for abrogating the mootness doctrine altogether.

The state has an interest in efficiently utilizing its limited resources. Complete abrogation of the mootness doctrine

regarding involuntary commitment appeals will increase the number of appeals that the district courts must hear and will increase the workload of public defenders and assistant attorneys general. In light of the fact that the current mootness doctrine ensures that all individuals who are in a position to obtain meaningful relief from reversal of the involuntary commitment can do so, there is no compelling justification for increasing the burden on the state's legal system. Regarding the above reference to the limited resources of the state, Respondent points out that this case raises questions concerning the responsibility of legal counsel to determine whether an involuntary commitment should be appealed in the first place and whether it should be dismissed once the individual is released. The appellants in these types of cases have been declared mentally incompetent and thus they are not competent to make decisions regarding their legal rights. Application of the mootness doctrine in these cases, as it is currently applied by this Court and the district courts of appeal, provides a procedure for ensuring that only actual cases are heard by the courts without having to be concerned about whether an individual was competent to make the decision to drop his appeal once he has been released from confinement.

Petitioner suggests that the short nature of certain individuals' commitment stays contributes to the problem of their commitment evading review. However, this problem can be largely attributed to the nature of the regular appellate process and an effort to process involuntary commitment appeals through an

expedited process would alleviate this problem if an effort was made to expedite the appeal from the very beginning of the process.

Respondent asserts that the above cited argument and authority generally addresses all of the major points raised by the Petitioner. The following sections address the arguments raised by Petitioner in a more specific fashion.

B. Petitioner's Liberty Interest Is Not At Issue

While the State recognizes that significant liberty interests are involved in involuntary placements, the liberty interests implicated in the context of involuntary placements revolve around protection from unnecessary confinement, not the right to appeal. See, O'Conner v. Donaldson, 422 U.S. 563 (1975).

The Baker Act contains numerous procedures to ensure that individuals are not unnecessarily committed, thus protecting to the fullest extent possible, an individual's liberty interests. Pursuant to Florida's Baker Act Statute, the potential commitee has a right to notice, a hearing, appointed counsel, access to medical records and personnel, and an independent expert examination. Additionally, a potential commitee's liberty interest is further protected by the stringent criteria of commitment. A person cannot be involuntarily committed unless, among other criteria, there is a substantial

likelihood the potential committee will inflict serious bodily harm in the near future or that he is manifestly incapable of surviving alone or with the help of willing family or friends. Section 394.467(1)(a)2.a and 2.b., F.S. Providing even further protection is the heightened standard of proof required for involuntarily commitment. The court must find by clear and convincing evidence, not merely a preponderance of evidence, that the criteria for commitment exist. Section 394.467(1), F.S. Thus, there are numerous protections in place to ensure that Petitioner's liberty interest were not improperly infringed upon when Petitioner was involuntarily placed at NFSH for treatment on April 4, 1991. While recognizing that Petitioner has a significant liberty interest when confinement was threatened and during the months that Petitioner was actually confined, upon release from NFSH, Petitioner's liberty interests were no longer at stake. See, O'Connor, supra. Moreover, if Petitioner is ever to be committed in the future, the State must show that Petitioner meets the criteria to commit with "fresh" evidence. See, Section 394.467, F.S.

Therefore, Petitioner's argument that public policy requires that claims mooted by release should be adjudicated to avoid similar losses of liberty in the future, is without merit. The question of whether Petitioner met the criteria for commitment on April 4, 1991 has no bearing on whether she will be committed at some unspecified and unknown date in the future. See, Everett, supra.

Unlike Florida's involuntary commitment statute, the involuntary commitment statutes of some states provide that a prior commitment is relevant to subsequent commitments even when there has been an intervening release. Under statutory schemes where this sort of linkage is permissible, liberty interests remain at issue even after an individual has been released. For example, Texas' statutory scheme allows for temporary commitment of 90 days and an indefinite commitment. Only if a person has been committed pursuant to a Temporary Commitment Order sometime within the past twelve (12) months, may an order of Indefinite Commitment issue. Art. 5547-31, Texas Mental Health Code. Because a temporary commitment can serve as a predicate to a future commitment, release from the temporary commitment does not render an appeal moot under the commitment laws of Texas. See, State v. Lodge, 608 S.W.2d 910 (Tex. 1980).

Petitioner's reliance on State v. Lodge to guide this Court in answering the question before it, is therefore, misplaced. Texas' statutory scheme allows for a former commitment to serve as a predicate for a later commitment, while Florida's statutory scheme does not permit this sort of linkage.

Reliance on In Re Hatley, 231 S.E.2d 633 (N.C. 1977) is similarly misplaced. Therein, the court specifically notes that the decision to commit the appellant was based on prior commitments Id., at 635.

Petitioner also argues that without the opportunity to appeal her commitment after release, a person could be caught in

a revolving door of involuntary commitments. If some individual is indeed caught in this unfortunate circumstance, it is not because the opportunity to appeal a commitment after release exists only when a collateral legal consequence is alleged. Rather, it is because the individual has improved so that he is no longer a threat to himself or others or has improved so that he can survive, has been released, and then later deteriorates to the point that commitment is again necessary.

While Petitioner has argued that she should be allowed to pursue her appeal because of the liberty interests involved, no effort was made by Petitioner or Petitioner's counsel to petition the circuit court or the First District Court of Appeal for writ of habeas corpus in order to secure Petitioner's speedy release. Section 394.459(10)(a), Florida Statutes, specifically states:

> At any time, and without notice, a person detained by a facility, or a relative, friend, or guardian, representative, or an attorney on behalf of such person, may petition for a writ of habeas corpus to question the cause and legality of such detention and request that the circuit court issue a writ for release.

§394.459(10)(a), Florida Statutes.

In light of counsel for Petitioners present concern for Petitioner's liberty interest (now that Petitioner is released from custody) it is problematic to Respondent that no petition for writ of habeas corpus was filed while Petitioner's liberty interests were actually affected. The Fifth District Court of

Appeal has noted "that the most salutory relief available to a person wrongfully committed would be release pursuant to a timely petition for habeas corpus, not an impractical appeal which cannot avert short-term confinement." Everett, 440 So.2d at 75.

C. The Threat Of Potential Adverse Consequences

Current law establishes the right to appeal an involuntary commitment when a collateral legal consequence is alleged. Westlake, supra. There is, therefore, no summary disposal of an appeal of an involuntary commitment order. Petitioner argues that the potential of adverse social consequences warrants abrogation of the mootness doctrine. This violates the fundamental principle that courts must address cases or controversies rather than hypothetical situations. Courts must limit the exercise of their power to cases where an adjudication will affect the rights of the parties involved.

Petitioner cites State v. Van Tassel, 484 P.2d 1117 (Or. App. 1971) as a court of appeal's case that has rejected mootness on the basis of potential employment or bonding difficulties. Traditionally, the Oregon Supreme Court has taken a relaxed approach toward mootness. Id., at 1121. The Oregon Supreme Court has heard habeas corpus petitions even after release and has heard an appeal dealing solely with the question of the length of a criminal sentence where that sentence had already been completed. Id. at 1121-1122.

Other jurisdictions have not taken such a relaxed approach. The Wisconsin Supreme Court in In Re M.G.S., 348 N.W.

2d 181 (Wis. 1984), dismissed an appeal of an involuntary commitment order brought by a patient that had been released. The court stated that:

> This court has consistently adhered to the rule that a case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. Milwaukee Police Assn. v. City of Milwaukee, 92 Wis.2d 175, 183, 285 N.W.2d 133, 137 (1979). It is generally thought to be in the interest of judicial economy to avoid litigating issues that will no affect real parties to an existing controversy. State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis.2d 220, 228, 340 N.W.2d 460, 464 (1983).

Id. at 182.

The New York Court of Appeal is in accord with the above-cited authority. In Boggs v. NYC Health and Hospitals Corp., 70 N.Y.2d 972, 520 N.E.2d 515 (N.Y. 1988) the court dismissed an appeal presenting only issues regarding the sufficiency of the evidence of commitment as moot. The court stated that:

> [t]he "power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal "(Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400, N.E. 2d 876). Where, as here, a change in circumstances resolves the matter and no controversy remains, the appeal should be dismissed as moot.

Id. at 520 N.E. 2d 516.

Claims by released patients regarding concerns about future employment, reputation and standing in the community were specifically held to be insufficient to overcome mootness or were

termed speculative in State Ex Rel D.W. v. Hensley, 574 S.W.2d 389 (Mo. 1978) and in In re Ringland, 357 N.W.2d 132 (Minn. 1984).

A number of other foreign jurisdictions continue to support application of the mootness doctrine to commitment appeals, applying the same exceptions as Florida courts. Radulski v. Delaware State Hospital, 562 A.2d 562 (Del. 1988); In re Faucher, 558 A.2d 705 (Me. 1989); In re Robledo, 341 N.W.2d 278 (Minn. 1983); State Ex Rel D.W., supra ; Diamond v. Cross, 662 P.2d 828 (Wash. 1983); In re G.S., 348 N.W. 2d 181 (Wis. 1984); Boggs, supra.

The case of Radulski, supra, is noteworthy in that the Delaware Supreme Court encouraged attorneys to utilize expedited review of involuntary commitment cases as a way of avoiding application of the mootness doctrine. Id. at 566. Expedited review would be an option in Florida, especially in those instances where counsel for the committed individual believes that the commitment is clearly wrongful and that the committed individual will thus be quickly released by the hospital from custody. As evidenced by the record in this case, involuntary commitment proceedings are relatively short and uncomplicated. A notice of appeal could be submitted immediately and the trial judge could order expedited preparation of the transcript and

record. It would be the responsibility of the appellant to timely submit an initial brief and to motion the appellate court for expedited consideration of the appeal. Not only would this have the effect of avoiding a dismissal on the grounds of mootness, it would serve the committed individual's interest in being released as soon as possible. If the procedure suggested above had been utilized by the Petitioner it is likely that the 1st DCA would have had the opportunity to issue a decision before Petitioner was released from NFSH.

Respondent asserts that the cases cited above provide a proper balance between the private interest and the government's interest not only because an appeal based on potential future social consequences fails to present a case or controversy, but also because (1) the effectiveness of an appeal to remedy potential adverse social consequences is questionable and (2) there exists more direct and effective means to combat discrimination in the form of federal anti-discrimination laws.

Petitioner's characterization of the First District's opinions in Forness v. State, 533 So.2d 932 (Fla. 1st DCA 1988) and MacIntyre v. State, 505 So.2d 2 (Fla. 1st DCA 1986) as precedent or support for the proposition that possible effects on employment defeats mootness, is misplaced. The opinion in these cases consist of merely two sentences stating that there is not competent substantial evidence in the record to support the commitment and that the order of involuntary commitment is reversed. There is no indication from the opinion that mootness

was even an issue nor is there any indication what matters the court considered, let alone what matters the court found persuasive.

The Petitioner's arguments regarding the potential of unspecified adverse social consequences fails to present this Court with an actual case or controversy. Petitioner has failed to allege any actual adverse social consequences suffered by her as a result of her involuntary commitment, nor has she established that a reversal of her commitment would prevent her from suffering adverse social consequences.

D. **The Threat Of Stigma**

Stigma does not provide a sufficient basis upon which to overturn Kinner, supra, and the mootness doctrine enunciated therein. The Supreme Court has noted that it is the symptomatology of mental illness that is truly stigmatizing, (Parham v. J.R., 442 U.S. 584 (1979)), not the commitment itself.

As discussed previously, the majority of involuntary commitment appeals do not challenge the determination that the appellant is suffering from a mental illness and instead challenge one of the other findings required by Chapter 394, F.S. Moreover, it is the mental illness diagnosis itself and the resultant behavioral symptoms of mental illness that are the root of societal stigma, not hospitalization. Even if this Court were to find that commitment imposes some additional measure of stigma

upon the individual, the extent to which an order overturning an involuntary commitment alleviates or extinguishes this additional measure of stigma is questionable. Already, there are confidentiality provisions to protect an individual's records from release or disclosure. See, Section 394.459(9), F.S.

If this Court were to accept Petitioner's position that mootness should never be applied to involuntary commitment appeals, courts might well be deciding an appeal, when a released individual had been subsequently committed , solely on the basis that an individual might, sometime in their life, suffer social stigma from their commitment. The State contends that this would be a poor use of the state's limited administrative and fiscal resources.

While it is true that the First District in 1969 reversed an order of incompetence after the appellant had been released and his sanity restored, (In Re Sealy, 218 So.2d 765 (Fla. 1st DCA 1969)), this Court in 1987 held that release moots an appeal contesting the sufficiency of the evidence to commit. See, Kinner, supra. Petitioner has not provided any cogent reason for this Court to abandon its application of the mootness doctrine enunciated in Godwin, supra, and Kinner, supra, and to replace it with the one enunciated by the First District in 1969. The current criteria for commitment is more stringent than the criteria in place in 1969, so that the threat of unwarranted commitment as occurred in Sealey is minimal. See, Section 394.467, F.S.

E. The Capable of Repetition, Yet Evading Review Exception to the Mootness Doctrine Is Inapplicable to Petitioner's Appeal

Petitioner states that the greater weight of authority holds that release does not moot an involuntary commitment appeal "because the issues presented by such cases are capable of repetition, yet could evade appellate review." Petitioner's Brief on the Merits, p. 22. What Petitioner has failed to recognize is that a case may be moot for the purposes of a challenge to the sufficiency of the evidence, yet still present a live justiciable issue. In neither In Re W.J.C., 369 N.W.2d 162 (Wisc. App. 1985), nor In Re McLaughlin, 676 P.2d 444 (Wash. 1984), nor In Re Cordie, 372 N.W.2d 24 (Minn. App. 1985) nor In Re Z.O., 484 A.2d 1287 (N.J. Super. A.D. 1984) nor In Re Bunnell, 666 P.2d 1119 (N.W. App. 1983), nor in In Re Helvenston, 658 S.W.2d 99 (Tenn. App. 1983), nor in Hashimi v. Kalil, 446 N.E.2d 1387 (Mass. 1983), nor in Conservatorship of Manton, 703 P.2d 1147 (Cal. 1985) do the respective courts hold that the sufficiency of the evidence to commit is an issue capable of repetition yet evading review, warranting review of such evidence after release. In fact, in W.J.C., supra, and in McLaughlin, supra, the courts held that the validity of the commitment was moot because the committee had been released. The issue capable of repetition in W.J.C. was whether to allow telephone testimony at commitment hearings and in McLaughlin, the issues capable of repetition were the standard of proof at commitment hearings and whether a unanimous verdict is necessary to commit. In Cordie,

supra, the court specifically stated that the commitment orders themselves were not subject to review; the analysis was restricted to the issue of the performance of counsel. In Bunnel, supra, the court addressed the issue of whether to grant a continuance to counsel in involuntary commitment hearings, and in Helvenston, supra, the court addressed the issue of whether the privilege against self-incrimination applied to judicial hospital proceedings. In none of of the cases cited above did the courts review the sufficiency of the evidence to commit. In Hashimi, supra, the court did not review the sufficiency of the evidence to commit, but heard the appeal to interpret troubling statutory language. And in the Conservatorship of Manton, supra, the court did not review the sufficiency of the evidence, but ruled on the issue of the admissibility of the evidence in conservatorship hearings. These cases apply the mootness doctrine as did this Court in Kinner, supra. While the issues relating to the sufficiency of the evidence to commit were mooted by release, other unrelated issues prevented the dismissal of the case as moot.

The "capable of repetition, yet evading review" exception to mootness is limited to cases where (1) the action is in its duration too short to be fully litigated prior to its cessation, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." Sosna v. Iowa, 419 U.S. 393 (1976). In the absence of a class action, to overcome mootness with the capable of repetition

exception, there must be a reasonable expectation that the same party would be subjected to the same action again. Sosna, supra; Murphy v. Hunt, 455 U.S. 478 (1978). It is not enough to show a mere theoretical possibility, the exception requires a reasonable expectation or demonstrated probability that the party would be subjected to the same action again. Hunt, supra. Petitioner, then, needs to show that there is a reasonable expectation that she would be recommitted and released from commitment before her appeal could be heard on the basis that it is a case capable of repetition, but evading review.

CONCLUSION

In conclusion, the current case by case application of the mootness doctrine as evidenced by Godwin, supra, Kinner, supra, Westlake, supra, Madden, supra, and Everett, supra, appropriately balances the competing interests implicated in involuntary commitment appeals. While Petitioner's appeal is not moot due to the holding in Godwin, supra, that Section 402.33(8), F.S., creates a collateral legal consequence, Petitioner has failed to present any adequate justification for abrogating the mootness doctrine in all commitment cases. Respondent respectfully requests that this Court preserve the mootness doctrine articulated by this Court in Godwin, supra, remand this case to the lower court for reconsideration in light of the decision in Godwin, and reject Petitioner's arguments regarding abrogation of the mootness doctrine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **JAMES T. MILLER, ASSISTANT PUBLIC DEFENDER,** 407 Duval County Courthouse, Jacksonville, Florida 32202 this 7th day of February, 1992.

Kathleen E. Moore
KATHLEEN E. MOORE