IN THE SUPREME COURT FOR THE STATE OF ALASKA

WSB, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S-12677
	)	Trial Court Case No. 3AN 07-247 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER A. MICHALSKI, PRESIDING

BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this _____
day of _____, 2007

Marilyn May, Clerk

By: _____
Deputy Clerk

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AS 47.30.700 Initiation of involuntary commitment procedures.

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an *ex parte* order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The *ex parte* order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.730 Procedure for 30-day commitment; petition for commitment.

(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must

(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;

(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;

(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;

(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;

(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;

(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and

(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

AS 47.30.735 30-day commitment.

(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.

(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 - 47.30.915, the respondent has the right:

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;

(2) to view and copy all petitions and reports in the court file of the respondent's case;

(3) to have the hearing open or closed to the public as the respondent elects;

(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;

(5) to have an interpreter if the respondent does not understand English;

(6) to present evidence on the respondent's behalf;

(7) to cross-examine witnesses who testify against the respondent;

(8) to remain silent;

(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

AS 47.30.745 90-day commitment hearing rights.

(a) A respondent subject to a petition for 90-day commitment has, in addition to the rights specified elsewhere in this chapter, or otherwise applicable, the rights enumerated in this section. Written notice of these rights shall be served on the respondent and the respondent's attorney and guardian, if any, and may be served on an adult designated by the respondent at the time the petition for 90-day commitment is served. An attempt shall be made by oral explanation to ensure that the respondent understands the rights enumerated in the notice. If the respondent does not understand English, the explanation shall be given in a language the respondent understands.

(b) Unless the respondent is released or is admitted voluntarily following the filing of a petition and before the hearing, the respondent is entitled to a judicial hearing within five judicial days of the filing of the petition as set out in AS 47.30.740(b) to determine if the respondent is mentally ill and as a result is likely to cause harm to self or others, or if the respondent is gravely disabled. If the respondent is admitted voluntarily following the filing of the petition, the voluntary admission constitutes a waiver of any hearing rights under AS 47.30.740 or under AS 47.30.685. If at any time during the respondent's voluntary admission under this subsection, the respondent submits to the facility a written request to leave, the professional person in charge may file with the court a petition for a 180-day commitment of the respondent under AS 47.30.770. The 180-day commitment

hearing shall be scheduled for a date not later than 90 days after the respondent's voluntary admission.

(c) The respondent is entitled to a jury trial upon request filed with the court if the request is made at least two judicial days before the hearing. If the respondent requests a jury trial, the hearing may be continued for no more than 10 calendar days. The jury shall consist of six persons.

(d) If a jury trial is not requested, the court may still continue the hearing at the respondent's request for no more than 10 calendar days.

(e) The respondent has a right to retain an independent licensed physician or other mental health professional to examine the respondent and to testify on the respondent's behalf. Upon request by an indigent respondent, the court shall appoint an independent licensed physician or other mental health professional to examine the respondent and testify on the respondent's behalf. The court shall consider an indigent respondent's request for a specific physician or mental health professional. A motion for the appointment may be filed in court at any reasonable time before the hearing and shall be acted upon promptly. Reasonable fees and expenses for expert examiners shall be determined by the rules of court.

(f) The proceeding shall in all respects be in accord with constitutional guarantees of due process and, except as otherwise specifically provided in AS 47.30.700 - 47.30.915, the rules of evidence and procedure in civil proceedings.

(g) Until the court issues a final decision, the respondent shall continue to be treated at the treatment facility unless the petition for 90-day commitment is withdrawn. If a decision has not been made within 20 days of filing of the petition, not including extensions of time due to jury trial or other requests by the respondent, the respondent shall be released.

AS 47.30.839 Court-ordered administration of medication.

(a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if

(1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or

(2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

(b) An evaluation facility or designated treatment facility may seek court approval for administration of psychotropic medication to a patient by filing a petition with the court, requesting a hearing on the capacity of the person to give informed consent.

(c) A patient who is the subject of a petition under (b) of this section is entitled to an attorney to represent the patient at the hearing. If the patient cannot afford an attorney, the court shall direct the Public Defender Agency to provide an attorney. The court may, upon request of the patient's attorney, direct the office of public advocacy to provide a guardian ad litem for the patient.

(d) Upon the filing of a petition under (b) of this section, the court shall direct the office of public advocacy to provide a visitor to assist the court in investigating the issue of whether the patient has the capacity to give or withhold informed consent to the administration of psychotropic medication. The visitor shall gather pertinent information and present it to the court in written or oral form at the hearing. The information must include documentation of the following:

(1) the patient's responses to a capacity assessment instrument administered at the request of the visitor;

(2) any expressed wishes of the patient regarding medication, including wishes that may have been expressed in a power of attorney, a living will, an advance health care directive under AS 13.52, or oral statements of the patient, including conversations with relatives and friends that are significant persons in the patient's life as those conversations are remembered by the relatives and friends; oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, when possible.

(e) Within 72 hours after the filing of a petition under (b) of this section, the court shall hold a hearing to determine the patient's capacity to give or withhold informed consent as described in AS 47.30.837 and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication if previously expressed wishes are documented under (d)(2) of this section. The court shall consider all evidence presented at the hearing, including evidence presented by the guardian ad litem, the petitioner, the visitor, and the patient. The patient's attorney may cross-examine any witness, including the guardian ad litem and the visitor.

(f) If the court determines that the patient is competent to provide informed consent, the court shall order the facility to honor the patient's decision about the use of psychotropic medication.

(g) If the court determines that the patient is not competent to provide informed consent and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes documented under (d)(2) of this

section, the court shall approve the facility's proposed use of psychotropic medication. The court's approval under this subsection applies to the patient's initial period of commitment if the decision is made during that time period. If the decision is made during a period for which the initial commitment has been extended, the court's approval under this subsection applies to the period for which commitment is extended.

(h) If an evaluation facility or designated treatment facility wishes to continue the use of psychotropic medication without the patient's consent during a period of commitment that occurs after the period in which the court's approval was obtained, the facility shall file a request to continue the medication when it files the petition to continue the patient's commitment. The court that determines whether commitment shall continue shall also determine whether the patient continues to lack the capacity to give or withhold informed consent by following the procedures described in (b) - (e) of this section. The reports prepared for a previous hearing under (e) of this section are admissible in the hearing held for purposes of this subsection, except that they must be updated by the visitor and the guardian ad litem.

(i) If a patient for whom a court has approved medication under this section regains competency at any time during the period of the patient's commitment and gives informed consent to the continuation of medication, the evaluation facility or designated treatment facility shall document the patient's consent in the patient's file in writing.

AS 47.30.915 Definitions.

In AS 47.30.660 - 47.30.915

* * *

(7) "gravely disabled" means a condition in which a person as a result of mental illness

(A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or

(B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently;

Civil Rule 53(d)(1) & 2

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The

master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for an action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 77. The court may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

F.R.C.P. 53 (g)(3) & (4)

(g) Action on Master's Order, Report, or Recommendations.

* * *

(3) Fact Findings.

The court must decide *de novo* all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions.

The court must decide *de novo* all objections to conclusions of law made or recommended by a master.

Probate Rule 2(a), (b)(2)(C), & (e)

(a) **Appointment**. The presiding judge may appoint a standing master to conduct any or all of the probate proceedings listed in subparagraph (b)(2). Appointment of standing masters must be reviewed annually. A standing master in probate shall serve as a registrar. The presiding judge may appoint a special

master to conduct a proceeding which is specified in the order of reference and is listed in subparagraph (b)(2).

(b) **Authority, Order of Reference**.

2. The following proceedings may be referred to a master:

* * *

C. mental commitment, alcohol or substance abuse commitment, and medication consent hearings under Title 47;

* * *

(e) **Master's Report, Recommendations**. A master may issue a written report or oral findings on the record concerning an order or recommendation which must be approved by a superior court judge.

Jurisdictional Statement

This appeal is brought by WSB, Respondent below, before the Superior Court, Third Judicial District at Anchorage, under Case No. 3AN 07-247 PR, with respect to involuntary commitment and involuntary administration of psychotropic medication, under AS 47.30. Appellant appeals to the Alaska Supreme Court from Order on Objections to the Master's Findings Regarding the Order for 30-Day Commitment, dated March 27, 2007. Notice of Appeal was timely filed on April 18, 2007. This court has jurisdiction over this appeal pursuant to AS 22.05.010(a) & (b).

Parties

All of the parties are listed in the caption.

Statement of Issues Presented

1. May the Superior Court approve a Master's recommendations authorizing the massive curtailment of liberty represented by involuntary commitment or the deprivation of the fundamental constitutional right represented by involuntary administration of psychotropic medication without having a transcript of the proceedings available as required by Civil Rule 53(d)(1).

2. May the Superior Court properly approve a Master's recommendations authorizing the massive curtailment of liberty represented by involuntary commitment finding Respondent gravely disabled when there was no testimony that WSB was incapable of surviving safely in freedom.

STATEMENT OF THE CASE

I. Brief Description of Case

After a hearing, Probate Master Brown recommended to the Superior Court that it order Appellant, WSB, (a) involuntarily committed under AS 47.30.735 for not more than 30 days, and (b) subjected to the involuntary administration of psychotropic medication under AS 47.30.839 during that same time period. (Exc. 7-11)

No transcript of the proceedings as required by Civil Rule 53(d)(1) was prepared.[1] The Superior Court, Judge Jack Smith presiding, issued orders granting the involuntary commitment and forced drugging petitions without the required transcript and before objections to the Probate Master's recommendations were filed.[2] Judge Michalski eventually overruled the objections on the eve of a jury trial on a petition for 90-Day Involuntary Commitment, under AS 47.30.740 & .745.[3] Whether it is proper for the Superior Court to act without the required transcript is the first of the two issues in this appeal.

The other issue is whether the finding that WSB was gravely disabled is proper under the standard enunciated in *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007).

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[1] Tr. 3/28/07 (Michalski), pp. 7-8, 13.
[2] Exc. 7-8, 9-11, & 12-17, respectively.
[3] Tr. 4/2/07 (Judge Michalski), p. 6.

II. Course of Proceedings

February 22, 2007 -- *Ex Parte* Petition and Order. On February 22, 2007, at 3:24 p.m., a Petition for Initiation of Involuntary Commitment under AS 47.30.700 was filed.[4] That same day, an *Ex Parte* Order (Temporary Custody for Emergency Examination/Treatment) under AS 47.30.700 was signed by Superior Court Judge Michael Wolverton.[5]

February 23, 2007 -- 30-Day Petition for Commitment and Forced Drugging. On February 23, 2007, petitions for 30-Day Commitment under AS 47.30.730 and for Court approval of Administration of Psychotropic Medication under AS 47.30.839 were filed.[6]

February 27, 2007 -- Hearing Before Probate Master. An evidentiary hearing was held February 27, 2004,[7] which Probate Master Brown presided over telephonically.[8] At the conclusion of the hearing, Master Brown orally stated his findings and recommendations that WSB should (i) be committed for up to 30 days, and (ii) involuntarily administered psychotropic drugs.[9]

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[4] Exc.1-2. This is commonly referred to as an "*Ex Parte* Application."
[5] Exc. 3.
[6] Exc. 4-6.
[7] The Transcript filed in this matter shows the date as February 24, 2007, but all other indications are that it was held February 27, 2007. See, e.g. Exc. 7 & 9.
[8] Tr. 2/27/07, p. 2 (Master Brown).
[9] Tr. 2/27/07 (Master Brown), pp 69-72, 82-84.

March 1, 2007 -- Master's Recommendations Issued. On March 1, 2007, Master Brown issued his written report to the Superior Court recommending it grant the petitions for 30-day commitment and forced drugging.[10] This was not served on counsel.[11]

March 2, 2007 -- 30-Day Commitment and Forced Drugging Orders Issued. On March 2, 2007, Superior Court Judge Jack Smith approved the recommendations without change.[12] These were not served on counsel at that time.[13]

March 6, 2007 -- Objections to Master's Recommendation. On March 6, 2007, WSB's attorney, Assistant Public Defender Kelly Gillilan-Gibson, filed objections to the Master's recommendations.[14]

March 12, 2007 -- Response to Objections. On March 12, 2007, the Alaska Psychiatric Institute (API) filed a response to the objections.[15]

March 15, 2007 -- Orders Served. On March 15, 2007, the orders granting the 30-day involuntary commitment and forced drugging petitions were served on counsel.[16]

March 22, 2007 -- Hearing. On March 22, 2007, at a hearing before Master Brown respecting a 90-day commitment petition and associated forced drugging petition,

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[10] Exc. 7-11.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Exc. 12-17.
[15] Exc. 18-20.
[16] Exc. 8, 11.

it was brought to the Probate Master's attention that the objections to his recommendations had never been ruled upon.[17]

March 28, 2007 -- Objections Overruled. On March 28, 2007, the Superior Court, Judge Michalski, issued an Order overruling the objections.[18]

April 1, 2007 -- Motion For Reconsideration. On April 1, 2007, WSB filed a motion for reconsideration.[19]

April 2, 2007 -- Reconsideration Denied. At a hearing on April 2, 2007, the Superior Court orally denied the motion for reconsideration.[20]

April 18, 2007 -- Appeal. This appeal followed on April 18, 2007.

III. Facts

Facts relevant to each issue not set forth above are contained in the appropriate argument sections pursuant to Appellate Rule 212(c)(1)(G).

STANDARDS OF REVIEW

Each issue will be proceeded by a discussion of the applicable standard(s) of review pursuant to Appellate Rule 212(c)(1)(H).

ARGUMENT

I. Summary of Argument.

Civil commitment and forced psychiatric drugging petitions under AS 47.30 are to be decided by the Superior Court, but for expedience, in the Third Judicial District, have

[17] Tr. 3/22/07 (Master Brown), p. 9.
[18] Exc. 21-2.
[19] Exc. 23-4.
[20] Tr. 4/2/07 (Judge Michalski), p. 6.

been referred to Probate Master Brown under a standing order pursuant to Probate Rules 2(a) & (b)(2)(C). The Probate Master has no authority to issue involuntary commitment or forced drugging orders; instead "the master may issue a written report or oral findings on the record concerning an order or recommendation which must be approved by a superior court judge."[21] In order for the Superior Court to be in a position to decide whether to approve such recommendation(s), Civil Rule 53(d)(1) requires a transcript accompany the Probate Master's recommendations. No transcript was prepared, which gives rise to the first of only two issues in this appeal, to wit: whether the Superior Court can properly discharge its duty without at least having a transcript. WSB asserts the Superior Court can not properly discharge its duty without at least having a transcript and the other evidence upon which the Probate Master made his recommendations, as required by Civil Rule 53(d)(1).

The reason why a transcript is necessary is starkly illustrated by the second issue in this appeal, which is that there was insufficient evidence to support the gravely disabled finding.

II. A Transcript Must Accompany the Master's Recommendations.

A. Standard of Review

This Court exercises its independent judgment when interpreting a civil rule. *Gibson v. GEICO General Ins. Co*., 153 P.3d 312 (Alaska 2007).

[21] Probate Rule 2(e), emphasis added.

B. The Failure to Comply With Civil Rule 53(d)(1)'s Requirement of a Transcript is Fatal.

The orders for commitment and forced psychiatric drugging are invalid for failure to comply with the mandatory requirement that a transcript be filed with the master's report. Civil Rule 53(d)(1) provides in relevant part:

> (1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(emphasis added).

The required transcript was not filed with the Master's report.[22] In fact, both the Superior Court and API acknowledge it is not the practice to comply with Civil Rule 53(d)(1)'s requirement that transcripts accompany the master's recommendations.[23]

The failure of the master to file the required transcript was raised at a March 28, 2007, hearing before Judge Michalski.

> MR. GOTTSTEIN: . . . [T]he probate master has no authority to issue a commitment order, and that's why there's a recommendation that goes to the superior court, and under 50 -- Civil Rule 53.d.1, I believe, a transcript of the hearing before the probate master is supposed to accompany the report in order for you to decide the issue. [24]

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[22] Tr. 3/28/07 (Michalski), pp. 7-8, 13.
[23] Tr. 3/28/07 (Michalski), pp. 8, 10.
[24] Tr. 3/28/07 (Michalski), p. 8.

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> MR. GOTTSTEIN: I believe it says that it's supposed to accompany the master's report, whether there's an objection or not, in order for the superior court --
>
> THE COURT: To evaluate the recommendation?
>
> MR. GOTTSTEIN: Yes.[25]

* * *

> MR. GOTTSTEIN: It seems to me that the court is really obliged to look at the testimony in all cases and determine whether or not there's sufficient evidence to grant the petition.[26]

On April 1, 2007, a motion for reconsideration of the Superior Court's order overruling the objections was filed.[27] The Superior Court orally denied this motion on April 2, 2007.[28]

Thus, the issue of a transcript being required was squarely raised below and is a proper subject of appeal.

The only Alaska decision WSB could find relating to this issue was *State v. 7.536 Acres*, 431 P.2d 897, 900 (Alaska 1967). However, this Court declined to consider the argument in that case because it was not raised below. The opposite is true here.

Under the Federal Rules of Civil Procedures, when a master is appointed, litigants have the right to *de novo* determination of the facts and law, pursuant to F.R.C.P.

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[25] Tr. 3/28/07 (Michalski), p. 10.
[26] Tr. 3/28/07 (Michalski), p. 11.
[27] Exc. 23-4.
[28] Tr. 4/2/07 (Judge Michalski), p. 6.

53(g)(3) & (4). Even though this is substantially different than the Alaska rule, it does serve to emphasize it is the trial court's responsibility to determine the facts and law, not the master's.

Under Civil Rule 53(d)(2), the Superior Court is to accept the master's factual findings in a non-jury trial unless clearly erroneous, but "the exercise of judicial discretion upon those facts is vested in the superior court."[29] It is the Superior Court's job, not the master's, to decide mental health proceedings under AS 47.30. As this Court has held with respect to Child in Need of Aid cases:

> It is the responsibility of the superior court judge to hear, adjudicate and dispose of children in need of aid cases. The superior court is not bound by the master's recommendations when determining the proper course of action in light of all the facts.[30]

The same must be true of mental health proceedings under AS 47.30. It is the Superior Court's duty to determine the proper course of action, not the Probate Master's.

It is apparent a transcript is necessary for the Superior Court to discharge its duties to determine both (1) whether the facts determined by the master are clearly erroneous, and (2) what is the proper action in light of the facts.

The lack of a transcript makes it impossible for the Superior Court to properly discharge its duty and renders the involuntary commitment and forced drugging orders and the order overruling the objections to the master's report in this case invalid.[31]

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[29] *Headlough v. Headlough*, 639 P.2d 1010, 1012 (Alaska 1982).
[30] *Matter of B.L.J.*, 717 P.2d 376, 381 (Alaska 1986).
[31] In fact, since the Superior Court did not even have the requisite procedural predicate for issuing these orders, they may very well be void.

That a transcript is necessary for the Superior Court to properly discharge its duty is starkly demonstrated by the next issue, which is the testimony did not establish that WSB met the gravely disabled standard.

III. WSB Was Not Gravely Disabled Within the Meaning of *Wetherhorn*.

A. Standard of Review

Factual findings in involuntary commitment or medication proceedings are reviewed for clear error, and this Court reverses only if its review of the record leaves it with a definite and firm conviction that a mistake has been made. *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 375 (Alaska 2007). The question of whether factual findings comport with the requirements of AS 47.30 presents a legal issue, which this Court reviews *de novo*. *Id*.

B. The Conclusion that WSB was Gravely Disabled Does Not Comport with the Requirements of AS 47.30.

(1) Mootness

In *Wetherhorn*, this Court declined to decide whether the facts present in that case were sufficient to meet the gravely disabled standard on the grounds it was moot. This Court decided not to invoke an exception to the mootness doctrine "because the facts . . . are specific to a certain time and place."[32] As an initial matter WSB points out that in *Washington v. Harper*, 494 U.S. 210, 218, 110 S.Ct. 1028, 1035, (1990), the United States Supreme Court held the appeal there was not moot even though the appellant was no longer subject to the forced medication order because he was not unlikely to be faced

[32] 156 P.3d at 382.

with a new forced medication effort. The same is certainly true here with respect to future involuntary commitment efforts.

In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 244 (Alaska 2006),[33] this Court explained its mootness doctrine as follows:

> We generally "refrain from deciding issues 'where the facts have rendered the legal issues moot.'" But we do not enforce this rule rigidly, and have recognized that an exception applies when a potentially moot case raises a matter "of grave public concern" that is "recurrent" but "capable of evading review."

In *Myers* this Court noted such orders are "time critical" and it is "doubtful" an appeal from such an order "could ever be completed within the order's period of effectiveness,"[34] holding:

> Given the importance of the issues Myers raises, their likelihood of recurring, and their ability to evade timely appellate review, we similarly hold that the public interest exception applies to this case.[35]

WSB respectfully suggests the same considerations apply here. In *Wetherhorn*, this Court held adopting the "unable to survive safely in freedom" standard for committing someone for being gravely disabled was necessary to "protect persons against the 'massive curtailment of liberty' that involuntary commitment represents."[36] Because the Superior Court needs guidance on what sorts of facts satisfy this standard and this

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[33] Footnotes omitted.
[34] *Id.*
[35] 138 P.3d at 245. This Court also acknowledged the U.S. Supreme Court's holding in *Washington v Harper* that such orders are not moot.
[36] 156 P.3d at 378.

issue will always evade review if mootness is applied, this Court should give such guidance here.

(2) The Facts Do Not Support the Gravely Disabled Conclusion

In *Wetherhorn*, this Court concluded:

> [T]he definition of "gravely disabled" in AS 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving safely in freedom.[37]

The evidence presented does not support the conclusion that WSB was gravely disabled.

Most important was the testimony of API's psychiatrist, Dr. Worrall.[38] He testified that while WSB was brought in because of concern that he couldn't get his groceries and was so verbally aggressive the police were escorting him off properties and somebody might assault him, he couldn't give an opinion that WSB was unable to survive safely in freedom.[39]

Dr. Worrall also testified he had no reason to think WSB was going to freeze to death or starve, and that in spite of the guardian's concerns about his ability to eat sufficiently, he lost only 3.5 pounds and that wasn't enough to put him in any medical

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[37] As acknowledged in *Wetherhorn*, 156 P.3d at 377, citing to *O'Connor v. Donaldson*. 422 US 563, 575, 95 S.Ct. 2486, 2493 (1975), this is also required under the United States Constitution.

[38] It seems worth noting here that the Master's Report does not even mention that Dr. Worrall testified his opinion was WSB could survive safely in freedom, which reinforces the point that it is absolutely necessary the Superior Court have a transcript of the proceedings in order to properly discharge its duties.

[39] Tr. 2/27/07 (Brown), p. 28.

jeopardy.[40] During cross-examination, Dr. Worrall summarized his opinion with respect to meeting the *Wetherhorn* criteria, as follows:

> Q Well, let me paraphrase that. Would he be able to survive in the community -- he may not be living healthy, but he's able to do that without being (indiscernible)?
>
> A Well, obviously, yes.[41]

Dr. Worrall confirmed later that WSB was able to survive safely if not committed:

> Q And do you think that he can survive safely -- do you have any conclusory -- again, I'm going to use your word -- concerns -- (indiscernible).
>
> A No, I don't have any reason to think he can't survive for a few weeks. Even if he did nothing for the next few weeks, he's gonna survive for at least two weeks. As long as he has housing, a warm place to go to, he's [not] gonna freeze to death. We haven't had to admit him with hypothermia, or such impaired judgment, that he sleeps outdoors in winter. He doesn't drink a lot of alcohol. He hasn't passed out in a snow bank. . . .
>
> But there's a chance that he is gonna get himself severely assaulted. I think the chance is low because of his disruptive behavior. I think there's a better chance that he'll get arrested because of his disruptive behavior in public. Frightening -- concern he's gonna frighten people. He could be pretty scary, but it's really all talk. He's really not the kind of guy that goes around hitting people. But I don't have a firm opinion that he won't survive outside of API if it was a reasonable period of time, weeks or months or more.[42]

Thus, Dr. Worrall, API's psychiatrist/expert witness opined WSB could survive safely in freedom.

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[40] Tr. 2/27/07 (Brown), p.29.
[41] Tr. 2/27/07 (Brown), p. 50.

The only other relevant testimony was from Steve Young, WSB's guardian, who filed the *Ex Parte* Application.[43] He said he felt WSB was in jeopardy of not surviving because WSB was refusing to cooperate with him in obtaining food.[44] However, as Dr. Worrall testified, WSB had lost only 3.5 pounds, so WSB was obtaining food in a way(s) that Mr. Young was unaware. In addition, Mr. Young testified that WSB (1) had an apartment, (2) had the financial resources to pay the rent and his other expenses, and (3) got around using the bus system.[45]

The real reason for WSB's involuntary commitment and forced drugging was succinctly stated by Dr. Worrall, "He's very hard to tolerate, and the only thing that fixes that is medication."[46] In order to force him to take medication so he will be more tolerable, he was involuntarily committed. This is exactly the sort of impermissible reason for commitment this Court warned about in *Wetherhorn*:

> This construction of the statute is necessary not only to protect persons against the "massive curtailment of liberty" that involuntary commitment represents, but also to protect against a variety of dangers particular to those subject to civil commitment. For example, there is a danger that the mentally ill may be confined merely because they are "physically unattractive or socially eccentric" or otherwise exhibit "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable."[47]

(Continued footnote)----------
[42] Tr. 2/27/07 (Brown) pp 53-5.
[43] Exc. 1.
[44] Tr. 2/27/07 (Brown) p. 25.
[45] Tr. 2/27/07 (Brown) pp. 17, 19.
[46] Tr. 2/27/07 (Brown) p. 41.
[47] 156 P.3d at 378, footnotes omitted.

Being "hard to tolerate" is not grounds for civil commitment.

This case exemplifies the cavalier manner in which the Probate Master recommends commitment and the Superior Court "rubber stamps" the recommendations without due regard for the serious deprivation of liberty represented by psychiatric imprisonment.

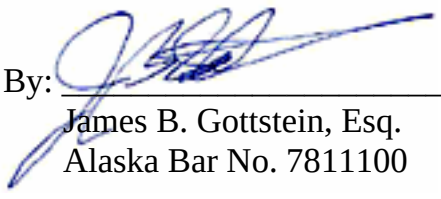
CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court:

1. Hold a transcript of proceedings must accompany a Master's Report in AS 47.30 mental health proceedings.
2. Reverse the 30-day commitment and involuntary medication orders and the order overruling the objections to the Master's Report issued in this case.
3. Hold the facts in this case do not support a finding that WSB was gravely disabled.

RESPECTFULLY SUBMITTED this 17th day of July, 2007.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.



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