No. 127681

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. RICHARD KASTMAN, Defendant-Appellee. ROB JEFFREYS, Director of the Illinois Department of Corrections, in his official capacity, Intervenor-Appellant.	)	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois No. 93CM4621 The Honorable THEODORE S. POTKONJAK, Judge Presiding.

REPLY BRIEF OF INTERVENOR-APPELLANT

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ARGUMENT

I. This appeal is not moot and, even if it was, this Court should reach the merits under the public interest exception to mootness or, alternatively, vacate the appellate court's opinion and the circuit court's order.

On March 3, 2021, the circuit court ordered the Director of the Illinois Department of Corrections ("Director") to pay Richard Kastman more than $2,400 per month to cover his rent, cell phone, electricity, gas, water, groceries, medical copays, cable television, and sex offender treatment while he was on conditional release from his commitment under the Sexually Dangerous Persons Act ("Act"), 725 ILCS 205/0.01 *et seq.* (2020). SR95.[*] In his opening brief in this Court, the Director noted that, after he filed his petition for leave to appeal, Kastman was charged with new criminal offenses and the Attorney General, on behalf of the People, filed a petition to revoke Kastman's conditional release based on those charges. AT Br. at 14-17. After the Director filed his opening brief, Kastman and the People entered into a plea agreement whereby Kastman agreed to a sentence of 36 months' incarceration, "to be served at 50%." SUP2 SR7. In exchange, the People agreed to withdraw the petition to revoke Kastman's conditional release and not revoke his conditional release "based on any conduct, charged or

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[*] This reply brief cites the supporting record filed in the appellate court as "SR__," the supplemental supporting record filed in the appellate court as "SUP SR__," the second supplemental supporting record filed in this Court as "SUP2 SR__," the Director's opening brief in this Court as "AT Br. __," the appendix to the Director's opening brief as "A__," and Kastman's response brief in this Court as "AE Br. ___."

uncharged, alleged in the police reports related to" the new criminal charges. *Id.* The circuit court then entered an agreed order staying the Director's duty to pay Kastman's living expenses under the March 3, 2021 order until Kastman completes his incarceration. SUP2 SR14. That stay will be lifted without further order of the court once Kastman notifies the Director's counsel of his release. *Id.*

As Kastman recognizes in his response brief, *see* AE Br. at 5, his incarceration and the temporary stay of the March 3, 2021 order do not render this appeal moot. The Attorney General withdrew the People's petition to revoke Kastman's conditional release and, once Kastman is released from prison, the stay of the circuit court's order will be lifted and the Director's obligation to pay Kastman's living expenses will resume. SUP2 SR 7, SUP2 SR14. By reaching the merits, therefore, this Court can afford either Kastman or the Director effectual relief — it will decide whether Kastman will receive payments from the Director when his incarceration ends. *See Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill. 2d 367, 387 (1992) (appeal is not moot when "a decision could have a direct impact on the rights and duties of the parties") (internal quotation marks omitted).

And for the reasons stated in the Director's opening brief, which Kastman does not dispute, *see* AE Br. at 5, even if this Court concludes that Kastman's current incarceration has rendered this appeal moot, it should either consider the merits under the public-interest exception to mootness or,

alternatively, vacate the appellate court's judgment and the circuit court's order. AT Br. at 17-21.

II. The Act does not require the Director to pay Kastman's living expenses while he is on conditional release.

In ordering the Director to pay Kastman's living expenses, the circuit court relied on the Director's duty to provide "care and treatment" to those "committed to him." 725 ILCS 205/8 (2020). SR95. The appellate court affirmed that order, holding that the Director's duty to "keep safely" persons committed to his custody, *see* 725 ILCS 205/8 (2020), extended to Kastman because, despite his conditional release, he had not yet "recovered," A6.

As explained in the Director's opening brief, neither of those duties extends to individuals, like Kastman, who are on conditional release. The Act's plain language makes clear that Director's duties to provide care and treatment and keep safely extend only to those committed to his custody, but Kastman's commitment ended when he was conditionally released. Kastman's response brief misconstrues the Act's text, attempts to graft the language of other statutes onto the Act, and relies on inapposite precedent. This Court should reject Kastman's arguments, apply the Act's unambiguous language, reverse the appellate court's judgment, and vacate the circuit court's March 3, 2021 order.

A. The Director is not responsible for keeping safely or providing care and treatment for sexually dangerous persons on conditional release because they are not committed to his custody.

As explained in the Director's opening brief, AT Br. at 22-24, the Director's duty to keep safely extends only to those "so committed" to his custody and his duty to provide care and treatment is limited to "person[s] committed to him." 725 ILCS 205/8 (2020). And a person on conditional release is not committed to the Director's custody because the Act states that conditional release is the "release of any person committed to" the Director's custody, *id.* § 10, that individuals on conditional release are considered to be "at large," *id.* § 9(e), and that such persons should be "recommit[ted]" if they violate their conditional release terms, *id.* §§ 9(e), 10. Under that plain language, Kastman's commitment to the Director's custody, and the Director's corresponding duties to keep him safely and provide him care and treatment, ended when Kastman was placed on conditional release. *See* AT Br. at 22-24.

Disregarding that clear language, Kastman asserts that the phrase "so committed" does not "function as a limit on the Director's obligations" but rather "functions as an announcement of [a sexually dangerous person's] civil commitment." AE Br. at 21-22. But section 8 states that the Director "shall keep safely the person so committed." 725 ILCS 205/8 (2020). Plainly, the phrase "so committed" specifies which persons the Director must keep safely, *i.e.*, persons who are "committed," which, as explained, does not include individuals on conditional release.

Kastman also contends that his conditional release did not "terminate [his] civil commitment" because the circuit court's order "imposed continued restrictions and conditions on his liberty." AE Br. at 13. But this argument does not address the Act's text, which makes clear that those on conditional release are no longer committed to the Director's custody, regardless of the conditions placed on their release by the circuit court. *See* AT Br. at 22-24; 725 ILCS 205/8, 9(e), 10 (2020). It also ignores the circuit court's conditional release order in this case, which stated that "Kastman shall be released from civil commitment." SR3.

Next, Kastman argues that, even though the Act states that a sexually dangerous person on conditional release should be "recommit[ted]" for violating the terms of his conditional release, that word should not be read as "an indication that the legislature intended the court to 'recommit' the person" because doing so would require the People to initiate new proceedings under the Act and reprove that Kastman is sexually dangerous beyond a reasonable doubt. AE Br. at 24-27. Otherwise, Kastman says, a revocation of his conditional release would violate his due process rights. *Id.*

But Kastman confuses his status as a sexually dangerous person with his commitment status. When the People initially seek to commit a person under the Act, they must prove that the person is sexually dangerous beyond a reasonable doubt. 725 ILCS 205/3.01 (2020); *People v. Pembrock*, 62 Ill. 2d 317, 321 (1976). If that burden is met, the person remains a sexually

dangerous person until the court finds that he is "no longer dangerous," even if the court orders his conditional release because he "appears no longer to be dangerous." 725 ILCS 205/9(e) (2020); *see also People v. Cooper*, 132 Ill. 2d 347, 355 (1989) (person on conditional release "retains the legal status of a sexually dangerous person" until he "proves to the court that he is no longer sexually dangerous"). For that reason, the People are "not required to prove that a respondent is [sexually dangerous] for a second time" when they seek to revoke his conditional release; they need only prove a violation of the conditional release conditions by a preponderance of the evidence. *People v. Kish*, 395 Ill. App. 3d 546, 556 (3d Dist. 2009); *see also* 725 ILCS 205/9(e), 10 (2020); 730 ILCS 5/5-6-4(c) (2020).

The Act, however, does not say that anyone who has been determined to be sexually dangerous, and has not proven that he is no longer sexually dangerous, remains committed to the Director's custody at all times, much less that the Director must provide care and treatment and keep safely all sexually dangerous persons regardless of their commitment status. Instead, it limits those duties to those "committed" to the Director's custody, 725 ILCS 205/8 (2020), which, as explained, does not include a person on conditional release, *id.* §§ 9(e), 10. If the General Assembly intended the Director to provide care and treatment to, or keep safely, all sexually dangerous persons through their conditional release term, it would have specified that he should perform those duties until a sexually dangerous person is "found to be no longer dangerous"

or "fully recovered" — phrases that the legislature used elsewhere in the Act. 725 ILCS 205/9(e) (2020). By declining to use such language in section 8, the General Assembly demonstrated its intent that the Director's duties should last only until a sexually dangerous person's commitment ends. *People v. Clark*, 2019 IL 122891, ¶ 23 ("When the legislature includes particular language in one section of a statute but omits it in another section of the same statute, courts presume that the legislature acted intentionally and purposely in the inclusion or exclusion, and that the legislature intended different meanings and results.") (citations and internal quotation marks omitted).

Kastman also contends that the word "committed" should be interpreted to include conditional release because other sections of the Act refer to "hearings for commitment and detention" of sexually dangerous persons, 725 ILCS 205/2 (2020), define the State's burden of proof when it seeks "to commit a defendant to confinement," *id.* § 3.01, and define the phrase "criminal propensities to the commission of sex offenses" as a substantial probability that the person "subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined," *id.* § 4.05. AE Br. at 20-21. If anything, those provisions equate commitment with detention or confinement, further supporting the Director's argument that commitment does not include conditional release, which permits a sexually dangerous person to go "at large," 725 ILCS 205/9(e), 10 (2020),

connoting freedom from restraint rather than detention or confinement. *See* AT Br. at 23.

Finding no support in the Act's text, Kastman turns to the Sexually Violent Persons Act ("SVP Act"), 725 ILCS 207/1 *et seq.* (2020), noting that, under that statute, a person on conditional release is considered committed to the custody of the Department of Human Services ("DHS"). AE Br. at 22-23. But as Kastman recognizes, *see id.* at 22, this Court should look to the SVP Act only if the Act is ambiguous. *See*, *e.g.*, *People v. Burns*, 209 Ill. 2d 551, 569-71 (2004) (rejecting argument that provisions of SVP Act should be read into the Act because the Act was unambiguous). And there is no ambiguity here, as the Act makes clear that a sexually dangerous person on conditional release is no longer committed to the Director's custody.

Nor are the Director's duties under the Act comparable to DHS's duties under the SVP Act. As explained, *see supra* pp. 3-4, the Act specifies that the Director must keep safely and provide care and treatment only those "committed" to his custody. 725 ILCS 205/8 (2020). Under the SVP Act, however, DHS must provide "care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (2020). If the legislature intended the Director's duty to provide care and treatment under the Act to extend through a term of conditional release, it could have used similar language.

Finally, Kastman argues that the Director forfeited his argument that his duty to provide "care and treatment" ended with Kastman's conditional release because the Director allegedly "did not dispute that he had a duty to provide care and treatment" in the circuit court. AE Br. at 28. Kastman is mistaken. In his response to Kastman's motion to compel him to pay living expenses in the circuit court, the Director noted that section 8 requires him "to 'provide care and treatment for the person *committed* to him,'" and explained that Kastman "is no longer held in confinement." SR43 (quoting 725 ILCS 205/8 (2020)) (emphasis in original). Thus, the Director argued, he had "no continuing duty to provide for housing and treatment expenses." *Id.* The Director reiterated that point at oral argument before the circuit court, *see* SUP SR8, and in his briefs in the appellate court. The Director has consistently argued that any duty to provide Kastman care and treatment ended with his conditional release, so there is no basis on which to find forfeiture.

B. The fact that the Director has a duty to keep safely the persons in his custody until they have "recovered" does not extend that duty to individuals on conditional release.

As discussed, *see supra* p. 3, section 8 of the Act states that the Director has a duty to "keep safely the person so committed" until a sexually dangerous person "has recovered and is released as hereinafter provided." 725 ILCS 205/8 (2020). Kastman does not dispute that his conditional release meant that he was "released" under section 8, but he contends that the Director's

duty to keep safely applied to him because he has not yet recovered. AE Br. at 9, 11.

As detailed in the Director's opening brief, Kastman's contention would strip the phrase "so committed" of any meaning and nullify the Act's distinction between those who have "recovered" and those who have "fully recovered." AT Br. at 29-31. Kastman does not explain how this Court can hold that he is not yet recovered while still giving effect to every word of the Act. *See* AE Br. at 11-12; *see also Palm v. Holocker*, 2018 IL 123152, ¶ 21 (when possible, statutes must be "construed so as to give effect to every word, clause, and sentence").

Instead, Kastman argues that his status as a sexually dangerous person means that he cannot be considered recovered. AE Br. at 9-12. But if the legislature had intended the Director's duty to keep safely to extend until a sexually dangerous person is "no longer dangerous" or "fully recovered," it would have used that language, which appears in other sections of the Act. *See* 725 ILCS 205/9(e), 10 (2020); *Clark*, 2019 IL 122891, ¶ 23. And although individuals on conditional release retain their status as sexually dangerous persons, that status is compatible with the fact that they have "recovered" under section 8. Nothing in the Act limits the term "recovered" to those who are no longer dangerous. Indeed, it states that those who are "no longer dangerous" and must be "discharged" from any court supervision are considered "fully recovered," rather than "recovered." 725 ILCS 205/9(e)

(2020). By stating that the Director's duty to keep safely extends until a sexually dangerous person has "recovered," rather than until he is "no longer dangerous" or "fully recovered," the legislature indicated its intent for that duty to end when a sexually dangerous person is placed on conditional release.

C. Kastman's extra-textual arguments are unpersuasive.

Kastman's remaining arguments are not based on the Act's text, but rather the Director's alleged status as Kastman's guardian and the circuit court's general "supervisory power" over a guardian. AE Br. at 14-15. But whether the Director remains Kastman's guardian while he is on conditional release is beside the point. No matter what title the Director holds, section 8 makes clear that his duties to provide "care and treatment" and "keep safely" extend only to those committed to his custody. 725 ILCS 205/8 (2020). Those duties formed the bases of the circuit court's order and the appellate court's opinion, *see* SR95, A6, and even Kastman acknowledges that "[t]he Director's guardianship obligations are set forth in [s]ection 8 of the [Act]." AE Br. at 8. Even if the Director is Kastman's guardian, then, he does not have a duty to provide Kastman with care and treatment or keep him safely unless section 8 requires it, and, as explained, section 8 does not require this while Kastman is on conditional release. Instead, the Director's duties at that time are limited to supervising Kastman's compliance with the conditions of his release. *See* AT Br. at 24-26.

Despite acknowledging that section 8 defines the Director's duties under the Act while he is on conditional release, Kastman cites guardians' duties under different statutes to support his claim that the Director should be required to pay his living expenses. *See* AE Br. at 8, 15, 17, 19. Aside from noting that these statutes and the Act refer to certain individuals as "guardians," however, Kastman makes no substantive comparison between them and the Director's duties under section 8. Nor could he, as none of these statutes include the same limits on guardians' duties that are present in section 8. *See*, *e.g.*, 755 ILCS 5/11a-17(a) (2020) (requiring guardians of the person of disabled persons to "procure for [their wards] and . . . make provision for their support, care, comfort, health, education and maintenance, and professional services"); *id.* § 11a-18 (requiring guardians of the estate of disabled persons to manage ward's estate "so far as necessary for the comfort and suitable support and education of the ward"); *In re Lawrence M.*, 172 Ill. 2d 523, 526-27, 529-34 (1996) (holding that juvenile court could compel Department of Children and Family Services to pay for drug treatment for mothers whose children were removed from their custody based on statutory provisions requiring agency to provide such services).

Kastman also cites *In re Mark W.*, 228 Ill. 2d 365, 375 (2008), for the proposition that circuit courts have the independent duty to "judicially interfere and protect the ward if the guardian is about to do anything that would cause harm." AE Br. at 15. But *Mark W.* involved the question of

whether the circuit court could appoint a guardian *ad litem* for a disabled person who already had been appointed a plenary guardian of the person. 228 Ill. 2d at 374-75. In holding that a guardian *ad litem* could be appointed, this Court noted that the Probate Act of 1975 ("Probate Act"), 755 ILCS 5/1-1 *et seq.* (2020), was silent as to whether such an appointment was permissible, but that such an appointment should be allowed because disabled adults are "favored person[s]" who are "entitled to vigilant protection" by courts. *Mark W.*, 228 Ill. 2d at 374-75 (internal quotation marks omitted). Unlike the Probate Act, however, the Act is not silent as to the Director's duties — it clearly limits them to those committed to his custody. Nor has Kastman cited any authority to support the notion that sexually dangerous persons are favored persons comparable to disabled adults. Thus, the reasoning of *Mark W.* does not apply here.

Kastman's reliance on *People v. Carter*, 392 Ill. App. 3d 520 (2d Dist. 2009); *People v. Downs*, 371 Ill. App. 3d 1187 (5th Dist. 2007); and *People v. Wilcoxen*, 358 Ill. App. 3d 1076 (3d Dist. 2005), is also misplaced. *See* AE Br. at 8, 14, 18-19. As the Director explained in his opening brief, the legislature effectively overruled these cases, which held that the Director must pay for sexually dangerous persons' attorney fees, by amending the Act to provide that counties are responsible for such fees. AT Br. at 32-33. Kastman recognizes that these cases are no longer good law, but claims that their reasoning remains persuasive. AE Br. at 8, 18-19.

But in addition to being overruled, *Carter*, *Downs*, and *Wilcoxen* are inapposite for at least two reasons. First, each of the sexually dangerous persons in those cases petitioned for attorney fees that they incurred while they were still committed to the Director's custody, not while they were on conditional release. *Carter*, 392 Ill. App. 3d at 521-22; *Downs*, 371 Ill. App. 3d at 1188; *Wilcoxen*, 358 Ill. App. 3d at 1077. Unlike this case, then, there was no dispute that the Director's duties to "keep safely" or provide "care and treatment" would have applied to them. 725 ILCS 205/8 (2020). Second, in holding that the Director was responsible for paying a sexually dangerous person's attorney fees under the prior version of the Act, these courts explained that the Act expressly affords sexually dangerous persons the right to counsel, *see* 725 ILCS 205/5 (2020), and that right would only be meaningful if an indigent sexually dangerous person could have his attorney fees paid. *Carter*, 392 Ill. App. 3d at 525; *Downs*, 371 Ill. App. 3d at 1190; *Wilcoxen*, 358 Ill. App. 3d at 1078. By contrast, nothing in the Act expressly affords sexually dangerous persons on conditional release a right to housing, a cell phone, groceries, medical insurance, or cable television that must be given effect by requiring the Director to pay for those expenses. *See* SR95.

Finally, Kastman argues that it would be unfair to jeopardize his ability to remain on conditional release if he cannot support himself. AE Br. at 15-17. But it is the legislature's role, not this Court's, to determine whether the Act should offer more robust support for sexually dangerous persons on

conditional release. *See McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 49 ("It is not our role to inject a compromise, but, rather, to interpret the acts as written.") (internal quotation marks omitted). Because the Act is clear that the Director owed no duty to provide care and treatment or keep safely Kastman while he was on conditional release, and thus owes no duty to pay Kastman's living expenses, this Court should apply that language as written.

CONCLUSION

For these reasons, Intervenor-Appellant Rob Jeffreys requests that this court reverse the appellate court's judgment and vacate the circuit court's March 3, 2021 order.

Respectfully submitted,

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February 16, 2022

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 pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 16 pages.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 16, 2022, I electronically filed the foregoing Reply Brief of Intervenor-Appellant with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other participants in this matter, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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