No. 119392

IN THE SUPREME COURT OF ILLINOIS

In re LINDA B., A person subject to an order for involuntary commitment People of the State of Illinois, Appellee v. Linda B., Appellant	Appeal from the Appellate Court First Judicial District No. 1-13-2134 Original appeal from the Circuit Court of Cook County No. 2013 CoMH 1381 Honorable David Skryd, Presiding Judge

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The public-interest mootness exception applies here; further guidance is needed as the appellate opinion does not provide clarity.

Section 3-611's 24-hour filing deadline for an involuntary-admission petition intends to provide a "bright-line test." *In re Demir*, 322 Ill. App. 3d 989, 994 (4th Dist. 2001), *citing Sassali v. DeFauw*, 297 Ill. App. 3d 50, 53 (2nd Dist. 1998). Although a bright-line test may seem to provide clear guidance, case law and Linda B.'s circumstances show lack of clarity as to when and where section 3-611's timeframe begins. While previously the appellate court in *Moore* simply held any place other than "sections within a hospital devoted to treatment of mentally ill patients" exempt from the Mental Health Code's timeframes and protections, this view is evolving. *In re Moore*, 301 Ill.App.3d 759, 766 (4th Dist. 1998). A few years after *Moore*, the appellate court implicitly recognized an emergency room as a mental-health facility for purposes of section 3-606. *In re Demir*, 322 Ill. App. 3d 989, 992-993 (4th Dist. 2001). Section 3-606 then required peace officers to complete an involuntary-admission petition when they took a person into custody and "transport[ed] him to a *mental health facility*." *Id.* (italics added) The appellate court reversed an involuntary-admission order because a social worker completed the petition and not the police officer who transported the respondent to the emergency room. *Id.*

The appellate court thus treats an emergency room as a mental-health facility under section 3-606, when peace officers bring a person to the emergency room, but not under section 3-611, requiring a petition to be filed within 24 hours of

admission to a mental-health facility. *Compare Demir*, 322 Ill. App. 3d at 992-993, *with Moore*, 301 Ill.App.3d at 766.

The appellate court in *Joseph P.* further diluted Moore's holding when it enforced the Code's deadlines when a respondent was held in an emergency room. *In re Joseph P.*, 406 Ill. App. 3d 341, 343 (4th Dist. 2010), *reversed on other grounds by In re Rita P.*, 2014 IL 115798. There, the respondent was brought by police to the emergency department of a private hospital and 17 hours later was transferred to a state-operated mental-health facility. *Joseph P.*, 406 Ill. App. 3d at 349. On appeal, the respondent argued the petition did not comply with the Code's provisions because it did not identify the police officers who brought the respondent to the facility, was not filed within 24 hours of admission, and was not served on the respondent within 12 hours of admission. *Id.* at 344. Joseph P. also asserted he was not examined by a psychiatrist within 24 hours of admission. *Id.* The statutory provisions at issue necessitated determining when admission begins and whether the emergency department is a mental-health facility.

While recognizing *Moore's* holding that an emergency room is not a mental-health facility, the court noted it did not know whether the respondent was "admitted" to the emergency room but found the "procedural history of respondent's confinement begins with his admission to" the emergency room. *Id.* at 349, 350. The court reversed the commitment order due to the "bevy of procedural errors" raised by the respondent, though it noted that one of the errors alone might not have been enough for reversal. *Id.* at 347, 351. The court appears to have been trying to follow *Moore* but had it unfailingly done so, it would have had to

countenance what it viewed as procedural irregularities. Because it reversed an order for failure of the petition to comply with deadlines dependent on the emergency room being a mental-health facility – while also repeating *Moore*'s holding that an emergency room is *not* a mental-health facility – its opinion lacks clear guidance.

The appellate court also recognized that section 1-114 defining "mental health facility" applies beyond the walls of hospital psychiatric units to other places that provide mental-health treatment. The court explicitly held that a nursing home's behavioral-health unit qualifies as a mental-health facility, and that the definition of "mental health facility" does not require the facility to have mental-health treatment as its "primary purpose." *In re Muellner v. Blessing Hospital*, 335 Ill. App 3d 1079, 1084 (4th Dist. 2002). Thus, arguably the *Muellner* court's rejection of a "primary purpose" requirement is at odds with *Moore*, which found only psychiatric units "devoted to" to treating people with mental illness qualify as mental-health facilities. *Moore*, 301 Ill.App.3d at 766.

Finally, the Illinois Department of Public Health, the licensing body under the Hospital Licensing Act, 210 ILCS 85/1 et seq. (West 2017), recently determined the Mental Health Code applies to emergency departments, thus directly contravening the 20-year old *Moore* case. See Linda B.'s opening brief at 24, A-20. Bound by the view of their licensing and regulatory body the Department of Public Health, hospitals must treat their emergency departments as mental-health facilities and apply the Mental Health Code there. But assistant state's attorneys, who are responsible for ensuring petitions and orders are properly prepared (405 ILCS 5/3-

101 (West 2017)), do not have to consider emergency departments as mental-health facilities under *Moore*, nor possibly under *Joseph P.* (as long as there is not a bevy of procedural errors). *Moore*, 301 Ill.App.3d at 766; *Joseph P.*, 406 Ill. App. 3d at 347-350. These opposing constructions of the Mental Health Code show the law is not clear, if not in disarray, and do not shed light on how to address a situation like Linda B.'s.

While Linda B.'s case is not about an emergency room, the case law and public policy described above represent the current state of guidance available to the parties to decipher whether and when a medical floor is a mental-health facility subject to the Mental Health Code. And the appellate court's opinion here does not clarify when a hospital must file an involuntary-admission petition for a recipient like Linda B., brought to a hospital for mental-health reasons, found to have medical issues that cannot be treated on a mental-health unit, and thus treated on a medical unit where mental-health services can also be provided.

The State argues the appellate court's opinion provides clarity, and no guidance is needed. State's brief at 9. But the appellate court's opinion does not enlighten hospitals or pubic officials as to when 3-611's bright-line test is triggered.

In response to Linda B.'s argument that a petition would have provided authority for holding her on a medical floor and treating her mental illness, the appellate court simply concludes that Linda B. was not admitted under Article VI of the Mental Health Code. *Id.* But the court does not say under what authority Linda B. was admitted, nor why day 17 of her hospitalization (with no transfer to the

psychiatric unit, see Argument II herein) then became an Article VI admission that triggered section 3-611's bright-line test.

Thus, review by this Court is needed to provide guidance and is warranted under the public-interest exception.

II. The State bases its argument on a misperception that Linda B. was transferred during her hospitalization to the psychiatric unit at Mount Sinai Hospital, but there was no such trigger for the hospital to file the involuntary-commitment petition.

The State cannot use a transfer that never occurred as the trigger for the 24-hour filing deadline by which Mount Sinai Hospital staff should have petitioned for Linda B.'s involuntary commitment. 405 ILCS 5/3-611 (West 2017).

Linda B. was not transferred from one unit to another; instead, she was held on a medical floor during her entire hospitalization at Mount Sinai Hospital – April 22 through the June 11 commitment hearing – specifically in Room N311, Bed 1. (R.19,30; C.29-34) Dr. Mirkin explained that there would have been "no point" in transferring Linda B. to the Six-East inpatient psychiatric unit[1] when she finally got medical clearance the Saturday before the hearing (June 8). (R.30). A transfer at that time would have been pointless because Ms. B. could still get one-to-one supervision and psychotropic medication on the medical floor. (R.20,30; See A-21 of Linda B.'s opening brief) And with the decision on June 8 to request that Ms. B. be committed

[1] The parties involved understood that Six-East was the designated inpatient psychiatric unit at Mount Sinai Hospital.

directly to a nursing home, Dr. Mirkin explained that her patient did "not need to be transferred to [the] inpatient psych unit." (R.30)

The State's brief refers to a "decision to move respondent from a medical floor to the psychiatric wing of the hospital," but the testimony on the page in the record it cites does not specify that such a decision was made. State's brief at 5. Instead, the decision was made *not* to move Ms. B. to the psychiatric unit. (R.30)

The State makes additional references, without citation to the record, that Linda B. was admitted or transferred to the psychiatric unit after being initially housed on a general medical unit. State's brief at 8, 15, 29, 31. The State suggests, without citation to the record, that when Ms. B.'s "physical health" stabilized and she was purportedly moved to the psychiatric floor, the petition in this matter was properly filed within 24 hours. State's brief at 31. Notably, the record indicates that Linda B.'s "physical health" was stabilized – that is, "cleared medically" – on June 8, thirty days after the commitment petition was filed here, when Mount Sinai staff considered and rejected transferring her at that late date to their inpatient psychiatric unit. (R.30; C.3)

The State does not and cannot provide a date or time for when Linda B. was transferred from Room N311, Bed 1, to the Six-East inpatient psychiatric unit at Mount Sinai Hospital, as both Dr. Mirkin's testimony and the hospital's records show that there was no transfer. (R.30; C.29-34) The State's argument that the petition here was timely filed per 3-611's filing deadline is thus based on a misperception that the hospital changed Ms. B.'s location. State's brief at 29,31. No transfer occurred here to trigger the 24-hour filing deadline. 405 ILCS 5/3-611 (West 2017).

III. The State bases its argument that a petition was not required upon Linda B.'s April 22 admission and that the medical floor was not a "mental-health facility" under the circumstances here on the misperception that Linda B. was voluntarily on the medical floor.

The State agrees that Mount Sinai Hospital can be considered "both a 'licensed private hospital' and a 'mental health facility' within the meaning of the Code" – just not in Linda B.'s circumstances. State's brief at 26-27. The State argues that Ms. B. was not in a mental-health facility based on an incorrect assumption that M. B. was voluntarily there "for weeks" for "underlying health concerns." State's brief at 27. But Linda B. was not on the medical floor at Mount Sinai voluntarily. (R.12,15,35,44; C.4) The State does not point to anywhere in the record to support its proposition that Ms. B. was voluntarily at Mt. Sinai. Instead, Linda B. was brought to Mount Sinai for mental-health reasons on April 22, as she was "agitated and ... angry," "intolerable[,] and threatening." (R.9-10,16) Her non-psychiatric medical conditions only became apparent after examination and blood testing. (R.10,14-15) She was prevented from leaving by sitters. (R.14,15,30,31; C.33-34) She did not consent to treatment of any kind. (R.12,15,35,44; C.4) The doctor's testimony that "[f]or medical conditions, there's no need for consent" shows treatment was likely forced on Linda B. (R.35)

The State points out that involuntary detention at a mental-health facility may not necessarily become an admission. (State's brief at 19) The Code, however, does not tolerate detention that lasts for weeks. Instead, involuntary detention of a person with symptoms of mental illness is limited to no more than 24 hours pending an examination. 405 ILCS 5/3-604 (West 2017). Linda B.'s detention beyond 24

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hours was not voluntary, and occurred in a hospital meeting the definition of mental-health facility. See Linda B.'s opening brief at 29-32, 34.

Although the record shows Linda B. was not at Mount Sinai voluntarily and did not receive voluntary care there, the State nonetheless argues that Ms. B. "did not introduce any evidence that she received involuntary psychiatric care before being admitted to the psychiatric unit"[2] and "there is nothing in the record to support the notion that respondent refused to consent to any treatment; respondent did not testify to that fact (or to anything else)." State's brief at 5, 22. The State argues that Ms. B. should bear the burden of any absence of evidence in the trial court, claiming "the absence of evidence in the record would be construed against the appellant." State's brief at 21, citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-392 (1984). The State's arguments not only misinterpret the evidence presented at the trial in this matter, as noted above, but also confuse the burden of proof in involuntary mental-health proceedings with the appellant's burden in providing a complete record on appeal.

The burden of proof in a civil involuntary mental-health proceeding is the State's, by clear and convincing evidence. *See generally, Addington v. Texas*, 441 U.S. 418 (1979); *In re Stephenson*, 67 Ill.2d 544 (1977). The mental-health respondent facing an involuntary mental-health petition has no obligation to present any evidence in the proceeding, as she has the right to remain silent and the right not to

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[2] Linda B. remained on the medical floor for the duration of her hospitalization at Mount Sinai. (R.30). See Argument II herein.

attend her hearing with no negative inference resulting therefrom. 405 ILCS 5/3-208 (West 2017); 405 ILCS 5/3-806(b) and (c) (West 2017).

The State confuses "absence of evidence in the record" with an appellant having failed to file a complete record on appeal, as happened in the *Foutch* case cited by the State. State's brief at 21; *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In *Foutch*, a pivotal hearing occurred but no court reporter was present; on appeal, the appellant filed neither a report of proceedings nor a bystander's report for that hearing. *Id.* at 392. Unlike in *Foutch*, Ms. B. has filed a complete record on appeal here. (R.1-60; C.1-57)

Based on the complete record filed here, and contrary to the State's argument, Mount Sinai staff's failure to file an involuntary-commitment petition until May 9 does not raise the implication that Ms. B. "consented to care and was compliant with treatment before that date." State's brief at 21. Having refused treatment since April 22 (R.12,15,35,44; C.4), Mount Sinai staff finally petitioned for involuntary mental-health treatment pursuant to its policy: "we never ever start petitions while [the] patient is on [a] medical floor *unless* we think that she needed *more* psych (sic), more structured environment." (R.44, italics added)

Linda B. entered Mount Sinai for mental-health reasons and was treated as a recipient of mental-health services starting April 22, where, as Dr. Mirkin testified, she was being treated psychiatrically on the medical floor. (R.9) Ms. B. was not on the medical floor voluntarily on April 22 or at any other time. (R.14,15,30,31; C.33-34) She did not consent to medical treatment or mental-health treatment there. (R.12,15,35,44; C.4) The State's argument that the medical floor was not a mental-

health facility is thus flawed in that it depends on Linda B. having been willingly in the hospital and willingly receiving both medical and psychiatric treatment before the May 9 commitment petition was filed.

IV. The State, like the appellate court, conflates sections 3-601 and 3-611 by misplaced reliance on *In re Andrew B.* with its different facts.

Section 3-611 requires the facility director to file with the court an involuntary-admission petition within 24 hours after the respondent's admission. 405 ILCS 5/3-611 (West 2017). It does not anywhere provide for filing the petition within 24 hours after the petition is presented to the facility director. *Id.* But that is the crux of the appellate court's opinion: "We thus conclude that the May 9, 2013, petition seeking respondent's emergency inpatient admission by certificate was timely as it was filed within 24 hours after it was presented to Connie Shay-Hadley, the mental health facility director[3] at Mount Sinai Hospital." *Linda B.*, 2015 IL App (1st) 132134, ¶23; see also State's brief at 15-20.

The language about the petition being presented to the facility director is contained in section 3-601, providing two methods by which a petition may be proffered to a facility director, who is charged with filing the petition under section 3-611: "...any person 18 years of age or older may present a petition to the facility director of a mental health facility...," or "[t]he petition may be prepared by the facility director of the facility." 405 ILCS 5/3-601(a) (West 2017). The appellate court's opinion conflates sections 3-611 and 3-601, and rewrites the Code to permit

[3] Connie Shay-Hadley identifies herself on the petition only as "Director," not as "mental health facility director." (C.6,7); Linda B.'s opening brief at A-18, A-19.

filing within 24 hours of when the facility director completes or is presented with the petition. The State supports this revision of the Code, and urges this Court to adopt it as well. State's brief at 15-20.

The appellate court likely conflated sections 3-601 and 3-611 of the Code by its reliance on this Court's *Andrew B.* decision. *Linda B.*, 2015 IL App (1st) 132134, ¶23, *citing In Re Andrew B.*, 237 Ill. 2d 340, 349 (2010). In that case, the respondent argued in part that his article VI petition was untimely and should have been filed when he initially arrived at the facility. *Andrew B.*, 237 Ill. 2d at 343, 345. This Court noted that the respondent was "not admitted pursuant to article VI when he first entered the facility." *Id.* at 349-350. Similarly, the appellate court here concluded that Linda B. was "not admitted in a legal sense pursuant to article VI when she first entered the medical floor of Mount Sinai Hospital on April 22, 2013." *Linda B.*, 2015 IL App (1st) 132134, ¶23.

But in *Andrew B.*, we know the respondent was first admitted to the facility as a *voluntary* recipient under article IV. *Andrew B.*, 237 Ill. 2d at 343; 405 ILCS 5/3-400 (West 2017). He later exercised his right as a voluntary recipient to request discharge (405 ILCS 5/3-403 (West 2017)), and the facility filed two successive untimely petitions that the trial court dismissed. *Id.* The respondent was not physically released, and the facility finally filed a third petition the day after the trial court dismissed the second petition and ordered the respondent to be discharged. *Id.* The respondent argued that because he was never physically released, the third petition was filed late under section 3-611 and should have been filed within 24 hours of his initial admission. *Id.* at 345. This Court rejected that reasoning in part

because the respondent's initial admission was voluntary pursuant to article IV. *Id.* at 343, 349-350. Thus this Court's observation that the respondent was not admitted under article VI when he first entered the facility has a legal basis in fact. *Id.* at 343. Here, however, there is no indication in the record under what authority Linda B. was admitted to Mount Sinai on April 22, and the appellate court does not identify any authority either. *Linda B.*, 2015 IL App (1st) 132134, ¶23.

Further, in *Andrew B.*, this Court held that the respondent's petition under article VI "was timely because it was filed within 24 hours after it was presented to the facility director." *Andrew B.*, 237 Ill. 2d at 351. Similarly, the appellate court here concluded, "[Linda B.'s] May 9, 2013 petition... was timely as it was filed within 24 hours after it was presented to ... the facility director..." *Linda B.*, 2015 IL App (1st) 132134, ¶23, *citing Andrew B.*, 237 Ill. 2d at 351. But in *Andrew B.*, the petition was filed the day after the trial court dismissed an untimely petition and ordered respondent discharged. *Andrew B.*, 237 Ill. 2d at 343. This Court did not reference or construe section 3-601, and only incidentally mentioned section 3-601's language about presenting a petition to a facility director. *Id.* at 350-351. Presentation of the petition is not integral or necessary to the holding in *Andrew B.* because the third petition was timely filed within 24 hours of respondent's legal – though not physical – discharge. *Id.* Exactly when the petition was presented to the facility director is not relevant and not identified in *Andrew B.*

For Linda B., there was no such legal discharge by the trial court, nor a physical discharge by the hospital, that would start a new admission. Nor was there any legal trigger to justify the facility director's filing of the petition on the arbitrary

day of May 9. Thus the appellate court's reliance on this Court's *Andrew B.* opinion is misplaced and, worse, grafts section 3-601's language about the facility director being in possession of the petition onto the bright-line test of 3-611's 24-hour filing deadline. Thus, the State is wrong to urge this Court to adopt the appellate court's opinion here.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Linda B.'s opening brief, Linda B. respectfully requests that this Court reverse the appellate court's and the trial court's decisions in this matter. Because Ms. B.'s involuntary-commitment period concluded in 2013, a remand is not necessary. *See In re Barbara H.*, 183 Ill. 2d 482, 498 (1998) (finding that because the proceedings had concluded, a remand was not in order and any further involuntary mental-health order would require the initiation of new proceedings).

Respectfully submitted,
LEGAL ADVOCACY SERVICE

By: /s/Laurel Spahn, One of Linda B.'s Attorneys

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, Rule 341 certificate of compliance, and the certificate of service is **13** pages.

By: /s/Laurel Spahn, One of Linda B.'s Attorneys

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Notice Of Filing Appellant's Reply Brief

To: Clerk of the Supreme Court of Illinois
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Please take notice that on April 27, 2017, I electronically filed Linda B.'s Appellant's Reply Brief with the Clerk of the Supreme Court of Illinois.

LEGAL ADVOCACY SERVICE

By: /s/Laurel Spahn

Proof of Service

I, Laurel Spahn, an attorney, certify that I served Ms. Wichern, Mr. Connors, and Ms. Jansen this Notice and a copy of the reply brief on April 27, 2017, by 9:30 p.m., by transmitting the documents via email at the above email addresses of record.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct

/s/Laurel Spahn

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