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

REPLY BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this _____
day of _____, 2008

Marilyn May, Clerk

By: _____
Deputy Clerk

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Civil Rule 53(d)(1)

(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.

Civil Rule 94

These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice.

Probate Rule 2(f)(1)

(f) Objections to Master's Report, Recommendations.

1. **Objections, Reply, Oral Argument**. Objections to a master's report or recommendation must be filed within 10 days of the date of notice of the report as provided by Civil Rule 58.1(c), unless the court otherwise provides. A reply to the objections must be filed within three days of service of the objections. The superior court may permit oral argument, order additional briefing or the taking of further evidence, or grant a hearing de novo.

ARGUMENT

I. Should This Court Consider Matters Not at Issue, Nor Tried Before the Trial Court In the Commitment Appealed?

Because API's brief contains references to matters that were not made issues or tried in the trial court[1] Appellant, WSB, moved to strike the offending portions of API's Brief.[2] By Order dated December 28, 2007, this Court denied the motion to strike, stating, "The appellant may argue that the disputed portions of API's brief and excerpt are irrelevant to the issues on appeal." It is hard to see how events occurring after the Commitment Order on appeal here can be relevant to whether such Order was properly entered. In referring to these events, as will be discussed in the following subsections, API attempts to divert this Court's attention from the insufficient testimony relied upon by the Superior Court in granting the involuntary commitment on appeal here and shore it up with a distorted presentation of these later events.

A. The Commitment Order

The grounds upon which the Superior Court's commitment order was based was:

> 6. The facts which support the above conclusions are:
>
> The evidence is clear and convincing that the Respondent has the mental illness of Affective Disorder, Bi-Polar Type. His thought processes involve paranoid ideas, delusions of wealth and grandeur, and irrational thinking. He cannot perceive and understand reality. While he has sufficient funds for housing and basic necessities, his inability to focus on what is necessary and be able to interact with others without disturbing or frightening them impairs his ability to actually provide for himself. He is

[1] *See, Maines v. Kenworth Alaska, Inc.* 155 P.3d 318, 329 (Alaska 2007).
[2] *See,* Motion To Strike Portions Of API's Brief and to Vacate Reply Brief Notice, filed November 6, 2007.

> unable to shop in an appropriate manner for his own food and does not have the ability to make correct nutritional choices. The impairment of his ability to reason and understand causes a substantial deterioration to function independently and he is unable to survive in freedom. He is gravely disabled and there is no less restrictive placement than API.[3]

In his opening brief, at pp 12-13, Appellant, pointed out (1) that the treating psychiatrist, Dr. Worrall, who had been qualified as an expert in psychiatry, unequivocally testified that in his opinion, Appellant could survive safely in freedom, and (2) that under *Wetherhorn v. Alaska Psychiatric Institute*[4] he should not have been committed. Dr. Worrall further testified that while Appellant's guardian, Steve Young, had obtained an *ex parte* order to have Appellant brought in for evaluation due to concerns that he wasn't eating sufficiently, Appellant had lost only 3.5 pounds and was not in any danger of starving.[5] He further testified that while there was some concern Appellant might be assaulted by someone else, the probability of that was low.[6]

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[3] Exc. 7-8.

[4] 156 P.3d 371, 384 (Alaska 2007)(the State can not commit someone for being gravely disabled unless the "level of incapacity [is] so substantial that the respondent is incapable of surviving safely in freedom.")

[5] Tr. 2/24/07(Brown):29. In the Admission Record, explaining the discrepancy between the guardian's assertion Appellant was not meeting his nutritional needs and the small weight loss, Dr. Worrall, notes "Apparently, the [Appellant] may have been getting small amounts of money from his attorney in order to secure groceries." Exc. 52. This document wasn't before the Superior Court in connection with the 30-day commitment on appeal here, but was in the subsequent 90-day jury trial, which Appellant won. If the jury verdict form API put in its Excerpt of Record (Exc. 48-50) is part of the record, so is this, but unlike the jury verdict, the Admission Record (Exc. 52) is relevant to whether Appellant was gravely disabled for inability to fulfill his nutritional needs, which was the basis for the commitment appealed here.

[6] Tr 2/24/07(Brown): 50.

B. The Two Jury Trials Which Appellant Won

In one of its efforts to overcome the lack of sufficient evidence presented at the hearing in support of the commitment appealed here, API's brief, at 7-8, refers to a jury verdict form in the subsequent 90 day jury trial for commitment over a month after the commitment order on appeal here, which Appellant won.[7] It does not seem to Appellant that what a jury found a month later in a different proceeding can possibly be relevant in determining whether the Superior Court was correct in committing Appellant over a month earlier.[8] API cited the jury verdict because Appellant had been found gravely disabled by the jury, but fails to mention that in a jury trial held in June, 2007, the jury unanimously found that Appellant was not gravely disabled.[9,10]

C. The Order to Return Appellant Was Proven Illegal.

In another of its attempts to shore up the lack of evidence before the Superior Court with respect to the commitment on appeal here, at pages 5-6 of its Brief, API discusses the subsequent "early release" after the commitment on appeal here and then Appellant's order to return. API states Appellant was ordered returned from early release

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[7] Exc. 50.

[8] *Wetherhorn*, *supra*, 156 P.3d at 381, makes this point in another context. ("These facts are all specific to Wetherhorn's condition immediately before and at the time of her hearing. If it were to become necessary to seek Wetherhorn's commitment again, the hearing would be based on a different set of facts specific to different circumstances . . .")

[9] 3 Apdx. 1-2, of which this court may take judicial notice under *Drake v. Wickwire*, 795 P.2d 195, n1 (Alaska 1990). All of the documents in the Appendix come from involuntary commitment/forced medication cases in which Appellant here was the respondent and are therefore similarly a proper subject of judicial notice

because Anchorage Community Mental Health Services (ACMHS) "determined that [Appellant] could no longer be treated on an outpatient basis because he was likely to cause harm to himself or others or was gravely disabled," citing to a document directing Appellant to return to API (Notice to Return).[11]

API leaves out that in the jury trial referred to at page 7 of its Brief, it was revealed, contrary to the signed statement contained in the Notice to Return, that the Appellant was ordered to return because he had stopped taking the drugs forced on him in the hospital and not because of any determination that he was a danger to self or other or gravely disabled.[12] This was an illegal basis for doing so because under AS 47.30.795(c) it is only if the outpatient provider "determines" a respondent given an early release is likely to cause harm to self or others or is gravely disable may the respondent be ordered to return. The statutory grounds were recited, but not the truth.

It also came out at this hearing that in spite of his denial under oath, the guardian and API had developed the illegal plan whereby Appellant would be given an early release so that he was still technically under commitment and then ordered to return when he predictably quit taking his medication.[13]

(Continued footnote)----------
[10] That the only two times jury trials have been held, Appellant won, yet is always committed and subjected to forced drugging orders when the cases are heard by a probate master is troubling in a number of regards.
[11] Exc. 30.
[12] Exc. 56; Tr. 4/3/07(Michalski):250-254; Tr. 4/4/07(Michalski): 303-306.
[13] Contrast Exc. 55 and Tr. 4/3/07(Michalski):250-254 that there was a plan between the guardian and API to utilize the early release mechanism to keep him technically committed and then ordered back to API when he didn't take the drugs, with the ----------(footnote continued)

D. The Arrest of Appellant Six Months After the Commitment on Appeal Here Was the Calculated and Deliberate Result of API Abandoning Its Then Extant Forced Drugging Petition and Discharging Him Before the Court Could Order It to Provide A Less Intrusive Alternative.

API also attempts to shore up the lack of evidence regarding grave disability with respect to the commitment order on appeal here, when, at footnote 6 it refers to Appellant being arrested for disorderly conduct in September, 2007. This is almost seven months after the commitment order on appeal here was issued. This footnote is to a statement by API at page 21 of its brief that Dr. Worrall and the guardian in their testimony had "expressed great concern that [Appellant's] conduct would result in his arrest or assault by another." No citation to the transcript for this testimony is provided. However, what Dr. Worrall actually testified to was:

> 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.[14]

So, Dr. Worrall testified he believed the chance of Appellant getting assaulted was low, but there was a better chance of him getting arrested. This is hardly an expression of great concern as represented by API in its brief.

(Continued footnote)----------
guardian's testimony at Tr. 4/3/07(Michalski):224, denying there had been any such plan ("No. There's never been any such plan between myself and the hospital").

[14] Tr. 2/27/07(Brown):54-5, emphasis added.

Nowhere in the transcript of the February 24, 2007 hearing does the guardian express any, let alone great, concern that Appellant would be arrested or assaulted.

Thus, API misrepresented in its brief that Dr. Worrall and the guardian expressed great concern at the hearing in this matter that the Appellant's conduct would result in his arrest or assault by another and then submitted non-record documents from over six months later to show that he had been arrested.

In addition, as set forth above, the basis for the Superior Court's order committing Appellant was his supposed inability to obtain food and had nothing to do with the prospect of getting arrested or being assaulted by someone else.[15] The inclusion of this subsequent event only serves as a *post hoc* rationalization of counsel[16] for the commitment order on appeal here and seems inappropriate for consideration.

It is also seriously misleading by failing to include the context of that discharge and resultant arrest. In that September, 2007 forced medication proceeding, 3AN-07-1064 P/R to which API refers, unlike the hearing on appeal here, the likelihood of Appellant's arrest was an issue, in which Dr. Worrall testified, "We're looking at a guy who is going to do time in jail if we don't intervene".[17]

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[15] In its brief at p. 21, API asserts that the prospect of being arrested satisfies the "unable to survive" requirement of *Wetherhorn*. Appellant does not believe that is so. Getting arrested when one is homeless and it is cold, or when one is hungry, etc., is a well known survival strategy for the homeless, rather than being an indication that one is incapable of surviving. However, since that was not the basis of the commitment, the issue is not before the Court.

[16] *N. L. R. B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443, 85 S.Ct. 1061, 1064 (1965).

[17] Apdx 30.

In that case, represented by the Law Project for Psychiatric Rights with respect to the forced medication petition only,[18] Appellant presented a serious challenge to the proposed forced medication on the grounds (1) it was not in his best interests as required by *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006)[19] and (2) that the Superior Court should order API to provide a specific available less intrusive alternative under *Myers*.[20] Rather than try to rebut the best interest challenge, API abandoned the forced drugging petition. Then, in order to avoid addressing the motion for a less intrusive alternative, and while the 30-day commitment was still in force, API discharged the Appellant to the streets[21] before the Superior Court could rule on the motion to order the less intrusive alternative, knowing full well Appellant was then in a condition where he was likely to be arrested for bothering Senator Murkowski's staff without the less intrusive alternative requested.[22] This is the context of the arrest to which API cited in its brief.[23]

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[18] The Public Defender Agency represented Appellant with respect to the involuntary commitment, which Appellant lost and was committed. Apdx 4.
[19] *See*, e.g., Affidavit of Robert A. Whitaker, Apdx 9-23.
[20] *See* the following documents from 3AN 07-1064 P/R, the relevant portions of which have been included in the Appendix herein for the Court's convenience: Pre-Hearing Brief, Apdx 6-8; Request for Less Intrusive/Alternative Remedy contained in Opposition To Motion To Strike All Attachments To Pre-Hearing Brief Of Respondent And Presentation Of Other Matters, Apdx 31-24; Tr 9/10/07(Brown): at Apdx 40; Affidavit of Ronald Bassman, PhD, Apdx 24-28; Affidavit of Robert Whitaker, §IV, Apdx 15-17; Affidavit of Paul A. Cornils, Apdx 49-53; and Memorandum in Support of Motion for Permanent Mandatory Injunction, Apdx 41-48.
[21] Apdx. 54.
[22] Apdx 30.
[23] Footnote 6 of API's Brief.

In this Section I, Appellant vigorously disputes API's characterization of events subsequent to the issuance of the commitment order on appeal here. However, as Appellant asserted in his motion to strike, it is hard to see how these subsequent events have any bearing on whether the commitment order on appeal here is sustainable.

II. The Superior Court's Finding Appellant Gravely Disabled Was In Error

There is no doubt that Dr. Worrall and the guardian believed Appellant should be committed for his own good. This is all that the testimony cited by API in its brief shows. In fact, Dr. Worrall testified "I felt comfortable filing for grave disability, because he is certainly suffering.[24]

It is also clear, as the testimony set out above demonstrates, that Dr. Worrall believed Appellant would survive safely if not committed. In fact, the petition was filed only at the insistence of the guardian even though Dr. Worrall didn't believe Appellant met the gravely disabled standard just announced in *Wetherhorn*. This is shown by the Admission Record for the commitment on appeal here, relevant portions of which are:

> **PRESENTING PROBLEM:** . . . The patient allegedly was at risk of going hungry because he would not cooperate with efforts to provide him groceries. . . .
>
> **HISTORY OF PRESENT ILLNESS:** . . . The patient claims that he has frozen foods in his freezer and that he is able to provide for his nutritional needs, and he still has housing and is safe from the weather outdoors. Apparently, the patient may have been getting small amounts of money from his attorney in order to secure groceries. . . .
>
> **PERTINENT MEDICAL PROBLEMS:** . . . He has a 4-pound weight loss since his last admission over a 3-month period. . . .

[24] " Tr. 2/24/07(Brown):29.

> **Preliminary Treatment Plan:** . . . His guardian insists that the patient meets grave disability criteria and is unable to provide for his needs for his own safety. We will seek court clarification as to whether the patient is gravely disabled or not.[25]

Dr. Worrall was very consistent. He thought Appellant would benefit from commitment, but he didn't believe he was unable to survive safely in freedom.

The guardian, who insisted that Appellant met grave disability criteria, never actually testified he believed the Appellant was unable to survive safely in freedom, as was required to actually meet the grave disability standard. In fact, his entire testimony about the Appellant not being able to get groceries was based on the Appellant's refusal to cooperate with the guardian in doing so. As the Admission Record shows, however, the guardian (a) didn't know Appellant was obtaining food somewhere else, and (b) had not lost very much weight. This completely invalidates the guardian's whole premise of grave disability.[26] And the Superior Court's.

There is simply insufficient evidence to support the Superior Court's finding of grave disability.

III. The Failure to Comply With the Transcript Requirement of Civil Rule 53(d)(1) Is Reversible Error.

At p.23-24 of its Brief, API concedes that (a) Civil Rule 53(d)(1) requires a transcript accompany the master's report, (b) this requirement was violated in this case, and (c) the requirement is uniformly violated in involuntary commitment and forced medication proceedings assigned to the probate masters.

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[25] Exc. 52-54 (introduced at the 90-Day jury trial), boldfacing in original.

In arguing this is not reversible error, API argues, (1) the Superior Court could have listened to the tape if it desired, (2) Appellant should have asked for a *de novo* hearing or other further proceedings under Probate Rule 2(f), and (3) the decision was correct anyway. These arguments miss the point, which is that when an involuntary commitment is referred to a master, the respondent is entitled to have Civil Rule 53(d)(1)'s requirement that the Master's Report be accompanied by a transcript be followed in order for the Superior Court to properly discharge its duty.[27] That the Superior Court has the discretion to order a *de novo* hearing, or conduct further proceedings is irrelevant.

In reality, even if the commitment order here is reversed by this Court as Appellant believes it should, since that will not undo Appellant being erroneously locked up and subjected to forced drugging, the real question presented by this aspect of this appeal is whether ignoring Civil Rule 53(d)(1) will be blessed by this Court.

A. <u>Strict Compliance With Civil Rule 53(d)(1) Should Be Required</u>

While Civil Rule 94 allows the Superior Court to relax or dispense with a court rule "where it shall be manifest to the court that a strict adherence to them will work injustice," some court rules must be strictly complied with. This court has thus held Civil Rule 51(a) pertaining to objections to testimony,[28] Civil Rule 52(a)[29] and Civil Rule

(Continued footnote)----------
[26] *Id.*
[27] *See*, pp 6-10 of Appellant's Brief.
[28] *Brown v. Jonz*, 591 P.2d 532, 534 (Alaska 1979); *Thomson v. Wheeler Construction*, 385 P.2d 111, 115 (Alaska 1963).

65(d) pertaining to the court specifying the grounds for injunctions,[30] and Civil Rule 89(f)(3) regarding the notice requirement for garnishment,[31] must all be strictly complied with. Other court rules such as the requirement to move for telephonic participation,[32] and time limits[33] may be relaxed or dispensed with in the interests of justice. Appellant suggests this Court should hold strict compliance with Civil Rule 53(d)(1)'s requirement that a transcript accompany the Master's Report in involuntary commitment and forced medication cases is required.

First, it is the masters, who are referred these cases on the condition that they provide transcripts with their recommendations, not either party, who are ignoring this rule. Appellant respectfully suggests this Court should not countenance the masters flouting Civil Rule 53(d)(1)'s requirement of providing a transcript.

Second, Appellant respectfully suggests requiring strict compliance with Civil Rule 53(d)(1)'s requirement of a transcript would be in accord with the rationale behind the other court rules with which this Court has required strict compliance. In *Thomson*, this Court explained its reason for requiring strict compliance with Civil Rule 51(a) as follows:

(Continued footnote)----------
[29] *Ostrow v. Higgins*, 722 P.2d 936, 939-940 (Alaska 1986); and *Department of Fish and Game v. Pinnell*, 461 P.2d 429, 432 (Alaska 1969)
[30] *Id.*
[31] *Beery v. Browning*, 717 P.3d 365 (Alaska 1986).
[32] *Carvalho v. Carvalho*, 838 P.2d 259, 263 (Alaska 1992).
[33] *Safeco Insurance Co., v. Honeywell, Inc.*, 639 P.2d 996, 999 (Alaska 1981); *Palzer v. Serv-U-Meat Co*, 419 P.2d 201, 206 (Alaska 1966).

> The purpose of this requirement is to facilitate the administration of justice by permitting the trial judge to obviate any error that might otherwise occur if no objection were made, by permitting him to correct at the earliest possible time any error that may have occurred, and by allowing the adverse party the opportunity to remedy, if possible, any defect in his method of proof.

Here, the Master's Reports did not present both sides of the evidence; just reporting on his findings and conclusions. Presumably, this is typical. Even when objections to the Masters Report are made, without a transcript, the Superior Court is not in a position to evaluate the testimony itself, which is its duty. When no objections to the masters reports are made, the Superior Court is still obligated to review the testimony to determine if the testimony is sufficient to support a recommendation for commitment and if the Superior Court agrees commitment should be imposed. Appellant respectfully suggests this situation is analogous to *Thomson*, in that strict compliance is necessary to remedy any problems at the time, because an erroneously incarcerated psychiatric inmate can never recover the lost time.

Appellant suggests this is also analogous to why strict compliance with Civil Rules 52(a) and Civil Rule 65(d) was required in *Pinnell* and re-affirmed in *Ostrow*, pertaining to the court specifying the grounds for injunctions in that the Superior Court can not meaningfully perform its function to decide whether to grant petitions for involuntary commitment or forced medication without the transcript, just as this Court

can not "meaningfully exercise its review jurisdiction" without the required findings and conclusions.[34]

In *Beery*, this Court required strict compliance with Civil Rule 89(f)(3)'s notice requirement to a garnishee, saying, "Given the serious consequences of garnishment, *i.e.*, potential liability to judgment creditor and debtor, we must insist on strict compliance with the notice requirements."[35] This court has recognized that civil commitment involves a "massive curtailment of liberty,"[36] and forced medication's intrusiveness is comparable to lobotomy and electroshock.[37] Surely Civil Rule 53(d)(1)'s relatively minor requirement of a transcript as a protection against the erroneous massive curtailment of liberty represented by involuntary commitment and erroneous court ordered intrusiveness comparable to lobotomy and electroshock represented by forced drugging, is just as deserving of strict compliance as the notice requirement in garnishee proceedings.

B. No Justification for Relaxing or Dispensing with the Requirement of a Transcript Appears.

By its express terms, Civil Rule 94 requires the court to consider whether to relax or dispense with a particular rule or rules in each case.[38] In the appellate context, this Court has held while compliance with rules should be relaxed where "surprise or injustice

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[34] 461 P.2d at 432.
[35] 717 P.2d n.8.
[36] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 375 (Alaska 2006).
[37] *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242 (Alaska 2006), *Wetherhorn* 156 P.3d at 375.
[38] *See*, also, *Vogt v. Winbauer*, 376 P.2d 1007, 1009 (Alaska 1962) ("nothing in the record . . . indicates . . . the judge was relaxing the application of any rule in this case.") (emphasis added).

would result," this Court "must also remain mindful of the fact that the rules are designed to facilitate business and to assure an orderly procedure on appellate review and should therefore be enforced by this court."[39] While Appellant did not find a similar statement with respect to enforcement of rules in the trial court, it seems the same principle should apply, especially since Civil Rule 94 and Appellate Rule 521 have identical language.

No justification for dispensing with the rule was presented to, nor considered by, the Superior Court.

API nonetheless suggests the failure to follow the rule is of no moment because the Superior Court could, if it desired, listen to the tape.[40] However, Judge Michalski indicated he did not listen to the tape in overruling the objections, and that while Judge Smith theoretically could have listened to the tape, there is no reason to think he did either.[41] The prejudice to Appellant was great. When Judge Smith approved the Master's recommendations the day after Master Brown signed it, all he had before him was the following from the Master:

> 6. The facts which support the above conclusions are:
>
> The evidence is clear and convincing that the Respondent has the mental illness of Affective Disorder, Bi-Polar Type. His thought processes involve paranoid ideas, delusions of wealth and grandeur, and irrational thinking. He cannot perceive and understand reality. While he has sufficient funds for housing and basic necessities, his inability to focus on what is necessary and be able to interact with others without disturbing or

[39] *Cook v. Aurora Motors, Inc.*, 503 P.3d 1046, 1049 (Alaska 1972).
[40] API Brief, p. 25.
[41] Tr. 3/28/07(Michalski):12. Judge Smith approved the Master's recommendation to commit Appellant before Appellant timely filed his objections to the Master's Report. Exc. 8 and Exc. 17.

> frightening them impairs his ability to actually provide for himself. He is unable to shop in an appropriate manner for his own food and does not have the ability to make correct nutritional choices. The impairment of his ability to reason and understand causes a substantial deterioration to function independently and he is unable to survive in freedom. He is gravely disabled and there is no less restrictive placement than API.[42]

This does not inform the Superior Court judge that Dr. Worrall had testified he couldn't give an opinion that WSB was unable to survive safely in freedom.[43] Neither did the Master inform the Superior Court that 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 had lost only 3.5 pounds and that wasn't enough to put him in any medical jeopardy.[44] Nor did the Master inform the Superior Court that during cross-examination, Dr. Worrall reiterated that in his opinion Appellant would be able to survive in the community[45] if it was a reasonable period of time, weeks or months or more.[46] In approving the Master's recommendations, the Superior Court had none of this testimony in front of him.

It was Appellant's right to have this testimony before the Superior Court before it decided to order the "massive curtailment of liberty" that involuntary commitment represents. It is Appellant's right to have the decision made by the Superior Court, and without a transcript, the Superior Court can not make a legitimate determination.

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[42] Exc. 8.
[43] Tr. 2/27/07 (Brown), p. 28.
[44] Tr. 2/27/07 (Brown), p.29.
[45] Tr. 2/27/07 (Brown), p. 50.
[46] Tr. 2/27/07 (Brown) pp 53-5.

Appellant was also prejudiced by not being able to review and cite to the transcript in making his objections. Appellant characterized the testimony one way and API another. The Superior Court had no way to evaluate what the proof really showed, or even supported, without a transcript.

C. The Possibility of Asking for *De Novo* Review is No Excuse For Ignoring the Rule

At page 26 of its brief, API asserts Appellant should have requested a *de novo* hearing under Probate Rule 2(f) as if this somehow operated as a waiver of the transcript requirement. There are a couple of flaws in this notion. First, that the Superior Court might grant a *de novo* trial is no excuse for violating the rule requiring a transcript in the first place.

Second, during the pendency of any decision on granting a *de novo* hearing, psychiatric respondents are suffering the "massive curtailment of liberty," represented by being locked up in the hospital.[47] Such respondents have the right to have the legitimacy of their continued psychiatric incarceration properly passed upon by the Superior Court without unnecessary delay. Having to ask for a *de novo* hearing, which may or may not be granted, is no remedy for the Superior Court's failure to properly follow the rules in the first instance.

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[47] *Wetherhorn*, 156 P.3d at 378.

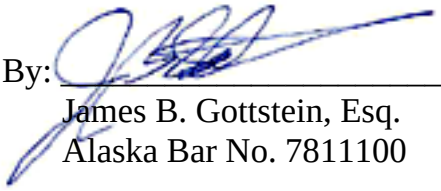
CONCLUSION

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 at the time of the 30-Day commitment hearing appealed here.

RESPECTFULLY SUBMITTED this 19th day of February, 2008.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.



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