

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

COPY
Original Received
Probate Division

JAN 05 2009

Clerk of the Trial Court

**MEMORANDUM IN SUPPORT OF
MOTION TO CLARIFY STATUS OF NOVEMBER 20
& 21, 2008 HEARINGS**

The Law Project for Psychiatric Rights, counsel for Respondent with respect to any forced drugging proceedings (PsychRights), has moved for an order clarifying whether the November 20, 2008 status conference, and November 21, 2008, hearing pertaining to the 90-day commitment petition in the above captioned matter, were open or closed to the public.

I. BACKGROUND

AS 47.30.735(b)(3), pertaining to a 30-day commitment hearing, provides, "the respondent has the right . . . to have the hearing open or closed to the public as the respondent elects." AS 47.30.745(a) makes this provision applicable to 90-day commitment hearings.

At the October 21, 2008, hearing on the 30-day commitment before Master Lack, represented by the Public Defender Agency, Respondent elected to have the hearing open to the public. The issue came up at the October 28, 2008, hearing on the forced drugging petition filed in this matter when PsychRights noted that a sign had been posted on the court room door stating it was a closed proceeding. The Court was made aware of the AS

47.30.735(b)(3) and the previous election to have the commitment hearing open to the public, and the sign was removed from the courtroom door. At that time this Court said, "I will ask the parties at future hearings their position on whether it should be open or closed." Thereafter, all of the hearings pertaining to the forced drugging petition were, with some continuing confusion by the Alaska Psychiatric Institute (API), open to the public.

A petition for 90-day commitment was apparently filed on November 17, 2008,¹ a status conference pertaining thereto held on November 20, 2008, and a hearing on the commitment itself held November 21, 2008.²

On December 14-15, 2008, PsychRights and the Public Defender Agency had the following exchange of e-mails regarding whether the November 21, 2008, hearing was open to the public. First, PsychRights e-mailed the Public Defender Agency as follows:³

I have received the transcript of the November 21st 90-day commitment hearing and while I haven't read the whole transcript didn't see where the issue of the hearing being open or closed to the public was addressed. Unless I hear otherwise from you, I am assuming it was open.

The Public Defender Agency responded, " "You should treat the hearing as closed unless you hear otherwise from us."⁴ PsychRights responded, "I didn't see an election to keep it

¹ PsychRights was not notified the 90-day commitment petition had been filed in spite of its requests to both the Public Defender Agency and the Attorney General's Office to be served with the petition. Exhibit A. PsychRights knows the date because but reference to the date was made in this Court's November 25, 2008, Order.

² The undersigned indicated to the Public Defender he would want to come to the 90-day commitment hearing if his calendar permitted, but as he was never notified of the hearing, he did not attend. This Court's November 25, 2008, Order, notes PsychRights' absence, but was unaware of the reason for that absence.

³ Exhibit B, page 3.

closed in the transcript."⁵ The Public Defender Agency then responded, "Again, please treat the hearing as closed unless you hear otherwise from our office. Thank you."⁶

PsychRights responded:⁷

I haven't posted it yet, but absent an election to close the hearing I don't believe there is any authority to do so, especially since the previous hearings were all open.

Can you give me a reason why the hearing should be closed? Is there something in particular that you think should be kept private to protect Bill's interests? I am (hopefully) attaching a copy for your review.

To which the Public Defender Agency responded:⁸

As counsel for Mr. Bigley in the commitment proceeding I am again notifying you that you should treat the proceedings as confidential unless you hear otherwise from our office.

Both the forced drugging and 90-day commitment petitions granted in this Court's November 25, 2008 Order have been appealed and the transcripts are due January 27, 2009. When filing the transcripts PsychRights needs to advise the Clerk of the Supreme Court if the November 20 & 21, 2008 transcripts are confidential, which necessitates this motion.

II. JURISDICTION

A threshold question is whether this Court has jurisdiction to consider the motion in light of Appellate Rule 203, which provides:

⁴ Exhibit B, page 2.

⁵ Exhibit B, page 2.

⁶ Exhibit B, page 1.

⁷ Exhibit B, page 1.

⁸ Exhibit B, page 1.

The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the appellate courts, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the trial court, or to modify or vacate any order made by the trial court in relation to the prosecution of the appeal, including any order fixing or denying bail.

In *Jackson v. State*, 926 P.2d 1180, 1184-1185, (Alaska App 1996), the Alaska Court of Appeals, in a criminal matter, discussed whether this rule prohibited the Superior Court from considering and revoking bail while the underlying case was on appeal. The Court of Appeals concluded it did not, stating that the last sentence of Appellate Rule 203, "necessarily implies that the trial court retains the authority to issue 'order[s] ... in relation to the prosecution of the appeal,'" and that certain Appellate Rules contemplate action by the Superior Court during the pendency of an appeal, such as Appellate Rule 205, which provides a motion for stay pending appeal to the appellate court will normally not be considered by the Supreme Court unless application has previously been made to the trial court and has been denied, or has been granted on conditions other than those requested.⁹

It seems to PsychRights that a determination of whether the November 20 & 21, 2008 transcripts are confidential or not is the type of issue this Court probably has jurisdiction to consider. However, if this Court has any doubt, it could so state and PsychRights will file a motion in the Supreme Court seeking permission for this Court to decide the issue.

⁹ *Id.*

III. DISCUSSION

There are reasons why psychiatric respondents might want to have the proceedings closed, especially those with reputations, jobs, school, relationships, etc., to protect. Others, especially those like Respondent, who have none of these to protect and feel abused by the system, want the world to know what is being done to them. AS 47.30.735(b)(3) clearly allows respondents to make that choice.

In the above referenced e-mails, the Public Defender Agency cites no authority for the November 21, 2008, hearing being confidential absent an election to close it.¹⁰ Neither did the Public Defender Agency assert Respondent desired the proceedings be closed. Nor, despite a request to do so, did the Public Defender Agency give any reason or interest why the Respondent might want to keep the proceedings closed. For the reasons that follow, under these circumstances, PsychRights believes the November 20 & 21 hearings were not closed and the transcripts are not confidential.

A. There Is No Reason to Believe Respondent Reversed His Previous Election to Have the Hearings Open

As set forth above, the Respondent elected to have the 30-day commitment proceeding open to the public and that election was carried forward to the forced drugging proceedings. As set forth above, when the issue was raised previously, this Court said, "I will ask the parties at future hearings their position on whether it should be open or closed." In light of this, it seems this Court must have assumed, as did PsychRights, that

¹⁰ It wasn't until PsychRights reviewed the November 21, 2008, transcript that he became aware there had been a November 20, 2008, status conference.

the Respondent did not desire to single out the 90-day commitment hearing to be closed when the others were open. In these circumstances it seems to PsychRights that if the Public Defender Agency thought the Respondent wanted the proceedings closed, it was incumbent upon it to have made this Court aware of that at the time. Absent some affirmative action reversing the previous election(s) to have future hearings closed to the public, they remained open.

B. Without an Election to Close the Hearings, They Are Open to the Public.

AS 47.30.735(b)(3) clearly requires an election and just as clearly does not provide the hearing is to be closed in the absence of such an election. Because the United States and Alaska constitutions, and Alaska Court Rules all require that court proceedings be open to the public absent affirmative action to close them, and no such action was taken with respect to the November 20 & 21, 2008 hearings, PsychRights believes they are open to the public.

(1) Constitutional Provisions

The following analysis involves the constitutional mandate that hearings are public absent constitutionally sufficient and compelling reasons to close them. PsychRights totally supports psychiatric respondents' right to close commitment and forced drugging hearings to the public, but at the same time believes that closure of such trials must be accompanied by constitutionally adequate predicates. In Alaska, the Legislature has mandated that the respondent make an election. That is entirely sensible, indeed extremely sensitive to the competing interests involved, and as this Court indicated it would do in the

future, the trial courts should follow that statutory mandate. Thus, the purpose of presenting the following constitutional analysis is to emphasize that unless a psychiatric respondent affirmatively elects to have the hearing closed, it is open.

A good starting point is Justice Douglas' observation in *Craig v. Harney*,¹¹ that "A trial is a public event. What transpires in the court room is public property." *Harney* involved a criminal case where the Sixth Amendment's right to a public trial comes into play, however, and did not directly address the issue of whether there is a constitutional mandate that civil trials be open. In *Richmond Newspapers v. Virginia*,¹² the United States Supreme Court held that the First Amendment right to free speech also attaches to criminal trials, but explicitly left open whether the First Amendment right attached to civil trials.¹³ However, Justice Stewart wrote in his concurring opinion that, "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."¹⁴

In *Publicker Industries v. Cohen*,¹⁵ the Third Circuit, after a comprehensive review of both the common law and the First Amendment, held the First Amendment does apply to civil trials:

This survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access to criminal trials in *Globe Newspaper Co.*

¹¹ 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947).

¹² 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

¹³ *Id.* at n. 17.

¹⁴ *Id.*, 448 U.S. at 599, 100 S.Ct. at 2839.

¹⁵ 733 F.2d 1059, 1070 (CA3 1984), emphasis added.

v. Superior Court, supra and *Richmond Newspapers, Inc. v. Virginia, supra*. A presumption of openness inheres in civil trials as in criminal trials. We also conclude that the civil trial, like the criminal trial, “plays a particularly significant role in the functioning of the judicial process and the government as a whole.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606, 102 S.Ct. at 2620. From these authorities we conclude that public access to civil trials “enhances the quality and safeguards the integrity of the factfinding process.” *Id.* It “fosters an appearance of fairness,” *id.*, and heightens “public respect for the judicial process.” *Id.* It “permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.” *Id.* Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the “First Amendment embraces a right of access to [civil] trials ... to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”

The Third Circuit then went on to hold:

The trial court may limit this right, however, when an important countervailing interest is shown. . . .

[A] trial court in closing a proceeding must both articulate the countervailing interest it seeks to protect and make “findings specific enough that a reviewing court can determine whether the closure order was properly entered.” Substantively, the record before the trial court must demonstrate “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”¹⁶

The Alaska Supreme Court held Alaska's Free Speech clause, Article 1, §5 of the Alaska Constitution, applies to civil trials in *S.N.E. v. R.L.B.*,¹⁷ and:

Compelling justification is required to uphold an order infringing the right of free speech.

As we have noted, where such fundamental rights as freedom of speech and association are involved, only compelling government interests will justify

¹⁶ *Id.*, at 1071, citations omitted.

¹⁷ 699 P.2d 875, 880 (Alaska 1985), footnote omitted.

their encroachment. An essential aspect of this test is an inquiry into whether less restrictive alternatives will adequately protect those interests.¹⁸

Here, as set forth above, the Alaska Legislature has considered the interests involved and determined that psychiatric respondents' election prevails.¹⁹

IV. CONCLUSION

As said at the outset, it must be determined whether or not the November 20 & 21 hearings were open or closed to the public. For the foregoing reasons, PsychRights believes the hearings were open to the public.

DATED: January 5, 2009.

Law Project for Psychiatric Rights

By: _____

James B. Gottstein, ABA # 7811100

¹⁸ *Id.*, citations omitted.

¹⁹ A question not presented here is whether or, perhaps, when, the public's right of access might override a respondent's election to have the hearing closed.

Subject: Re: Ninety Day Commitment
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Wed, 19 Nov 2008 21:23:49 -0900
To: "Beecher, Linda R (DOA)" <linda.beecher@alaska.gov>
CC: Jim Gottstein <jim.gottstein@psychrights.org>

Hi Linda,

Beecher, Linda R (DOA) wrote:

Mr. Gottstein,

Are you planning to represent Mr. Bigley at the ninety-day commitment hearing?

No. API mentioned they were going to file, but I haven't seen a petition. I would like to see it and would want to come to the hearing if my calendar permits, but I won't be representing him in the commitment proceeding.

Also, when do you expect to finish with the medication hearing?

It was submitted to the judge today as far as I know. At least with respect to the *Parens Patriae* Count. The Police Power Count ("Emergency" Drugging) was deferred.

If you could let me know as soon as possible I'd appreciate it. Thanks.

Linda Beecher
Assistant Public Defender
334-4438

James B. (Jim) Gottstein, Esq.
President/CEO

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska 99501
USA
Phone: (907) 274-7686 Fax: (907) 274-9493
jim.gottstein[at]psychrights.org
<http://psychrights.org/>

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Psychiatric Rights

Subject: RE: 3AN 08-1252PR
From: "Pohland, Erin A (LAW)" <erin.pohland@alaska.gov>
Date: Thu, 20 Nov 2008 11:48:25 -0900
To: Jim Gottstein <jim.gottstein@psychrights.org>
CC: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>, "Kraly, Stacie L (LAW)" <stacie.kraly@alaska.gov>, "Brennan, Elizabeth (DOA)" <elizabeth.brennan@alaska.gov>, "Beecher, Linda R (DOA)" <linda.beecher@alaska.gov>

Jim-

Thank you for your e-mail. All pleadings from this office will be served in accordance with the applicable court rules.

Have you entered an appearance as counsel for Mr. Bigley in the commitment proceeding? If not, your communication raises issues that confuse the matter of Mr. Bigley's representation. As such, unless and until you have entered a general appearance as Mr. Bigley's counsel, we will limit our communications with you to the subject of court-ordered administration of psychotropic medications.

Erin

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Thursday, November 20, 2008 11:22 AM
To: Pohland, Erin A (LAW)
Cc: Derry, Laura J (LAW)
Subject: 3AN 08-1252PR

Hi Erin,

If you've filed a 90-day Commitment Petition against Mr. Bigley, you should serve me with it and anything else you file in the case.

--

James B. (Jim) Gottstein, Esq.
President/CEO

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Psychiatric Rights

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to other brain and body damaging interventions against their will. Extensive information about this is available on our web site, <http://psychrights.org/>. Please donate generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.

Exhibit A, page 2 of 2

Subject: RE: November 21st Hearing
From: "Beecher, Linda R (DOA)" <linda.beecher@alaska.gov>
Date: Mon, 15 Dec 2008 09:32:33 -0900
To: jim.gottstein@psychrights.org, "Brennan, Elizabeth (DOA)" <elizabeth.brennan@alaska.gov>

Jim,

As counsel for Mr. Bigley in the commitment proceeding I am again notifying you that you should treat the proceedings as confidential unless you hear otherwise from our office.

Linda Beecher
Assistant Public Defender
334-4438

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]

Sent: Monday, December 15, 2008 09:26 AM

To: Beecher, Linda R (DOA)

Subject : Re: November 21st Hearing

Hi Linda,

I haven't posted it yet, but absent an election to close the hearing I don't believe there is any authority to do so, especially since the previous hearings were all open.

Can you give me a reason why the hearing should be closed? Is there something in particular that you think should be kept private to protect Bill's interests? I am (hopefully) attaching a copy for your review.

Beecher, Linda R (DOA) wrote:

Jim,

Again, please treat the hearing as closed unless you hear otherwise from our office. Thank you.

Linda Beecher
Assistant Public Defender
334-4438

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]

Sent: Monday, December 15, 2008 09:02 AM

To: Beecher, Linda R (DOA)

CC : Brennan, Elizabeth (DOA)

Subject : Re: November 21st Hearing

Hi Linda,

I didn't see an election to keep it closed in the transcript.

Beecher, Linda R (DOA) wrote:

Jim,

You should treat the hearing as **closed** unless you hear otherwise from us.

Linda Beecher

Assistant Public Defender

334-4438

From: Jim Gottstein [<mailto:jim.gottstein@psychrights.org>> <<mailto:jim.gottstein@psychrights.org>>]

Sent: Sunday, December 14, 2008 02:09 PM

To: Beecher, Linda R (DOA)

Subject : November 21st Hearing

Exhibit B, page 2 of 3

Hi Linda,

I have received the transcript of the November 21st 90-day commitment hearing and while I haven't read the whole transcript didn't see where the issue of the hearing being open or closed to the public was addressed. Unless I hear otherwise from you, I am assuming it was open.

--

James B. (Jim) Gottstein, Esq.

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