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SJC-13068

IN THE MATTER OF P.R.

Suffolk. April 9, 2021. - August 5, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Mental Health. Incompetent Person, Commitment. Evidence,
Expert opinion, Hearsay. Practice, Civil, Commitment of mentally ill person, Standard of proof, Hearsay, Findings by judge. Witness, Expert. Words, "Likelihood of serious harm," "Very substantial risk."

P<u>etition</u> for involuntary commitment filed in the Falmouth Division of the District Court Department on June 14, 2017.

Following transfer to the West Roxbury Division of the Boston Municipal Court Department, the case was heard by Jonathan R. Tynes, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

<u>Devorah A. Vester</u>, Committee for Public Counsel Services, for P.R.

<u>H. David Kim</u>, Assistant Attorney General, for Department of Mental Health.

The following submitted briefs for amici curiae: Thomas F. Schiavoni, pro se.

Brian C. Almeida, Michael C. Boyne, James T. Hilliard, Michael T. Porter, & Jessica L. Deratzian for Massachusetts Psychiatric Society, Inc., & others.

Mark J. Murphy, of New York, Kathryn Rucker, Robert LeRoux Hernandez, Jennifer Honig, & Tatum A. Pritchard for Center for Public Representation & others.

LOWY, J. Civil commitments necessarily entail a loss of liberty. For this reason, a person facing a possible commitment under G. L. c. 123, §§ 7 and 8 -- sections that govern longterm, involuntary commitments -- is afforded various safeguards, including those provided by the law of evidence. This case centers on what an expert witness may testify to on direct examination during a hearing held pursuant to these sections. As is well settled, experts may not testify on direct examination about the basis of their opinion when these facts are neither within their personal knowledge nor otherwise admitted in evidence during the proceeding. See, e.g.,

Commonwealth v. Goddard, 476 Mass. 443, 448 (2017). Applying this rule here, the judge erred in allowing the expert to do just that. Because this error was prejudicial, we remand for a new hearing.

¹ We acknowledge the amicus briefs submitted by the Center for Public Representation, Disability Law Center, and Mental Health Legal Advisors Committee; Massachusetts Psychiatric Society, Inc., Massachusetts Association of Behavioral Health Systems, and Massachusetts Health & Hospital Association; and Thomas F. Schiavoni.

Background. In November 2016, P.R. was committed to the Pocasset Mental Health Center (Pocasset), a facility operated by the Department of Mental Health (department). In June 2017, the department filed a petition to recommit P.R. pursuant to G. L. c. 123, §§ 7 and 8. The petition alleged that P.R. had schizoaffective disorder, bipolar type, and was manic. P.R. waived his right to a hearing and was recommitted.

After being transferred to the Lemuel Shattuck Hospital (Shattuck), another department facility, however, P.R. requested a hearing regarding his commitment.² In his motion before a judge in the Boston Municipal Court, P.R. argued that commitment at Shattuck no longer was necessary. The judge subsequently held a full hearing on the merits of the underlying petition. Two witnesses testified: P.R.'s psychiatrist at Shattuck, who testified for the department; and P.R., who testified on his own behalf.

The psychiatrist testified that P.R. was diagnosed with paranoid schizophrenia and experienced delusions, such as beliefs that his medications were poisoned with cyanide, he had

 $^{^2}$ P.R. requested this hearing pursuant to G. L. c. 123, \S 6 (b), which allows a person who has waived his or her initial right to a hearing to request one concerning the reasons for continued commitment upon a showing of "good cause." Because the judge reached the merits of the underlying G. L. c. 123, $\S\S$ 7 and 8, petition without first finding good cause and the parties do not raise the issue on appeal, we do not examine the issue further.

gotten married when he was two years old, Jewish people were trying to change his religion using birds, and he was the chief executive officer of several companies. The psychiatrist testified that P.R. remained "quite delusional" at the time of the hearing. Although P.R. was not violent or threatening toward others, the psychiatrist testified that the delusions caused him to suffer from poor judgment and to put himself in danger.

According to the psychiatrist, this poor judgment manifested in several ways. Along with his mental illness, P.R. also has chronic obstructive pulmonary disease, a condition for which he had been prescribed oxygen. While at Pocasset, P.R. increased the flow from his oxygen tank to what the psychiatrist deemed "extremely harmful" levels because P.R. believed these levels were necessary. Although P.R. eventually was prescribed nebulizers and his prescription was discontinued for oxygen, he did not take his prescribed medications every day. In particular, P.R. had not been taking all of his medications during the two weeks before the hearing. The psychiatrist further testified that, although P.R. was under a guardianship that authorized the administering of antipsychotic medications, his guardian would not be able to force P.R. to take his

 $^{^{3}}$ The last oxygen incident occurred more than one month before the time of the hearing.

medications after being discharged. Based on these facts, the psychiatrist believed that P.R. required a supervised living arrangement.

During direct examination, the psychiatrist also testified that P.R. had been living at an assisted living facility prior to his initial commitment in November 2016.4 This assisted living facility had been staffed by nurses who had provided P.R. with medications and food. The psychiatrist testified that, despite this care, P.R. had not been "able to function and was putting himself in danger[]" there. Furthermore, the psychiatrist added that even if P.R.'s prior assisted living facility could have provided adequate supervision, he could not now be discharged to it because it was unavailable. All the information about the assisted living facility appeared to come from a medical report that the psychiatrist had consulted. report, which seems to have detailed the findings of a social worker who spoke with an unknown third party about P.R.'s previous living arrangements, never was entered in evidence and is not in the record.

P.R. testified that he intended to accept prescribed psychiatric medications if he were discharged. P.R. explained

⁴ Precisely when P.R. resided at the assisted living facility is unclear. Although the psychiatrist noted that this had been P.R.'s residence right before being hospitalized, P.R. contended that he had been living in an apartment.

that he knew how to use bus transportation and that if he had questions about his medication or treatment, he would consult his doctors. P.R. also testified that before he was committed to Pocasset, he had been living in an apartment; he had a representative payee who had continued to pay the rent since his commitment to Pocasset; and he planned to return there after being discharged.

The judge found that P.R.'s commitment should continue under §§ 7 and 8. The Appellate Division of the Boston Municipal Court affirmed. P.R. appealed to the Appeals Court, and we transferred the case to this court on our own motion.

<u>Discussion</u>. ⁵ General Laws c. 123, §§ 7 and 8, set out the statutory framework under which P.R. was committed. Pursuant to these sections, by petitioning the Juvenile Court, the District Court, or, as in this case, the Boston Municipal Court, the superintendent of a mental health facility may seek to commit

⁵ Although the parties do not dispute the timeliness of the appeal, the Appeals Court ordered them to address this issue before we took the case. Generally, an appellant in a civil case has thirty days to file a notice of appeal after the Appellate Division issues its decision. See G. L. c. 231, § 109. P.R. filed fifty-nine days after the decision issued. Where, like here, one of the Commonwealth's agencies is a party, however, the filing window is sixty days. See Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019). Because G. L. c. 231, § 109, defers to the Massachusetts Rules of Appellate Procedure, the statute and rule do not clash. See Boston Seaman's Friend Soc'y, Inc. v. Attorney Gen., 379 Mass. 414, 416-417 (1980). Thus, rule 4 (a) (1) applies and the appeal was timely.

involuntarily -- initially for a period of six months, and then for subsequent one-year periods -- an individual who has been admitted to the facility. G. L. c. 123, §§ 7 (a), 8 (d). To order such a commitment, a judge must find both that the individual is mentally ill and that discharge from the facility would "create a likelihood of serious harm." G. L. c. 123, § 8 (a). Much of this case centers on what a judge may consider in determining whether the second condition is fulfilled.

1. <u>Likelihood of serious harm</u>. "Likelihood of serious harm" is statutorily defined in three ways; the applicable one here is the third.⁶ See G. L. c. 123, § 1. It requires the judge to find that both (1) "a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community," and (2) "reasonable

 $^{^{\}rm 6}$ General Laws c. 123, § 1, defines "likelihood of serious harm" as

[&]quot;(1) a substantial risk of physical harm to the person himself [or herself] as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."

provision for his protection is not available in the community."

Id. The department must prove each of these elements beyond a reasonable doubt.⁷ See Matter of J.P., 486 Mass. 117, 119

(2020).

On appeal, P.R. advances two distinct evidentiary arguments regarding the likelihood of serious harm that he posed. First, P.R. argues that the department failed to carry its burden as to the very substantial risk of harm that he posed to himself.

Second, P.R. contends that the judge erroneously relied on hearsay evidence in determining that reasonable provision for his care in the community was unavailable. Although there was sufficient evidence concerning the risk of harm, we agree that the judge committed prejudicial error by relying on hearsay evidence concerning the unavailability of alternatives to hospitalization.

a. <u>Very substantial risk of harm</u>. To demonstrate a "very substantial risk of physical impairment or injury," the department needed to prove that P.R.'s "judgment is so affected

⁷ P.R. also argues that the case of <u>Matter of a Minor</u>, 484 Mass. 295, 309 (2020), requires as a matter of substantive due process that judges consider the least restrictive alternative to hospitalization before committing a person under G. L. c. 123, §§ 7 and 8. We need not address the constitutional requirements because the statutory definition of "likelihood of serious harm" applicable in P.R.'s case contains the equivalent requirement: the judge must find beyond a reasonable doubt that "reasonable provision for his protection [was] not available in the community" before ordering commitment. G. L. c. 123, § 1.

that he is unable to protect himself in the community." G. L. c. 123, § 1. "The focus of the evidence, then, must be on [P.R.'s] degree of impaired judgment due to [mental illness and] the degree of likelihood that, as a direct consequence, [P.R.] will sustain or inflict injury" Matter of G.P., 473

Mass. 112, 129 (2015). The risk also must be imminent, meaning "it will materialize 'in days or weeks rather than in months.'"

Matter of J.P., 486 Mass. at 119, quoting Matter of G.P., supra at 128. "In our review of the sufficiency of the evidence, we accept the findings of fact made by the hearing judge unless clearly erroneous; however, we review without deference whether the legal standard for civil commitment was met." Matter of J.P., supra at 121.

P.R. emphasizes that at the time of the hearing he was no longer on an oxygen prescription and thus could not harm himself by increasing the intake to dangerous levels as he had done previously. Yet the underlying issues that created the "very substantial risk of physical impairment or injury" -- P.R.'s paranoid schizophrenia, delusions, and resulting impaired judgment -- still were present. G. L. c. 123, § 1. The oxygen incidents, which occurred only months prior to the hearing and had been a recurring issue throughout P.R.'s time at Pocasset, were but one particularly stark example of P.R.'s poor judgment. Even under the department's supervision, P.R. repeatedly

resisted taking his medications, which he believed were poisoned. Indeed, the psychiatrist testified that P.R. had refused medication in the two weeks before the hearing, was still "quite delusional," and remained unable to care for himself.

Therefore, although P.R. no longer could harm himself using the intake valve on his oxygen tank, the impaired judgment that led him initially to attempt these acts of self-harm remained. See Matter of D.K., 95 Mass. App. Ct. 95, 101-102 (2019) (affirming finding of imminent and very substantial risk of self-harm where conditions were same as had been present when patient was discovered in life-threatening condition two years prior). We discern no error here.

b. Reasonable alternatives to hospitalization. To demonstrate that reasonable provision for P.R.'s protection was unavailable in the community, the department relied on the psychiatrist's testimony that the assisted living facility where P.R. had resided prior to his commitment no longer was available. In addition, the psychiatrist testified that even if it were available, P.R. had not been able to function there. All this information appeared to come from an unadmitted medical report filled out by a social worker who had spoken with a third party concerning P.R.'s prior assisted living facility. P.R. argues that the judge committed prejudicial error by inquiring

on direct examination into the basis of the psychiatrist's opinion that no alternative to hospitalization at a department facility existed. We agree.

Testimony about basis of expert opinion. Our law of evidence applies to proceedings under §§ 7 and 8, see Matter of J.P., 486 Mass. at 121-122; standards 5.01-5.02 of the District Court Standards of Judicial Practice: Civil Commitment and Authorization of Medical Treatment for Mental Illness (rev. Apr. 2019), and limits both on what an expert's opinion may be based and when an expert may testify to the various bases for an opinion, see Mass. G. Evid. §§ 703, 705 (2021). To start, an expert's opinion must be based on (1) facts within his or her direct personal knowledge, (2) evidence already in the record, or (3) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.8 See Commonwealth v. Watt, 484 Mass. 742, 746 (2020). Here, the psychiatrist's opinion was based on the unadmitted medical report, leaving only the third option as the possible basis.

⁸ It is within a judge's discretion, however, to allow an expert to testify on direct examination to evidence that will be admitted in evidence. See Mass. G. Evid. § 611(a). See also Mass. G. Evid. § 703 note ("On direct examination, the expert witness's testimony regarding the basis of his or her opinion is limited to [1] facts within the witness's personal knowledge; [2] facts in evidence; or [3] with approval of the court, facts that a party will put in evidence").

This third basis -- unadmitted but independently admissible evidence -- entails some nuance in determining when an expert may testify to it. Although an expert may state an opinion based on unadmitted but independently admissible evidence, the expert may testify about this evidence only if asked about it on cross-examination. See, e.g., Goddard, 476 Mass. at 448;

Commonwealth v. Greineder, 464 Mass. 580, 583, cert. denied, 571 U.S. 865 (2013); Commonwealth v. Barbosa, 457 Mass. 773, 785 (2010), cert. denied, 563 U.S. 990 (2011); Commonwealth v. Nardi, 452 Mass. 379, 392 (2008); Commonwealth v. Markvart, 437 Mass. 331, 338 (2002); Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 532 (1986). This rule governs "both civil and criminal cases and applies to both sides." Commonwealth v. Chappell, 473 Mass. 191, 204 (2015).

In other words, "[t]he expert's direct examination may not be used to put before the [trier of fact] facts that are not (and will not be) properly in evidence." Markvart, 437 Mass. at 338. Cross-examination, however, is a different story. If the opponent of the testimony decides to inquire about the basis for an opinion when the underlying information is not in evidence, then that party owns the risks that follow: not only will that evidence now be before the trier of fact, but the opponent has also opened the door to the proponent asking about it on redirect examination. See Commonwealth v. Piantedosi, 478 Mass.

536, 543-544 (2017) ("If the door is opened by the opposing party, on redirect examination, the proponent of the evidence then may introduce the details surrounding the source of the expert's opinion"). Given that the evidence otherwise might not come in, the initial decision to ask about the information is properly for the opponent to make on cross-examination, not the proponent to make on direct examination.

Why this rule matters in the context of §§ 7 and 8 bears emphasizing. Involuntary hospitalizations under these sections can last up to a year before further review and thus involve a "massive" infringement of an individual's liberty. See Matter of N.L., 476 Mass. 632, 637 (2017), quoting Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777, 784 (2008). Consequently, "[t]he provisions of G. L. c. 123 balance the rights of and protections for [mentally ill] persons with the Commonwealth's interest in 'protecting the public from potentially dangerous persons' who may be unable to control their actions because of their mental condition [as well as protecting such persons from self-harm]." Matter of M.C., 481 Mass. 336, 344 (2019), quoting Matter of E.C., 479 Mass. 113, 119 (2018). To strike this balance, a person facing involuntary commitment under §§ 7 and 8 is afforded extensive procedural protections. See Matter of M.C., supra.

Among these safeguards are the rights to introduce evidence and to cross-examine witnesses. See id. The rule disallowing experts from testifying on direct examination about unadmitted evidence protects both rights. First, the rule obviates "the danger that the [proponent] would use an expert's opinion to inform the [trier of fact] of facts not in evidence, "Barbosa, 457 Mass. at 785, by limiting what an expert may testify to on direct examination. See Nardi, 452 Mass. at 392, quoting Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 273 (1990) ("expert witness may not, under the guise of stating the reasons for his opinion, testify to matters of hearsay in the course of his direct examination unless such matters are admissible under some statutory or other recognized exception to the hearsay rule"). Moreover, the rule also protects the right to cross-examine witnesses by preventing inadmissible hearsay evidence -- which, by its nature, is not susceptible to cross-examination -- from slipping into a hearing. See Greineder, 464 Mass. at 584.

Turning to the testimony at issue, when asked on direct examination whether P.R. could be discharged safely, the psychiatrist replied that he could not "because the facility where he was before is not available." At this point, P.R. objected as to the basis of the opinion and on hearsay grounds, arguing that the testimony was relaying information that had not

been admitted in evidence. In response to the objection, the department indicated to the judge that the social worker's findings were in a medical report reviewed by the psychiatrist. The judge requested that the department inquire into the basis of the opinion. It did so, and the psychiatrist testified that the information came from a social worker who had contacted P.R.'s previous assisted living facility. The medical report never was admitted in evidence, and the social worker did not testify.

Over P.R.'s continued objections, the judge allowed the psychiatrist to continue to detail what she knew about the assisted living facility where P.R. previously had been, including his inability to function there. Because this information appears to have come from the unadmitted medical report, allowing the psychiatrist to testify about it on direct examination was error. By explaining the basis of her opinion, the psychiatrist's testimony served to "import inadmissible hearsay into" the hearing. Goddard, 476 Mass. at 448.

That the department inquired into the basis of the psychiatrist's opinion at the judge's request does not alter this conclusion. After P.R. lodged his initial objection, the judge responded:

⁹ The department concedes that the psychiatrist's testimony concerning the basis of her opinion was hearsay.

"Here's what I'm going to do, I'm going to allow the testimony. You can cross on it and obviously argue whether or not it's reliable enough when it comes to no less restrictive means, but <u>I think I need the information on what is available to [P.R.] if he were to be discharged.</u>
And if I don't know what his other options are or were, I don't see how I can make an informed decision" (emphasis added).

Although a judge clearly may ask questions when acting as the trier of fact, the judge must be cognizant of his or her role as the judge of the law with the duty to consider the permissibility of the question. Cf. Commonwealth v. Lucien, 440 Mass. 658, 664 (2004). Understandable as the judge's desire to discover further information was considering both his role as the trier of fact and the importance of the decision he was called upon to make, doing so took him beyond what the law of evidence allows, which otherwise would have prevented him from basing his ruling on the psychiatrist's testimony about the unadmitted medical report. Hence, it was error.

The department contends that this conclusion "misses the mark," arguing that the "question is not whether the medical records were actually in evidence, but rather whether they could have been admitted" under G. L. c. 233, § 79, a statute that allows a judge to admit certain hospital records. The department, however, is aiming at the wrong target. This framing, which focuses on the proper basis for expert opinion, overlooks the fact that the psychiatrist testified about the

unadmitted medical records on direct examination. Allowing such testimony required either that the medical report on which the expert relied be admitted in evidence, or potentially other medical records of the facility. See Mass. G. Evid. § 703.

See also Matter of J.P., 486 Mass. at 122 ("the emergency room records themselves were not admitted in evidence; thus, [the expert's] testimony regarding anything in those records . . . was hearsay that is not admissible under [G. L. c. 233, § 79]").

Neither happened. The department cannot now claim absence of error based on an unadmitted medical report. 11

ii. <u>Prejudicial error</u>. Once the erroneous testimony is removed, little else remains to attest to whether reasonable alternatives for P.R.'s protection were absent in the community. Compare Matter of J.P., 486 Mass. at 122 (expert testimony about

¹⁰ Presumably, the social worker could have been called to testify as well. We realize, however, that logistical hurdles often may make calling such witnesses difficult.

admitted erroneously, the evidence concerning the unavailability of the alternatives to hospitalization was insufficient. In evaluating sufficiency, however, we take into consideration all the evidence before the trier of fact, regardless of whether it was properly admitted. See Commonwealth v. Bacigalupo, 455 Mass. 485, 490 (2009) ("Ordinarily, in determining the sufficiency of the evidence, we include evidence improperly admitted"). Although reliance on the basis testimony was improper, it provided sufficient evidence that reasonable alternatives to hospitalization were unavailable, especially given the psychiatrist's testimony that, according to the medical report, P.R. was unable to function even at his previous assisted living facility.

basis on direct examination was error but not prejudicial because impermissible testimony was cumulative). For example, although the psychiatrist testified that the assisted living facility would not have been appropriate even if it were available, this testimony would not have been before the judge but for the error. Indeed, when P.R. objected to the information concerning how he had functioned at the assisted living facility, the psychiatrist confirmed that this information came from the unadmitted medical report.

More importantly, it is impossible to ignore the judge's express reliance on the psychiatrist's testimony about the basis of her opinion. In this, we recognize the judge's dilemma. Although the department argues that it could have admitted the medical report under G. L. c. 233, § 79, its failure to do so at the hearing left the judge, in his role as judge of the facts, conscientiously trying to obtain essential information and with little other option than to inquire into the basis of the psychiatrist's testimony when P.R. objected. Unfortunately, in his role as judge of the law, the question led the judge to rely on impermissible information in rendering his decision. Had the department offered the medical report in evidence, then the judge could have properly relied on the facts and data contained in it when issuing his order. The department's failure to admit

the report, which it presumably could have, thus led to the error at issue. 12

Because this error was preserved, we cannot say that it did not influence the finder of fact "or had but a slight effect." Commonwealth v. Pfeiffer, 482 Mass. 110, 129, cert. denied, 140 S. Ct. 498 (2019), quoting Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). Therefore, the error was prejudicial. A new hearing is necessary.

2. Written or oral findings. Although the evidentiary issues resolve this case, we address another issue that may reoccur on remand: P.R.'s contention that the judge erred by not making a statement of written or oral findings before ordering commitment under §§ 7 and 8. To support this claim, P.R. analogizes to Matter of a Minor, 484 Mass. 295 (2020). There, we held that commitments under G. L. c. 123, § 35, which governs the short-term commitment of individuals with substance use disorders, required that judges make written or oral

¹² The medical report is not in the record. Therefore, we cannot say with certainty whether it was admissible. It is the department's position, however, that it was. Thus, we assume, for the sake of argument, that it would have been admitted had the department sought to do so.

¹³ Citing Commonwealth v. Adams, 434 Mass. 805, 812 (2001), the department argues that the error was not prejudicial because it did not alter P.R.'s strategy at the hearing. Yet unlike in Adams, supra at 814, where the other evidence of sanity -- the issue in dispute -- was "substantial," the judge expressly relied on the erroneous testimony here.

findings on the record to satisfy due process. <u>Id</u>. at 307.

Commitments under both § 35 and §§ 7 and 8 entail deprivations of liberty. Therefore, P.R. reasons, due process demands that commitments under either section entail the same procedural safeguards. Because the differences between proceedings under § 35 and those under §§ 7 and 8 dwarf the similarities, we disagree.

Written or oral findings often are necessary when a law restrains a person's liberty. See <u>Brangan v. Commonwealth</u>, 477 Mass. 691, 693 (2017), <u>S.C.</u>, 478 Mass. 361 (2017) (written or oral findings required in bail hearings "where it appears that a defendant lacks the financial resources to post the amount of bail set"); <u>Commonwealth v. Hartfield</u>, 474 Mass. 474, 484 (2016), citing <u>Commonwealth v. Durling</u>, 407 Mass. 108, 113 (1990) (written or oral finding of fact required for revocation of probation); <u>Doucette v. Massachusetts Parole Bd.</u>, 86 Mass. App. Ct. 531, 539 (2014) (same requirement for revocation of parole). Cf. <u>Mendonza v. Commonwealth</u>, 423 Mass. 771, 775 (1996) (suggesting same requirement for pretrial detention on dangerousness grounds mandated by G. L. c. 276, § 58A [4]). See generally <u>Matter of a Minor</u>, 484 Mass. at 306-307 (discussing instances where written or oral factual findings are required).

It does not follow, however, that due process dictates written or oral findings in every case where a person's liberty

is restrained. "Due process, by its nature, is a flexible concept." <u>Durling</u>, 407 Mass. at 113. Each case presents a unique assortment of individual and governmental interests that must be weighed. See <u>Querubin</u> v. <u>Commonwealth</u>, 440 Mass. 108, 117 (2003), quoting <u>Mullane</u> v. <u>Central Hanover Bank & Trust Co.</u>, 339 U.S. 306, 313 (1950) ("the features of the required hearing will be determined by the 'nature of the case'"). See also <u>Mathews</u> v. <u>Eldridge</u>, 424 U.S. 319, 334 (1976) ("'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" [citation omitted]).

A written or oral statement of factual findings is certainly necessary in a scenario such as a commitment hearing under § 35, where many procedural safeguards that protect a person's liberty interests are absent. For example, the rule against hearsay does not apply to hearings under § 35. See

Matter of a Minor, 484 Mass. at 308 (hearsay allowed under § 35 so long as evidence is reliable and "specific indicia of reliability" are detailed in finding). See also Hartfield, 474

Mass. at 485 ("Even if not required by court rule, we conclude that, where a judge relies on hearsay evidence in finding a violation of probation, the judge should set forth in writing or on the record why the judge found the hearsay evidence to be reliable"). A judge also need only find each element by clear

and convincing evidence to order commitment under § 35. See

Matter of a Minor, supra at 296. See also Mendonza, 423 Mass.

at 774 (clear and convincing standard applied in pretrial

commitment for dangerousness under G. L. c. 276, § 58A);

Commonwealth v. Holmgren, 421 Mass. 224, 226 (1995)

(preponderance of evidence standard applied in probation

revocation hearings).

Yet when other protections are present, the scale of procedural due process may tip toward such a statement being unnecessary. See generally Mathews, 424 U.S. at 334-335. For example, criminal defendants are not entitled to written findings at a jury or bench trial because they have a "full panoply" of other protections. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). See Commonwealth v. Szewczyk, 89 Mass. App. Ct. 711, 714 (2016) (judge at jury-waived criminal trial "is not required to honor requests for findings of fact"). So the balance shifts here.

Individuals facing a possible commitment under §§ 7 and 8 already are afforded sufficient procedural protections. Not only do such individuals have the right to present evidence and cross-examine witnesses as discussed <u>infra</u>, but they also have "the right to notice and a hearing, the right to an attorney, . . . [and] the right to an independent medical evaluation."

Matter of M.C., 481 Mass. at 344. All these rights are further

safeguarded by the requirement that the individual be provided at least two days after the appearance of counsel to prepare his or her case and that the hearing follow "forthwith" unless counsel requests a delay. G. L. c. 123, § 5. The hearings themselves must "be recorded and must operate as open, public proceedings." Matter of M.C., supra at 338. Finally, a person may not be committed unless the department proves each element beyond a reasonable doubt. See Matter of J.P., 486 Mass. at 119. See also Matter of M.C., supra at 344, quoting Kirk v. Commonwealth, 459 Mass. 67, 72 (2011) ("commitment hearings have been increasingly clothed with procedural protections and formality typical of other civil [and criminal] trials").

A statement of findings and reasons helps to ensure that the judge has "weigh[ed] carefully the substantiality of the specific evidence." Matter of G.P., 473 Mass. at 126. But such a statement is not the only mechanism that ensures this. 14 Taken together, procedural protections such as the application of the laws of evidence, the right to introduce evidence, the right to cross-examine witnesses, and the reasonable doubt quantum of

¹⁴ P.R. argues that written findings are necessary because the facts at issue in a commitment hearing concern possible future harm. Yet written findings are not required in criminal bench trials where, although the harm occurred in the past, the liberty interests are no less dear. There is no reason to believe that written findings would increase accuracy where the harm is prospective rather than retrospective.

proof adequately ensure accuracy in the proceedings under consideration. Whatever benefit another layer of procedure would provide in this regard under §§ 7 and 8 is outweighed by the additional burden it would place on the court system. See Mathews, 424 U.S. at 334-335. Therefore, where "the prescribed procedures are followed, 'an individual's due process rights

. . . are protected at a hearing under G. L. c. 123, §§ 7 and 8." Matter of M.C., 481 Mass. at 344, quoting Matter of E.C., 479 Mass. at 121.

<u>Conclusion</u>. The case is remanded to the Boston Municipal Court for a rehearing consistent with this opinion.

So ordered.