

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 S.)
Bigley,)
)
)
_____)
Case No. 3AN-08-1252 PR

~~*** CONFIDENTIAL ***~~ ← Not Confidential
Jim Gottstein

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE WILLIAM F. MORSE
Superior Court Judge

Anchorage, Alaska
November 17, 2008
8:39 A.M.

APPEARANCES:

FOR THE STATE: Erin Pohland, Esq.
Assistant Attorney General
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FOR THE RESPONDENT: James B. Gottstein, Esq.
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I-N-D-E-X

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1 (Transcriptionist's note: When Mr. Bigley was asked a

2 direct question and responded, this has been

3 transcribed; however, I did not attempt to transcribe

4 Mr. Bigley speaking in the background during the

5 proceedings.)

6 3AN6108-203

7 8:39:29

8 P R O C E E D I N G S

9 THE COURT: Madame Clerk, can you hear us?

10 THE CLERK: Yes.

11 THE COURT: You can go on record.

12 THE CLERK: Okay. I'm on record.

13 THE COURT: All right. Where are we? What

14 do we -- is there anything we need to take up before

15 we begin cross examination?

16 MR. GOTTSTEIN: I don't believe so, Your

17 Honor. We -- there was a question -- I have Ron

18 Bassman, Bob Whitaker, and Sarah Porter standing by on

19 the telephone. Ms. Porter is in New Zealand, and I

20 think it's 6:40 a.m. there, so we need to take her

21 last.

22 And then Mr. Cornils is here for cross

23 examination. And then there is maybe some confusion

24 or disagreement. I also subpoenaed Susan Musante, who

25 is the executive director of Choices, to clear up any

1 issues around Choices' availability that may arise out

2 of Mr. Cornils' testimony. So I would propose that we

3 call Mr. Bassman first.

4 MS. POHLAND: The state would object to

5 calling Ms. Musante, given that we were told that

6 only -- the only remaining deponents were those who

7 were testifying via direct the affidavit, and she was

8 not one of those.

9 MR. GOTTSTEIN: Your Honor, I thought I

10 brought -- I'm pretty sure I mentioned this on

11 Thursday.

12 THE COURT: What is it that she's going to

13 testify about that Mr. Cornils can't?

14 MR. GOTTSTEIN: There was -- the State

15 brought up some testimony of Mr. Cornils from last May

16 which ended up I think being a little bit inaccurate

17 or unclear. And so Ms. Musante is here to clarify

18 Choices' availability if that becomes an issue on

19 cross.

20 THE COURT: We'll cross that bridge when we

21 have to. Who do you want to do first?

22 MR. GOTTSTEIN: Ron Bassman.

23 THE COURT: All right.

24 MS. POHLAND: Could we object to the issue of

25 Dr. Mosher's testimony?

1 THE COURT: Okay. What --

2 MS. POHLAND: The State (indiscernible) based

3 on relevance, given that the testimony of Dr. Mosher

4 is from a separate case in 2003, along with

5 (indiscernible) the State does not believe that his

6 testimony meets the criteria for -- under 804(B)(1),

7 given that the State didn't have the same or similar

8 opportunity to -- motive to cross examine him. This

9 is an entirely different case, has nothing to do with

10 Mr. Bigley.

11 THE COURT: What would you have asked him

12 that wasn't asked of him (indiscernible)?

13 MS. POHLAND: Well, I would have asked him

14 about his experiences with Mr. Bigley, what he knows

15 about the side effects of this medication -- proposed

16 medication for Mr. Bigley, given that that's the

17 subject of the hearing. And, you know, as such, I

18 don't think it meets the criteria under the rules.

19 Further, the affidavit itself is not direct

20 testimony, and that should be -- even if the prior

21 testimony itself would be allowed in, the affidavit is

22 not prior testimony. It's merely an exhibit.

23 THE COURT: My tentative thought was to

24 strike the affidavit and allow the testimony.

25 Do you want to be heard further? Do you want

1 to be heard?

2 MR. GOTTSTEIN: I didn't see why I should
3 argue with that. I mean, I think that his affidavit
4 was -- was submitted as testimony in that case, and
5 then Dr. Mosher was called for cross examination on
6 this affidavit and on -- and then he testified and was
7 cross examined. I don't know if you want me to
8 address those other issues that she --

9 THE COURT: Let me -- I read most of his
10 testimony, but I wasn't reviewing it -- I wasn't
11 thinking in terms of the affidavit being part of the
12 direct testimony.

13 So I am going to revisit the testimony itself
14 and see if it the affidavit was actually direct
15 (indiscernible). If it was direct, then I will allow
16 it. If it wasn't direct, then I won't.

17 Is there anything else?

18 MS. POHLAND: No. (Indiscernible)
19 Dr. Mosher, that is it.

20 THE COURT: Thank you. Then let's call
21 Mr. Bassman.

22 MR. GOTTSTEIN: (Indiscernible) Mr. Bassman
23 (indiscernible).

24 MS. POHLAND: Your Honor, then there is an
25 additional matter. The State would object, based on

1 the relevance of Mr. Bassman's testimony, and that
2 it's a generalized analysis of clinical trials. It
3 has nothing to do with the issue at hand
4 (indiscernible) expert (indiscernible) pharmacology.

5 MR. GOTTSTEIN: No. That's -- you're --
6 that's Bob Whitaker. This is Ron Bassman. He is a
7 psychologist -- Ph.D. psychologist.

8 MS. POHLAND: Again, though, it has no
9 (indiscernible) his affidavit. The State doesn't
10 (indiscernible) affidavit, merely that it's a
11 notarized (indiscernible).

12 But that aside, it's not specific to this
13 case, or even (indiscernible) specific medication.
14 And Dr. Khari is (indiscernible) for Mr. Bigley. I
15 don't see how it falls within the (indiscernible) with
16 respect to the (indiscernible) under the statute
17 (indiscernible).

18 THE COURT: The objection is overruled. Call
19 him.

20 (Pause.)

21 MR. GOTTSTEIN: Yes. I think you are
22 conferenced in. I am going to turn you over to the
23 judge now.

24 THE WITNESS: Okay. Thank you.

25 THE COURT: Dr. Bassman, can you hear me all

1 right?

2 THE WITNESS: Yes, I do.

3 THE COURT: My name is William Morse. I am a
4 superior court judge in Anchorage.

5 You are being called as a witness on behalf
6 of the respondent in the petition involving the
7 medication of William Bigley, who -- he is present.

8 Also present in the hearing room is
9 Mr. Gottstein, his counsel, Ms. Pohland is the state's
10 attorney, the public guardian, and various other
11 representatives of API.

12 If you'd please stand and raise your right
13 hand.

14 (Oath administered.)

15 THE WITNESS: Yes, I do.

16 THE COURT: You may be seated. Would you
17 state and spell your full name, please?

18 THE WITNESS: My name is Ronald Bassman.

19 THE COURT: Will you spell your last name,
20 please.

21 THE WITNESS: B, as in boy, A-S-S-M-A-N.

22 THE COURT: Thank you, Doctor. We have -- I
23 have accepted an affidavit that you submitted
24 previously as your direct testimony. So the State is
25 going to now cross examine you.

1 THE WITNESS: Okay.

2 RONALD BASSMAN, PH.D.
3 called as a witness on behalf of Respondent, testified
4 telephonically as follows on:

5 CROSS EXAMINATION
6 BY MS. POHLAND:

7 Q Dr. Bassman, this is Erin Pohland for the
8 State of Alaska. Can you hear me okay?

9 A Yes, I hear you fine.

10 Q Okay. Thank you. Dr. Bassman, you are not a
11 medical doctor, correct?

12 A That's correct.

13 Q So you are a psychologist, not a
14 psychiatrist?

15 A That's correct.

16 Q You are not familiar with the standard of
17 care for psychiatry in the State of Alaska, are you,
18 Dr. Bassman?

19 A No, I am not.

20 Q You cannot offer any true alternative to
21 medication for Mr. Bigley, can you, Mr. Bassman --
22 Dr. Bassman?

23 A Yes, I can.

24 Q You can? What would those alternatives be,
25 based -- let me strike that.

1 Do you have alternatives -- true alternatives
2 for Mr. Bigley in the city of Anchorage to medication?

3 A I don't specifically have alternatives, but
4 alternatives are known to work well with people
5 without medication, and they can be easily set up as
6 the system supports for the person.

7 Q But, Dr. Bassman, you cannot provide any
8 actual alternatives in the State of Alaska or the city
9 of Anchorage for Mr. Bigley, can you?

10 A If you're asking me if I can personally
11 provide alternatives, you're -- no, I cannot.

12 Q And, Dr. Bassman, medication for psychiatric
13 illness is one of many forms of proper treatment; is
14 that correct?

15 A It can be. It depends on the individual.
16 Many people do not do well with medications, and they
17 do better without them. And that's well researched.

18 MS. POHLAND: That's all I have for this
19 witness.

20 THE COURT: Any redirect?

21 MR. GOTTSTEIN: No, no questions.

22 THE COURT: Thank you, Dr. Bassman. You may
23 hang up.

24 THE WITNESS: Thank you. Bye.

25 MR. GOTTSTEIN: Thanks, Ron.

1 THE WITNESS: You're welcome.
2 (Witness excused.)

3 MR. GOTTSTEIN: Okay. Can we get
4 Mr. Whitaker?

5 (Pause.)

6 THE COURT: Madame Clerk, can you still hear
7 us?

8 THE CLERK: Yes.

9 THE COURT: Thank you.

10 Sir, if you wanted to bring a chair over here
11 so that you are sitting next to Mr. Gottstein, that
12 way -- scoot the chair behind him so we can --

13 If you'd stand and raise your right hand.
14 (Oath administered.)

15 THE WITNESS: I do.

16 THE COURT: You may be seated. Will you
17 state your full name and spell your last name.

18 THE WITNESS: Paul Cornils, C-O-R-N-I-L-S.

19 MR. GOTTSTEIN: Are we still connected to the
20 clerk?

21 THE COURT: Yes, we are.

22 Madame Clerk, you're still there, right?

23 THE CLERK: Yes.

24 THE COURT: We have accepted your affidavit
25 as direct testimony, so --

1 PAUL CORNILS

2 called as a witness on behalf of Respondent, testified
3 as follows on:

4 CROSS EXAMINATION

5 BY MS. POHLAND:

6 Q Mr. Cornils, Erin Pohland for the State. We
7 met earlier.

8 Mr. Cornils, is this -- do you still work at
9 Choices?

10 A I do not.

11 Q You do not.

12 MS. POHLAND: At this point, Your Honor, the
13 State would move to strike his affidavit as based on
14 (indiscernible) offered by Choices. He no longer --

15 THE COURT: Overruled.

16 BY MS. POHLAND:

17 Q Do you have any medical (indiscernible),
18 Mr. Cornils?

19 A I do not.

20 Q Are the services that, in your affidavit, you
21 discuss offering for Mr. Bigley, are they intended to
22 replace treatment by medicines for Mr. Bigley?

23 A No. They are an alternative in certain
24 cases, but (indiscernible).

25 Q What is the current status of your

1 relationship with Mr. Bigley?

2 A I don't have a relationship with Mr. Bigley
3 any longer.

4 Q Now, Mr. Cornils --

5 MS. POHLAND: The State would like to offer
6 Exhibit -- I believe we're on Exhibit I. Mr. Cornils'
7 prior testimony in May 2008.

8 BY MS. POHLAND:

9 Q Isn't it true, Mr. Cornils, that in May 2008,
10 you testified that if Mr. Bigley is not compliant with
11 treatment recommended by his physicians, that Choices
12 would not be able to work with him?

13 A That was -- at the time that was my
14 understanding the direction (indiscernible).

15 Q Are you aware of any other mental health
16 providers in the city of Anchorage other than API
17 which are willing to provide treatment to Mr. Bigley?

18 A There were not at the time that I was working
19 there.

20 Q Are you aware of any currently that would
21 provide treatment to Mr. Bigley without
22 medication?

23 A Possibly Choices. We --

24 Q Let me rephrase. I was asking if there are
25 any medical providers who would --

1 A Oh, not that I am aware of, no.
 2 MS. POHLAND: No further questions.
 3 PAUL CORNILS
 4 testified as follows on:
 5 REDIRECT EXAMINATION
 6 BY MR. GOTTSTEIN:
 7 Q Now, Mr. Cornils, you said that -- about the
 8 compliance with recommendations, that was your
 9 understanding at the time. Has your understanding
 10 changed about that testimony since you --
 11 A I kind of missed the question. I'm sorry.
 12 Q Ms. Pohland asked you that -- whether you
 13 testified that your medical director would not support
 14 Choices working with a patient or client who is
 15 refusing to take medication against his physician's
 16 recommendation.
 17 A Okay. No. I guess I said -- that's not what
 18 I meant.
 19 Our medical director at the time would not
 20 supervise medication and would not work with an
 21 individual who is working -- not following his
 22 psychiatrist's advice.
 23 Whether or not they were taking medication or
 24 not was not the issue. It was that the person -- that
 25 the client had to be following his psychiatric

1 provider's advice. So if the psychiatrist said that
 2 they were doing okay not taking medication,
 3 (indiscernible). But if it was recommended that they
 4 needed to take medication, then that was
 5 (indiscernible).
 6 Q Now, that was your understanding at the time?
 7 A Yes, sir.
 8 Q Is there anything after that that made you
 9 think that understanding was incorrect or has
 10 changed?
 11 A No.
 12 MR. GOTTSTEIN: No further questions.
 13 MS. POHLAND: Your Honor, if I may.
 14 PAUL CORNILS
 15 testified as follows on:
 16 RECROSS EXAMINATION
 17 BY MS. POHLAND:
 18 Q So, Mr. Cornils, given that Mr. Bigley's
 19 treating psychiatrist, Dr. Khari, has recommended
 20 medication in order to treat Mr. Bigley, if he were
 21 non-compliant with his treating psychiatrist's
 22 recommendation, is it your testimony that Choices
 23 would not be able to work with him?
 24 A I (indiscernible) couldn't testify to that
 25 one way or the other. I haven't been at Choices for

1 six months now.
 2 MS. POHLAND: No further questions.
 3 MR. GOTTSTEIN: Mr. Cornils, if --
 4 THE COURT: That's it. You had your cross --
 5 I mean, your redirect.
 6 MR. GOTTSTEIN: Okay.
 7 THE COURT: Thank you. You may -- you are
 8 free to leave. You don't have to stay.
 9 THE WITNESS: Thank you.
 10 THE COURT: You may stay, but you -- you may
 11 stay (indiscernible).
 12 MR. GOTTSTEIN: Could we try Mr. Whitaker
 13 again?
 14 (Pause.)
 15 THE COURT: Mr. Whitaker?
 16 THE WITNESS: Hello, this is Bob Whitaker.
 17 THE COURT: Can you hear us?
 18 THE WITNESS: Yes.
 19 THE COURT: My name is William Morse. I am a
 20 superior court judge in Anchorage.
 21 THE WITNESS: Hi, Judge -- Your Honor.
 22 THE COURT: You are being called as a witness
 23 in a case involving William Bigley, who is present in
 24 the hearing room.
 25 THE WITNESS: Okay.

1 THE COURT: Also present is Mr. Gottstein,
 2 his attorney, and Ms. Pohland, the State's lawyer.
 3 There are other representatives of API in the hearing
 4 room, as well as the public guardian, as well.
 5 THE WITNESS: Okay.
 6 THE COURT: If you would stand and raise your
 7 right hand.
 8 THE WITNESS: Okay. I am standing and hand
 9 is raised.
 10 (Oath administered.)
 11 THE WITNESS: I swear I will.
 12 THE COURT: You may be seated. If you would
 13 state your name and spell your last name, please.
 14 THE WITNESS: Name is Robert Whitaker. Last
 15 name is spelled W-H-I-T-A-K-E-R.
 16 THE COURT: Thank you. Your affidavit has
 17 been submitted as direct testimony, and so the
 18 State's counsel is going to begin with cross
 19 examination.
 20 THE WITNESS: Okay.
 21 MS. POHLAND: Your Honor, as an initial
 22 matter, the State would object to Mr. Whitaker's --
 23 the relevance of Mr. Whitaker's testimony, and
 24 furthermore his qualifications as an expert witness in
 25 this case.

1 THE COURT: Both are overruled.
2 ROBERT WHITAKER
3 called as a witness on behalf of Respondent, testified
4 telephonically as follows on:

5 CROSS EXAMINATION

6 BY MS. POHLAND:

7 Q Mr. Whitaker, you are a journalist,
8 correct?

9 A That's correct.

10 Q You are not a medical doctor; is that
11 correct?

12 A I am not a doctor.

13 Q And the affidavit that you submitted is not
14 based on your own research or studies; is that
15 correct?

16 A That's correct.

17 Q It's --

18 A Well, the only thing, in terms of research,
19 I'm just saying this is what I found in the research
20 literature. But I am not the one who did the studies,
21 that's correct.

22 Q And you are not an expert in
23 psychopharmacology; is that correct?

24 A No, I am not a doctor, as you said. I came
25 at this as a journalist, someone who reviewed the

1 THE WITNESS: Yes. I co-founded a company
2 called Center Watch, and I co-founded that in 1994.
3 And we covered the clinical trials industry. So we
4 covered the development of new drugs.

5 BY MR. GOTTSTEIN:

6 Q And did you publish a journal or articles
7 or --

8 A Well, what Center Watch did was it published
9 many things. It published a monthly newsletter; it
10 published a weekly newsletter. We had a couple of
11 books.

12 And the people who read us, our clients, were
13 doctors, they were pharmaceutical companies, they were
14 people on Wall Street. Those were who read our
15 publications.

16 And I was the editorial person, so there was
17 two of us who founded it, so I was responsible for
18 most of that copy.

19 Q So these readers paid -- was it a significant
20 amount of money?

21 A Yeah, they paid a fair amount of money. It
22 was \$395 a year just for the 12 monthly issues, and it
23 was 295 for the weekly facts. And books, we would
24 charge as much as \$400 for a book.

25 MR. GOTTSTEIN: No further questions.

1 research literature.

2 Q And --

3 (Intercom announcement.)

4 MS. POHLAND: Sorry about that,
5 Mr. Whitaker.

6 THE WITNESS: That's okay.

7 BY MS. POHLAND:

8 Q And, Mr. Whitaker, do you have any idea as to
9 the efficacy or the side effects of the proposed
10 recommendation for Mr. Bigley?

11 A No. I don't even know what the proposed
12 recommendation is for Mr. Bigley.

13 MS. POHLAND: Okay. No further questions.

14 THE COURT: Any redirect?

15 ROBERT WHITAKER

16 testified telephonically as follows on:

17 REDIRECT EXAMINATION

18 BY MR. GOTTSTEIN:

19 Q Mr. Whitaker, did you have a company that
20 analyzed clinical studies?

21 MS. POHLAND: Objection, relevance.

22 THE COURT: Overruled.

23 THE WITNESS: I am allowed to answer? I'm
24 sorry --

25 THE COURT: You are. You may.

1 ROBERT WHITAKER

2 testified telephonically as follows on:

3 RECROSS EXAMINATION

4 BY MS. POHLAND:

5 Q Mr. Whitaker, Center Watch published these
6 articles but did not author these articles; is that
7 correct?

8 A Oh, no, no. We wrote the articles.

9 Q You wrote the articles?

10 A Yeah, that's right.

11 Q And these articles were reviewed with other
12 articles or studies?

13 A No. Well, what Center Watch in particular
14 focused on was the business aspects of the clinical
15 trial business. So we would -- we would focus on, you
16 know, doctors getting paid, what sort of monies were,
17 you know, being paid to contract research
18 organizations, that sort of thing.

19 It was really more of a business publication,
20 Center Watch. So we would do original -- we would
21 actually do original research for Center Watch in the
22 sense of finding out, you know, what were -- what were
23 average payments to a doctor doing a clinical trial,
24 that sort of thing.

25 Q So --

1 A You understand that answer, right?
 2 Q I understand. So essentially, your -- Center
 3 Watch publications were not focused on the efficacy or
 4 side effects of these drugs, but rather on the
 5 business aspect of the clinical trials, correct?

6 A Yes. We -- the only time we got into sort of
 7 questions about that -- like say for example I did a
 8 story on drugs that were coming to market for
 9 impotence.

10 And what we did was, showing that there was a
 11 difference between what was being reported in the
 12 popular press as opposed to what really the -- the
 13 actual study findings were.

14 Now, why was that important? That was
 15 important because we had, you know, Wall Street
 16 analysts that wanted to know what were the studies
 17 really showing, that sort of thing.

18 But generally, again, we were a business
 19 publication.

20 MS. POHLAND: No further questions.

21 THE COURT: Thanks, sir. You may hang up.

22 THE WITNESS: Okay. Thank you.

23 (Witness excused.)

24 MR. GOTTSTEIN: What I'd like to do -- may I
 25 call Ms. Musante to clarify Mr. Cornils' testimony

1 (indiscernible)?

2 THE COURT: I'll allow it.

3 MR. GOTTSTEIN: You'll allow it?

4 THE COURT: Yes.

5 If you'd just come around to this -- sir, if
 6 you could remove your hat, please.

7 Will you raise your right hand?

8 (Oath administered.)

9 THE WITNESS: I do.

10 THE COURT: Thank you. You may be seated,
 11 please.

12 Would you state and spell your full name.

13 THE WITNESS: Susan Musante. That's Susan,
 14 S-U-S-A-N, M-U-S-A-N-T-E.

15 THE COURT: You may proceed.

16 SUSAN MUSANTE
 17 called as a witness on behalf of Respondent, testified
 18 as follows on:

19 DIRECT EXAMINATION

20 BY MR. GOTTSTEIN:

21 Q You were subpoenaed to testify here?

22 A Yes, I was.

23 Q Or were you? Okay. Did you hear
 24 Mr. Cornils' testimony?

25 A I did.

1 Q Are you the executive director of Choices?

2 A Yes, I am.

3 Q Do you have any disagreements, or was his --
 4 strike that.

5 Was his testimony accurate regarding the
 6 availability of Choices?

7 A I did not have the exact same understanding
 8 that he did about why or why not (indiscernible) with
 9 Mr. Bigley.

10 So Choices has a philosophy of people having
 11 a choice in -- (indiscernible) that (indiscernible)
 12 must do that.

13 So our medical director -- he was accurate in
 14 that our medical director is a -- kind of more of a
 15 consulting, supervising doctor as opposed to treating
 16 doctor. So he prefers that people that are working
 17 with Choices have another physician working with them,
 18 but he also believes in a period of engagement.

19 And I've never heard him say he won't work
 20 with somebody who is (indiscernible). We don't
 21 usually -- we don't use that kind of language at
 22 (indiscernible), because we don't view it from that --
 23 philosophically that way.

24 My -- my understanding of that part of his
 25 testimony is a little bit different. So in fact, he

1 would be interested in working with someone who
 2 (indiscernible), whether it's a medical -- general
 3 medical doctor or psychiatrist, and that he would
 4 (indiscernible) consulting and the supervising
 5 psychiatrist. Does that (indiscernible)?

6 I've never heard him say he wouldn't work
 7 with somebody if they were non-compliant with a
 8 certain mode of treatment.

9 Q Does you ever ask him that question?

10 A We have discussed Mr. Bigley's case
 11 (indiscernible) worked with him in the past. And
 12 (indiscernible) you know, we do participate in a
 13 community of folks who (indiscernible) talking about
 14 how to provide services for people who are hard to
 15 reach (indiscernible). So in that sense, we have
 16 (indiscernible).

17 Q As you talked about here?

18 A Yes. So I have spoken with him about whether
 19 Choices would be able to be available to that
 20 (indiscernible) individual and individuals like him.

21 And the answer, again, without -- nobody's
 22 actually made a firm referral -- would be yes, if we
 23 had enough staff to be available and/or if we worked
 24 in conjunction with others in the community to provide
 25 the kind of wrap-around engagement services that --

1 that (indiscernible) would be needed for him to be in
2 the community.

3 Q If -- if the court didn't allow API to -- to
4 administer medication against Mr. Bigley's will, and
5 he had (indiscernible) a physician (indiscernible),
6 would that -- would Choices then (indiscernible)?

7 A We would certainly review -- review
8 (indiscernible) see if we could (indiscernible), yes.
9 I don't want to say yes because there may be some
10 other factors. But if that was the situation and
11 there was enough support and funding for the support,
12 yes (indiscernible).

13 Q So is the issue about the physician that the
14 medical -- medical director doesn't basically want to
15 be on call for -- or be the primary physician for
16 (indiscernible)?

17 A Right. (Indiscernible) role, his role is not
18 to be the primary physician for anybody
19 (indiscernible).

20 MR. GOTTSTEIN: I have no further questions.

21 SUSAN MUSANTE

22 testified as follows on:

23 CROSS EXAMINATION

24 BY MS. POHLAND:

25 Q Ms. Musante, my name is Erin Pohland. Do you

1 we do see as an alternative. And so that would be --
2 that would not be the deciding factor, whether or not
3 he's on medication. It would be whether we had the
4 staff or others who would work (indiscernible) on a
5 team basis to provide the kinds of support that we
6 would think he needs.

7 Q Ms. Musante, are you aware that there's been
8 testimony from a number of witnesses that Mr. Bigley
9 is unwilling to engage with social workers and various
10 other treatment organizations in the community?

11 A I am not aware of that, no.

12 But I am not surprised about that. Because
13 when Choices worked with Mr. Bigley originally,
14 Choices engaged with him in a different way than most
15 organizations are able to do. And that is Choices
16 would go into the community, (indiscernible). We did
17 (indiscernible) assessment.

18 So our medical director at the time met with
19 him in the community. So (indiscernible) had lunch
20 (indiscernible).

21 Q But despite this different approach,
22 Mr. Bigley ceased services with Choices?

23 A He no longer (indiscernible) Choices, that's
24 correct.

25 Q So this approach has essentially failed in

1 have a relationship with Mr. Bigley?

2 A I would not describe it as a relationship. I
3 have met Mr. Bigley on more than one occasion, and I
4 know who he is.

5 MR. BIGLEY: Who is this? (Indiscernible.)

6 THE WITNESS: We met before.

7 MR. BIGLEY: When?

8 THE WITNESS: But I have not physically
9 worked with him myself, but I have supervised people
10 who work with (indiscernible).

11 BY MS. POHLAND:

12 Q And is this (indiscernible) based on your
13 testimony that you cannot provide a clear answer as to
14 whether or not Choices would work with Mr. Bigley if
15 he is going against the advice of his treating
16 psychiatrist and not taking medication?

17 A I think that that would not be the issue that
18 would preclude him with working with Choices. That
19 would not be the issue.

20 The issue would be do we -- Choices is a very
21 small organization, so the issue would be do we have
22 enough staff to be available and/or are there -- or
23 are we sharing the -- you know, the (indiscernible)?

24 And our primary (indiscernible) is really
25 developing a personal relationship with someone which

1 the past, given that Mr. Bigley is no longer working
2 with your organization?

3 A You know, Choices didn't really -- at that
4 time, it was a fledgling organization that only had
5 one -- two staff people and didn't have
6 (indiscernible) to work with him. But -- and
7 (indiscernible), but I believe if there were others
8 working with him or there were (indiscernible) to hire
9 someone, for example, then we (indiscernible).

10 Q Ms. Musante, is it accurate to say that
11 Mr. Gottstein is a co-founder of Choices?

12 A Mr. Gottstein, yes, (indiscernible) Choices.

13 Q And what is his current relationship with
14 Choices?

15 A (Indiscernible) Choices.

16 Q And so you have said that if the resources
17 and staffing were available (indiscernible) resources
18 nor the staffing are available at this time for
19 Mr. Bigley?

20 A They are not available at this moment, no.
21 But they could be if -- if there was the correct
22 funding and/or mix of personnel. And that could be a
23 combination of a community team or something like
24 that.

25 Q But you are not aware of any (indiscernible)

1 funding for this at this present time?
 2 A I believe there are people who are advocating
 3 for funding, but I don't believe there is
 4 (indiscernible).
 5 MS. POHLAND: Okay. No further questions.
 6 THE COURT: When was it that Choices dealt
 7 with Mr. Bigley (indiscernible)?
 8 THE WITNESS: Okay. I have to think about
 9 this. It would have been I think probably a little
 10 more than a year ago, a year or year and a half ago.
 11 THE COURT: And do you know for how long?
 12 THE WITNESS: We worked with him on and off
 13 for a period of some months, and I (indiscernible).
 14 But I think probably, I don't know, for seven months
 15 maybe (indiscernible).
 16 THE COURT: How long -- when you were in a
 17 period of engagement with him, how often would
 18 (indiscernible)?
 19 THE WITNESS: Sometimes it would be daily.
 20 Sometimes it might be every other day. Choices
 21 assisted him in procuring housing and then helping him
 22 to try and keep housing, which was (indiscernible)
 23 difficult for him.
 24 So Mr. Cornils was very effective in helping
 25 him be (indiscernible) around the housing

1 (indiscernible).
 2 THE COURT: At that time, what was the
 3 funding source for the services provided to
 4 Mr. Bigley?
 5 THE WITNESS: Mr. Bigley at that time had
 6 (indiscernible) but they are limited to how many hours
 7 Medicaid will provide. And there's a cap on case
 8 management (indiscernible).
 9 THE COURT: (Indiscernible) would that be one
 10 hour a week, ten hours a month, 500 hours a year? I
 11 mean, do you know what that limitation is?
 12 THE WITNESS: I think it's 200 -- I can't
 13 remember. I should have reviewed that before I came
 14 here. But I think it's 200-something hours.
 15 THE COURT: Annually or --
 16 THE WITNESS: Yes. It is an annual cap,
 17 uh-huh. I mean, I could get (indiscernible).
 18 THE COURT: What is --
 19 THE WITNESS: But we would have -- we would
 20 have approached the cap for sure to provide
 21 (indiscernible).
 22 THE COURT: And does Choices currently have
 23 any other funding source that isn't tied to a, you
 24 know, individual patient's (indiscernible).
 25 THE WITNESS: Tied to an individual

1 patient's --
 2 THE COURT: Right.
 3 THE WITNESS: No. The main source is
 4 Medicaid (indiscernible) individual patient, and then
 5 we have some people who are (indiscernible) pay on a
 6 sliding scale.
 7 THE COURT: How many people are employed
 8 currently by Choices?
 9 THE WITNESS: Right now we have an
 10 (indiscernible) assistant and two recovery
 11 coordinators. (Indiscernible) the third one, but she
 12 is in the process of leaving. She will be gone
 13 (indiscernible).
 14 THE COURT: Recovery coordinator. That would
 15 be the individual who actually interacted -- would be
 16 the primary interactor with the user of your services?
 17 THE WITNESS: Right. The recovery
 18 coordinator would be someone who would be available
 19 for support services and for case management and
 20 (indiscernible).
 21 THE COURT: Currently could you tell me how
 22 many -- if there's two recovery coordinators, how many
 23 cases do they have?
 24 THE WITNESS: Again, they're both fairly new.
 25 Choices (indiscernible) each have probably about

1 eight.
 2 THE COURT: Eight a piece?
 3 THE WITNESS: Yeah, eight. But it would be
 4 (indiscernible).
 5 THE COURT: Do you have a rough sense of
 6 what -- I appreciate each patient provides demand
 7 (indiscernible) rough sense of what you think would be
 8 the maximum number of (indiscernible) a single
 9 recovery coordinator could deal with?
 10 THE WITNESS: I'm sorry; say that again.
 11 THE COURT: Can you give me a rough sense of
 12 what is the maximum number of cases --
 13 THE WITNESS: Oh, yes.
 14 THE COURT: -- that a coordinator
 15 (indiscernible)?
 16 THE WITNESS: We would say up to 20. But
 17 that would depend on the acuity of the person.
 18 Because (indiscernible), so we would manage
 19 that. So it might be people who are in the process of
 20 just getting minimal support, periodically checking
 21 in, and then there might be some people who are
 22 requiring more intensive support and services.
 23 THE COURT: Thank you. I have no further
 24 questions.
 25 MR. GOTTSTEIN: (Indiscernible) clarify

1 (indiscernible)?
 2 SUSAN MUSANTE
 3 testified as follows on:
 4 REDIRECT EXAMINATION
 5 BY MR. GOTTSTEIN:
 6 Q You testified that (indiscernible) no
 7 relationship with --
 8 A Well, no formal -- is that what you're asking
 9 (indiscernible)?
 10 Q Well, do I represent Choices in a couple of
 11 legal matters?
 12 A (Indiscernible.)
 13 Q And I'm going to -- Judge Morse asked you
 14 about whether Choices had any funding not connected to
 15 patients, and I think you said no; is that correct?
 16 A I thought he said connected to patients.
 17 THE COURT: No. I meant (indiscernible)
 18 Medicaid funding or some other funds.
 19 THE WITNESS: Yes. I misunderstood the
 20 question. I thought you said connected with specific
 21 patients, such as (indiscernible).
 22 So yes, we do have a grant from the Alaska
 23 Mental Health Trust Authority.
 24 THE COURT: What is the amount of that grant?
 25 THE WITNESS: It is \$200,000 a year.

1 THE COURT: Are there other (indiscernible)
 2 other witnesses do we have (indiscernible)?
 3 MS. POHLAND: I believe that's it, Your
 4 Honor.
 5 MR. GOTTSTEIN: She would be the last one.
 6 THE COURT: Well (indiscernible) find her
 7 (indiscernible).
 8 MS. POHLAND: No, Your Honor.
 9 THE COURT: Let's take a break. We'll see if
 10 we can figure out how to contact this individual
 11 (indiscernible).
 12 MR. GOTTSTEIN: Can we ask Mr. Adler how we
 13 might be able to make an international call and bill
 14 it to me?
 15 MS. POHLAND: (Indiscernible.) I don't know
 16 if the State is going to let you do it at all, but
 17 we'll find out. (Indiscernible.)
 18 MR. GOTTSTEIN: Yeah. I think we're still
 19 connected to the court.
 20 MS. POHLAND: (Indiscernible.)
 21 9:19:38
 22 (Off record.)
 23 9:28:39
 24 THE COURT: Are you there?
 25 (Pause.)

1 MR. GOTTSTEIN: I have no further questions.
 2 THE COURT: Any recross?
 3 MS. POHLAND: No, Your Honor.
 4 THE COURT: Thank you very much.
 5 THE WITNESS: Thank you.
 6 (Witness excused.)
 7 THE COURT: (Indiscernible.)
 8 MR. GOTTSTEIN: (Indiscernible.)
 9 THE COURT: My preference is that
 10 (indiscernible).
 11 MR. GOTTSTEIN: Can -- I can be billed for
 12 it. I don't know how that (indiscernible) otherwise.
 13 THE COURT: API will -- if API
 14 (indiscernible) for the call.
 15 MR. GOTTSTEIN: And I don't know if
 16 (indiscernible), but this is the number. And I think
 17 it's 011 would get you out to the international --
 18 (Pause.)
 19 UNIDENTIFIED SPEAKER: You want to try this
 20 other one?
 21 MR. GOTTSTEIN: Sure. I'm not sure that was
 22 the problem. Do you know if we could --
 23 THE COURT: (Indiscernible.)
 24 MR. GOTTSTEIN: Yes. Can we take a short
 25 break and see if -- to authorize it.

1 MR. GOTTSTEIN: Could I try on my cell phone
 2 and --
 3 THE COURT: All right.
 4 UNIDENTIFIED SPEAKER: (Indiscernible.)
 5 MR. GOTTSTEIN: Oh, joy.
 6 THE COURT: Let's do this. Let's -- if you
 7 can get her in the next 24 hours or so -- my guess is
 8 her testimony is going to be extremely brief. I mean,
 9 the State's cross is going to be rather brief.
 10 If you can set up a time where I can hear
 11 this back in my courtroom in the next -- you know,
 12 tomorrow, I'll do that.
 13 Now, do you -- last Friday, Mr. Gottstein
 14 submitted a history of a chronology, if you will. And
 15 is there any objection to me accepting that purely for
 16 the purposes of, he had a criminal case or he had an
 17 admission into the API, just for the history, leaving
 18 out the, I'll say commentary about what took place?
 19 I'm just -- I am interested in particularly
 20 the more recent history by the (indiscernible).
 21 MS. POHLAND: I think the State would have an
 22 objection. How would such commentary and the inner
 23 circles of --
 24 THE COURT: I'm not going to -- I'm going to
 25 ignore it. I can do it.

1 MS. POHLAND: Is it exclusively based on the
2 history, the --

3 THE COURT: I'm interested in purely -- I
4 don't have it in front of me. Does anyone have it?
5 (Indiscernible.) Yeah.

6 For example on page 4, it says on March 3,
7 '93, ten admissions.

8 Then the next section says OPA was appointed
9 in '96.

10 In '04, they filed (indiscernible).

11 That's what I'm interested in is sort of the
12 chronology. I'm not -- the arrests, the appointment
13 of Steve Young. Not this -- that's what I'm looking
14 at, just sort of dates we're talking about.

15 MS. POHLAND: The State would be willing to,
16 based on Mr. Bigley's (indiscernible), to prepare
17 something that is exclusively the facts, rather than
18 having something admitted --

19 THE COURT: Why don't you do this. You take
20 his document, and you send me a copy of it and black
21 out what you think is unacceptable.

22 MS. POHLAND: Okay.

23 THE COURT: I'm interested in -- I think the
24 record ought to include a history of these -- of his
25 situation, most significantly since -- in the last six

1 MS. POHLAND: Okay.

2 THE COURT: Is there anything else? And I'll
3 give you until the end of business tomorrow to get
4 this (indiscernible).

5 MR. GOTTSTEIN: So should I try and arrange a
6 time with your clerk, I guess --

7 THE COURT: Right. I mean (indiscernible)
8 relatively brief, I'll stick it in whatever I'm doing.

9 MR. GOTTSTEIN: Oh, so if I get her, I can
10 call her in and try and do it then?

11 THE COURT: Yes.

12 MR. GOTTSTEIN: And then try and get
13 (indiscernible) so we have to get --

14 THE COURT: Right. I can tell you I've
15 got -- I'm doing jury instructions and closing
16 arguments tomorrow. So I'm not going to break that
17 up.

18 But as soon as the jury goes out, I'll
19 (indiscernible) morning, I probably (indiscernible).

20 MR. GOTTSTEIN: I think I can probably get
21 this done as soon as I get back to the office. I
22 don't know why I couldn't get through.

23 THE COURT: I can't (indiscernible). I've
24 got (indiscernible) court (indiscernible) before --
25 when I believe here, I'm going to be doing jury

1 months, in particular since the last case, the one
2 that's in front of the supreme court. I think the
3 supreme court deserves to have a chronology of what
4 has happened since (indiscernible) record in that case
5 closed.

6 MS. POHLAND: Okay, Your Honor. We can get
7 that to you.

8 MR. GOTTSTEIN: Your Honor, if I may, there
9 are actually -- I submitted appendices and backup
10 documents that go -- you know, that go along. I think
11 the court will take judicial notice of those, as well.

12 THE COURT: If they are documents in other
13 court filings, yes. That's what I -- that's what I
14 would be doing.

15 And I would be looking -- and I would be --
16 let's say there was an assertion -- a petition that
17 said Mr. Bigley was X, Y, and Z. I'm not interested
18 in the assertion. I am interested in that there was a
19 petition filed that particular day that got resolved.
20 He was in API for one day, one week, whatever it is.
21 That's the history that's most relevant.

22 We've got one other document that lays out
23 stipulated theories of his admit/discharge dates.
24 This is just giving us -- flush it out so
25 (indiscernible) State can give that to me tomorrow.

1 instructions on --

2 THE CLERK: Your Honor, do you want me to
3 call Ellen right now?

4 THE COURT: No. That's all right. We don't
5 know when the witness is going to be available.

6 So anything else? If you -- if she's
7 available at noon today and (indiscernible), get ahold
8 of my office and I'll take her testimony in the court.

9 MR. GOTTSTEIN: Okay. And you can do it
10 telephonically, I presume.

11 THE COURT: Right.

12 MR. GOTTSTEIN: And then I guess the other
13 thing is I kind of prepared a little closing
14 statement. We'll do that after that?

15 THE COURT: No. We'll do that right now.

16 MS. POHLAND: (Indiscernible.)

17 Two years ago, Mr. Bigley would take the bus
18 or a taxi to come to API every two weeks to receive
19 his (indiscernible) Consta medication.

20 He was able to live alone, have coffee with
21 his friends, visit (indiscernible) people and
22 businesses all over town.

23 He was able to take care of himself and his
24 physical appearance. He could maintain relationships,
25 take care of his normal daily needs, along with help

1 from his guardian with whom he had a great
2 relationship.

3 During this period of compliance with
4 medication, he was very rarely in jail. In 2006, he
5 was only booked into the Department of Corrections
6 once, and only twice in 2007.

7 At some point, Mr. Bigley somehow became
8 convinced that medication that he had been using
9 voluntarily -- he had been taking voluntarily, was
10 poison and stopped taking his regular medication.

11 Since that time, since his mental health --
12 mental illness has progressed without treatment,
13 Mr. Bigley has lost more and more relationships, and
14 his world has become smaller and smaller. He is not
15 allowed in many of his favorite stores and coffee
16 shops. He is banned from the bank for threatening to
17 murder the teller who has helped him for years.

18 His mental health treatment is scattered, at
19 best. (Indiscernible) medication at the Department of
20 Corrections and when he comes to API.

21 But currently, based on what's been
22 happening, his severe schizophrenia causes him to
23 refuse any treatment at API. So without a court
24 order, API can only provide structure, daily care,
25 food, and water. And his personal care attendant --

1 where that is the only option. He will walk into his
2 room, pull down his pants, and allow the staff to
3 administer (indiscernible).

4 He is also -- he is incapable of informed
5 consent. He is unaware of his mental illness, and he
6 is incapable of insight at this time (indiscernible).
7 He currently believes he is Al Pacino from Scar Face
8 and he refuses (indiscernible) staff at API to fly him
9 to Cuba.

10 He believes that not only are medications
11 poison but food is poison, that everyone at API and
12 otherwise (indiscernible) is trying to kill him.

13 He tries to fire his counsel, hire new
14 counsel. He denies that he is Native Alaskan.
15 Despite the fact that -- that (indiscernible) denial
16 of his Native heritage limits his financial
17 (indiscernible).

18 He is not only incapable of participating in
19 his treatment decisions here at API, he refuses the
20 assistance, support, and treatment ideas of the staff
21 here at API.

22 The (indiscernible) of whether or not
23 medication is in Mr. Bigley's best interests
24 (indiscernible) to ask, has Mr. Bigley's life without
25 medication improved or deteriorated, and what is the

1 (indiscernible) last name, Rich (indiscernible), with
2 whom Mr. Bigley (indiscernible).

3 Without -- he is currently without community
4 support. He has an inability to trust people without
5 this medication. He can't utilize the services that
6 OPA is trying to provide to him as his guardian.

7 Under the -- this year alone, as Wendi
8 Shackelford testified, Mr. Bigley has had 14 bookings
9 with the Department of Corrections, and 32 other
10 police contacts that did not result in arrest.

11 His mental health treatment has effectively
12 been transferred to emergency medicines administered
13 at the Department of Corrections. He is clearly --
14 based on this history and this increased contact, he
15 is suffering without his medications.

16 Under the statute and applicable case law, in
17 order for the court to order administration of
18 psychotropic medications, the statements prove that
19 Mr. Bigley refuses medication, that he -- that he is
20 incapable of informed consent, that medication is in
21 his best interests, and medication is the
22 least-restrictive alternative to protect Mr. Bigley.

23 Mr. Bigley verbally refuses his medications,
24 although he does willingly accept the administration
25 of emergency medication when he's gotten to the point

1 likely outcome of Mr. Bigley living another day
2 without medically and psychiatrically appropriate
3 (indiscernible)?

4 Without treatment, Mr. Bigley will go back to
5 jail. He will continue to have (indiscernible) and
6 may (indiscernible) last independent housing at the
7 Paradise Inn because he was so disruptive and damaged
8 property.

9 It isn't that Mr. Bigley doesn't have
10 community support. It's that the community that is
11 attempting to support him doesn't have viable options
12 to keep him out of jail, put food in his mouth, and to
13 allow him (indiscernible) relationships
14 (indiscernible) because of his refusal to take
15 psychiatric medications.

16 There are side effects to the medications, as
17 Dr. Khari testified. So (indiscernible) -- the side
18 effects have been evaluated by his treating physicians
19 and by others in his treatment team and who have
20 determined that the potential side effects are less
21 harmful than the cost of going without medication.

22 Without medication, it is clear that the side
23 effects are that he's going to go to jail. He is
24 going to be without adequate (indiscernible), and
25 essentially it'll be impossible to help him out of the

1 extremely (indiscernible).
2 THE COURT: Mr. Bigley, would you like to get
3 some coffee?

4 MR. BIGLEY: (Indiscernible.)

5 THE COURT: (Indiscernible.)

6 MS. POHLAND: In terms of whether or not
7 medicating Mr. Bigley is the least-restrictive
8 alternative to protect Mr. Bigley, to say that the
9 Myers standard is that (indiscernible) exclusively
10 be -- medication must be the least-restrictive
11 alternative available is -- misstates the case.

12 Myers makes it clear that the medication
13 should be the least-restrictive alternative to protect
14 the patient. They have to be a realistic alternative,
15 not one that is pie in the sky, if only funding were
16 available, if only staffing were available.

17 And it also has to be therapeutic. It has to
18 protect Mr. Bigley, not just, for instance, give him
19 (indiscernible) walk around with him, which may or may
20 not keep him out of trouble when the (indiscernible).
21 I think it's been established through testimony that
22 that currently isn't available.

23 As it stands right now, sending Mr. Bigley to
24 jail is not the less-restrictive alternative to
25 medication, making him a (indiscernible) community,

1 excluding him from all of his favorite stores, bank,
2 the coffee, is not a less-restrictive alternative.

3 And having him be physically restrained when
4 he's unable to understand why he's being restrained is
5 not a less-restrictive alternative.

6 To make the phrase least-restrictive
7 alternative mean that he's only free to decline
8 medication is a (indiscernible) ignores the need for
9 protection of Mr. Bigley and for a therapeutic
10 alternative, which medications Mr. Bigley would likely
11 be able to trust again, participate in treatment, as
12 well as in society as a whole (indiscernible) utilize
13 the resources the community has available to him,
14 which he has taken advantage of in the past when he's
15 voluntarily taken medicine.

16 He'd be able to have a relationship with his
17 guardian (indiscernible). He'll likely be able to
18 live on his own again, not in and out of DOC and API
19 and not going to jail 14 times a year and having 32
20 other contacts with the police which didn't result in
21 incarceration. He'll likely be able to eat without
22 taking (indiscernible). He'll be able to do the
23 things that he loves to do, drink coffee, smoke
24 cigarettes, (indiscernible), and have relationships
25 with people.

1 Now, Mr. Bigley matters to the community of
2 Anchorage. The community is trying to come together.
3 Various people have testified that they're trying to
4 help him, get him (indiscernible) resources.

5 And without medication, he is unable to do
6 that. It is (indiscernible) receive medication, but
7 that the community is able to effectively treat and
8 support him and help him function again as a member of
9 society.

10 This is an approach that has worked in the
11 past for Mr. Bigley and we believe could work in the
12 future for him, as well.

13 MR. GOTTSTEIN: Thank you, Your Honor. First
14 I'd like to note, I believe that there was a fair
15 amount in her closing that really was not in evidence.
16 So you can consider that.

17 One thing that she misstated was that
18 Mr. Bigley just decided not to take the Risperdal
19 Consta, when what we had in the evidence was that he
20 voluntarily took it for two years, and then API
21 determined it was no longer working alone. And then
22 he started refusing when they wanted to add additional
23 medications.

24 I think one of the things that's really -- I
25 hope illuminative is Mr. Bigley has been in the

1 courtroom here, you know, quite a bit. And I think
2 that the picture of him here is quite a bit different
3 than what's kind of portrayed.

4 But fundamentally, the -- I think this case
5 really revolved in my view around whether or not API
6 should be ordered to provide a less-intrusive
7 alternative. And Ms. Pohland talked about less
8 restrictive, but really, it's less intrusive. When
9 you're talking about medication, the standard is less
10 intrusive. When you're talking about being locked up,
11 it's less restrictive. And it's clear that that's
12 related, but it's not -- it's not exactly the same.

13 And so fundamentally what's happened is that
14 API and the system has refused to provide a non-drug
15 alternative. And it's my view I think very clear
16 under the case law that that's unconstitutional, that
17 they -- that that's providing a social service and
18 unconstitutional matter, that he has the right to a
19 less-intrusive alternative.

20 And they -- we've also had testimony here
21 that their efforts -- efforts to keep Mr. Bigley on
22 drugs extends into the community. So I think that
23 even after discharge and after commitment periods
24 expire, and therefore I think the less-intrusive
25 alternative should really, of necessity, follow it

1 there.

2 I'm going to back up a little bit here and
3 talk about the informed consent issue and then get
4 back to couple of other things.

5 I don't want to make too big a point of it,
6 but it's very clear that if the -- if Mr. Bigley
7 accepts the medication, if he grants consent to the
8 medication, they'll accept that, even though -- even
9 though there is no court order, there is no commitment
10 or anything, they will do that.

11 Under the statute, it's illegal to do that
12 unless he's capable of giving informed consent. But
13 as soon as he changes his mind, then all of a sudden
14 they say he's incompetent. And I think that it
15 certainly is a disingenuous process, and I would
16 suggest that it's really illegal, in that if they're
17 going to -- that as a legal matter, he -- they
18 determine that he was competent to grant consent and
19 therefore that he's competent to withhold consent when
20 he decides to do that.

21 In terms of -- and then I want to talk a
22 little bit about best interests and get back to the
23 less-intrusive alternative.

24 What we have here, and it's very clear, is I
25 think it's essentially rebutted evidence that this

1 different -- or a different rephrase of a question.

2 And this is the way I -- (indiscernible)

3 Ms. Porter's testimony, but also Dr. Bassman's
4 testimony, is that that -- and Dr. Mosher, is that
5 this coercion is so detrimental.

6 And Ms. Pohland talked about not being able
7 to form trust relationships, and that's because
8 there's all this coercion. So what's most important
9 is to get to a point where he's not being forced.
10 Okay. So -- okay. And that -- and --

11 THE COURT: Can that include medication?

12 MR. GOTTSTEIN: I think it needs to be up to
13 him, and that he -- is he -- I think in one of those
14 exhibits that I submitted is -- even while he was
15 here, not under emergency, he went back and forth
16 deciding whether or not to take the medication, and he
17 ended up taking it. And I think it really --

18 THE COURT: Well, doesn't that suggest that
19 the medication, at a minimum, increases his ability to
20 make a decision one way or the other and that a small
21 amount of coercion up front gets it to a point where
22 he can make better decisions, including temporarily
23 declining?

24 MR. GOTTSTEIN: Well, first off, I wouldn't
25 necessarily agree they were better decisions to take

1 long regime of psychiatric drugging of Mr. Bigley has
2 resulted in substantial brain damage, in dysmentia and
3 dementia, possibly moving into dementia, and that
4 current -- and really he is at a very vulnerable stage
5 right now with each administration of medication
6 being -- you know, really exacerbating that problem,
7 in that the deterioration that we see really over the
8 years is very consistent with brain damage that these
9 drugs (indiscernible).

10 THE COURT: Let's assume that I find that he
11 has suffered some kind of brain damage as a
12 consequence of medication, and further that he has
13 some risk of increased damage if it is administered
14 either voluntarily or involuntarily, but also that his
15 quality of life without medication is profoundly low.

16 Is it your position that once there is a
17 finding that medication might cause future damage,
18 that it is simply impossible to medicate, or is there
19 a balancing of the risk of damage, even if that damage
20 is certain, versus the improvement of his life or the
21 detriment to his lifestyle without it? Can I balance
22 that?

23 MR. GOTTSTEIN: Well, I -- I would -- if I
24 may, I would kind of maybe -- I'll try and answer
25 that, but kind of -- I would look at it as a slightly

1 it.

2 But I think what's happened is --

3 THE COURT: But you would have to agree that
4 he was competent to make those decisions, and
5 voluntary -- if that's one of your goals, can't I
6 conclude that giving him some quantity of medication
7 will increase his ability to exercise a voluntary
8 (indiscernible)?

9 MR. GOTTSTEIN: There is a history that's not
10 what happens. We've got I think almost 29 years of
11 that not working. And that's one of the Myers
12 factors. That's been what's been happening for --

13 THE COURT: Is it your position that he's --
14 given that history, there can be no medication,
15 period?

16 MR. GOTTSTEIN: I think it should be up to
17 him. That is my position. And I think in the -- and
18 that's why this less-intrusive alternative is so
19 important, is that it's never -- and Dr. Jackson
20 testified as to, really, how long it would take --

21 THE COURT: Do you believe he has capacity to
22 exercise informed consent today?

23 MR. GOTTSTEIN: I think that he knows when he
24 wants to take it and when he doesn't want to take it.

25 THE COURT: Is that a "yes"?

1 MR. GOTTSTEIN: In terms of, you know -- let
2 me look at the statute. Because you know, it's a high
3 bar.

4 THE COURT: Do you think that a man that
5 thinks that he's Al Pacino (indiscernible) today is
6 capable of understanding the consequences of taking or
7 not taking a particular medication?

8 MR. GOTTSTEIN: Yes. Because he's
9 experienced it for 28 -- almost 29 years. And so
10 when -- (indiscernible) the cases, but competency
11 really is as to individual aspects.

12 And this is one of my big complaints about
13 the system, is that -- is that people who -- that he
14 knows -- he knows how he feels under it. You know,
15 he's got a lot of experience with it. And he -- and
16 he chooses not to do it right now, and sometimes he
17 decides that he does want it.

18 THE COURT: What would be the damage of
19 taking -- of medicating him involuntarily currently,
20 getting him to a point where API believes, and other
21 doctors believe that he does have capacity, and then
22 asking him to craft a healthcare directive, which may
23 say -- you know, who knows what it says. But let's
24 assume everyone agrees he has capacity,
25 (indiscernible) to make those decisions, and then he

1 themselves.

2 MR. GOTTSTEIN: I believe that Dr. Worrall
3 testified to that, and that is their -- that was his
4 position and --

5 THE COURT: But let's --

6 MS. POHLAND: Your Honor, Dr. Worrall
7 (indiscernible).

8 THE COURT: It is not your turn to talk.
9 Go ahead.

10 MR. GOTTSTEIN: Well, I -- from my
11 perspective, if that would really work, that would be
12 a satisfactory solution. And I -- but I -- I think
13 what Your Honor --

14 THE COURT: Do you think (indiscernible),
15 he'll have capacity in the future -- in the next year,
16 if he's not medicated? I realize that's what
17 (indiscernible).

18 MR. GOTTSTEIN: Yeah. I -- I don't think
19 that the medication will -- would substantially
20 increase his capacity. I mean, that's certainly what
21 has been testified to.

22 THE COURT: Do you think that he will be
23 capable of making that decision in six months if he's
24 not medicated?

25 MR. GOTTSTEIN: I think there's a -- if he's

1 is asked whether there are some medications he wants
2 to take, or there's some condition under which he will
3 take them, some medications he will refuse to take?

4 MR. GOTTSTEIN: I --

5 THE COURT: And if he's competent at that
6 point and says I want to come off these drugs, the
7 case is over with.

8 MR. GOTTSTEIN: Then I would query whether or
9 not API would agree to that. And --

10 THE COURT: They have no choice.

11 MR. GOTTSTEIN: Whether they --

12 THE COURT: If he is competent, if he has
13 capacity and makes an informed decision and issues an
14 advanced healthcare directive -- I mean
15 (indiscernible), the statute clearly says that he
16 cannot be medicated in the future, period.

17 MR. GOTTSTEIN: I believe that they would
18 assert that he was not competent at the time that he
19 made that. And what --

20 THE COURT: Let's assume they do. Let's
21 assume that it comes to that point. But I'd be
22 interested in them taking a position that he was never
23 competent (indiscernible) would be -- I mean, if they
24 medicated him and he was never, ever competent, that
25 would be an interesting dilemma that they crafted for

1 given the supports that we've asked for, I think that
2 there's a fair chance of that. And I think he's --

3 THE COURT: What happens --

4 MR. GOTTSTEIN: -- entitled to that.

5 THE COURT: -- if we try six months or nine
6 months or 12 months of no medication, and he does not
7 regain capacity?

8 MR. GOTTSTEIN: Well, I think that we -- we
9 can revisit it then.

10 THE COURT: Wouldn't that suggest at that
11 point that medication is the only other option?

12 MR. GOTTSTEIN: Well, I think that people can
13 be -- lack capacity and still be functioning okay in
14 the community. And that's really the issue, is that
15 if he had the type --

16 THE COURT: Do you think he's capable of
17 functioning in the community today?

18 MR. GOTTSTEIN: Yes, with the supports.
19 Because I -- yes, absolutely, with the supports that I
20 have proposed.

21 And I kind of want to talk a little bit about
22 kind of rationale behind some of the other aspects of
23 the less-intrusive alternative. And it's really
24 around this issue of lack of trying to get out of API
25 in a system being antagonistic and more -- in a more

1 cooperative way.
2 And so clearly, the idea that he has someone
3 with him to help keep him out of trouble is good. I
4 mean, he -- he wouldn't ever have to go to jail if he
5 was just brought here all the time instead, right, and
6 he could sign in voluntarily. They could evaluate him
7 and decide whether to --

8 THE COURT: How would he get here? I'm not
9 talking physically. So now he's got a personal
10 attendant and he goes into the store and he is asked
11 to leave. What does the personal attendant do?

12 MR. GOTTSTEIN: Well, I -- my belief is that
13 with the personal attendant that -- that if the
14 personal attendant is there, that he would leave and
15 he would tend to keep him substantially out of
16 trouble.

17 THE COURT: What if he -- what if he starts,
18 you know, being agitated, flailing his arms around,
19 and the shop owner says I'm calling the police, and
20 the attendant says we've got to go, Bill, and Bill
21 doesn't want to go?

22 MR. GOTTSTEIN: Then the police come and they
23 can do a police officer application for him here,
24 rather than --

25 THE COURT: (Indiscernible.)

1 MR. GOTTSTEIN: -- rather than jail.

2 THE COURT: And then what would happen?

3 MR. GOTTSTEIN: Well, I think that -- that
4 they would evaluate him. If they really thought he
5 was a danger to himself or others -- and I think it's
6 important to recognize that the standard for
7 commitment is around dangerousness. Is he a danger to
8 himself or others or so gravely disabled that he is
9 unable to survive safely in the community. So that is
10 the standard for commitment, and that's --

11 THE COURT: I'm trying to understand your
12 comment that this attendant is going to bring him to
13 API. How -- what --

14 MR. GOTTSTEIN: No, no, no. That was -- that
15 was -- first off, he -- we've had a lot of testimony
16 that he has trouble keeping housing.

17 THE COURT: Right. But how does -- how is
18 the attendant going to get him to API rather than to
19 jail?

20 MR. GOTTSTEIN: The police can bring him here
21 rather than jail.

22 THE COURT: And then what -- so let's assume
23 he doesn't meet the commitment criteria. What is the
24 point of coming here? I don't understand what that --

25 MR. GOTTSTEIN: Well, I -- I mean, you're

1 kind of assuming that this whole process is going to
2 fail, and that's -- I understand that. But --

3 THE COURT: You said attendant would minimize
4 his interaction with corrections because he could end
5 up here. How does he get here?

6 MR. GOTTSTEIN: Well --

7 THE COURT: What authority does his attendant
8 have?

9 MR. GOTTSTEIN: That really wasn't -- that
10 wasn't the part about him getting here. The -- what
11 I'm talking about, in terms of voluntary admission to
12 API, is as housing of last resort.

13 And I -- and I think most of the time he
14 wouldn't access it, but I think it should be available
15 to him because I don't think you want -- when the
16 system doesn't want to be at a point where we have to
17 be acting so badly to be able to access housing.

18 If he's lost his housing, and you know he
19 can't go to the shelters, he doesn't have any housing,
20 the guardian hasn't gotten another housing option, I
21 think that he ought to have the right to just say,
22 okay, I'm going to go to API. And there are a lot --
23 and he may not access it, but I think he ought to have
24 the right to do that.

25 And that will get him -- there's concern

1 about him eating. He can eat here. You know, he
2 actually today, you know, he looked pretty good. He
3 (indiscernible) actually looked pretty good. So you
4 know, wash facilities and that kind of thing, and
5 clothes, he has a problem. So just as housing of last
6 resort, which may never be used.

7 And when if -- if there's all this concern
8 expressed about what's happening to him in
9 corrections, and he gets brought to the criminal
10 justice system and then for however long it takes them
11 to decide that he'll never be competent to stand
12 trial, they -- they then release him. That doesn't
13 have to happen if -- if he's brought -- if he gets to
14 that point that he's brought here.

15 And I think it's very important that a system
16 be set up where it's not as random (indiscernible) to
17 Mr. Bigley as it currently is. And so that -- that
18 there, you know, are natural consequences. So if
19 he's -- you know, he doesn't leave, then you know, he
20 knows that he's going to come to API.

21 And so -- anyway, so -- I don't know. Have I
22 answered your question? Okay.

23 And then there's this issue about the housing
24 and subsidy, and really revolves around the spending
25 money. He gets about \$10 a day, and it really makes

1 him lived.
2 And in the settlement agreement with the
3 guardianship, it was agreed to try and get some
4 subsidized housing. API certainly didn't agree to pay
5 for it.

6 But when he went to the so-called -- you
7 know, the so-called country club in January of 2007,
8 they arranged a fair amount of extra money to put
9 him -- put him there. But the problem was that it
10 required him to take the drugs.

11 And so -- and actually, I didn't even -- I
12 didn't object to that. It was let's see if it works.

13 Well, as was pretty inevitable, it ended up
14 not working. So what I think needs to be done is a --
15 is enough of a -- so much of his Medicaid money goes
16 into housing that he only has \$10 a day left. And
17 that really gets him upset. I think it'd be hard for
18 anybody, you know, really to live on that. And so
19 that's -- that is apart of it.

20 And I think one of the problems that we have
21 here is that a lot of these obligations, one might
22 consider are the State's obligations. And API
23 complains or says well that's not our mission. And
24 I -- you know, (indiscernible) hospital. These are
25 the things that we do.

1 But I think that API has to be seen as -- I
2 don't know if you call it the manifestation of the
3 state. But it's the one that's come in here and
4 asking for this, you know, intrusive procedure that
5 our supreme court has equated with electroshock and
6 lobotomy and having invoked that state power, that
7 it's really then got the obligations of the state that
8 go along with that.

9 And I -- and two of the reasons I really
10 wanted to have, you know, kind of settlement
11 discussions to try and bring in all of the relevant
12 parties to try and put this together. But absent
13 that, I think that he's entitled to it.

14 And when you look at Myers, the Court said
15 that the State cannot drug him against his will if
16 it's not in his best interests unless it finds in
17 addition (indiscernible) best interests and there is
18 no less-intrusive alternatives. And there's
19 (indiscernible).

20 I think we've got pretty un rebutted evidence
21 that it's available if the -- actually it's pretty
22 reasonable amount of resources compared to what's
23 currently being spent is made available.

24 But there are some unanswered questions in
25 Myers. For example, if I would suggest that if the

1 Court finds that there's no less intrusive -- that
2 there is a less-intrusive alternative and therefore
3 they can't drug him -- you know, can't drug him, but
4 then that means you just dump him back out, I don't
5 think that makes sense and I don't think that's what
6 Myers really stands for.

7 I think if it can reasonably be made
8 available, then he's entitled to a less-intrusive
9 alternative.

10 And I'm going to -- I'm not going to say
11 that. So that's pretty much -- that's it, Your Honor.

12 MS. POHLAND: Yes. As an initial matter,
13 there has not been un rebutted testimony that any
14 psychiatric medication Mr. Bigley has taken
15 voluntarily or not over the years has caused dementia
16 or any other form of brain damage. In fact, the
17 testimony has been, by Dr. Khari and others,
18 including, Mr. Gottstein's own witness, Dr. Wolf, that
19 these tests have not been performed.

20 And even if they were to be performed, such
21 as an MRI, they actually -- the possible way to
22 determine if there's brain damage, but not necessarily
23 to connect it to medication or (indiscernible) other
24 causes.

25 The only court testimony about the potential

1 side effects of such drugs is by generic, canned
2 affidavits from people who have not met or treated
3 Mr. Bigley, let alone examined him.

4 In terms of Mr. Gottstein's statement that
5 the decision whether or not to receive medication
6 should be up to him, as things currently stand, it is
7 not Mr. Bigley's decision whether or not to receive
8 medication. He is out in the community unmedicated,
9 having contact with police, taken to DOC where he is
10 medicated against his will. It's not a decision that
11 he is making voluntarily.

12 Or he is brought to API where his behavior is
13 so bad, he is so psychotic that again, under the
14 appropriate statutes, the staff have to medicate him
15 under emergency medication. He is not being given the
16 choice as things currently stand, because without
17 medication, his behavior is such that he is cycling in
18 and out of DOC and API.

19 So to say that he should be given the choice
20 is kind of a false alternative. It's clearly not
21 something that, since he's gone off his medication,
22 he's been able to do on his own.

23 In terms of API being housing of last resort
24 or the State having an obligation to provide all these
25 different alternatives, you know, there's testimony

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1 (indiscernible) fact of the matter is it's not
 2 possible. API is not a hotel. It's not a residential
 3 treatment facility. It's an acute care facility. It
 4 doesn't exist so that people can come in and out and
 5 have a place to sleep or get some clothes or food. It
 6 exists to treat people.
 7 And that is what API has been trying to do
 8 with proper and appropriate medication when the court
 9 has allowed it or when it's necessary (indiscernible)
 10 emergency medication statute.
 11 The State agrees that the current cycle of
 12 what's been happening is unacceptable. But I wouldn't
 13 ascribe fault to that to API (indiscernible) there's
 14 been -- as Dr. Khari actually said, there's been so
 15 many things happening that Mr. Bigley has become a
 16 victim of the legal system (indiscernible) DOC and
 17 API.
 18 And this has clearly, by evidence on record,
 19 increased since he has stopped taking his medication
 20 consistently.
 21 In terms of less-intrusive alternatives
 22 available, there aren't -- number one, as I said
 23 before, they are not alternatives that are going to
 24 protect Mr. Bigley or that are necessarily
 25 therapeutic. Having an attendant with him 24 hours a

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1 day is not necessarily therapeutic.
 2 Your Honor, as you mentioned, you know,
 3 there's not even necessarily authority for an
 4 attendant to bring him to API, even if that were an
 5 option to be done.
 6 And furthermore, there is no testimony and no
 7 (indiscernible) that there are funds (indiscernible)
 8 or staffing available to (indiscernible). I'm pretty
 9 sure that the state and federal Medicaid and
 10 disability statutes aren't going to change to allow
 11 this exception, which we're not even positive would
 12 work at this point in time. And then (indiscernible)
 13 staffing available, let alone resources.
 14 But the bottom line is that the supposed
 15 alternatives are not actual alternatives at this point
 16 in time. And we have to stick with what's realistic,
 17 what's therapeutic, and what's in Mr. Bigley's best
 18 interests in order to protect him.
 19 THE COURT: Thank you. I'll close the
 20 record. The State's going to give me what they're
 21 willing to agree to on this proposed history, and I'll
 22 give Mr. Gottstein until then (indiscernible) tomorrow
 23 to attempt to get Ms. Porter on the line. And after
 24 that, the record will be closed. (Indiscernible.)
 25 (Indiscernible) as quickly as I can. If I

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1 issue a -- if I authorize the medication, both parties
 2 will be prepared to address the impact of the existing
 3 stay. That'll probably be done (indiscernible)
 4 subsequent hearing (indiscernible).
 5 All right. Thank you.
 6 (Off record.)
 7 10:14:22

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1 TRANSCRIBER'S CERTIFICATE
 2 I, Jeanette Blalock, hereby certify that the
 3 foregoing pages numbered 1 through 68 are a true,
 4 accurate, and complete transcript of proceedings in
 5 Case No. 3AN-08-1252 PR, In the Matter of the
 6 Necessity for the Hospitalization of William S.
 7 Bigley, Hearing held on November 17, 2008, transcribed
 8 by me from a copy of the electronic sound recording,
 9 to the best of my knowledge and ability.
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Date Jeanette Blalock, Transcriber