IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In The Matter of the Necessity for the Hospitalization of William Bigley,

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO VACATE ORDER SETTING OCTOBER 29, 2008 HEARING

Respondent, William Bigley, has moved to vacate this Court's order faxed to Respondent's counsel on October 27, 2007, setting a hearing for October 29, 2008 (Hearing Order), on the forced drugging petition filed in this case (Forced Drugging Petition).

I. API HAS MOVED TO DISMISS THE EXTANT PETITION

On Friday, October 24, 2008, petitioner, Alaska Psychiatric Institute (API) moved to dismiss the Forced Drugging Petition in this matter because "Mr. Bigley has responded well to his care at API; therefore, the factual basis for the petition, brought October 21, 2008, no longer exists." Apparently, this Court issued the Hearing Order without knowledge that API had filed such a motion to dismiss.

Prior to API filing its motion to dismiss, Respondent had demanded a copy of Respondent's chart in order to prepare for a possible hearing and upon API's failure to respond, notified API that it would be subpoenaing Dr. Khari for a deposition. API

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determined it would instead dismiss the petition and in reliance on that, Respondent cancelled the deposition. *See*, Exhibit A[1]

On Monday, October 27, counsel for API called Respondent's counsel and informed him API intended to file a new forced drugging petition. Counsel for Respondent reminded counsel for API about the Alaska Supreme Court having issued a stay pending appeal in a prior case and that API had represented to this Court (*via* Master Lack) that it was going to seek clarification from the Alaska Supreme Court as to whether the stay applied to this proceeding. Counsel for Respondent also mentioned that failure to do so could constitute contempt of court.

Counsel for Respondent attempted to ascertain from the Court's chambers if the hearing was still scheduled, but as of the end of the day, Monday, October 27, 2008, was informed the Court had not acted. As of the writing of this motion, Appellant's counsel has not received any new forced drugging petition. In light of the Alaska Supreme Court's stay, and API's representation to this Court (*via* Master Lack) that it would seek clarification from the Alaska Supreme Court it seems quite possible API has not filed a new petition, and as far as Respondent is aware there is no extant forced drugging petition.

The Hearing Order should therefore be vacated on that ground. In addition, Respondent cancelled Dr. Khari's deposition in reliance on API's assurance it was withdrawing the Forced Drugging Petition and the Hearing Order should also be dismissed on that ground.

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[1] As it turns out the deposition was going to be set for the same time as the Hearing Order later set for hearing the Forced Drugging Petition.

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II. THE HEARING SHOULD NOT TAKE PLACE ABSENT CLARIFICATION FROM THE ALASKA SUPREME COURT THAT ITS STAY PENDING APPEAL IS INAPPLICABLE

In addition, no forced drugging hearing against Respondent should take place while the Alaska Supreme Court's stay pending appeal is in place unless and until the Alaska Supreme Court might authorize it. API represented to this Court (*via* Master Lack) that it would seek such clarification and should be required so to do.

III. THE HEARING ORDER VIOLATES THE ALASKA SUPREME COURT'S MANDATE IN *MYERS* AND *WETHERHORN*.

In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), the Alaska Supreme Court held AS 47.30.839 was not a constitutionally permissible basis for forcing someone to take psychotropic drugs against their will except as follows:

> [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added).

In *Wetherhorn v. Alaska Psychiatric Institute,* 156 P.3d 371, 381 (Alaska 2007), the Alaska Supreme Court held:

> The expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily. In contrast, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse psychotropic medications remain intact. Therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.

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The same must be true of the constitutional protections mandated in *Myers*. Setting the hearing on such shortened time violates the Alaska Supreme Court ruling that forced drugging proceedings are not to be unduly rushed absent an emergency.[2]

IV. THE HEARING ORDER DENIES RESPONDENT DUE PROCESS

The Hearing Order also violates Respondent's right to due process of law. Meaningful notice and a meaningful opportunity to be heard are the hallmarks of procedural due process:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004) ("a citizen-detainee . . . must receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.") Respondent is similarly entitled to "receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions."

In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), in addition to holding:

> [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and

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[2] API has a history of abusing the emergency forced drugging statute against Respondent, which has been the subject of emergency Alaska Supreme Court proceedings. API has backed down when confronted with there being no actual emergency justifying such forced drugging and represented it would cease to utilize the emergency forced drugging statute.

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convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available.*

it held:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:
>
> > (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
> >
> > (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
> >
> > (C) a review of the patient's history, including medication history and previous side effects from medication;
> >
> > (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
> >
> > (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][3]

The Alaska Supreme Court then cited with approval the Supreme Court of Minnesota's requirement of consideration of the following factors:

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
>
> (2) the risks of adverse side effects;
>
> (3) the experimental nature of the treatment;
>
> (4) its acceptance by the medical community of the state; and

[3] 138 P.3d at 252.

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> (5) the extent of intrusion into the patient's body and the pain connected with the treatment.[4]

None of this factual basis supporting any forced drugging petition has been provided Respondent and this Court moving forward without Respondent receiving "notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions" will be a denial of due process.

Respondent is entitled to a reasonable amount of time to conduct discovery and prepare for any hearing. In *Department of Natural Resources v. Greenpeace*, 96 P.3d 1056, 1063 (Alaska 2004), the Alaska Supreme Court held that under the United States Supreme Court case of *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967):

> The United States Supreme Court has said that to comply with due process requirements, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded."

In *Greenpeace*, the failure of DNR to give Greenpeace access to previously requested relevant documents contributed to a denial of due process. Here, Respondent first demanded his chart on October 21, 2008, then not receiving any response scheduled a deposition to, among other things, obtain it, which deposition was cancelled in reliance on API's representation it was withdrawing the Forced Drugging Petition. API did file a motion to dismiss the Forced Drugging Petition, but apparently, there may be a new petition. Respondent has yet to receive a copy of his chart. Proceeding with the hearing under these circumstances is a denial of due process.

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[4] *Id.*

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V. CONCLUSION

For the foregoing reasons, the Hearing Order should be vacated.

DATED: October 28, 2008.

Law Project for Psychiatric Rights

By: _____
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