EMERGENCY

Law Project for Psychiatric Rights
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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13353
	) Trial Court Case No. 3AN 08-493 P/R

EMERGENCY MOTION FOR STAY OF ORDER AUTHORIZING FORCED PSYCHIATRIC DRUGGING

Appellant hereby moves, pursuant to Appellate Rules 504 and 205, on an emergency basis, for an order staying pending appeal the Superior Court's authorization of the forcible administration of psychotropic drugs to Appellant:

(1) under its November 25, 2008 Order granting the AS 47.30.839(a)(2) *parens patriae* count of the petition by Appellee Alaska Psychiatric Institute (API) under AS 47.30.839(a)(2) (*Parens Patriae* Forced Drugging Order),[1] and

(2) under its December 3, 2008, order purporting to clarify the *Parens Patriae* Forced Drugging Order, but actually authorizing the forced drugging under the AS 47.30.839(a)(1) police power count of API's petition without giving

Appellant an opportunity to be heard thereon (Police Power Forced Drugging Order).[2]

I. Appellate Rule 504 Emergency Motion Application

A. Telephone Numbers and Addresses of Counsel.

Counsel for Appellant's telephone number is 274-7686[3] and his office address is 406 G Street, Suite 206, Anchorage, Alaska 99501. Erin Pohland and Laura Derry have both served as counsel for Appellee Alaska Psychiatric Institute (API) in this matter, both of their offices are at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501, Ms. Pohland's phone number is 269-5140 and Ms. Derry's phone number is 269-5540.

B. Nature of Emergency and the Date and Hour Before Which a Decision is Needed.

The nature of the emergency is that Appellant is currently subject to being improperly drugged against his will, which this Court has equated with the intrusiveness of lobotomy and electroshock,[4] and the United Nations has recently recognized constitutes torture under international law.[5]

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[1] Exhibit A.
[2] Exhibits B & C.
[3] Appellant's counsel is scheduled to be out of state during the week of December 7, 2008, and he will call the clerk with a telephone number(s) at which he may be contacted during that time.
[4] *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242 (Alaska 2006); *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 271, 382
[5] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to United Nations General Assembly, July 28, 2008, relevant pages of which are attached hereto as Exhibit D, and a copy of the entire document accessible on the Internet available (on December 6, 2008) at http://psychrights.org/Countries/UN/080728UNRapporteuronTortureA_63_175.pdf.

A decision on staying the Police Power Forced Drugging Order is needed immediately because API takes the position it can now forcibly drug Appellant thereunder in spite of the time limited stay issued by the Superior Court in its *Parens Patriae* Forced Drugging Order.[6] A decision on staying the *Parens Patriae* Forced Drugging Order is needed before the stay granted by the Superior Court is set to expire on December 17, 2008, unless this Court has granted Appellant's emergency motion in Alaska Supreme Court Case No. S-13116 to vacate the *Parens Patriae* Forced Drugging Order because it violates the stay pending appeal issued in S-13116.[7]

C. Grounds Submitted to Superior Court

Appellant has contemporaneously herewith filed in the Superior Court a motion for stay pending appeal of the Police Power Forced Drugging Order,[8] asking for expedited consideration thereof.[9] Appellant filed a motion for stay pending appeal of the *Parens Patriae* Forced Drugging Order on December 1, 2008,[10] expedited consideration of which was denied that same day.[11]

D. Notification of Opposing Counsel

On Sunday, December 7, 2008, Appellant e-mailed counsel for API a link to this motion posted on the Internet. A copy of this motion is also set to be hand delivered to API's counsel as early as possible on Monday, December 8, 2008.

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[6] Exhibit A.
[7] Exhibit E, attachments omitted and Exhibit F.
[8] Exhibit G.
[9] Exhibit H.
[10] Exhibit I.
[11] Exhibit J.

II. Relationship to Pending Emergency Motion In S-13116

The procedural setting for this motion seems at least somewhat complex. As briefly mentioned above, in S-13116, Appellant has filed an emergency motion to vacate the *Parens Patriae* Forced Drugging Order for violating the stay pending appeal issued in that appeal.[12] That is a completely separate ground than asserted here. However, should this Court grant Appellant's pending emergency motion in S-13116 and vacate the *Parens Patriae* Forced Drugging Order that will moot the motion here.[13] Looked at differently, even if the stay issued in S-13116 is determined by this Court in S-13116 to not apply to the forced drugging orders issued below in this case, Appellant is, by this motion, separately seeking a stay pending appeal here.

III. Standard for Granting Stay Pending Appeal

This Court's Order granting the stay in S-13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

> It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without

[12] Exhibit K, without Exhibits.

[13] It might be argued that vacating the *Parens Patriae* Forced Drugging Order does not impact the Police Power Forced Drugging Order, but since the Superior Court held, as untrue as it is, that the Police Power Forced Drugging Order was really only a clarification of the *Parens Patriae* Forced Drugging Order, it seems vacating the *Parens Patriae* Forced Drugging Order would also encompass the Police Power Forced Drugging Order. However, since there seems no reason to leave this in doubt, Appellant respectfully suggests if this Court grants this motion, its order be clear in this regard. The proposed order lodged herewith addresses this issue.

> merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."[14]

Appellant meets both tests with respect to both the *Parens Patriae* Forced Drugging Order and the Police Power Forced Drugging Order.

IV. Police Power Forced Drugging Order

A. The Superior Court Lacked Subject Matter Jurisdiction to Issue the Police Power Forced Drugging Order.

As a threshold matter, it appears the Superior Court did not have subject matter jurisdiction to issue the Police Power Forced Drugging Order since Appellant had already filed the instant appeal. Appellate Rule 203, provides:

> 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.

In *Noey v. Bledsoe*,[15] this court held an appeal in another case didn't deprive the Superior Court of jurisdiction in the case at question. Appellant respectfully suggests *Noey* can be read as affirming Appellate Rule 203's assumption of exclusive jurisdiction over the matter on appeal unless some exception applies. Thus, in *Hertz v. Carothers*,[16] this Court held there was exactly just such an exception allowing the Superior Court to issue writs of execution while a judgment was on appeal where no stay had been granted. Here, the Superior Court purported to dramatically change its decision after it had been appealed.

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[14] Exhibit L.
[15] 978 P.3d 1264, 1275 (Alaska 1999).
[16] 174 P.3d 243, 248 (Alaska 2008).

B. Appellant Can Show Probable Success on the Merits

(1) Substantive Due Process Requirements

In *Myers v. Alaska Psychiatric Institute*, this Court held being free from the unwanted administration of psychotropic medications is a fundamental constitutional right[17] and:

> When a law places substantial burdens on the exercise of a fundamental right, we require the state to articulate a compelling state interest and to demonstrate the absence of a less restrictive means to advance that interest.[18]

The compelling state interest in *Myers* was the *parens patriae* doctrine involving "the inherent power and authority of the state to protect "the person and property" of an individual who "lacks legal age or capacity,"[19] while the compelling state interest invoked under the police power is when there is "imminent threat of harm."[20]

(2) Alaska's Statutory Implementation of the Police Power Justification

AS 47.30.838 is Alaska's statutory implementation of the Police Power justification. AS 47.30.838(a)(1) permits such forced drugging only if

> there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person.

It then goes on to require the behavior or condition of the patient giving rise to a crisis to be documented in the patient's medical records, which must "include an explanation of

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[17] 138 P.3d 238, 248 (Alaska 2006)
[18] 138 P.3d at 245-246, internal quotes and citations omitted.
[19] *Myers* 138 P.3d at 249.
[20] *Myers*, 138 P.3d at 248.

alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient."

Under AS 47.30.838(c) API can unilaterally invoke the police power justification for only three crisis periods without superior court approval under AS 47.30.839(a)(1).

(3) Appellant Was Denied Due Process

The order granting expedited consideration of the motion leading to the Police Power Forced Drugging Order, states in pertinent part:

> The Court has ruled on this and the underlying substantive motion without further input from William Bigley and James Gottstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision.[21]

That the police power justification for forced drugging under AS 47.30.839(a)(1) (Police Power Count) was fully addressed in the hearing is untrue. Believing that if it granted the forced drugging petition based on the *parens patriae* justification under AS 47.30.839(2) (*Parens Patriae* Count) it would eliminate the need for considering the Police Power Count and reduce the hearing time, the Superior Court ruled it would not take any evidence on the Police Power Count until after it ruled on *Parens Patriae* Count and if there was then a need to consider the Police Power Count, further evidence would be taken from both sides, after allowing Appellant some discovery.[22]

The issue of the separate nature of the Police Power Count was first raised by Appellant at the October 28, 2008, status conference:

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[21] Exhibit B.
[22] Exhibits M & N, culminating at Exhibit N, p 6, Tr. 19-20 (November 3, 2008).

> MR. GOTTSTEIN . . . Your Honor, in the past, API has administered medication pursuant to [the police power justification under AS 47.30.838/AS 47.30.839(a)(1)] without the legal predicate . . . existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually --what actually happened. So,. . . it really puts me in a difficult position because. . . they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.[23]

It was then discussed at some length during the November 3, 2008, status conference, perhaps the most relevant portions of the transcript being:

> THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria [*Parens Patriae* Count]. Doesn't that moot out the 838 -- the 839(a)(1) petition [Police Power Count]?
>
> MS. DERRY: Yes, Your Honor.[24]
>
> * * *
>
> THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) [*Parens Patriae* Count] in the first instance and present only the information it thinks is necessary there? If I grant that petition, then any need for 839(a)(1) authorization [Police Power Count] is moot?
>
> MS. DERRY: Yes. I believe that, Your Honor.
>
> THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority.[25]
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> * * *
>
> THE COURT: Okay. . . . So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

[23] Exhibit M, p. 6; Tr. 18 (October 28, 2008).
[24] Exhibit N, p. 6, Tr. 14 (November 3, 2008).
[25] Exhibit N, p. 5, Tr. 15 (November 3, 2008).

> MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --
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> THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?
>
> MR. GOTTSTEIN: Yes, Your Honor.[26]

Appellant then pointed out that because of the stay, API was going to run out of its limited authorization to utilize the police power justification for forced drugging under AS 47.30.838 without obtaining court approval under AS 47.30.839(a).[27] Assuming the Court would follow through on its statements that a later hearing would be held on the Police Power Count before forced drugging would be authorized under the police power justification, Appellant thought limiting the hearing to the *Parens Patriae* Count benefitted him,[28] and the Superior Court said:

> THE COURT: Okay. We're both in agreement. . . . [T]he State will present what it thinks is necessary under 839(a)(2) [*Parens Patriae* Count].

Appellant then raised the question of how much time he would have to prepare for a hearing on the Police Power Count "if we end up going to that?"[29] The Superior Court responded:

> THE COURT: . . . I'm going to issue an order in the first instance on the 839(a)(2) petition [*Parens Patriae* Count], and if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second

[26] Exhibit N, p. 5, Tr. 17 (November 3, 2008).
[27] Exhibit N, pp 5-6, Tr. 17-18 (November 3, 2008).
[28] Exhibit N, p. 6, Tr. 18 (November 3, 2008).
[29] Exhibit N, p.

> type of authorization [Police Power Count]. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.[30]

The problem was, just as Appellant had advised the Superior Court, everything else was not moot when the Superior Court issued the *Parens Patriae* Forced Drugging Order, as most dramatically shown by API filing a motion to "clarify" that the *Parens Patriae* Forced Drugging Order also granted the Police Power Count.[31]

Then, as set forth above, the Superior Court granted that motion without allowing Appellant to be heard on the matter. It is hard to imagine a more clear denial of due process. As the United States Supreme Court has recently held, a meaningful opportunity to be heard is one of the fundamental hallmarks of Due Process.[32]

(4) The Factual and Legal Predicates for the Police Power Forced Drugging Order Are Extremely Unlikely to Be Present

Appellant was not able to conduct much discovery with respect to the true facts surrounding API's purported police power drugging, but there is enough to demonstrate the factual and legal predicates justifying granting the Police Power Count are highly unlikely to exist. First, following a prior emergency motion to this Court to stop the improper purported police power forced drugging of Appellant in S-12851, Dr. Worrall advised Appellant's counsel that there was no API policy on implementing the police power justification as embodied in AS 47.30.838, or otherwise, he had received no

[30] Exhibit N, p 6, Tr. 19-20 (November 3, 2008).
[31] Exhibit O.
[32] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).

training on the topic, and he had had no idea of the requirements before Appellant raised them in S-12851.[33] Appellant's counsel understands from the same source that the Attorney General's office started working on a policy following this.

During the deposition of Ron Adler, API's CEO, over counsel for API's objection, Appellant asked Mr. Adler about this and he promised to provide the new policy,[34] but API has failed to do so. Mr. Adler did testify in his deposition that there was now training, that he couldn't identify who did the training, but he would subsequently provide that information "through our attorneys,"[35] which it has failed to do.

A deposition was also taken of Dr. Khari, the psychiatrist who signed the forced drugging petition on appeal here, and is the psychiatrist in charge of Appellant.[36] Over, API's objection, Appellant also questioned Dr. Khari about police power justification forced drugging procedures at API and of Appellant.[37] Appellant suggests this transcript demonstrates API's administration of police power forced drugging to Appellant did not and does not comply with AS 47.30.838, nor does it comply with constitutional requirements.[38]

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[33] Dr. Worrall asked that his e-mail so advising Appellant's counsel not be made public, so it is being filed in an envelope marked confidential.
[34] Exhibit P, page 4, Transcript page 12.
[35] Exhibit P, page 3, Transcript pages 8-9.
[36] Exhibit Q.
[37] Exhibit Q, pages 5-7, Transcript pages 15-25.
[38] Appellant sought the names of the nurses who decide whether the conditions for administering police power forced drugging exist and Dr. Khari said she would get Appellant a list of names the next day if not by fax that afternoon (Exhibit Q, page 7, Transcript page 23), which she failed to do.

V. *Parens Patriae* Forced Drugging Order

If this Court does not vacate the *Parens Patriae* Forced Drugging Order before December 17, 2008, which is the date the Superior Court in this case set for termination of its stay without further order of this Court, this Court should grant a stay of it pending appeal.

A. <u>This Court Has Already Granted a Stay Pending Appeal on Exactly the Same Relevant Facts.</u>

This Court has already granted a stay pending appeal in S-13116 on exactly the same relevant facts,[39] including denying full court reconsideration.[40] Appellant respectfully suggests that at least until this Court decides S-13116, which has been expedited, something akin to *collateral estoppel* or "law of the case" should apply.

API will presumably argue that it introduced new facts, but none of the testimony it elicited goes to the issues relevant for determining whether a stay pending on appeal should be granted. This is illustrated by the Superior Court's indication that it will deny Appellant's motion for stay pending appeal because it had concluded Appellant, "has deteriorated since May 2008 and should not have to wait longer for medication."[41] As set forth above, that is not the standard. Moreover, any deterioration of Appellant, if any, is almost certainly, as Dr. Jackson testified in both cases, to be from the brain damage caused by the drugs and the failure of API/the State to provide a less intrusive alternative,

[39] Exhibit L.
[40] Exhibit R.
[41] Exhibit A, page 32.

primarily consisting of having someone with Appellant in the community enough to avoid the difficulties he has been experiencing.

B. Appellant Faces the Danger of Irreparable Harm

With some trepidation, Appellant will incorporate by reference his presentation of harm that resulted in this Court granting the stay pending appeal in S-13116 on the belief repeating it here would unnecessarily lengthen this motion.[42] All of the same evidence was presented below,[43] plus the affidavit of Dr. Jackson filed in S-13116, which this Court did not rely upon in granting the stay in S-13116,[44] and some additional cross-examination below in this case, confirming the brain damage and that the drugging will likely kill Appellant if not stopped.

In that regard, in granting the *Parens Patriae* Forced Drugging Petition, the Superior Court assumed that past psychiatric drugging had caused brain damage, the forced drugging the Superior Court authorized will cause further brain damage and shorten Appellant's life.[45] This is a further demonstration of irreparable harm.

C. Appellant Can Demonstrate Probable Success on the Merits as Well.

Appellant also incorporates by reference his argument that he can demonstrate probable success on the merits contained in his opposition to API's motion for

[42] A copy of the Emergency Motion for Stay in S-13116 without the exhibits is attached hereto as Exhibit K.
[43] Exhibit S.
[44] Exhibit L, page 4.
[45] Exhibit A, page 28.

reconsideration of the stay granted in S-13116.[46] In addition, with respect to probable success on the merits, the Superior Court clearly erred in denying Appellant's motion for summary judgment and incorporates by reference his motion for summary judgment below[47] and reply to API's opposition.[48] To summarize that argument, API filed no affidavits or other competent evidence in opposition to those presented by Appellant. Frankly, it is hard for Appellant to see how he wouldn't prevail on that issue.

In addition, although perhaps less clear in light of *Wetherhorn*, Appellant believes he should also prevail on his motion to dismiss, and incorporated herein by reference that section of his motion to dismiss[49] and reply to API's Opposition.[50] To summarize that argument, the *Parens Patriae* Count fails to allege that the forced drugging is, as required by *Myers*, in Appellant's best interest and there is no less intrusive alternatives available. Thus, it fails to state a claim upon which relief may be granted or is otherwise insufficient to support the relief requested.

Appellant suggests *Wetherhorn* does not hold otherwise. First, *Wetherhorn* involved the sufficiency of the petition for commitment not forced drugging. However, even if the same analysis applies, in *Wetherhorn*, the sufficiency of the allegations were tested against the claim that they should:

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[46] Exhibit T, without 170 pages of exhibits.
[47] Exhibit U.
[48] Exhibit V, pages 4-9.
[49] Exhibit W, pages 2-3.
[50] Exhibit V, page 3.

> "(1) be sufficient, without supplementation, to entitle the petitioner to the granting of the petition as a matter of law, and (2) to at least summarize all of the evidence the state intends to put on in its case in chief."[51]

That is not the assertion here. The assertion here is just that the petition has to at least be sufficient to survive a Civil Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted.

Also, it is respectfully suggested the ruling in *Wetherhorn* on this issue was dicta because it was decided under the plain error standard since Ms. Wetherhorn's counsel at the time, the Alaska Public Defender Agency had not raised the issue with the trial court.

Thus, Appellant believes he has also shown probable success on the merits with respect to his motion to dismiss the *Parens Patriae* Count.

VI. Conclusion

For the foregoing reasons, both the Parens Patriae Forced Drugging Order and the Police Power Forced Drugging Order should be stayed pending appeal.

Dated this 6th day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

[51] 156 P.3d at 380

Exhibits

A. *Parens Patriae* Forced Drugging Order, November 25, 2008.
B. Order Granting Expedited Consideration, December 3, 2008.
C. Police Power Forced Drugging Order, December 3, 2008.
D. Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, to United Nations General Assembly, July 28, 2008
E. Emergency Motion to Enforce Stay and Non-Emergency Motion for Sanctions, December 1, 2008.
F. Second Update to Emergency Motion to Enforce Stay, December 3, 2008.
G. Memorandum in Support of Motion to Stay Police Power Forced Drugging Order, December, 6, 2008.
H. Motion to Expedition Motion to Stay Police Power Forced Drugging Order, December 6, 2008.
I. Memorandum in Support of Motion to Modify Stay and For Stay Pending Appeal of *Parens Patriae* Forced Drugging Order, December 1, 2008.
J. Order Denying Motion for Expedited Consideration, December 1, 2008.
K. Emergency Motion to Enforce Stay and Non-Emergency Motion for Sanctions in S-13116, December 1, 2008.
L. Stay Order in S-13116, May 23, 2008.
M. Transcript of October 28, 2008, hearing.
N. Transcript of November 3, 2008, hearing.
O. Motion for Clarification of Order, December 3, 2008.
P. Deposition Transcript of Ron Adler, November 4, 2008.
Q. Deposition Transcript of Khanaz Khari, MD, November 4, 2008
R. Full Court Denial of Reconsideration in S-13116, June 25, 2008.
S. Notice of Filing Written Testimony, October 28, 2008.
T. Opposition to Reconsideration of Stay in S-13116, June 9, 2008.
U. Summary Judgment Motion, October 28, 2008.
V. Reply re: Summary Judgment & Motion to Dismiss, November 3, 2008.
W. Motion to Dismiss, October 28, 2008.

Confidential Envelope, E-mail string between William Worrall, MD and Jim Gottstein, September 22, 23, 2007.

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.	CASE NO. 3AN-08-01252 PR

ORDER

Petition for Court Approval of Administration of Psychotropic Medication
Petition for 90-day Commitment

The State of Alaska, Alaska Psychiatric Institute (API), wants to administer psychotropic medication to William Bigley, who has suffered from schizophrenia for over a quarter century. Bigley opposes that request. He argues, among other things, that the medication is not only contrary to his best interests, but also would cause him injury, specifically brain damage. In advance of and during the hearing on the petition both parties raised many issues. In an effort to simplify the identification of those issues and the resolution of them, the Court will present a chronology of developments before addressing the ultimate issue of the propriety of the administration of the medication.

Commitment and First Medication Petition.

Bigley is 55 years old. He was born on 15 January 1953 in Kodiak. He moved to Sitka as a child. He was married for some time but is now divorced. He has two grown children who were living in Sitka five years ago. He has been hospitalized for his schizophrenia repeatedly, with more frequency in the last year

and decade. In March 1993 he was admitted to API for the tenth time. In July 2002 he was admitted for the fiftieth time. His seventy-fifth admission was on 25 April 2008. His most recent admission appears to be his eighty-first.[1] He has also been seen at other facilities in Anchorage and Sitka, though some of those admissions have resulted in API admissions as well. He has had many interactions with the police as a result of behavior that flows from his schizophrenia.

The parties have agreed that since December 2006 he has been at API fifteen times.[2] In 2008 Bigley was at API from 23 October 2007 to 21 January 2008; 23 February to 14 March; 16-21 April; 25 April to 4 June; 26-30 June; 1-5 August; 22-24 September; 30 September to 1 October; 8 October; and 20 October to the present.[3]

On 15 October 2008 Lisa Davis, a clinician with the Anchorage Community Mental Health Service, filed a petition for a screening investigation of Bigley, pursuant to AS 47.30.700. The Public Defender Agency was appointed to

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1 The parties were not able to agree upon his entire history of API admissions and interactions with judiciary in commitment proceedings. Bigley submitted a narrative of this history with supporting documents. It contained commentary on the events surrounding many of the admissions. API was unwilling to agree to the accuracy of the submission. The Court invited API's counsel to redact the objectionable commentary, in hopes of crafting a relatively accurate and neutral chronology. API claimed that this was not possible. It submitted its own document.

2 *See* Exhibit F. This list of the records generated during his admissions identifies the dates of his recent admissions.

3 *Id.*

represent Bigley. That agency has represented him on numerous occasions. On 17 October a magistrate recommended that petition be approved.

On 20 October Bigley arrived at API. Dr. Kahnaz Khari, a psychiatrist at API, petitioned for judicial approval of the request that API be authorized to administer psychotropic medication to Bigley, pursuant to AS 47.30.839. Dr. Khari filed a petition for the 30-day commitment of Bigley on the same day, pursuant to AS 47.30.730.

On 20 October, while those petitions were pending, API administered emergency psychotropic medication to Bigley pursuant to AS 47.30.838. This was a single dosage.

On 21 October James Gottstein entered a limited appearance on behalf of Bigley.[4] Gottstein sought to represent Bigley "only to any forced drugging under AS 47.30.838 or AS 47.30.839." On 21 October Master Jonathan Lack held a hearing on the commitment petition. The Public Defender Agency represented Bigley. Its attorney played the lead role at the hearing, cross examining the API witnesses. Gottstein also participated, but played only a minor role.

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[4] The roles of Gottstein and that of the Public Defender Agency during this litigation were the subject of some dispute. Normally the Court would ascribe actions taken by a lawyer on behalf of a party as if the party made them. Thus the Court would usually state that Bigley filed a motion when actually it was his lawyer who did. To differentiate what Gottstein did from what the Public Defender Agency did, the Court will identify Gottstein or the Agency as the one filing motions or taking actions, rather than Bigley.

Master Lack recommended that the commitment petition be granted, but referred the medication petition to the superior court without recommendation. A hearing on the medication petition was set for 29 October. On 22 October, after listening to the recording of the hearing,[5] the Court granted the commitment petition.

On 22 October Gottstein filed a motion to dismiss the medication petition. On Friday, 24 October, API withdrew its medication petition, stating that Bigley had responded well to his care at API.

Second Medication Petition.

On Monday, 27 October, API filed a second medication petition. It was later explained that API observed a marked decline in Bigley's condition over the weekend and thus thought medication was necessary. In fact, API administered a second dosage of emergency psychotropic medication that day, again pursuant to AS 47.30.838. Meanwhile, Gottstein filed a motion for summary judgment on the first medication petition.

On 27 October, in response to the second medication petition Master John Duggan again appointed the Public Defender Agency to represent Bigley and appointed a court visitor to report on his condition. Master Duggan set a hearing for 29 October at API with the undersigned judge to preside. Unaware of the dismissal of the first medication petition or the filing of the second medication

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5 *See Wayne B. v. Alaska Psychiatric Institute,* 192 P.3d 989 (Alaska 2008).

petition, the Court issued its own calendaring order for a hearing on the 29th on the first medication petition.

Status Hearing.

Open Hearing. On 28 October, having by then learned of the second medication petition, the Court held a scheduling hearing in its courtroom without Bigley being present. Gottstein objected to the notice on the entrance to the courtroom that the hearing was closed to the public. He explained that Bigley had consented to the proceedings being open, pursuant to AS 47.30.735(b)(4). That notice had been placed there by the Court's in-court clerk who had reasonably assumed that this hearing, like most mental health probate matters, was closed. Without objection from API the Court had the notice removed. Gottstein did not object to Bigley not being present since the purpose of the hearing was to sort out the various petitions that had been filed and determine what hearings, if any, needed to be set and for when.

Discovery and Timing of Hearing. At the status hearing the Court ordered API to make Bigley's charts available to Gottstein shortly after they were generated. It ordered API to provide Gottstein with paper copies of Bigley's charts from prior admissions at API for the past year.

AS 47.30.839(e) requires a hearing on the medication petition to be held within 72 hours of the filing of the petition. Gottstein moved to vacate the hearing set for the 29th. He demanded additional time to obtain documents from

API, to conduct discovery, and to prepare. API opposed the motion, citing the statutory deadline for the hearing.

The Court concluded that Bigley's due process rights to discover the evidence that might be used by API in support of the medication petition overrode the statutory deadline for a hearing on the petition.[6] It vacated the hearing on the 29th, setting a new hearing on 5 November at API.

Location of Hearing. Gottstein objected to holding the hearing at API, arguing that Bigley was being deprived of his right to have the hearing open to the public if it was held at a facility that was restricted to the public. The Court kept the hearing at API subject to further review after the first day of the hearing.

On 29 October Gottstein filed a motion for expedited consideration of his motion to hold the hearing set for 5 November at the courthouse rather than at API. The Court granted expedited consideration. On 30 October API opposed

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6 API moved for reconsideration of this ruling at the beginning of the hearing. The Court concluded that discovery was authorized by court rule and statute. The Rules of Probate Procedure apply to proceedings pursuant to AS 47.30. Probate Rule 1(b). No probate rule expressly addresses discovery in commitment or medication proceedings. Probate Rule 1(e) adopts the Civil Rules if no probate rule applies to a specific procedure. Civil Rule 26 governs discovery generally and Civil Rule 30 permits oral depositions.

It is true that AS 47.30.839 does not address discovery, but contrary to API's suggestion, that does not mean that no discovery is authorized in AS 47.30 proceedings. AS 47.30.825(b) mandates the disclosure of information about a patient and his treatment to the patient and his counsel. AS 47.30.850(2) authorizes the release of otherwise confidential information and records to the patient and his designee. AS 47.30.850(3) authorizes the release of those information and records to a person if ordered by a court.

the underlying motion, supported by an affidavit of Dr. Lawrence Maile. He opined that the transportation of Bigley from API posed a risk to him and members of the public. The Court denied the motion, subject to further review upon the Court's observation of the API facility and Bigley at the hearing.

On 30 October Gottstein moved to dismiss the portion of the medication petition that was made pursuant to AS 47.30.838(c) and .839(a)(1). The Court denied that motion at the beginning of the hearing on 5 November.

Depositions.

On 31 October API filed for expedited consideration of its Motion to Quash and Motion for Protective Order. API sought to quash deposition notices served on several of its administrators and physicians. The depositions were to occur on 3 November. API argued that the relevant statutes[7] and probate rules did not provide for discovery by the ward. API sought a protective order "so that the contents of all discovery in this case be confidential, from now and into the indefinite future. Such an order would protect both respondent fro the disclosure of sensitive medical information and the deponents from harassment and embarrassment by respondent's attorney."[8] The Court granted expedited consideration.

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7 AS 47.30.670 -- 47.30.915.

8 Motion for Protective Order (31 October 2008) at 2.

On 3 November the Court held a status hearing. Gottstein appeared in person. Laura Derry appeared telephonically for API. Bigley did not attend, without objection. The Court made various rulings. It:

a) denied API's second 30-day commitment petition as moot, since the Court had granted the first petition;

b) held Bigley's motion for summary judgment in abeyance until it could review the documents submitted by Gottstein;

c) denied the motion to quash, although it modified the timing of one deposition that was set at night by mistake;

d) granted the motion for a protective order in part, ordering that Gottstein could publish filings from the open file to third parties, but could not publish materials obtained in discovery, including Bigley's charts and the depositions to third parties (except as was necessary for the litigation, say to his experts) before 12 November. The Court intended that the depositions take place and then the parties could address the continued need for a protective order after reviewing the deponents' testimony and any request to publish.

On 4 November API filed a number of motions in limine concerning Bigley's proposed witnesses and the use of the term "forced drugging." API moved to strike the depositions that Gottstein had just taken. The Court held in abeyance the motions concerning the witnesses until Gottstein actually called them. The Court denied the motion to preclude Gottstein's use of the term "forced drugging" and the motion to strike.

The Physical Setting of the Medication Hearing.

On 5 November the Court convened a hearing at API.[9] In order to enter the facility one goes into an open, public lobby. There is a receptionist behind a glass wall who gives a visitor an identity badge and arranges to have the visitor escorted to her destination. Opposite the receptionist, across the public lobby, is a meditation room, also open to the public. On either side of the meditation room, are locked doors into a large, high glass walled room with a coffee and snack vendor and various chairs and tables. One may see into the snack room through the clear glass walls.

Behind the snack room is a hallway that extends down two wings, coming together at a roughly 90 degree corner directly behind the snack room. This hallway gives one access to the 5 or 6 residential units that are perpendicular to the hallway. The hallway has a ceiling that is perhaps forty feet high. There are large pieces of artwork roughly 75 feet apart on the walls opposite the snack room.

Down the left wing of the hallway are the two rooms that have been used as hearing rooms. One, a smaller room, is labeled as the courtroom. It was partially set up on the morning of 5 November, but the API staff suggested that the hearing be moved to a larger room closer to the entrance from the snack room.

All sessions of the hearing were held in this larger room. It is rectangular, roughly 20 feet along the hallway and 35 feet deep. It is labeled a

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9 The Court heard additional testimony concerning the medication petition on 6, 10, 17, and 18 November.

rehabilitation room and has numerous arts and crafts materials in it. There are cabinets built into half the perimeter of the room, both above and below a countertop. Along one wall perpendicular to the hallway are doors into adjacent offices with a window in the top half of the door and another window adjacent to the doors. Along that wall there are two sets of work stations with four computers. Along the opposite wall are additional counters and cabinets and an alcove with more counters and cabinets. The alcove is perhaps four feet deep. In it is a large, high wooden table. There is a sink in the alcove. Along the wall opposite the hallway is another door and window into another office. There is a restroom in the corner opposite the hallway and behind the alcove.

In the middle of the hearing room were five 3 feet by 5 feet tables setup to form a conference table 5 feet by 11 feet. There were eight chairs around the table. There were at least three additional chairs set back from the table. More could have been brought in if needed. In the middle of the table was a speakerphone that was linked to a regular courtroom where the proceedings were recorded and an in-court clerk kept log notes.

Participants at the Hearing.

Bigley. At the very beginning of the hearing on 5 November Bigley was not present, but he arrived in a few moments. He sat on a chair near Gottstein, but away from the table and to the left and rear of the judge, who was at the narrow end of the table across from the entrance from the hallway. There was an API attendant who accompanied Bigley everywhere. Occasionally Bigley would

leave the hearing room to use the restroom, to eat, or to get coffee. The hearing continued in his absence without objection.

The Court denied Gottstein's request to delay the hearing to permit Bigley to go outside the API building and off its campus in order to smoke a cigarette. It is against API policy to smoke on the campus. Dr. Khari opined that smoking was not good for Bigley, although she acknowledged that he was a heavy smoker and constantly asked to be allowed to smoke.

Throughout the hearing Bigley spoke, usually to himself, as if commenting on the proceedings. Sometimes he reacted more loudly to what was being said, sometimes directing those comments at another participant. For the vast majority of the hearing Bigley's speech did not interfere with the proceedings, particularly once the participants got used to it. His comments were only rarely coherent. Typically one might make out only one or two words. While Bigley was paying attention to the proceedings, he was not actually engaged with any other person for more than a few seconds. At times he was disruptive, usually in reaction to the presence of or testimony of a particular witness. The Court found that it was most effective to not respond to the outbursts in any but the calmest manner. They would pass. The Court often asked him to be quieter and occasionally suggested he might want to go get more coffee. He usually acted on that suggestion. Often I would silently signal to him to be quieter by gesturing with my hand for him to lower his voice or by putting my finger to my lips. He

would always respond to those gestures although often he'd begin speaking again in 10-15 seconds.

After the first day of the hearing the Court concluded that it would not be appropriate to hold the remainder of the hearing away from API. The physical setting of a courtroom, with the judge on the bench above Bigley, would have disturbed him. It was comforting for him to be at the same level as the other participants who were seated around the makeshift conference table. He insisted on sitting away from the table. If he had been forced to sit in a more formal setting, he would not have been as cooperative. Presumably the basic setting of API and perhaps even the particular room where the hearing was held was somewhat familiar to Bigley. He certainly was comfortable with the restroom and dining facilities that he used during the hearing. Finally, and most importantly, it was comforting for him to be able to leave the hearing room and go into the hallway or to get coffee at a small cafeteria a few doors down the hallway. He could not have walked about the courtroom or courthouse in that manner. He would have felt far more restricted in a courthouse and that would have increased his agitation.[10]

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[10] Having concluded that the hearings should not be held in the courthouse, the Court should not be understood to mean that the physical setting for hearings at API is acceptable. The API facility is only a few years old. It is quite beautiful and a tremendous improvement overall from the old facility. It is far from a depressing setting. But API holds hearings on petitions for evaluations and commitments on at least two days every week. In the modest regular "courtroom" there is little more than a conference table. The room that this hearing was in is better only in that it is bigger. But it is obvious that neither room was designed for

On two occasions after the first day Bigley got particularly agitated. At the start of one day, after he learned that API had filed a petition for a 90-day commitment, he came into the room quite upset. He had a pile of papers that included pictures of Al Pacino and President Kennedy, among others. He angrily shuffled through the stack, putting individual pictures on the table for us to see. Part of his delusion is that he is Al Pacino and wants to fly in his plane to Cuba. Occasionally he appears to think he is the president. He got agitated once when he insisted that he be released and that he was a free man.

In retrospect the Court's decision to hold the hearing at API was the only possible decision consistent with Bigley's immediate personal needs.

Counsel. Gottstein and two assistant public defenders were present at the beginning of the hearing on 5 November. The assistant public defenders objected to Gottstein being able to enter a limited appearance on Bigley's behalf. They argued that it was not permissible to carve out an appearance by one counsel that was limited to the medication petition while having the Public Defender Agency represent him on the commitment petitions. They alleged that such joint

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the hearings that API knew would be held in them. The audio recording system is preposterous. It is no more than a conference/speaker phone in the middle of the table that has to be moved in front of each speaker so that the court clerk back at the courthouse can make a recording. It is incomprehensible that the new facility was not designed to include a room specifically tailored for these hearings--which does not mean a small version of a regular courtroom. The hearing room should be designed to accommodate the unique needs of the mentally ill persons who are the subjects of the proceedings.

representation was contrary to the Agency's general policy.[11] More specifically, they alleged that the Agency lawyers had disagreed with Gottstein about the representation of Bigley in the past. They did not think that Gottstein and the Agency could cooperate.

The Court ruled that Civil Rule 82(d)(2) permitted an appearance that was limited by "subject matter." The Court permitted the assistant public defenders to attend the medication hearing as it would likely include testimony relevant to his continued or extended commitment. The two lawyers stayed for awhile, but then left and did not return at any other time during the medication hearing.

The Court denied the request of API and the Public Defender Agency that it make inquiries of Bigley to determine if he was competent to decide to have Gottstein represent him. The Court found that Gottstein's representation of Bigley in the past year when API had filed another petition to medicate (superior court case no. 3AN-08-00493 PR, supreme court case no. S-13116) Bigley was sufficient to support his current limited representation. This was a peculiar request from API in light of its allegation that Bigley was then so gravely disabled that he did not have the capacity to give or refuse informed consent to the suggestion that he be administered psychotropic medication. The Court found that it was neither appropriate nor necessary to question Bigly at that

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11 The policy was not more specifically identified. If a written policy exists, it was not produced.

time about his desire to have Gottstein represent him. Nor would it be fruitful to attempt to question him about earlier times when he might have engaged Gottstein as his attorney. The Court found that Gottstein's history as a representative of Bigley when similar and perhaps identical issues were in dispute was an adequate assurance that Gottstein's continued limited representation of Bigley was consistent with Bigley's wishes.[12]

The Press. At the hearing on 5 November it was brought to the Court's attention that a member of the press was in API's public lobby seeking to attend the hearing. The assistant attorney general representing API had instructed API to deny the reporter access to the hearing until she could again raise with the Court questions regarding the openness of the proceeding. The Court ordered the reporter to be permitted into the hearing room immediately. She attended the remainder of the hearing that day. The reporter attended the next day and perhaps for portions of other days as well.

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12 The Court notes that the status of representation of a person who may have a mental illness can be problematic. No one disputed that Bigley has a mental illness and has been deemed incompetent to stand trial in the past year. It would be helpful for attorneys who are engaged by a person who has chronic mental illness problems and might periodically lack the capacity to make decisions about representation in the future to memorialize the client's selection and capacity at the time of the person's engagement of the lawyer so as to avoid just this challenge at a later time. There should be a representation procedure or document analogous to advance health care directives as permitted by AS 13.52. This is a topic that ought to be addressed by the Probate and/or Civil Rules Committees.

The Court instructed the Department of Law that it could not unilaterally determine who could attend the hearing, but must allow any member of the public to attend, subject to any request by a party to have a particular person excluded. The person would be permitted to attend until the Court ruled on the application.[13]

The Protective Order.

The Court clarified the protective order. No party could reveal to third persons the contents of any deposition taken or discovery received in the litigation except as that deposition or discovery was used in open court. API again moved that the hearing be closed, and raised the ongoing issues of the confidentiality of the existing record and the publication of materials generated by the litigation.[14]

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[13] During a subsequent session of the hearing, some days after the first day, API's lawyer disclosed that a representative of the press with unspecified camera equipment had sought access to the hearing, but had been barred entrance by API. The Court had Ron Adler, API's chief executive, provide testimony about this event. He explained that he had made this decision because of the desire to protect the privacy interests of the other patients at API. This was not the decision of the API lawyers involved in the hearing. He explained that he had tried to contact other counsel that API routinely consulted on patient privacy issues, but before he could speak with counsel, the photographer chose to leave. The Court ordered that API was not to bar any member of the press from the hearing although it could enforce its rules about photography of API patients while the photographer came into the hearing room from the public lobby. However, the use of photography in the hearing room would remain under the exclusive jurisdiction of the Court.

[14] On the second day of the hearing the Court distributed copies of the log notes and CDs of the prior day's hearing. The log notes were marked "CONFIDENTIAL." This was consistent with the regular practice for API hearings, but contrary to the Court's order in this particular hearing. The Court

Summary Judgment.

When, at the beginning of the hearing on 5 November, the Court indicated its intention to deny his Motion for Summary Judgment, Gottstein pointed out that there had not been oral argument and that he wanted to argue the motion. The Court heard oral argument on the motion and found there were significant genuine issues of material fact concerning Bigley's recent and current mental health and whether it was in his best interests to be administered particular psychotropic medications. The Court ruled that its consideration of the motion was not limited to evidence submitted by API with its formal opposition to the motion. Instead the Court was required to consider the entire file, including affidavits submitted in support of other motions. The factual issues concerning the impact of the proposed medication on Bigley, as well as his prognosis if not administered psychotropic medication, made it impossible for the Court to grant the motion as a matter of law.

AS 47.30.839.

API may seek court approval for the administration of psychotropic medication pursuant to AS 47.30.839(a) if

> (1) there have been, or it appears that there will be, repeated crisis situation as described in AS 47.30.838(1)[15] and the

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clarified that the log notes were not confidential, but were open to the public, as were the contents of the court file and the hearings themselves.

15 A crisis is defined to be an existing or impending situation "that requires immediate use of the [psychotropic] medication to preserve the life of, or prevent

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

API alleged that both circumstances were present in Bigley's case

If a court finds that the patient is competent to give informed consent, then API must honor the patient's decision about the use of the medication.[16] If the patient is found not to be competent, "and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes[,]"[17] then the court may authorize the administration of the medication if it further "finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available."[18]

The best interest analysis requires a court to consider the following statutory factors:

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
>
> (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of

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significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse[.]" AS 47.30.838(a)(1).

16 AS 47.40.839(f).

17 AS 47.30.839(g).

18 *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006).

dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

(C) a review of the patient's history, including medication history and previous side effects from medication;

(D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.] [19]

In addition, the court should consider the following:

(1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;

(2) the risks of adverse side effects;

(3) the experimental nature of the treatment;

(4) its acceptance by the medical community of the state; and

(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[20]

Competency and Informed Consent.

A patient is competent to make mental health decisions, such as whether to take psychotropic medication, if the patient

(A) has the capacity to assimilate relevant facts and to appreciate and understand the patient's situation with regard to those facts, including the information described in (2) of this subsection;

(B) appreciates that the patient has a mental disorder or impairment, if the evidence so indicates; denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions;

(C) has the capacity to participate in treatment decisions by means of a rational thought process; and

(D) is able to articulate reasonable objections to using the offered medication.[21]

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19 AS 47.30.837(d)(2); *Myers*, 138 P.3d at 252.

20 *Myers*, 138 P.3d at 252.

21 AS 47.30.837(d).

Marieann Vassar, the Court Visitor, and Dr. Khari, Bigley's primary treating psychiatrist at API, testified about his current capacities and condition. Both opined that Bigley is not competent. The Court agrees.

Current Capacity. The Court finds that Bigley suffers from chronic paranoid schizophrenia. Although he has not received long term psychotropic medication for nearly a year, he as recently been administered several doses of emergency psychotropic medication. On 7 October he was taken to Providence Alaska Medical Center because he was walking in and yelling at traffic. He was given Haldol (5mg) and Ativan (2 mg).[22] While incarcerated between 16-20 October he was given two doses of Haldol and Ativan by the Department of Corrections medical staff. At API he was administered emergency psychotropic medications on 22 and 27 October. After his admission on 20 October he began yelling loud obscenities, invading other person's spaces, banging the walls with a platter, and throwing himself against the walls even after being taken to a quiet

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[22] Haldol is a typical anti-psychotic medication. This is an older category of anti-psychotic drug that may produce a variety of negative side effects for some patients. A newer category of anti-psychotic drugs that allegedly pose a lower risk of side effects are labeled atypical anti-psychotics. Whether these are actually more benign is controversial in some quarters and hotly contested by Gottstein. API seeks to administer Risperdal Contra, a brand of the generic drug risperidone, to Bigley. It is an atypical anti-psychotic. Ativan is an anti-anxiety drug.

room. The last four administrations of psychotropic medications were involuntary. It is not clear whether the dosage at Providence was voluntary.[23]

Bigley does not appreciate that he has a mental illness, in fact he denies it. He is delusional, thinking at times that he is Al Pacino and/or President Kennedy or the president. He currently cannot interact with other people in any meaningful way. Although for brief periods during the recent admissions at API he has been more cooperative with API staff, normally he cannot engage in a conversation for even a few sentences. Most often he speaks incoherently. Usually he is either speaking to himself or making comments about the events he is observing. His words are not often understandable and his thought process can rarely be tracked, regardless of whether they are rational or not. If agitated he will yell loudly, sometimes making statements of aggression. He does not act out on these comments. He is not capable of participating in treatment decisions, indeed he cannot participate in any treatment at all as he does not engage with others.

Bigley does not express any reasonable objection to medication in general or to the proposed specific medication. He does claim the drugs are killing him or his brain. He does fear that he is being poisoned by medication that he has received in the past. But this is part of his delusional thought pattern and not an

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[23] The medic chart from Providence states that Bigley took the medication voluntarily, but it is unclear if this was meant to signify that he was capable of giving informed consent (which would be dubious) or merely that he cooperated in the administration of the medication, say by taking the pill when it was handed to him.

objection based upon his experience with or reaction to medication. Thus he also fears that his food at API is poisoned, often waiting until others eat the food before he will. Nor does he identify any side effects of medication that he wishes to avoid. He has in the past exhibited mild symptoms that might be tardive dyskinesia, but he makes no mention of that currently. He has experienced other mild side effects that may have been from medications, such as mood swings or sexual dysfunction, but he currently does not mention those effects.

Prior Expressed Wishes. At times in the past Bigley has declined medication. In the past year he has been declining psychotropic medication. It appears that during this past year that he has not been competent to give informed consent regarding medication. This conclusion is supported by the number of interactions with police that Bigley has had and the observations of API and other health care facilities that have treated Bigley this year.

For roughly 16 months before late 2007 Bigley was taking a prescribed psychotropic, risperidone, at first in shot acting pill form and later in longer acting injections of Risperdal Contra. He was living in an apartment and being given medications twice a day orally. Mental health aides would visit his home and offer the medication to him. He usually took them without objection. Occasionally he declined them for short periods, of up to two days. Usually he would only decline for a much shorter period, often because when the aides came to his apartment to administer the medication they interrupted his sleep or something he was doing.

These refusals cannot be construed as a general objection to all psychotropic medication or even to a specific medicine. Nor can they be construed as an expression of his unwillingness to take medications in the future or when in any given mental state.

Then for a period of months Bigley would come to API voluntarily to get his risperidone in the form of an injection every two weeks (Risperdal Contra). It is not clear why he stopped taking the medications.

During past hospitalizations API staff would ask Bigley if he wanted to take pills or get a shot. He usually agreed. Gottstein argued that this constitutes an admission by API that Bigley was then competent to give informed consent, otherwise why bother to ask him? He argues that API concludes that Bigley is competent when he takes medication but incompetent when he declines. That is not API's stated position.

The Court finds that even when Bigley is not competent API asks him to take the medication that API has prescribed for him for two reasons. First, it is respectful and gives a patient a sense of empowerment, and second, it is easier if the patient physically cooperates in the mechanics of the administration of the medication. Neither eating a pill rather than being physically forced to swallow it, nor lowering one's pants so that medication can be injected into a buttock rather than being held down by staff while the shot is given, is necessarily proof of competence.

The Court finds by clear and convincing evidence that Bigley has never expressed a decision not to take psychotropic medications in the future, nor conditioned his willingness to take medication in the future on the existence of certain circumstances. He has never expressed anything that may be construed as an advance health care directive as defined by AS 13.52. Nor can his expressions about psychotropic medications, even when he has declined medication, be construed as an opinion about his willingness to take the same or similar medication in the future.

The Court finds by clear and convincing evidence that Bigley is not competent to provide informed consent.[24]

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[24] By this conclusion the Court should not be understood to minimize the difficulty of determining competency, particularly at the time, perhaps months or years prior, of some expression about medication under different circumstances. Even if a person makes an emphatic expression in opposition to the taking of all or some forms of psychotropic medication, it is difficult to construe that expression, some months or years earlier, as being informed consent or objection to a proposed medication under the new, current circumstances. It will nearly always be difficult to determine if the person at the time of the expression was capable of informed consent, much less to determine whether that ancient expression has any reliability when it comes to the decision the physician, patient and court are facing in the present.

These difficulties are to some extent avoided by the use of an advance health care directive. But the memorialization of the directive and the condition and knowledge of the patient at the time it was executed is critical. If not done carefully the directive is ambiguous if not meaningless.

For persons who have chronic mental illness but have periods of relative lucidity, it might be helpful for a facility like API to videotape the person while floridly mentally ill for the sole purpose of showing the person the tape when he has returned to relative mental health and capacity. Then, as a part of the creation of an advance health care directive, the person can be shown the tape so that he

Bigley's Best Interests.

Since March 2008 Bigley has for the most part been unmedicated, although he has been given medication involuntarily at API and when incarcerated during that period. On at least one occasion in October 2008 he appears to have accepted medication at Providence Hospital, although the circumstances of that administration were not made clear to the Court.

When not medicated he has deteriorated mentally, emotionally, and physically. He cannot maintain employment (nor can he if medicated) or a residence. He cannot provide himself with basic nutrition. His thoughts are confused and his actions threatening to others. He is repeatedly asked to leave commercial premises. He is often has interaction with the police and is frequently arrested.[25] He is charged with a minor crime but those charges are dropped when

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may have some "objective" evidence of his condition when not medicated. The Court appreciates that this could be a harmful and even cruel technique for some persons. The point is that there should be greater exploration and recordation of a patient's wishes during those periods when he is most healthy and capable rather than waiting until the patient is doing the most poorly and others are left to try to evaluate the significance of sporadic and often confusing and even conflicting expressions about medication.

The Court understands that some patients would opt to forego some or all medication, in order to avoid some unpleasant and unwanted affect of the medication, a choice perhaps ultimately only understood by the patient after experiencing them. But many patients would choose medication, particularly if they had the added appreciation of viewing themselves while undedicated.

[25] *See* Attachment C to the Court Visitor's Report. This is a chart of police calls for service involving Bigley between 10 March and 10 August 2008. It has 48 entries.

he is deemed incompetent to stand trial. After a period of incarceration and perhaps medication, he is released from prison, returned to the streets without services.

Bigley does have a public guardian who handles his meager finances and tries to get him housing, but without medication there are no facilities where he is acceptable for residency.

The longer that he is without medication, the lower the level of his baseline of capabilities which can be expected to return if and when he is medicated. His public guardians have noticed a decline in his condition. He is more frequently having confrontations or unwanted interactions with the public. He is sometimes so delusional that he has wandered in traffic, oblivious to danger.

When medicated, Bigley has remained actively schizophrenic. But when taking risperidone (Risperdal Contra) he was capable of maintaining an apartment for nearly 16 months with some assistance from his guardian to purchase food and other items. He was less agitated. He could engage with other persons. He could do those activities that he enjoys—buy and smoke cigarettes, drink coffee, watch live musical performances, ride the bus, buy trinkets and decorate his apartment, and engage in conversations. He could laugh when medicated.

API seeks to administer risperidone at first orally and then by injection. The injections would be effective for roughly two weeks. It would take

four to six weeks for the risperidone to be fully effective. There are no expected to side effects, although tardive dyskinesia is possible. He should not consume alcohol while taking this medication. Bigley rarely drinks alcohol.

Gottstein objects to the proposed medication.[26] He contends that Bigley has been seriously injured by the administration of various psychotropics for nearly 30 years. He contends these drugs cause permanent brain damage. The Court finds that he has not proven that Bigley has been damaged by the psychotropic medications in general or by any specific medication.

Dr. Aron Wolfe testified that API should evaluate Bigley for brain damage by the use of an MRI. API is not convinced that he would tolerate that procedure. Dr. Wolfe thought even one as prone to agitation as Bigley could be given Valium or some other anti-anxiety drug so that he could tolerate the MRI procedure. When asked if one could determine the etiology of any brain damage found, specifically could one determine if the brain damage was the result of psychotropic medications, Dr. Wolfe stated that he had read in the *New York Times* the day before of a new protocol that allowed this determination. That is not convincing.

Gottstein has raised significant concerns about long term administration of psychotropic medication. These concerns should be taken more seriously by API. The Court is not finding that the concerns have yet been proven,

but API should be careful that it is not failing to explore these concerns in part because of its irritation at Gottstein's challenges to its practices.

The Court is willing to assume that past medications have damaged Bigley's brain. It is further willing to assume that additional brain damage will result if API is allowed to administer more psychotropics. But that does not end the analysis.

The Court finds that the danger of additional (but uncertain) damage is outweighed by the positive benefits of the administration of medication and the emotional and behavioral problems that will escalate if Bigley is not medicated. Even if the medication shortens Bigley's lifespan, the Court would authorize the administration of the medication because Bigley is not well now and he is getting worse.

The Court appreciates that if the medication were to dramatically shorten Bigley's lifespan and the benefits of medication were low, then at some point it would not be in Bigley's interest to take the medication. But currently the possibility of such damage is the more uncertain variable, whereas the recent experience with risperidone has been very positive for Bigley. If Bigley were returned to his condition in 2007 by the administration of risperidone, then Bigley's quality of life would be profoundly improved.

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[26] Gottstein submitted various affidavits and prior testimony of witnesses. The Court permitted this to function as the direct testimony of the witness and required Gottstein to make the witness available for cross examination.

It is true that Bigley acted rather calmly during the hearings and has been getting more sleep and nutrition. But he remains gravely disabled and his delusions are debilitating. He cannot function outside of an extremely controlled environment. His deterioration over the past year is troubling and will likely continue if he is not medicated.

If Bigley is medicated and his competency to make health care decisions is restored, then Bigley might execute a health care directive. Then, if he does not want to be medicated he can effectuate that desire. The Court must caution that the status of his mental health must be carefully documented at the time he executed any directive so that the evaluation required by AS 47.30.839(e) can be made at some future time if an entity sought to involuntarily medicate Bigley.

Alternative, Less Intrusive Treatments.

Gottstein argues that Bigley should be kept off psychotropic medications for at least a year so that the impact of his consumption of them in the past several years may be minimized, if not eliminated, and he could be better evaluated. During the next year API and other agencies, both public and private should provide Bigley with a fulltime set of attendants. These attendants would accompany Bigley as he interacted with the community so as to avoid having the public resort to calling the police. The hope is that the attendants could redirect Bigley before minor incidents escalate.

The Court finds that this proposal would not work with Bigley. He has an attendant accompany throughout API, at least when he is outside of his residential unit and in the more open areas of API, such as the hallway outside the hearing rooms. If Bigley cannot navigate the controlled environment of API alone, then he certainly could not succeed alone in the community. No attendant could adequately monitor Bigley in the community if he remained in his current state.

To be clear, even if the proposed attendants were available, the Court would not find that alternative to be viable. Even if Bigley were afforded the most protective wraparound set of services, such as a home and the team of attendants, the Court would authorize the medication.

Having come to that conclusion, the Court should not be understood to find the current set of options for the mentally ill in the community to be acceptable. API repeatedly pointed out that it is an acute care facility that depends upon medication as its primary (but not exclusive) mode of treatment. It is not a long term care facility. It is not a long term residential facility. While it did arrange for its patients, when discharged, to have their immediate needs cared for by other service providers, it does more as a transition from API than as a long term treatment option.

In *Myers* the Alaska Supreme Court held that when the state seeks to administer psychotropic medication against a patient's wishes, it may do so constitutionally only after showing that "the proposed treatment is actually the

least intrusive means of protecting the patient."[27] There will be patients whose chronic illness and immediate needs are not as sever as Bigley's. For those patients it will be possible to identify less intrusive means of protecting them than medication. But if API cannot deliver those means of treatment or array of services, is that failure to provide that less intrusive means justification for the medication? That seems highly unlikely. The question that must be anticipated by API and other state agencies, is what responsibility or obligation does API or the state have to provide those services, whether by public facilities or by public funding.

The Court cannot and need not answer these questions. But there is no doubt that it will soon have cases before it that will require that they be answered. It is hoped that API and the state begin exploring those questions now rather than have to develop ad hoc responses in litigation. To this end the Court is encouraged to see that DOC, the Anchorage Police Department and other state and municipal entities have begin exploring what to do with persons like Bigley. The endless cycle of arrest, emergency medication while incarcerated, evaluation at API and discharge to homelessness and further degradation must be ended.

API and the Department of Law must understand that the advocates for the mentally ill will not go away. In *Myers,* API argued that the legal and judicial system should play little or no role in medication decisions, instead

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27 *Myers*, 138 P.3d at 250.

leaving them to doctors.[28] That suggestion has been soundly rejected.[29] That means there will be an increasing number of challenges to API's treatment and proposed treatment of the mentally ill. Both agencies will have to change their attitudes about the admittedly time consuming and sometimes contentious litigation process. This is not to say that all advocates for the mentally ill are right or take reasonable positions or are not bothersome at times. But they can be expected to resort to the judicial system on behalf of their clients. More litigation, not less, should be anticipated.

Should the Medication Order Be Stayed?

On 19 May 2008 Judge Sharon Gleason granted API's earlier petition for involuntary medication in 3AN-08-00493 PR. On 23 May 2008 in S-13116, a single justice stayed that order pending appeal. The Supreme Court denied API's motion for reconsideration on 25 June 2008. Oral arguments are scheduled for the middle of December 2008.

If the Court were asked to stay its ruling pending appeal at a time when there was no related case now on appeal, it would deny that request. It would conclude that Bigley has deteriorated since May 2008 and should not have to wait longer for medication. But if the Court were to permit API to begin medicating Bigley, it would effectively moot the Supreme Court's stay of the

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28 138 P.3d at 249-50.

29 *Id.*

earlier (but different order) and perhaps the appeal. The Court will not do that. Instead, it will grant a stay of the medication order until **15 December 2008.** This will give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in the pending appeal as supplemented by this Court's findings.

Petition for 90-Day Commitment.

On 17 November API petitioned to have Bigley committed for 90 days, pursuant to AS 47.30.740. The Court heard testimony on 21 November. Liz Brennan and Linda Beecher, assistant public defenders, appeared for Bigley, who was also present. Scott Friend appeared for API. Bigley was present. The Court heard testimony from Dr. Khari

The Court announced its decision to grant the petition at the hearing. The Court found that Bigley had not attempted to harm others since his admission, does not have a current plan to harm others, and is not a direct danger to himself, that is, he will not inflict physical harm to himself. The Court does find that if he were released from API without having first been stabilized with psychotropic medication, he would not be able to care for himself. He would be at risk of injury from the winter elements, from other persons with whom he might interact in ways that they found threatening, or he might wander in traffic or into other inherently dangerous situations. If not treated with medication he will continue to suffer mental and emotional distress that affects his ability to exercise judgment, reason and behave in a manner that is not dangerous and which distress is directly the

product of his mental illness. The Court finds that Bigley's condition is such that his distress is so incapacitating that he cannot live safely outside a controlled environment.[30]

Conclusion.

The Petition for Court Approval of Administration of Psychotropic Medication, specifically risperidone, is GRANTED. The order is STAYED until ***15 December 2008*** *or until further order of this Court or the Alaska Supreme Court. The Petition for 90-day Commitment is GRANTED (effective 21 November 2008).*

DONE this 25th day of November 2008, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 25 November 2008 a copy of the above was mailed to each of the following at their addresses of record: s/faxed

J. Gottstein
AGO: L. Derry; E. Pohland
PDA: L. Beecher, L. Brennan

Ellen Bozzini
Judicial Assistant

30 *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 373, 378 (Alaska 2007).

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-08-1252 PR

ORDER GRANTING EXPEDITED CONSIDERATION

The Court, having received petitioner's Motion for Expedited Consideration, ~~any opposition~~ & and being fully advised in the premises,

IT IS HEREBY ORDERED that petitioner's Motion for Expedited Consideration is GRANTED and the Court shall render a decision on petitioner's Motion for Clarification of Order on or before December 5, 2008.

DATED: 3 December 2008

SUPERIOR COURT JUDGE
William F. Morse

Recommended for approval:

Probate Master

Dated:

& the Court has ruled on this and the underlying substantive motion without further input from William Digley and James Goltstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision. WFMorse

I certify that on 4 Dec 2008 a copy of the above was ~~mailed/faxed/~~handed to each of the following at their address of record

Judicial Assistant

ATG-Pohland PD-Becker RAdler
M. Vassar GGoltstein API

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Exhibit B

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-08-1252 PR

ORDER GRANTING MOTION FOR CLARIFICATION OF ORDER

The Court, having considered petitioner's Motion for Clarification of Order, respondent's opposition, and being fully advised in the premises,

IT IS HEREBY ORDERED that petitioner's Motion for Clarification of Order is GRANTED as follows:

1. This Court's order of November 25, 2008, is amended to include the following: API may administer emergency medication to Mr. Bigley as necessary and medically appropriate under AS 47.30.838(a)(1) – (a)(2)(C) and AS 47.30.838(b).*

DATED: 3 December 2008

SUPERIOR COURT JUDGE
William F. Morse

Recommended for approval:

* API may administer psychotropic medication on more than three occassions if there are future crisis ~~points~~ situations as defined by AS.838(a)(1) pursuant to AS.838(c) and AS 839(a)(1). WFMorse

Probate Master

Dated: _____

I certify that on 4 Dec. 2008 a copy of the above was mailed/faxed/handed to each of the following at their address of record

Judicial Assistant

ATG-Portland PD-Beecher R Adler
M. Vassar Goltstein API

EP/TO/DERRYL/API/BIGLEY (3AN-08-1252 PR)/MOTION FOR CLARIFICATION OF ORDER.DOC

DEC 0 5 2008

DEPARTMENT OF LAW
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Exhibit C

United Nations A/63/175

General Assembly

Distr.: General
28 July 2008

Original: English

Sixty third session
Item 67 (a) of the provisional agenda*
Promotion and protection of human rights: implementation of human rights instruments

Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 62/148.

* A/63/150.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 62/148, the Special Rapporteur addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur draws the attention of the General Assembly to the situation of persons with disabilities, who are frequently subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. He is concerned that such practices, perpetrated in public institutions, as well as in the private sphere, remain invisible and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment. The recent entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol provides a timely opportunity to review the anti-torture framework in relation to persons with disabilities. By reframing violence and abuse perpetrated against persons with disabilities as torture or a form of ill-treatment, victims and advocates can be afforded stronger legal protection and redress for violations of human rights.

In section IV, the Special Rapporteur examines the use of solitary confinement. The practice has a clearly documented negative impact on mental health, and therefore should be used only in exceptional circumstances or when absolutely necessary for criminal investigation purposes. In all cases, solitary confinement should be used for the shortest period of time. The Special Rapporteur draws attention to the Istanbul Statement on the Use and Effects of Solitary Confinement, annexed to the report, as a useful tool to promote the respect and protection of the rights of detainees.

Contents

I. Introduction

1. The present report is the tenth submitted to the General Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 62/148 (para. 32). It is the fourth report submitted by the present mandate holder, Manfred Nowak. The report includes issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.

2. The Special Rapporteur draws attention to document A/HRC/7/3, his main report to the Human Rights Council, in which he explored the influence of international norms relating to violence against women on the definition of torture and the extent to which the definition itself can embrace gender sensitivity and discussed the specific obligations upon States which follow from this approach. According to the Special Rapporteur, the global campaign to end violence against women when viewed through the prism of the anti-torture framework can be strengthened and afforded a broader scope of prevention, protection, justice and reparation for women than currently exists.

3. Document A/HRC/7/3/Add.1 covered the period 16 December 2006 to 14 December 2007 and contained allegations of individual cases of torture or general references to the phenomenon of torture, urgent appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment, as well as responses by Governments. The Special Rapporteur continues to observe that the majority of communications are not responded to by Governments.

4. Document A/HRC/7/3/Add.2 contains a summary of the information provided by Governments and non-governmental organizations (NGOs) on implementation of recommendations of the Special Rapporteur following country visits. The Government of Mongolia has not provided any follow-up information since the visit was carried out in June 2005. Documents A/HRC/7/3/Add.3 to 7 are reports of country visits to Paraguay, Nigeria, Togo, Sri Lanka and Indonesia, respectively.

II. Activities related to the mandate

5. The Special Rapporteur draws the attention of the General Assembly to the activities he has carried out pursuant to his mandate since the submission of his report to the Human Rights Council (A/HRC/7/3 and Add.1-7).

Communications concerning human rights violations

6. During the period from 15 December 2007 to 25 July 2008, the Special Rapporteur sent 42 letters of allegations of torture to 34 Governments, and 107 urgent appeals on behalf of persons who might be at risk of torture or other forms of ill-treatment to 42 Governments. In the same period 39 responses were received.

disabilities, and primarily upon persons with mental or intellectual disabilities, warrants greater attention.

63. Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture.[35] In *Viana Acosta v. Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquillizers against his will, constituted inhuman treatment.[36] The Special Rapporteur notes that forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment.

d. Involuntary commitment to psychiatric institutions

64. Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a "danger to oneself and others" or in "need of treatment".[37] The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty.[38]

65. In certain cases, arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual, thus falling under the scope of the Convention against Torture. When assessing the pain inflicted by deprivation of liberty, the length of institutionalization, the conditions of detention and the treatment inflicted must be taken into account.

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[35] E/CN.4/1986/15, para. 119.

[36] Human Rights Committee, views on communication No. 110/1981, *Viana Acosta v. Uruguay*, adopted on 29 March 1984 (CCPR/C/21/D/110/1981), paras. 2.7, 14 and 15.

[37] See HRI/GEN/1/Rev.8, sect. II, Human Rights Committee, general comment No. 8 (1982) on the right to liberty and security of the person, para. 1, where the Committee clarifies that article 9 applies "whether in criminal cases or in other cases such as, for example, mental illness …". See also the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6), para. 58. See further the discussion by the European Court of Human Rights in *Shtukaturov v. Russia*, application No. 44009/05, judgement of 27 March 2008.

[38] During the convention-making process, some States (Canada, Uganda, Australia, China, New Zealand, South Africa and the European Union) supported deprivation of liberty based on disability being permitted when coupled with other grounds. Finally, at the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Japan, with the support of China, sought to amend the text of article 14 to read "in no case shall the existence of a disability 'solely or exclusively' justify a deprivation of liberty". However, the proposal was rejected. See daily summary of discussion at the seventh session, on 18 and 19 January 2006, available at www.un.org/esa/socdev/enable/rights/ahc7summary.htm.

EMERGENCY

Law Project for Psychiatric Rights
James B. Gottstein, Esq.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13116) Trial Court Case No. 3AN 08-493 P/R

EMERGENCY MOTION TO ENFORCE STAY
and
NON-EMERGENCY MOTION FOR SANCTIONS

Appellant hereby moves, pursuant to Appellate Rules 504 and 205 on an emergency basis,

(1) for an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order)[1] by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR (3AN 08-1252PR), and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

[1] Exhibit A.

and on a non-emergency basis,

(2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order issued in this appeal.

Because there are two parts to this motion and only one of them requires expedited action, two separate proposed orders are being lodged herewith.

I. Appellate Rule 504 Emergency Motion Application

A. Telephone Numbers and Addresses of Counsel.

Counsel for Appellant's telephone number is 274-7686 and his office address is 406 G Street, Suite 206, Anchorage, Alaska 99501. Timothy Twomey is counsel for Appellee Alaska Psychiatric Institute (API) in this appeal, his phone number is 269-5168, and his office at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501.

B. Nature of Emergency and the Date and Hour Before Which a Decision is Needed.

On October 25, 2008, the Superior Court issued the Offending Forced Drugging Order, but in light of the Stay Order issued by this Court in this appeal, stayed its effectiveness until December 15, 2008 or until further order of the Superior Court or this Court.[2] In doing so, the Superior Court stated it was staying the Offending Forced Drugging Order until December 15, 2008, to "give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in [this appeal] as supplemented by [the Superior] Court's findings."[3]

However, oral argument is not scheduled until December 16, 2008, the day after

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[2] Exhibit B, page 34.

the Superior Court's stay of the Offending Forced Drugging Order is scheduled to terminate without further order by this Court or the Superior Court. Therefore, Appellant essentially had no choice but to seek emergency relief here.[4] Appellant has moved the Superior Court to extend its stay,[5] but if the Superior Court fails to do so before Friday, December 12, 2008, a decision on the emergency motion is needed by the end of the day, Friday, December 12, 2008, in order for the stay to remain effective.

However, frankly, it would be desirable from Appellant's point of view, and perhaps this Court's as well, if the Superior Court fails to extend the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, as Appellant has requested,[6] for this Court to issue its decision by the end of the day, Friday, December 5, 2008, because failing that, Appellant will have to file an emergency motion for stay pending appeal of the Offending Forced Drugging Order in S-13353, which he would expect to do Monday, December 8, 2008.[7]

C. Grounds Submitted to Superior Court

Appellant advised the Superior Court, Probate Master Lack presiding, at a hearing held on October 21, 2008, that he believed the forced drugging petition filed the previous day in 3AN 08-1252PR was a violation of this Court's Stay Order and that if API thought

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[3] Exhibit B, page 33.
[4] While the Superior Court indicated it was granting the limited stay to allow API to give this Court an opportunity to review its Stay Order in this appeal, API has no incentive to seek enforcement of this Court's Stay Order.
[5] Exhibit C.
[6] Exhibit G.

otherwise, it should obtain permission from this Court before being allowed to proceed under it. At that hearing, API's counsel stated it had theretofore interpreted this Court's Stay Order as precluding the filing of a new forced drugging petition pending determination of this appeal, but because of Appellant's continuing difficulties in the community, had decided to file a new forced drugging petition anyway[8] At that hearing Master Lack stated whether or not the Stay Order issued by this Court applies to a new petition was not ripe for decision,[9] and that whether or not the Stay Order issued by this Court applied to emergency medication should be taken to this Court.[10] API's counsel then stated she was going to recommend to API that it not drug Appellant under any circumstances "until there is further litigation on the matter."[11]

API dismissed that forced drugging petition on October 24, 2008,[12] but then, without seeking clarification from this Court as to whether this Court's Stay Order precluded it, filed another forced drugging petition on October 27, 2008.[13] The Superior Court, Judge Morris presiding, held a status conference on October 28, 2008, where

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[7] Appellant's counsel has an out of town trip scheduled for December 7-14, 2008, that is personally very important to him, and would expect to prepare the Emergency Motion for Stay prior to his departure, to be filed December 8, 2008.
[8] Recording of October 21, 2008, hearing at 3:58.
[9] Recording of October 21,2 008, hearing at 4:01.
[10] Recording of October 21, 2008, hearing at 4:02.
[11] In spite of this API went ahead and forcibly drugged Appellant again, purportedly as an emergency. Exhibit B, page 4.
[12] Exhibit B, page 4.
[13] Exhibit B, page 4.

Appellant again raised that this Court's Stay Order precluded proceeding under the new forced drugging petition and should not occur without permission of this Court.[14]

Also, this same date, December 1, 2008, Appellant filed a motion to modify the stay contained within the Offending Forced Drugging Order.[15] If the Superior Court grants Appellant's motion to modify the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, the emergency nature of this motion becomes moot, but the relief requested does not.[16]

D. Notification of Opposing Counsel

On November 28, 2008, Appellant e-mailed counsel for API in both this appeal and in 3AN 08-1252PR requesting they stipulate to extend the stay contained within the Offending Forced Drugging Order pending a determination by this Court and advising them that this motion would be filed on this date if no agreement was reached.[17] A copy of this motion was hand delivered to API's counsel in both this appeal and 3AN 08-1252PR prior to filing here.

II. Emergency Motion to Enforce Stay Order

Appellant has moved on an emergency basis for an order to enforce the Stay Order issued in this appeal by striking the forced drugging petition filed October 27, 2008, in 3AN 08-1252PR, and vacate the Offending Forced Drugging Order. As will be set forth

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[14] Appellant does not yet have a recording of this hearing.
[15] Exhibit C.
[16] Because of the short time frames, Appellant believes he needs to file this motion now to allow at least a reasonable time for opposition and consideration, if necessary.
[17] Exhibit D.

more fully below, merely extending the stay contained in the Offending Forced Drugging Order pending determination of this Appeal is an insufficient remedy.

A. The Stay Order Issued in This Appeal

On May 23, 2008, this Court, at the direction of a single justice, issued the Stay Order in this appeal, staying pending determination of this appeal, the Superior Court's findings and order of May 19, 2008, granting API's then extant forced drugging petition.[18] On May 28, 2008, API filed for full court reconsideration, one of the grounds being, that the Stay Order, "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods."[19]

By the time of Appellant's opposition to the motion for reconsideration, Appellant had been discharged from API, and Appellant raised the issue of whether the Stay Order had become moot as a result, arguing it had not because of the likelihood of new forced drugging petitions being filed.[20] This Court then denied reconsideration of its Stay Order.[21]

Appellant respectfully suggests this Court's Stay Order applies to all efforts to force Appellant to take psychotropic drugs against his will during the pendency of this appeal, including 3AN 08-1252PR. Since Appellant had been discharged prior to this Court's Order denying reconsideration of its Stay Order, at that time, the Stay Order issued in this appeal could only apply to future Superior Court cases, such as 3AN 08-

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[18] Exhibit A.
[19] Exhibit E, p.2.
[20] Exhibit F.
[21] Exhibit E.

1252PR. In other words, unless the Stay Order issued in this case applies to future cases, such as 3AN 08-1252PR, it was a nullity when reconsideration was denied. Since this issue was specifically raised by Appellant in connection with reconsideration,[22] it seems fair to assume this Court did not reaffirm the Stay Order to be a nullity and must have intended it to apply to future cases, including 3AN 08-1252PR.

B. Merely Extending the Stay of the Offending Forced Drugging Order Effectively Precludes this Court from Granting Relief In This Appeal.

If this Court agrees its Stay Order applies to 3AN 08-1252PR, the forced drugging petition in 3AN 08-1252PR should be stricken and the Offending Forced Drugging Order vacated.[23] Since filing the forced drugging petition in 3AN 08-1252PR was a violation of the stay, it was an illegal act and should be stricken. Vacating the Offending Forced Drugging Order naturally follows.

Moreover, merely extending the stay of the Offending Forced Drugging Order pending determination of this appeal is an insufficient remedy. The very existence of the Offending Forced Drugging Order precludes this Court from effectively requiring API to provide a less intrusive alternative, which is the primary relief sought by Appellant in this appeal. More specifically, the Offending Forced Drugging Order purports to supersede any such relief granted by this Court by creating a "new" finding that no such less intrusive alternative is available, which in turn has already resulted in yet another

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[22] Exhibit F, pp 2-4.

[23] In the same order, the Superior Court granted API's petition for 90-day commitment. Appellant is not suggesting this portion of the order be vacated. The proposed order lodged herewith is consistent with this.

appeal.[24]

The Offending Forced Drugging Order has already been appealed because Appellant had to file a motion to the Superior Court for a stay pending appeal of the Offending Forced Drugging Order as a protective matter,[25] and if the Superior Court denies that motion, which it has indicated it will,[26] unless the Offending Forced Drugging Order is stricken before December 6, 2008, there will have to be yet another emergency motion for a stay pending appeal before this Court, on virtually the same facts upon which this Court granted the Stay Order here. Unless the Stay Order issued in this appeal applies to all future forced drugging efforts, including 3AN 08-1252PR, and the Offending Forced Drugging Order is vacated, this Court will never be in a position to effectively order API to provide Appellant with a less intrusive alternative.[27] Surely API may not divest this court of authority to order appropriate relief by obtaining new forced drugging orders that supersede not yet issued decisions by this Court. The whole purpose of a stay pending appeal is to preserve the *status quo* in order to allow the reviewing court to be able to provide meaningful relief. Logically, the new forced drugging petition should be stricken and the Offending Forced Drugging Order vacated.

III. Non-Emergency Motion for Sanctions

Appellant has also moved on a non-emergency basis for an order imposing contempt sanctions against API and/or Dr. Khari for violating the Stay Order issued in

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[24] S-13353, filed this same date.
[25] Exhibit C.
[26] Exhibit B, page 32.
[27] There are similar concerns with respect to a best interests finding.

this appeal.[28] The attorney's fees billed by Appellant's counsel,[29] and the Law Project for Psychiatric Rights' costs, in defending 3AN 08-1252 are as follows:[30]

Description	Amount
Attorney's Fees	$ 61,458.57
Costs	$ 2,986.10
Total	$ 64,444.67

Appellant believes API's violation of this Court's Stay Order constitutes contempt and, at a minimum, payment of Appellant's costs and attorney's fees should be awarded therefor. In *L.A.M. v. State*, 547 P.2d 827, 831 (Alaska 1976), more recently reiterated in *Anchorage Police & Fire Retirement System v. Gallion*, 65 P.3d 876, n. 18 (Alaska 2003), this Court explained the four elements of criminal contempt are:

> (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; ... (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.

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[28] Under Civil Rule 90, an order to show cause and a hearing are contemplated with respect to an alleged contempt committed outside the presence of the court. No comparable rule appears in the Appellate Rules, although Appellate Rule 510(c) acknowledges this Court's inherent power to punish for contempt. It appers the show cause and hearing requirements in Civil Rule 90(b) are to satisfy due process requirements of notice and an opportunity to be heard, both requirements of which are met by this motion and API's opportunity to respond. Of course, this Court can always require further proceedings, but it is believed only this Court can determine the scope of its Stay Order and it would similarly be appropriate for any such additional proceedings, if deemed necessary, to only be conducted by this Court. Oral argument is scheduled in just two weeks (December 16, 2008), and perhaps this Court could inquire of API's counsel at that time regarding its decision to proceed with its efforts to obtain a forced drugging order in spite of the Stay Order issued in this appeal.

[29] Appellant's counsel's current billing rate is $325 per hour, which he believes is a market rate considering his training, experience, and expertise in this area of the law.

[30] Exhibits H and I, respectively.

There is no question about the existence of the first three elements here.

There is also dicta in *L.A.M.*, requiring these same four elements, including willfulness for civil contempt. Appellant believes under the circumstances here, willfulness has been demonstrated, but also suggests that willfulness is only required in civil contempt in the context in which it was discussed in *L.A.M.*, which is to "coerce future conduct," by a recalcitrant party who refuses to comply with an order. Where, as here, contempt sanctions are sought for remedial purposes, Respondent respectfully suggests, willfulness is not required.

The recitation of the law regarding this subject in *Select Creations v. Paliafito America*, 906 F. Supp. 1251, 1271 (E.D. Wis 1995) seems helpful:

> 6. The state of mind of a party to the underlying action is irrelevant in a civil contempt proceeding. See, e.g., *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 785 n. 11 (7th Cir.1981) ("[T]he fact that a prohibited act is done inadvertently does not preclude a contempt citation...."); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 448 (D.C.Cir.1953) ("Adjudications for civil contempt to protect the benefits of a decree do not depend on the state of mind of the contemnors.") cert. denied, 346 U.S. 855, 74 S.Ct. 70, 98 L.Ed. 369 (1953); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062 (8th Cir.1970) ("[C]ivil contempt ... is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the respondent.") cert. denied, 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed.2d 829 (1971); *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir.1971) ("The crucial issue in civil contempt proceedings ... is not the employers state of mind but simply whether the Court's order was in fact violated.")
>
> 7. According to the Supreme Court, "[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.... An act does not cease to be a violation of the law and of a decree merely because it may have been done innocently." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).FN3

> FN3. While this Court has previously stated in dicta that a party's conduct must be "deliberate and intentional" in order to support a finding of contempt, *Rototron Corp. v. Lake Shore Burial Vault*, 553 F.Supp. 691, 700 (E.D.Wis.1982), we conclude that a party need not intentionally violate the Court's order to be found in contempt.

Here, API's violation of the Stay Order issued in this case occasioned a considerable amount of costs and attorney's fees to defend. Costs and fees that would not have been required absent the failure to comply with the Stay Order. API and/or Dr. Khari should bear this expense[31] regardless of whether its violation of the Stay Order was willful.

However, even if willfulness is required, Appellant respectfully suggests willfulness exists here. In *State v. Browder*, 486 P.2d 925, 943 (Alaska 1971), this Court defined "willfully" in the context of criminal contempt as an act "done voluntarily and intentionally, that is, with the intent to disobey or disregard the law." There is no doubt that API willfully filed the forced drugging petition in 3AN 08-1252PR in spite of this Court's Stay Order and after it had previously interpreted it to have been prohibited. As set forth above, Appellant does not believe there is any real ambiguity in this Court's Stay Order in light of the circumstances surrounding its issuance. Even if there is, however, Appellant respectfully suggests, under the circumstances, as Appellant repeatedly told API, API was obligated to seek clarification from this Court.

---

[31] Dr. Khari who was also the treating psychiatrist below in this appeal and thus was directly subject to the Stay Order issued in this appeal, filed the offending forced drugging petitions in 3AN 08-1252PR and therefore is certainly a proper subject of such

As the 7th Circuit held in *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir.1974):[32]

> Willfulness, for the purpose of criminal contempt, does not exist where there is a "good faith pursuit of a plausible though mistaken alternative." To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible.

Since API's current interpretation renders the Stay Order issued in this case a nullity, it is not plausible.

The 7th Circuit went on to say a party who has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order, and that while a party is not required to seek such clarification, the failure to do so when combined with an implausible interpretation of the order is strong evidence of willfulness sufficient to support criminal contempt sanctions.[33] The 7th Circuit then went on to add:

> Similarly, while actions showing a good faith effort to comply with the order will tend to negate willfulness, . . indifference to the order. . . will support a finding of willfulness.[34]

Appellant respectfully suggests that even if willfulness is a requirement for a finding of contempt where the purpose is to vindicate the authority of this Court's order and provide a remedy to the party aggrieved by the violation of the court order, such willfulness has been established here.

---

sanctions. The order lodged herewith for sanctions, makes API and Dr. Khari jointly and severally liable for payment.

[32] Citation omitted.

[33] *Id.*

[34] *Id.*, citation omitted.

IV. Conclusion

For the foregoing reasons, Appellant requests the Court grant his motion for

(1) an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order) by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR, and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

and on a non-emergency basis,

(2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order.

Dated this 1st day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

Exhibits

A. Stay Order in this Appeal, May 23, 2008.

B. Offending Forced Drugging Order, November 25, 2008.

C. Motion To Modify Stay and For Stay Pending Appeal filed in 3AN 08-1252PR, December 1, 2008.

D. E-mail exchange between Jim Gottstein and Laura Derry, November 28, 2008.

E. API's Motion For Full Court Reconsideration, May 28, 2008.

F. Appellants Opposition to Reconsideration, June 9, 2008.

G. Order Denying Reconsideration., June 25, 2008.

H. Attorney's Fees Invoice, November 29, 2008.

I. Costs Invoice, November 30, 2008.

J. Motion for Expedited Consideration, December 1, 2008.

Law Project for Psychiatric Rights
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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13116) Trial Court Case No. 3AN 08-493 P/R

SECOND UPDATE TO
EMERGENCY MOTION TO ENFORCE STAY

By order dated December 2, 2008, received by Appellant on December 3, 2008, a copy of which is attached hereto, the Superior Court extended the stay contained within its November 25, 2008, Order by two days, until December 17, 2008.

Dated this 3rd day of December, 2008.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

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

DEC 0 2008

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

Respondent.

CASE NO. 3AN-08-01252 PR

ORDER EXTENDING STAY

On 25 November 2008 the Court granted API's Petition for Court Approval of Administration of Psychotropic Medication but stayed that order until 15 December 2008. The Court erroneously understood that the Alaska Supreme Court was hearing oral argument in a similar case involving William Bigley on or before that date. The oral argument is actually on 16 December 2008. Therefore, the Court, on its own motion, *is extending the stay until **17 December 2008** or until further order of this Court or the Alaska Supreme Court.*

DONE this 2nd day of December 2008, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 2 December 2008 a copy of the above was mailed to each of the following at their addresses of record:

J. Gottstein
AGO: L. Derry; E. Pohland
PDA: L. Beecher, L. Brennan
OPA:

Ellen Bozzini
Judicial Assistant

James B. Gottstein, Esq.
Law Project for Psychiatric Rights, Inc.
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM S. BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13116)))))))

Trial Court Case No. 3AN 08-00493 PS

CERTIFICATE OF SERVICE

I hereby certify that on this date, true and correct copies of:

(1) Second Update to Emergency Motion to Enforce Stay;
(2) and this Certificate of Service

have been served via hand delivery on:

Timothy Twomey
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

Laura Derry/Erin Pohland
(Courtesy Copy)
Assistant Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

I further certify that the font used in Second Update to Emergency Motion to Enforce Stay is Times New Roman 13 point.

Dated: December 3, 2008

Lisa E. Smith

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

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

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO STAY POLICE POWER FORCED DRUGGING ORDER

Respondent has moved to stay this Court's December 3, 2008, Order Granting Motion for Clarification of Order (Police Power Forced Drugging Order).

Standard for Granting Stay Pending Appeal

The Alaska Supreme Court's Order granting the stay in S-13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

> It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."

Respondent meets both tests here.

A. This Court Lacked Subject Matter Jurisdiction to Issue the Police Power Forced Drugging Order.

As a threshold matter, however, this Court did not have subject matter jurisdiction to issue the Police Power Forced Drugging Order since Respondent had already filed an appeal to the November 25, 2008 order. Appellate Rule 203, provides:

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> 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.

In *Noey v. Bledsoe*,[1] the Supreme Court held an appeal in another case didn't deprive the Superior Court of jurisdiction in the case at question, but otherwise affirmed Appellate Rule 203 grants exclusive jurisdiction over the matter on appeal to the appellate court unless some exception applies. Here, there is no such exception and this Court's dramatic addition to its decision after it had been appealed is exactly what Appellate Rule 203 prohibits.

B. Respondent Can Show Probable Success on the Merits

Substantive Due Process Requirements

In *Myers v. Alaska Psychiatric Institute*, the Supreme Court held the right to be free from the unwanted administration of psychotropic medications is a fundamental constitutional right[2] and:

> When a law places substantial burdens on the exercise of a fundamental right, we require the state to articulate a compelling state interest and to demonstrate the absence of a less restrictive means to advance that interest.[3]

The compelling interest in *Myers* was the *parens patriae* doctrine involving "the inherent power and authority of the state to protect "the person and property" of an individual who

[1] 978 P.3d 1264, 1275 (Alaska 1999).
[2] 138 P.3d 238, 248 (Alaska 2006)
[3] 138 P.3d at 245-246, internal quotes and citations omitted.

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"lacks legal age or capacity,"[4] while the compelling state interest invoked under the police power is "imminent threat of harm."[5]

Alaska's Statutory Implementation of the Police Power Justification

AS 47.30.838 is Alaska's statutory implementation of the police power justification for forced psychiatric drugging. AS 47.30.838(a)(1) permits such forced drugging only if

> there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person.

It then goes on to require the behavior or condition of the patient giving rise to a crisis to be documented in the patient's medical records, which also must "include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient."

Under AS 47.30.838(c) API can unilaterally invoke the police power justification for only three crisis periods without superior court approval under AS 47.30.839(a)(1).

Respondent Was Denied Due Process

The order granting expedited consideration of the motion to "clarify," states:

> The Court has ruled on this and the underlying substantive motion without further input from William Bigley and James Gottstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision.

This is not truthful as the transcripts from the October 28, 2008 and November 3, 2008 hearings demonstrate.

---

[4] *Myers* 138 P.3d at 249.
[5] *Myers*, 138 P.3d at 248.

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Believing that if it granted the forced drugging petition based on the *parens patriae* justification under AS 47.30.839(2) (*Parens Patriae* Count) it would eliminate the need for considering the Police Power Count, this Court ruled it would not hear any evidence on the Police Power Count until after it ruled on the Parens Patriae Count and if there was then a need to consider the Police Power Count, further evidence would be taken from both sides, after allowing Respondent some discovery.[6]

The issue was first raised by Respondent at the October 28, 2008, status conference:

> MR. GOTTSTEIN . . . Your Honor, in the past, API has administered medication pursuant to 838 without the legal predicate . . . existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually --what actually happened. So,. . . it really puts me in a difficult position because. . . they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.[7]

It was then discussed at some length during the November 3, 2008, status conference, including:

> THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria. Doesn't that moot out the 838 -- the 839(a)(1) petition?
>
> MS. DERRY: Yes, Your Honor.[8]
>
> * * *
>
> THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) in the first instance and present only the information it thinks is necessary

---

[6] Exhibits A & B, culminating at Exhibit B, p 6, Tr. 19-20 (November 3, 2008).
[7] Exhibit A, p. 6; Tr. 18 (October 28, 2008).
[8] Exhibit B, p. 6, Tr. 14 (November 3, 2008).

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there? If I grant that petition, then any need for 839(a)(1) authorization is moot?

MS. DERRY: Yes. I believe that, Your Honor.

THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority.[9]

* * *

THE COURT: . . . So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --

THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?

MR. GOTTSTEIN: Yes, Your Honor.[10]

Respondent then pointed out, however, that because of the stay, API was going to run out of its limited authorization to utilize the police power justification for forced drugging under AS 47.30.838 without obtaining court approval under AS 47.30.839(a)(1).[11] Assuming this Court would follow through on its statements that a later hearing would be held on the Police Power Count before forced drugging would be

[9] Exhibit B, p. 5, Tr. 15 (November 3, 2008).
[10] Exhibit B, p. 5, Tr. 17 (November 3, 2008).
[11] Exhibit B, pp 5-6, Tr. 17-18 (November 3, 2008).

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authorized under AS 47.30.839(a)(1), Respondent thought limiting the hearing to the *Parens Patriae* Count benefitted him,[12] and this Court said:

> THE COURT: Okay. We're both in agreement. . . . [T]he State will present what it thinks is necessary under 839(a)(2).

Respondent then raised the question of how much time he would have to prepare for a hearing on the Police Power Count "if we end up going to that?"[13] This Court responded:

> THE COURT: . . . I'm going to issue an order in the first instance on the 839(a)(2) petition, and if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second type of authorization. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.[14]

The problem was, just as Respondent had advised this Court, everything else was not going to be moot when this Court issued the *Parens Patriae* Forced Drugging Order.

Then, as set forth above, this Court granted API's motion to "clarify," but which was really a back door granting of the Police Power Count without allowing Respondent to be heard on the matter. It is hard to imagine a more clear denial of due process. As the United States Supreme Court has recently held, a meaningful opportunity to be heard is one of the fundamental hallmarks of Due Process.[15] Respondent has demonstrated probable success on the merits because of this due process violation.

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[12] Exhibit B, p. 6, Tr. 18 (November 3, 2008).
[13] Exhibit B, p. 6, Tr. 19, (November 3, 2008).
[14] Exhibit B, p 6, Tr. 19-20 (November 3, 2008).
[15] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).

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The Factual and Legal Predicates for the Police Power Forced Drugging Order Are Extremely Unlikely to Be Present

Respondent was not able to conduct much discovery with respect to the true facts surrounding API's police power drugging of him, but there is already enough to demonstrate the factual and legal predicates justifying granting the Police Power Count are highly unlikely to exist. First, following a prior emergency motion to this Court to stop the improper purported police power forced drugging of Respondent in Supreme Court Case No. S-12851, Dr. Worrall advised Respondent's counsel that there was no API policy on implementing the police power justification as embodied in AS 47.30.838, or otherwise, he had received no training on the topic, and he had had no idea of the requirements before Respondent pointed them out in connection with S-12851.[16] Respondent's counsel understands from the same source that the Attorney General's office then started working on a policy.

During the deposition of Ron Adler, API's CEO, over counsel for API's objection, Respondent asked Mr. Adler about this and he promised to provide the new policy,[17] but API has failed to do so. Mr. Adler also testified that there was now training, that he couldn't identify who did the training, but he would subsequently provide that information "through our attorneys,"[18] which he has failed to do.

---

[16] Dr. Worrall asked that his e-mail so advising Respondent's counsel be kept private, but he would so testify if subpoenaed. It may be necessary to make that e-mail public at some later date if Dr. Worrall testifies contrary to it, but Respondent is respecting his request at this time and it is not attached it hereto.

[17] Exhibit C, page 4, Transcript page 12.

[18] Exhibit C, page 3, Transcript pages 8-9.

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A deposition was also taken of Dr. Khari, and over, API's objection, Respondent also questioned her about police power justification forced drugging procedures at API.[19] This transcript demonstrates API's practice of administering police power forced drugging does not comply with AS 47.30.838, nor does it comply with constitutional requirements.[20]

Thus, Respondent has also demonstrated probable success on the substantive merits as well due process grounds.

C. Respondent Faces the Danger of Irreparable Harm

The unrebutted written testimony of Dr. Jackson and Robert Whitaker demonstrates Respondent faces the danger of irreparable harm if the police power forced drugging of Respondent is not stayed pending appeal.

D. Conclusion

For the foregoing reasons, Respondent's Motion to stay the Police Power Forced Drugging Order should be **GRANTED**.

DATED: December 6th, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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[19] Exhibit D, pages 5-7, Transcript pages 15-25.

[20] Respondent sought the names of the nurses who decide whether the conditions for administering police power forced drugging exist and Dr. Khari said she would get Respondent a list of names the next day if not by fax that afternoon (Exhibit __, page 7, Transcript page 23), which she failed to do.

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,	)
Respondent	)
Case No. 3AN 08-1252 PR	

MOTION FOR EXPEDITED CONSIDERATION: Re: MOTION TO STAY POLICE POWER FORCED DRUGGING ORDER

Pursuant to Civil Rule 77(g), Respondent hereby moves for expedited consideration of his Motion To Stay Police Power Forced Drugging Order. A decision on the underlying Motion is needed immediately because the petitioner, Alaska Psychiatric Institute (API) is taking the position that the stay contained within this Court's November 25, order granting API's forced drugging petition does not apply.[1] The undersigned counsel hereby certifies that, as the e-mails to petitioner's counsel, PsychRights has made a good faith effort with API's counsel to resolve this issue.[2] API's counsel will have been hand served with the motion for expedited consideration as well as the underlying Motion by the time the Court receives this motion.

DATED: December 6, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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[1] Exhibit A.
[2] *Id.*

Subject: RE: Police Power Forced Drugging Order Stay
From: "Pohland, Erin A (LAW)" <erin.pohland@alaska.gov>
Date: Thu, 04 Dec 2008 12:03:14 -0900
To: Jim Gottstein <jim.gottstein@psychrights.org>, "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
CC: "Kraly, Stacie L (LAW)" <stacie.kraly@alaska.gov>

Jim-
You assume incorrectly. The entire purpose of the order is to allow API to treat Mr. Bigley with emergency medication should he become a danger to himself or others. This is necessary because of the stay on the medications order.

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Thursday, December 04, 2008 12:00 PM
To: Pohland, Erin A (LAW); Derry, Laura J (LAW)
Subject: Police Power Forced Drugging Order Stay

Hi Erin and Laura,

I assume you agree with me that the Superior Court's Order regarding the emergency medications is stayed until December 17th or further order of the Superior Court or Supreme Court.

--

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

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PsychRights®
Law Project for
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.

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

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

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO MODIFY STAY and FOR STAY PENDING APPEAL

Respondent has moved this Court to (a) to modify the stay of this Court's November 25, 2008, Order (Order) to keep it in effect pending determination by the Alaska Supreme Court of the applicability of the stay pending appeal granted by it in S-13116, and (b) issue a stay pending appeal of the Order.

I. STAY IN S-13116

In its Order, this Court acknowledged the stay granted in Alaska Supreme Court Case No. S-13116, and granted a stay of the forced drugging it authorized until December 15, 2008, in order "to give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in the pending appeal as supplemented by this Court's finding." Respondent respectfully suggests the terms of the stay contained in the Order are flawed in two respects. First, oral argument is not scheduled until December 16, 2008, which is the day after the stay is currently set to terminate without further order of this Court or the Alaska Supreme Court.

Second, the termination of the stay should occur only upon further order of this Court or the Alaska Supreme Court, rather than the other way around. Respondent advised

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the Court at both the October 21, 2008 hearing before the Probate Master, and the October 28, 2008 hearing before the Superior Court, that he believed the petition(s) for the involuntary administration of psychotropic medication (Forced Drugging Petition) violated the stay in S-13116, and petitioner Alaska Psychiatric Institute (API) should seek clarification from the Alaska Supreme Court before it should be allowed to proceed.

The Stay in S-13116 was granted upon the Alaska Supreme Court's determination that Respondent faced the danger of irreparable harm from even a single dose of Risperdal Consta and API could be adequately protected.[1] In asking for full court reconsideration of the stay, among other things, API complained that the stay, "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods."[2] In his Opposition to Reconsideration, Respondent stated:[3]

> In the Stay Order, this Court noted that it is highly likely the present commitment order will have expired before this Court can rule on the merits of the appeal and that the possibility of technical mootness is substantial, and directed the parties to discuss in their briefing whether the Court should nonetheless reach the merits of the Forced Drugging Order.[1] Appellant was discharged on June 4 or 5, 2008, which raises the same issue with respect to the Stay Order, itself. In other words, has the Stay Order become technically moot, thus also mooting the motion for reconsideration, and if so, should the Court nonetheless reach the merits of the Motion for Reconsideration?
>
> API's Motion for Reconsideration suggests the Motion for Reconsideration has not been rendered moot by Appellant's discharge, when at page 2, it states the Stay Order "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods." It is unclear, however, whether this statement was

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[1] Appendix to Respondent's History (History Appendix) 226-229.
[2] History Appendix 232.
[3] History Appendix 236-238.

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meant to include only extensions of the then existing commitment under the same case number, as distinct from future commitments in which a new 30-day petition might be filed under a different case number. What is clear is that unless Appellant is provided the sort of community support he seeks as a less intrusive alternative,[2] he is almost certainly going to continue to have the sorts of problems in the community that have been bringing him to API[3] and involved with the criminal justice system.[4]

In Myers, this Court invoked the public interest exception to the mootness rule,[5] noting, however, that the United States Supreme Court in Washington v. Harper,[6] held such an issue was not moot because the controversy could recur.

Here, as this Court acknowledges in its Stay Order[7] and API in its Motion for Reconsideration,[8] the controversy is at least likely to recur. Appellant suggests it is almost certain to recur. It is also clear that the issue is capable of evading review unless decided, and it is suggested here it raises a matter of grave public concern, which are the criteria for invoking the public exception to the mootness doctrine.[9]

With respect to the grave public concern criteria, unless appellants who make a sufficient showing to obtain a stay of forced drugging orders under AS 47.30.839 are able to do so, the fundamental right to decline psychiatric medication recognized in Myers will not have an effective manner of being vindicated on appeal.

It is also respectfully suggested here that under *Washington v. Harper*, the issue is not technically moot, at least with respect to Appellant's rights under the Due Process Clause of the United States Constitution. Appellant respectfully suggests the same should also be true under the Alaska Constitution.

Should this Court hold that the Stay Order and/or the Motion for Reconsideration are moot, the status of the stay in any subsequent forced drugging proceeding during the pendency of this appeal will be unclear unless the order holding the Motion for Reconsideration moot addresses the issue.

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[1] §4 of Stay Order.

[2] Whether or not, having invoked the civil commitment and forced drugging statutes to psychiatrically confine and administer psychiatric drugs against Appellant's will, API may evade its constitutional obligation under *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), to provide a less intrusive alternative to the forced drugging by discharging Appellant is the main issue on appeal in S-13015. As a practical matter, the

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same situation has now occurred here as a result of Appellant's post appeal discharge.
[3] Without the requested community supports, it is almost certain Appellant will continue to experience these difficulties in the community even if he is psychiatrically drugged against his wishes .
[4] Appellant is consistently determined to be incompetent to stand trial without the prospect of becoming competent to stand trial and is then released from criminal custody, often to API for possible civil commitment.
[5] 138 P.3d at 245.
[6] 494 U.S. 210, 218-19, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).
[7] Page 3.
[8] Page 2.
[9] Myers, 138 P.3d at 244.

Following this, the Alaska Supreme Court denied API's motion for reconsideration.[4] Since, at that time, the Alaska Supreme Court knew the Stay Order could only apply to new cases, such as this one, it must be assumed that was its intent. In other words, unless the Alaska Supreme Court's Stay Order in S-13116 applied to new cases such as this one, it was a nullity and this Court should not assume the Alaska Supreme Court issued an order which was a nullity.

Moreover, presumably to address API's stated concern about not being able to drug Respondent during "this or any future commitment periods," ordered the parties "to briefly address whether the appeal should be expedited.[5] API did not comply with the Alaska Supreme Court order requiring it to address whether the appeal should be expedited. Respondent did, stating the appeal should be expedited, not because API could not drug Respondent against his will during the pendency of the appeal, but because:

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[4] History Appendix 272.
[5] History Appendix 273.

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> In addition, mostly as a result of expressing his extreme anger at the way he has been treated, he has been arrested multiple times for minor offenses not involving violence, including since his discharge from his most recent commitment. The unanimous testimony in this case is that if Appellant were to have someone with him in the community and provided dependable housing, he could probably avoid being readmitted to API or landing back in jail.[6] API refuses to provide such a less intrusive alternative. Instead, when it has been prevented from drugging Appellant against his will, including in this case, it has discharged him even though it has just come into court and obtained involuntary commitment orders upon the sworn testimony of its employees that he is gravely disabled and/or a danger to himself.
>
> Appellant believes he is entitled to the less intrusive alternative requested from the Superior Court. Unless API is ordered by this Court to provide a less intrusive alternative during the pendency of this appeal, Appellant will be without the constitutionally required less intrusive alternative to which he is entitled during the time it takes to decide this appeal. This will cause Appellant unnecessary, and inherently irremediable suffering.[7]

The Alaska Supreme Court ordered the appeal expedited, presumably because of the problem Respondent anticipated regarding multiple admissions/discharges/arrests and dismissals.[8] This, of course, is exactly what has happened until API, under pressure from the community to do something about Respondent, decided to ignore the Alaska Supreme Court stay and filed a new forced drugging petition.

It is suggested here, that upon a more full analysis of the circumstances surrounding the Alaska Supreme Court's Stay Order in S-13116 there is not really any ambiguity whether it applies to a separate case, such as this one. However, if there is any such

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[6] There was some meretricious contrary testimony in this case.
[7] History Appendix 279-280, footnotes omitted.
[8] In ordering the appeal expedited, the Alaska Supreme Court also ordered that "Appellant's request for alternative relief [an order requiring API to provide the less intrusive alternative during the pendency of the appeal] is therefore DENIED without prejudice."

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ambiguity, as Respondent argued on the very first day of this proceeding, October 21, 2008, and reiterated at the status conference on October 28, 2008, clarification from the Alaska Supreme Court should have been sought instead before proceeding on the new forced drugging petition.

In the Order, this Court recognized that the Supreme Court should decide the issue, but the implementation of that recognition in the Order requiring the Supreme Court to issue an order or the stay issued in the case will automatically terminate unless this Court issues a further order, is an improper mechanism.[9] Therefore, this Court should modify its stay to remain in effect unless and until the Alaska Supreme Court might rule the stay in S-13116 does not apply.

II. MOTION FOR STAY PENDING APPEAL

Respondent has filed an appeal of the Order this same date,[10] and as a result, in addition to, and independent, of the stay in S-13116, has moved this Court for a stay herein pending appeal of the Order. In the Order, this Court, stated:

> If the Court were asked to stay its ruling pending appeal at a time when there was no related case now on appeal, it would deny that request. It would conclude that Bigley has deteriorated since May 2008 and should not have to wait longer for medication.

Respondent respectfully suggests this standard this Court articulated for denying a motion for stay is manifestly incorrect. The Alaska Supreme Court's Order granting the stay in S-

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[9] It can be noted here that under this Court's Order, should API simply fail to ask the Alaska Supreme Court to clarify its order (and Respondent did not obtain such an order) this Court's stay would automatically terminate.

[10] *See*, Notice of Appeal, and Points on Appeal, attached hereto as Exhibit A.

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13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

> It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."[11]

(A) Respondent Faces the Danger of Irreparable Harm and API is Adequately Protected.

The Alaska Supreme Court has already held, on exactly the same evidence presented here, that Respondent faces the danger of irreparable harm and API can be adequately protected.[12] Moreover, in the Order, this Court assumes that "additional brain damage will result if API is allowed to administer more psychotropics." In addition, this Court ruled that "even if the medication shortens Bigley's lifespan, the Court would authorize the administration of the medication." Both brain damage and early death are irreparable and this Court assumes Respondent faces this irreparable harm. Respondent's arguments are certainly not "frivolous or obviously without merit," which the Alaska Supreme Court has also concluded in granting its stay pending appeal in S-13116, and

[11] History Appendix 226-7.
[12] None of API's testimony in this case is to the contrary.

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respondent respectfully suggests this Court is required, under the Alaska Supreme Court's precedent, to grant the stay pending appeal.

Further in support of irreparable harm, Respondent draws the Court's attention to Paragraph 63 of the "Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," to the United Nations General Assembly, July 28, 2008 (UN Report on Torture), which states:

> 63. Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture. In *Viana Acosta v. Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquillizers against his will, constituted inhuman treatment. The Special Rapporteur notes that forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment.[13]

Respondent respectfully suggests this Court has fallen prey to what has been termed the "banality of evil," a phrase coined in 1963 by Hannah Arendt, describing how the great evils in history were not executed by fanatics or sociopaths but rather by ordinary people who accepted the premises of their state and therefore participated with the view that their

[13] Exhibit B.

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actions were normal.[14]

For this Court to accept the State's premise that shortening Respondent's life by authorizing continued forced drugging is acceptable because the Public Guardian and the state paid psychiatrist assert the trade-off is acceptable, purporting to do so in Respondent's best interests when Respondent has been desperately fighting against the forced drugging for almost 30 years, on the grounds that he is not competent to make such a decision is, in Respondent's view, an example of such an evil.

This Court should recognize the forced drugging authorized by this Court in its Order should not take place before the Alaska Supreme Court decides whether forcing Respondent to endure an intervention

(a) recognized by the United Nations as constituting torture,

(b) that will cause additional brain damage to Respondent, and

(c) shorten Respondent's life,

can possibly support a conclusion it is in Respondent's best interests, and grant the stay pending appeal.

(B) Respondent Can Also Demonstrate a Clear Showing of Probable Success on the Merits.

In opposing reconsideration of the stay in S-13116, Respondent also argued he could demonstrate a clear showing of probable success on the merits, and hereby incorporates such argument herein as though fully set forth.[15]

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[14] *See*, Wikipedia entry on "Banality of evil," at http://en.wikipedia.org/wiki/Banality_of_Evil, accessed on November 28, 2008.

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In addition, in succumbing to API's insistence on conducting this proceeding on an extremely expedited basis, this Court failed to properly consider Respondent's two pre-trial motions regarding the *Parens Patriae* justification allegation in the forced drugging petition, both of which mandate reversal.

(1) Motion to Dismiss

The entirety of Forced Drugging Petition allegations under the *Parens Patriae* justification is that Respondent has refused the medication and:

> Petitioner has reason to believe the patient is incapable of giving or withholding informed consent. The facility wishes to use psychotropic medication in a noncrisis situation.

This is what AS 47.30.839 provides.

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

> unless the court makes findings that comply with all applicable statutory requirements *and*, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added).

Over two years after *Myers*, the Alaska Psychiatric Institute (API) is still using the "check box" form of forced drugging petition that only alleges in a conclusory fashion the constitutionally insufficient statutory requirements. This makes the petition legally deficient under *Myers*.

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[15] History Appendix 244-259.

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Thus, under Civil Rule 12(b)(6), or otherwise, the Forced Drugging Petition fails to state a claim that supports the requested relief, and should have been dismissed for failure to allege a sufficient basis on which the requested relief may be granted. This is a demonstration of probable success on the merits, mandating grant of the motion for stay pending appeal.

(2) Motion for Summary Judgment

On October 28, 2008, Respondent filed a motion for summary judgment to (a) deny the petition, and (b) order the Alaska Psychiatric Institute (API) to provide a specific less intrusive alternative (Summary Judgment Motion). In support of his Motion for Summary Judgment, Respondent submitted the following affidavits and other competent evidence:

1. Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.
2. Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.
3. Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.
4. Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.
5. Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.
6. Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court case No. S-13116.
7. Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;
8. Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.
9. Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

API filed no affidavits or other competent evidence in its October 31, 2008, opposition to the Motion for Summary Judgment.

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Under Civil Rule 56:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, *shall* be entered against the adverse party.

In *Bennett v. Weimar*, 975 P.2d 691, 694 (Alaska 1999), the Alaska Supreme Court reaffirmed that "assertions of fact in unverified pleadings and memoranda cannot be relied on in denying a motion for summary judgment."

At the November 5, 2008, hearing, this Court orally denied the motion for summary judgment, stating, without identifying any, that there were material facts in dispute, "based on the entire file and the history of Mr. Bigley on all of the issues." In the Order, this Court stated it denied the summary judgment motion because it "was required to consider the entire file, including affidavits submitted in support of other motions."[16] This Court again did not identify any such issues of material fact and there are none.[17] Respondent respectfully submits this Court's denial of his summary judgment motion is clearly erroneous under Civil Rule 56. Respondent has therefore demonstrated probable success on the merits with respect to the Summary Judgment Motion, mandating the motion for stay pending appeal be granted on that ground as well.

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[16] Page 17.

[17] Respondent's review of the file reveals the only affidavits filed by API in support of other motions were executed by API's counsel. These could only be submitted with respect to procedural issues because otherwise, it was improper for them to be fact witnesses and counsel in the same proceeding.

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III. CONCLUSION

For the foregoing reasons, this Court should grant Respondent's Motion to (a) modify the stay issued in this matter to keep it in effect pending determination by the Alaska Supreme Court of the applicability of the stay pending appeal granted by it in S-13116, and (b) issue a stay pending appeal of the Order.

DATED: December 1, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

William Bigley, Appellant,	)	Supreme Court No. S- 13353
vs.	)	
ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	
Trial Court Case No. 3AN 08-1252PR P/R	)	

NOTICE OF APPEAL

Appellant, William Bigley, by and through his attorney, hereby gives notice of appeal to the Alaska Supreme Court from that certain Order re: Petition for Approval of Administration of Psychotropic Medication and Petition for 90-day Commitment, dated November 25, 2008, a copy of which has been filed herewith along with a completed Docketing Statement and the other documents set forth in Appellate Rule 204(b).

Dated this 1st day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

Law Project for Psychiatric Rights
James B. Gottstein, Esq.
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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

William Bigley, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S- 13353 **POINTS ON APPEAL**

Trial Court Case No. 3AN 08-1252 P/R

The Superior Court erred by:

1. Proceeding on the forced drugging petition in violation of the Stay issued in Alaska Supreme Court Case No. S13116.
2. Denying Appellant's motion to dismiss for failing to state a claim upon which relief may be granted;
3. Denying Appellant's motion for summary judgment, there being no disputes over any material fact;
4. Finding the course of treatment proposed by the Alaska Psychiatric Institute to be in Appellant's best interest;
5. Concluding there is no less intrusive alternative available;
6. Failing to order the Alaska Psychiatric Institute to provide a less intrusive alternative;
7. Excluding the testimony of Dorothy Pickles;
8. Concluding there is not any less restrictive alternatives available; and
9. Concluding that Appellant was gravely disabled.

Dated this 1st day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq., Alaska Bar No. 7811100

United Nations A/63/175

General Assembly

Distr.: General
28 July 2008

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Sixty third session
Item 67 (a) of the provisional agenda*
Promotion and protection of human rights: implementation of human rights instruments

Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 62/148.

* A/63/150.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 62/148, the Special Rapporteur addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur draws the attention of the General Assembly to the situation of persons with disabilities, who are frequently subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. He is concerned that such practices, perpetrated in public institutions, as well as in the private sphere, remain invisible and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment. The recent entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol provides a timely opportunity to review the anti-torture framework in relation to persons with disabilities. By reframing violence and abuse perpetrated against persons with disabilities as torture or a form of ill-treatment, victims and advocates can be afforded stronger legal protection and redress for violations of human rights.

In section IV, the Special Rapporteur examines the use of solitary confinement. The practice has a clearly documented negative impact on mental health, and therefore should be used only in exceptional circumstances or when absolutely necessary for criminal investigation purposes. In all cases, solitary confinement should be used for the shortest period of time. The Special Rapporteur draws attention to the Istanbul Statement on the Use and Effects of Solitary Confinement, annexed to the report, as a useful tool to promote the respect and protection of the rights of detainees.

Contents

I. Introduction

1. The present report is the tenth submitted to the General Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 62/148 (para. 32). It is the fourth report submitted by the present mandate holder, Manfred Nowak. The report includes issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.

2. The Special Rapporteur draws attention to document A/HRC/7/3, his main report to the Human Rights Council, in which he explored the influence of international norms relating to violence against women on the definition of torture and the extent to which the definition itself can embrace gender sensitivity and discussed the specific obligations upon States which follow from this approach. According to the Special Rapporteur, the global campaign to end violence against women when viewed through the prism of the anti-torture framework can be strengthened and afforded a broader scope of prevention, protection, justice and reparation for women than currently exists.

3. Document A/HRC/7/3/Add.1 covered the period 16 December 2006 to 14 December 2007 and contained allegations of individual cases of torture or general references to the phenomenon of torture, urgent appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment, as well as responses by Governments. The Special Rapporteur continues to observe that the majority of communications are not responded to by Governments.

4. Document A/HRC/7/3/Add.2 contains a summary of the information provided by Governments and non-governmental organizations (NGOs) on implementation of recommendations of the Special Rapporteur following country visits. The Government of Mongolia has not provided any follow-up information since the visit was carried out in June 2005. Documents A/HRC/7/3/Add.3 to 7 are reports of country visits to Paraguay, Nigeria, Togo, Sri Lanka and Indonesia, respectively.

II. Activities related to the mandate

5. The Special Rapporteur draws the attention of the General Assembly to the activities he has carried out pursuant to his mandate since the submission of his report to the Human Rights Council (A/HRC/7/3 and Add.1-7).

Communications concerning human rights violations

6. During the period from 15 December 2007 to 25 July 2008, the Special Rapporteur sent 42 letters of allegations of torture to 34 Governments, and 107 urgent appeals on behalf of persons who might be at risk of torture or other forms of ill-treatment to 42 Governments. In the same period 39 responses were received.

disabilities, and primarily upon persons with mental or intellectual disabilities, warrants greater attention.

63. Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture.[35] In *Viana Acosta v. Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquillizers against his will, constituted inhuman treatment.[36] The Special Rapporteur notes that forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment.

d. Involuntary commitment to psychiatric institutions

64. Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a "danger to oneself and others" or in "need of treatment".[37] The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty.[38]

65. In certain cases, arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual, thus falling under the scope of the Convention against Torture. When assessing the pain inflicted by deprivation of liberty, the length of institutionalization, the conditions of detention and the treatment inflicted must be taken into account.

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[35] E/CN.4/1986/15, para. 119.

[36] Human Rights Committee, views on communication No. 110/1981, *Viana Acosta v. Uruguay*, adopted on 29 March 1984 (CCPR/C/21/D/110/1981), paras. 2.7, 14 and 15.

[37] See HRI/GEN/1/Rev.8, sect. II, Human Rights Committee, general comment No. 8 (1982) on the right to liberty and security of the person, para. 1, where the Committee clarifies that article 9 applies "whether in criminal cases or in other cases such as, for example, mental illness ...". See also the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6), para. 58. See further the discussion by the European Court of Human Rights in *Shtukaturov v. Russia*, application No. 44009/05, judgement of 27 March 2008.

[38] During the convention-making process, some States (Canada, Uganda, Australia, China, New Zealand, South Africa and the European Union) supported deprivation of liberty based on disability being permitted when coupled with other grounds. Finally, at the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Japan, with the support of China, sought to amend the text of article 14 to read "in no case shall the existence of a disability 'solely or exclusively' justify a deprivation of liberty". However, the proposal was rejected. See daily summary of discussion at the seventh session, on 18 and 19 January 2006, available at www.un.org/esa/socdev/enable/rights/ahc7summary.htm.

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,)
)
Respondent)
Case No. 3AN 08-1252 PR

ORDER ~~GRANTING~~ DENYING
MOTION FOR EXPEDITED CONSIDERATION Re:
MOTION TO MODIFY STAY
and
FOR STAY PENDING APPEAL

Respondent's Motion for expedited consideration of his motion to

(a) modify the stay of this Court's November 25, 2008, Order (Order) to keep it in effect pending determination by the Alaska Supreme Court of the applicability of the stay pending appeal granted by it in S-13116, and

(b) issue a stay pending appeal of the Order,

is hereby ~~GRANTED~~. DENIED.

The Petitioner shall respond to the underlying motion by 12 December 2008 4PM.

DONE this 1st day of December, 2008, at Anchorage, Alaska.

William F. Morse, Superior Court Judge

I certify that on 2 Dec. 2008 a copy of the above was mailed/faxed/handed to each of the following at their address of record

Judicial Assistant

AG - Pohland
PD - Brennan
Glotstein

Exhibit J

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax

EMERGENCY

Law Project for Psychiatric Rights
James B. Gottstein, Esq.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13116) Trial Court Case No. 3AN 08-493 P/R

EMERGENCY MOTION TO ENFORCE STAY
and
NON-EMERGENCY MOTION FOR SANCTIONS

Appellant hereby moves, pursuant to Appellate Rules 504 and 205 on an emergency basis,

(1) for an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order)[1] by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR (3AN 08-1252PR), and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

[1] Exhibit A.

and on a non-emergency basis,

(2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order issued in this appeal.

Because there are two parts to this motion and only one of them requires expedited action, two separate proposed orders are being lodged herewith.

I. Appellate Rule 504 Emergency Motion Application

A. Telephone Numbers and Addresses of Counsel.

Counsel for Appellant's telephone number is 274-7686 and his office address is 406 G Street, Suite 206, Anchorage, Alaska 99501. Timothy Twomey is counsel for Appellee Alaska Psychiatric Institute (API) in this appeal, his phone number is 269-5168, and his office at 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501.

B. Nature of Emergency and the Date and Hour Before Which a Decision is Needed.

On October 25, 2008, the Superior Court issued the Offending Forced Drugging Order, but in light of the Stay Order issued by this Court in this appeal, stayed its effectiveness until December 15, 2008 or until further order of the Superior Court or this Court.[2] In doing so, the Superior Court stated it was staying the Offending Forced Drugging Order until December 15, 2008, to "give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in [this appeal] as supplemented by [the Superior] Court's findings."[3]

However, oral argument is not scheduled until December 16, 2008, the day after

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[2] Exhibit B, page 34.

the Superior Court's stay of the Offending Forced Drugging Order is scheduled to terminate without further order by this Court or the Superior Court. Therefore, Appellant essentially had no choice but to seek emergency relief here.[4] Appellant has moved the Superior Court to extend its stay,[5] but if the Superior Court fails to do so before Friday, December 12, 2008, a decision on the emergency motion is needed by the end of the day, Friday, December 12, 2008, in order for the stay to remain effective.

However, frankly, it would be desirable from Appellant's point of view, and perhaps this Court's as well, if the Superior Court fails to extend the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, as Appellant has requested,[6] for this Court to issue its decision by the end of the day, Friday, December 5, 2008, because failing that, Appellant will have to file an emergency motion for stay pending appeal of the Offending Forced Drugging Order in S-13353, which he would expect to do Monday, December 8, 2008.[7]

C. Grounds Submitted to Superior Court

Appellant advised the Superior Court, Probate Master Lack presiding, at a hearing held on October 21, 2008, that he believed the forced drugging petition filed the previous day in 3AN 08-1252PR was a violation of this Court's Stay Order and that if API thought

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[3] Exhibit B, page 33.
[4] While the Superior Court indicated it was granting the limited stay to allow API to give this Court an opportunity to review its Stay Order in this appeal, API has no incentive to seek enforcement of this Court's Stay Order.
[5] Exhibit C.
[6] Exhibit G.

otherwise, it should obtain permission from this Court before being allowed to proceed under it. At that hearing, API's counsel stated it had theretofore interpreted this Court's Stay Order as precluding the filing of a new forced drugging petition pending determination of this appeal, but because of Appellant's continuing difficulties in the community, had decided to file a new forced drugging petition anyway[8] At that hearing Master Lack stated whether or not the Stay Order issued by this Court applies to a new petition was not ripe for decision,[9] and that whether or not the Stay Order issued by this Court applied to emergency medication should be taken to this Court.[10] API's counsel then stated she was going to recommend to API that it not drug Appellant under any circumstances "until there is further litigation on the matter."[11]

API dismissed that forced drugging petition on October 24, 2008,[12] but then, without seeking clarification from this Court as to whether this Court's Stay Order precluded it, filed another forced drugging petition on October 27, 2008.[13] The Superior Court, Judge Morris presiding, held a status conference on October 28, 2008, where

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[7] Appellant's counsel has an out of town trip scheduled for December 7-14, 2008, that is personally very important to him, and would expect to prepare the Emergency Motion for Stay prior to his departure, to be filed December 8, 2008.
[8] Recording of October 21, 2008, hearing at 3:58.
[9] Recording of October 21,2 008, hearing at 4:01.
[10] Recording of October 21, 2008, hearing at 4:02.
[11] In spite of this API went ahead and forcibly drugged Appellant again, purportedly as an emergency. Exhibit B, page 4.
[12] Exhibit B, page 4.
[13] Exhibit B, page 4.

Appellant again raised that this Court's Stay Order precluded proceeding under the new forced drugging petition and should not occur without permission of this Court.[14]

Also, this same date, December 1, 2008, Appellant filed a motion to modify the stay contained within the Offending Forced Drugging Order.[15] If the Superior Court grants Appellant's motion to modify the stay contained within the Offending Forced Drugging Order by the end of the day, Thursday, December 4, 2008, the emergency nature of this motion becomes moot, but the relief requested does not.[16]

D. Notification of Opposing Counsel

On November 28, 2008, Appellant e-mailed counsel for API in both this appeal and in 3AN 08-1252PR requesting they stipulate to extend the stay contained within the Offending Forced Drugging Order pending a determination by this Court and advising them that this motion would be filed on this date if no agreement was reached.[17] A copy of this motion was hand delivered to API's counsel in both this appeal and 3AN 08-1252PR prior to filing here.

II. Emergency Motion to Enforce Stay Order

Appellant has moved on an emergency basis for an order to enforce the Stay Order issued in this appeal by striking the forced drugging petition filed October 27, 2008, in 3AN 08-1252PR, and vacate the Offending Forced Drugging Order. As will be set forth

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[14] Appellant does not yet have a recording of this hearing.
[15] Exhibit C.
[16] Because of the short time frames, Appellant believes he needs to file this motion now to allow at least a reasonable time for opposition and consideration, if necessary.
[17] Exhibit D.

more fully below, merely extending the stay contained in the Offending Forced Drugging Order pending determination of this Appeal is an insufficient remedy.

A. The Stay Order Issued in This Appeal

On May 23, 2008, this Court, at the direction of a single justice, issued the Stay Order in this appeal, staying pending determination of this appeal, the Superior Court's findings and order of May 19, 2008, granting API's then extant forced drugging petition.[18] On May 28, 2008, API filed for full court reconsideration, one of the grounds being, that the Stay Order, "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods."[19]

By the time of Appellant's opposition to the motion for reconsideration, Appellant had been discharged from API, and Appellant raised the issue of whether the Stay Order had become moot as a result, arguing it had not because of the likelihood of new forced drugging petitions being filed.[20] This Court then denied reconsideration of its Stay Order.[21]

Appellant respectfully suggests this Court's Stay Order applies to all efforts to force Appellant to take psychotropic drugs against his will during the pendency of this appeal, including 3AN 08-1252PR. Since Appellant had been discharged prior to this Court's Order denying reconsideration of its Stay Order, at that time, the Stay Order issued in this appeal could only apply to future Superior Court cases, such as 3AN 08-

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[18] Exhibit A.
[19] Exhibit E, p.2.
[20] Exhibit F.
[21] Exhibit E.

1252PR. In other words, unless the Stay Order issued in this case applies to future cases, such as 3AN 08-1252PR, it was a nullity when reconsideration was denied. Since this issue was specifically raised by Appellant in connection with reconsideration,[22] it seems fair to assume this Court did not reaffirm the Stay Order to be a nullity and must have intended it to apply to future cases, including 3AN 08-1252PR.

B. Merely Extending the Stay of the Offending Forced Drugging Order Effectively Precludes this Court from Granting Relief In This Appeal.

If this Court agrees its Stay Order applies to 3AN 08-1252PR, the forced drugging petition in 3AN 08-1252PR should be stricken and the Offending Forced Drugging Order vacated.[23] Since filing the forced drugging petition in 3AN 08-1252PR was a violation of the stay, it was an illegal act and should be stricken. Vacating the Offending Forced Drugging Order naturally follows.

Moreover, merely extending the stay of the Offending Forced Drugging Order pending determination of this appeal is an insufficient remedy. The very existence of the Offending Forced Drugging Order precludes this Court from effectively requiring API to provide a less intrusive alternative, which is the primary relief sought by Appellant in this appeal. More specifically, the Offending Forced Drugging Order purports to supersede any such relief granted by this Court by creating a "new" finding that no such less intrusive alternative is available, which in turn has already resulted in yet another

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[22] Exhibit F, pp 2-4.

[23] In the same order, the Superior Court granted API's petition for 90-day commitment. Appellant is not suggesting this portion of the order be vacated. The proposed order lodged herewith is consistent with this.

appeal.[24]

The Offending Forced Drugging Order has already been appealed because Appellant had to file a motion to the Superior Court for a stay pending appeal of the Offending Forced Drugging Order as a protective matter,[25] and if the Superior Court denies that motion, which it has indicated it will,[26] unless the Offending Forced Drugging Order is stricken before December 6, 2008, there will have to be yet another emergency motion for a stay pending appeal before this Court, on virtually the same facts upon which this Court granted the Stay Order here. Unless the Stay Order issued in this appeal applies to all future forced drugging efforts, including 3AN 08-1252PR, and the Offending Forced Drugging Order is vacated, this Court will never be in a position to effectively order API to provide Appellant with a less intrusive alternative.[27] Surely API may not divest this court of authority to order appropriate relief by obtaining new forced drugging orders that supersede not yet issued decisions by this Court. The whole purpose of a stay pending appeal is to preserve the *status quo* in order to allow the reviewing court to be able to provide meaningful relief. Logically, the new forced drugging petition should be stricken and the Offending Forced Drugging Order vacated.

III. Non-Emergency Motion for Sanctions

Appellant has also moved on a non-emergency basis for an order imposing contempt sanctions against API and/or Dr. Khari for violating the Stay Order issued in

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[24] S-13353, filed this same date.
[25] Exhibit C.
[26] Exhibit B, page 32.
[27] There are similar concerns with respect to a best interests finding.

this appeal.[28] The attorney's fees billed by Appellant's counsel,[29] and the Law Project for Psychiatric Rights' costs, in defending 3AN 08-1252 are as follows:[30]

Description	Amount
Attorney's Fees	$ 61,458.57
Costs	$ 2,986.10
Total	$ 64,444.67

Appellant believes API's violation of this Court's Stay Order constitutes contempt and, at a minimum, payment of Appellant's costs and attorney's fees should be awarded therefor. In *L.A.M. v. State*, 547 P.2d 827, 831 (Alaska 1976), more recently reiterated in *Anchorage Police & Fire Retirement System v. Gallion*, 65 P.3d 876, n. 18 (Alaska 2003), this Court explained the four elements of criminal contempt are:

> (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; ... (3) the contemnor's ability to comply with the order; and (4) the contemnor's willful failure to comply with the order.

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[28] Under Civil Rule 90, an order to show cause and a hearing are contemplated with respect to an alleged contempt committed outside the presence of the court. No comparable rule appears in the Appellate Rules, although Appellate Rule 510(c) acknowledges this Court's inherent power to punish for contempt. It appers the show cause and hearing requirements in Civil Rule 90(b) are to satisfy due process requirements of notice and an opportunity to be heard, both requirements of which are met by this motion and API's opportunity to respond. Of course, this Court can always require further proceedings, but it is believed only this Court can determine the scope of its Stay Order and it would similarly be appropriate for any such additional proceedings, if deemed necessary, to only be conducted by this Court. Oral argument is scheduled in just two weeks (December 16, 2008), and perhaps this Court could inquire of API's counsel at that time regarding its decision to proceed with its efforts to obtain a forced drugging order in spite of the Stay Order issued in this appeal.

[29] Appellant's counsel's current billing rate is $325 per hour, which he believes is a market rate considering his training, experience, and expertise in this area of the law.

[30] Exhibits H and I, respectively.

There is no question about the existence of the first three elements here.

There is also dicta in *L.A.M.*, requiring these same four elements, including willfulness for civil contempt. Appellant believes under the circumstances here, willfulness has been demonstrated, but also suggests that willfulness is only required in civil contempt in the context in which it was discussed in *L.A.M.*, which is to "coerce future conduct," by a recalcitrant party who refuses to comply with an order. Where, as here, contempt sanctions are sought for remedial purposes, Respondent respectfully suggests, willfulness is not required.

The recitation of the law regarding this subject in *Select Creations v. Paliafito America*, 906 F. Supp. 1251, 1271 (E.D. Wis 1995) seems helpful:

> 6. The state of mind of a party to the underlying action is irrelevant in a civil contempt proceeding. See, e.g., *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 785 n. 11 (7th Cir.1981) ("[T]he fact that a prohibited act is done inadvertently does not preclude a contempt citation...."); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 448 (D.C.Cir.1953) ("Adjudications for civil contempt to protect the benefits of a decree do not depend on the state of mind of the contemnors.") cert. denied, 346 U.S. 855, 74 S.Ct. 70, 98 L.Ed. 369 (1953); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062 (8th Cir.1970) ("[C]ivil contempt ... is a sanction to enforce compliance with an order of the court and is not dependent on the state of mind of the respondent.") cert. denied, 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed.2d 829 (1971); *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir.1971) ("The crucial issue in civil contempt proceedings ... is not the employers state of mind but simply whether the Court's order was in fact violated.")
>
> 7. According to the Supreme Court, "[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.... An act does not cease to be a violation of the law and of a decree merely because it may have been done innocently." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).FN3

> FN3. While this Court has previously stated in dicta that a party's conduct must be "deliberate and intentional" in order to support a finding of contempt, *Rototron Corp. v. Lake Shore Burial Vault*, 553 F.Supp. 691, 700 (E.D.Wis.1982), we conclude that a party need not intentionally violate the Court's order to be found in contempt.

Here, API's violation of the Stay Order issued in this case occasioned a considerable amount of costs and attorney's fees to defend. Costs and fees that would not have been required absent the failure to comply with the Stay Order. API and/or Dr. Khari should bear this expense[31] regardless of whether its violation of the Stay Order was willful.

However, even if willfulness is required, Appellant respectfully suggests willfulness exists here. In *State v. Browder*, 486 P.2d 925, 943 (Alaska 1971), this Court defined "willfully" in the context of criminal contempt as an act "done voluntarily and intentionally, that is, with the intent to disobey or disregard the law." There is no doubt that API willfully filed the forced drugging petition in 3AN 08-1252PR in spite of this Court's Stay Order and after it had previously interpreted it to have been prohibited. As set forth above, Appellant does not believe there is any real ambiguity in this Court's Stay Order in light of the circumstances surrounding its issuance. Even if there is, however, Appellant respectfully suggests, under the circumstances, as Appellant repeatedly told API, API was obligated to seek clarification from this Court.

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[31] Dr. Khari who was also the treating psychiatrist below in this appeal and thus was directly subject to the Stay Order issued in this appeal, filed the offending forced drugging petitions in 3AN 08-1252PR and therefore is certainly a proper subject of such

As the 7th Circuit held in *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir.1974):[32]

> Willfulness, for the purpose of criminal contempt, does not exist where there is a "good faith pursuit of a plausible though mistaken alternative." To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible.

Since API's current interpretation renders the Stay Order issued in this case a nullity, it is not plausible.

The 7th Circuit went on to say a party who has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order, and that while a party is not required to seek such clarification, the failure to do so when combined with an implausible interpretation of the order is strong evidence of willfulness sufficient to support criminal contempt sanctions.[33] The 7th Circuit then went on to add:

> Similarly, while actions showing a good faith effort to comply with the order will tend to negate willfulness, . . indifference to the order. . . will support a finding of willfulness.[34]

Appellant respectfully suggests that even if willfulness is a requirement for a finding of contempt where the purpose is to vindicate the authority of this Court's order and provide a remedy to the party aggrieved by the violation of the court order, such willfulness has been established here.

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sanctions. The order lodged herewith for sanctions, makes API and Dr. Khari jointly and severally liable for payment.

[32] Citation omitted.

[33] *Id.*

[34] *Id.*, citation omitted.

IV. Conclusion

For the foregoing reasons, Appellant requests the Court grant his motion for

(1) an order enforcing the stay pending appeal issued in this case on May 23, 2008, full court reconsideration denied June 25, 2008 (Stay Order) by (a) striking the forced drugging petition filed October 27, 2008, in *In re: Bigley*, 3AN 08-1252PR, and (b) vacating that portion of the November 25, 2008, order therein authorizing Appellant to be drugged with Risperdal Consta against his will (Offending Forced Drugging Order),

and on a non-emergency basis,

(2) for contempt sanctions against the Alaska Psychiatric Institute and/or Dr. Khanaz Khari for violation of the Stay Order.

Dated this 1st day of December, 2008, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

Exhibits

A. Stay Order in this Appeal, May 23, 2008.

B. Offending Forced Drugging Order, November 25, 2008.

C. Motion To Modify Stay and For Stay Pending Appeal filed in 3AN 08-1252PR, December 1, 2008.

D. E-mail exchange between Jim Gottstein and Laura Derry, November 28, 2008.

E. API's Motion For Full Court Reconsideration, May 28, 2008.

F. Appellants Opposition to Reconsideration, June 9, 2008.

G. Order Denying Reconsideration., June 25, 2008.

H. Attorney's Fees Invoice, November 29, 2008.

I. Costs Invoice, November 30, 2008.

J. Motion for Expedited Consideration, December 1, 2008.

In the Supreme Court of the State of Alaska

William S. Bigley,	)	
	)	Supreme Court No. **S-13116**
Appellant,	)	
v.	)	**Order**
	)	
Alaska Psychiatric Institute,	)	
	)	
Appellee.	)	Date of Order: **5/23/08**
	)	

Trial Court Case # **3AN-08-00493PR**

By motion of 5/20/08 (updated 5/21/08), appellant has moved on an emergency basis for a stay of the superior court's findings and order of 5/19/08 granting API's petition to administer psychotropic medication during appellant's period of commitment. The order limits the medication to Risperadone in an amount not to exceed fifty milligrams per two weeks. On 5/19/08 12:30 p.m. the superior court also entered a forty-eight hour stay to allow appellant to seek a stay in this court. API has opposed appellant's stay motion. API has also moved to strike an affidavit executed 5/20/08 by Grace E. Jackson, MD and submitted with appellant's 5/20 stay motion. Appellant has responded, at the court's request, to the motion to strike, and has requested alternative stay relief. Upon consideration of the stay motion and opposition, and the motion to strike and the response to that motion,

IT IS ORDERED:

1. It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of

irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.' " *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits." *Id.* The latter standard is proposed here by API. Appellant has not clearly identified the standard he thinks controls. He does, however, assert that he will suffer irreparable harm if he must undergo involuntary medication.

There is at least implicit disagreement in this case about whether administration of psychotropic medication causes medical health problems that are potentially grave or whether it may even contribute to mental illness. At least by implication, the involuntary administration of medication against appellant's fervent wishes may cause psychic harm. Whether long-term administration of such medication causes irreparable harm is an issue that implicates the merits of this appeal. The evidence appellant produced at the mid-May hearing permits a conclusion long-term medication will cause him irreparable harm. It also appears to imply that even the administration of a single dose, or an additional dose, intravenously may contribute to irreparable harm. The 5/20 affidavit of Dr. Jackson does not seem to expressly address the harm that might result from a single fifty-milligram intravenous injection of Risperadone. But it also appears that the likelihood the medication will end with the proposed injection authorized 5/19/08 by the superior court is small. Appellant has been admitted seventy-five times to API. It is

likely that if he is released with or without medication (his thirty-day commitment order was entered 5/5/08), he will be readmitted to API in the future and that API staff will again seek a medication order. Thus, if the medication is administered as presently authorized, it seems likely that he will sooner or later following return to the community decline to voluntarily accept medication and that API will seek permission to administer additional doses. In other words, whether irreparable harm will result from the medication authorized by the 5/19 order necessarily raises longer-term questions.

API asserts that its interests cannot be adequately protected. It certainly has an important interest in fulfilling its duty to patients and in satisfying its charter obligations to the public. But the evidence to date does not establish that medication is necessary to protect appellant from self-inflicted harm or from retaliatory harm in response to his behavior, threatening as it may seem to others. Nor has API identified any need to protect others from him, including API staff during his commitment or the public upon his release. This is not to minimize API's interest both in doing what it believes best for appellant and in carrying out its responsibilities. But it does not appear that API cannot adequately protect those interests. API's interest in protecting appellant does not dramatically outweigh his desire to make treatment decisions for himself. It therefore appears that the appropriate standard for a stay pending appeal is whether appellant has raised serious and substantial questions going to the merits of the case. He does not have to demonstrate a clear showing of probable success on the merits.

2. Applying that standard, the court concludes that a stay of the 5/19 order is appropriate. The evidence presented at the mid-May hearing supports appellant's contentions, but does not necessarily foreclose API's contentions. Because the findings

of fact of the superior court are reviewed under a clearly erroneous standard, and because necessary conclusions of law are considered de novo, this court cannot now conclude on the basis of the evidence review conducted in context of the stay motion that appellant's appellate issues are all frivolous or obviously without merit. The court cannot say that appellant has clearly demonstrated probable success on the merits. But he is not required to do so in this case to obtain a stay. His motion for stay is therefore **GRANTED**.

3. API's motion to strike the 5/20 affidavit of Dr. Jackson is **DENIED**. The affidavit appears to largely summarize other evidence offered at the May hearing. But the only alternative to striking or accepting the affidavit would be remand to the superior court for reconsideration of appellant's stay motion. The superior court, as a fact-finding court, is in a superior position to weigh Dr. Jackson's most recent statements and determine whether appellant has demonstrated irreparable harm. But doing so will simply delay the ultimate resolution of the medication issue. Unless a stay were granted in the superior court, it is probable appellant would renew his stay motion in this court, and then, if that motion were denied, seek full-court reconsideration. In the meantime, the thirty-day commitment period is running. In any event, the 5/20/08 affidavit is not the evidentiary basis for this stay order.

4. This appeal was filed 5/20/08, and the appellant characterized it as a Rule 204 appeal in his notice of appeal and docketing statement. Even if appellate briefing is expedited, it is highly likely the present commitment order will have expired before briefing is complete, and therefore before this court can rule on the merits. The possibility of technical mootness is substantial. The parties should anticipate this issue

in their briefing and discuss whether the court should nonetheless reach the merits of the 5/19/08 order permitting administration of Risperadone.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts

Lori A. Wade, Chief Deputy Clerk

cc: Supreme Court Justices
Judge Gleason by fax
Trial Court Clerk by fax

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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-08-01252 PR

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE WILLIAM MORSE

Pages 1 - 26, inclusive

October 28, 2008

9:39 a.m.

APPEARANCES:

For William Bigley: James Gottstein, Esq.
For the State of Alaska: Laura Derry, Esq. (by telephone)

ANCHORAGE, ALASKA; TUESDAY, OCTOBER 28, 2008; 9:39 a.m.

---oOo---

(9:39:39)

THE COURT: We're on the record in 3AN-08-01252 PR. Mr. Gottstein is in the courtroom, and on the telephone I have whom?

MS. DERRY: This is Laura Derry from the attorney general's office. I represent the psychiatric institute.

THE COURT: All right. Let me articulate my understanding of where we are and see if I'm procedurally accurate. Okay?

MR. GOTTSTEIN: Your Honor, there's a preliminary matter first, which is, I notice that the -- it was noted that it's a closed proceeding, and actually this is a public proceeding.

THE COURT: What is the -- is there a statute or a court rule that says one way or the other whether it's a public proceeding?

MR. GOTTSTEIN: There is -- with respect to AS 47.30.839 petition, there's no rule one way or the other. AS 47.30.735(b)(3) --

THE COURT: Wait. Slow down, slow down.

MR. GOTTSTEIN: 839.

THE COURT: On a -- there's nothing in 47.30.839

regarding --

MR. GOTTSTEIN: Having it open or closed.

THE COURT: -- open or not?

MR. GOTTSTEIN: Correct.

THE COURT: Is there a fallback one that applies generally to --

MR. GOTTSTEIN: Well, we're going to go through the whole thing. I've actually briefed this to the Supreme Court recently --

THE COURT: I know. But just talk more slowly because I don't -- I can't hear the numbers that come rattling out.

MR. GOTTSTEIN: Okay. So AS 47.30.735(b)(3) --

THE COURT: Okay. (B)(3). Okay.

MR. GOTTSTEIN: Okay. At the -- and that's pertaining to involuntary commitments. At the hearing before Master Lack, it was determined that the hearing would be open to the public pursuant to that.

THE COURT: Does the State have any -- any disagreement with this being an open procedure -- an open hearing today?

MS. DERRY: No, Your Honor.

THE COURT: All right. It will be open. I will ask the parties at future hearings their position on whether it should be open or closed.

MR. GOTTSTEIN: Your Honor, if I may, could the sign be removed from the --

THE COURT: Is it up there? Yes. Why don't you do me the favor of taking it down.

MS. DERRY: Your Honor, is Mr. Bigley in the courtroom?

THE COURT: No, he's not.

As I understand where we are, is several days ago, I think the 20th perhaps, there was a hearing before Master Lack on the State's petition for a 30-day commitment. And that was -- he recommended that that take place, that that petition be granted, and there was at the time a petition for court approval of the administration of psychotropic medication pursuant to 47.30.839, and he did not issue any ruling on that.

I then listened to the procedure -- listened to the CD of the hearing and granted the petition, and knowing there was a -- the commitment petition, and then knowing that there was a petition regarding medication, set out a hearing for tomorrow. I'm not sure exactly when it happened, but sometime over the weekend, or perhaps first thing yesterday, the State, as I understand it, withdrew that original petition for medication.

And I have been given a faxed copy of a petition that was filed yesterday, which I assume is a brand new

petition, and Master Duggan ordered that there would be a hearing on the petition using tomorrow's date that was already in place, then appointed the public defender agency as counsel for the respondent and appointed OPA as the visitor, which -- and then this morning I was handed a packet from Mr. Gottstein asking for a variety of things, but most imminently, an order requesting that tomorrow's hearing be canceled on this new petition.

So I guess I need to back up a little bit here. I probably need to get the public defender agency on the phone.

Mr. Gottstein, go ahead.

MR. GOTTSTEIN: A couple things. I noticed as I was looking in the courtroom that Ms. Derry mentioned that -- or asked about Mr. Bigley, and I think he's actually entitled to be here. I'm, with some reluctance, willing to proceed without that, but anyway, note that.

THE COURT: I won't go forward on anything substantively without Mr. Bigley being present, but given the fact that we just had to figure out what are the operative petitions and documents and what is the State's intent and what do we do with tomorrow's hearing, I thought it made sense just to at least have this status hearing.

MR. GOTTSTEIN: Yes. And I understand that, and

that's why I'm willing to go forward with some reluctance.
I have not, as far as -- I have not received a copy of the new petition, at least as of when I headed over here.
THE COURT: Let's wait three seconds and I will give you a copy.
And has the State received Mr. Gottstein's packet of motions?
MR. GOTTSTEIN: Your Honor, yes. I hand-delivered it about -- I don't know -- 8:45, I believe.
MS. DERRY: I haven't received it to my office, Your Honor. I'm sorry.
THE COURT: Well, I'll tell you what it contains. Obviously we're not -- there's a motion to vacate tomorrow's hearing.
MS. DERRY: Uh-huh.
THE COURT: Based on -- well, it sort of lays out the sequence of events in more detail than I've just described. In essence it says it's happening too quickly.
MS. DERRY: Uh-huh.
THE COURT: And there is also a motion for summary judgment and a variety of affidavits and materials in support of the motion for summary judgment. That's obviously something that we're not quite going to deal

with.
What does the State -- does the State have a position regarding the timing of the hearing for the most recent petition? And let me just throw one other thing in. My -- I'm looking at 47.30.839 itself, which seems to require this hearing to take place within 72 hours after the petition has been filed.
MS. DERRY: Yes, yes --
THE COURT: What's the State's position of when -- when this hearing should take place?
MS. DERRY: Your Honor, I would first just like to back up so that you understand what happened on Friday, was that on Friday I did ask that the petition for the medications be withdrawn. It was our intention to help -- well, the API's position was to help Mr. Bigley hopefully restabilize and then to be released and to continue on with the life that he has been leading as of late, but --
THE COURT: Actually, yesterday I signed the order dismissing the first petition.
MS. DERRY: Right. Okay.
THE COURT: I have not distributed that yet.
MS. DERRY: Okay. And then yesterday I called to check to see what had happened over the weekend, and the hospital, Dr. Khari, was actually very worried about him and concerned and he had decompensated and was doing

things that actually required that she followed the statutory guidelines and emergency medicated Mr. Bigley early in the morning on Monday.
THE COURT: That was yesterday?
MS. DERRY: Yes, Your Honor. I'm sorry. Was that Your Honor? I'm not sure who was speaking to me.
THE COURT: Yes.
MS. DERRY: And so -- and that was yesterday. And so we actually have to move forward because the doctor and API's position is that Mr. Bigley will continue to be in crisis and will continue to need treatment. And based on the statute, we do need to proceed with the medications petition in order to protect the due process interests of Mr. Bigley because emergency medications have been given --
THE COURT: Just let me read 838. I've skimmed it before, but I'm not sure what happened.
Am I reading this correctly? This says that the facility can, in an emergency, give him an initial dosage and may authorize additional, as-needed doses, and then -- the physician can act in the emergency first for 24 hours and then renew it for 72.
MS. DERRY: Yes, Your Honor.
THE COURT: And so --
MS. DERRY: And the way that I interpret that

statute is that the doctor could authorize several dosages within that first 24-hour period and make that be, you know, a scheduled dosage in order to maintain that crisis period within that 24 hours, and then so essentially there could be three 24-hour crisis periods, but in honor of protecting Mr. Bigley's interests and the fact that we are having legal issues with this matter, the doctor hasn't been doing that.
What she has been doing is trying to get him to the point where he could sleep and eat and not because he's been doing things that are actually harmful to himself. And so she hasn't been requesting that multiple medications be given to him. She just gave him one dosage yesterday in order to try to help stabilize him and get him sleep.
THE COURT: So we're about to pass the 24-hour period, and we're about to move into the second period, which is the second two-thirds of the 72 hours?
MS. DERRY: Yes, Your Honor.
THE COURT: Okay. I see nothing in 838 that has anything to do with when the Court has to hold an 839 petition. So when does the State think there has to be a hearing on the 839 petition?
MS. DERRY: Well, we -- the State's position is that we would try to move within that 72 hours because if

you are -- if we continue to hold Mr. Bigley and try to offer him other modalities for treatment, yet he continues to be in crisis, that we would be worried that we're looking outside of protecting his due process and we would have to continue to issue emergency medications until there were a hearing and --

THE COURT: So when was the -- when was the second petition filed? I mean, I've got it the 27th. But what time?

MS. DERRY: Yesterday morning, probably by 10:00.

THE COURT: If we just use that as a tentative time, 10:00 a.m. yesterday, so the 72 hours passes at 10:00 a.m. on the 30th.

MS. DERRY: Yes. And our concern, Your Honor, is that in trying to protect the best interests and the staff at API of what they feel they need to do, is medically necessary for them, and they are obligated to protect life and to try to treat him, that just relying on emergency medications is actually -- that that becomes a legal question of are we actually violating his due process by not having a hearing, but then in order to try to help him, the emergency medications are being given.

THE COURT: So you want the hearing to take place tomorrow?

MS. DERRY: I would like the hearing to take place tomorrow, Your Honor, yes.

THE COURT: And what happens, Mr. Gottstein, in your view if I'm stuck with a statute that says the hearing has to take place within 72 hours and you're telling me that that's too soon for you to be able to prepare?

MR. GOTTSTEIN: Your Honor, I think that that statute needs to be read in light of Myers and Weatherhorn, and Weatherhorn I cited in my motion, basically says that Mr. Bigley's liberty interests with respect to the forced medication is in not having it, and therefore, the protections should not be sacrificed in the interests of speed. Okay.

THE COURT: When do you think is the soonest that we can have the petition hearing?

MR. GOTTSTEIN: I -- I believe I -- I think next -- a week from today, Your Honor, because I need to conduct discovery.

THE COURT: What do you need to do?

MR. GOTTSTEIN: I need to -- I need to review the chart and I need to take some depositions of --

THE COURT: What -- have you -- I know you've been involved with Mr. Bigley at some point in the past, and I don't know the details of that, so -- and I

appreciate that his condition apparently is changing weekly and possibly daily. So have you had access to charts up to some point?

MR. GOTTSTEIN: I've got some of 2007 charts and I don't believe I've had any 2008 charts in spite of --

THE COURT: Has he been -- has he been at API, let's say, in October, other than just the last couple of days, that you know of?

MR. GOTTSTEIN: I don't know. Well, it's been about a week, I think, that he's been there, so a little over a week.

THE COURT: So are you going to be requesting essentially the charts that have been generated in, what, the past month?

MR. GOTTSTEIN: 2007 and 2008.

THE COURT: And you already have it up to where, roughly? I realize you're going from memory.

MR. GOTTSTEIN: I don't -- I don't know, Your Honor. I have a fair amount through -- till the first of September 2007, but there may be gaps in it.

THE COURT: Let's assume that you need everything from the past year. Do you have any sense as you stand here now of how many admissions that might be? Is it one or two or is it 50? I'm trying to get a rough sense of how large these charts might be.

MR. GOTTSTEIN: Your Honor, first off, I would really like to have two thousand -- all of 2007 and 2008 so I get a good picture.

THE COURT: Well, let me ask you --

MR. GOTTSTEIN: I don't know -- I don't know how many admissions that he's had. It may be -- and Ms. Derry might know.

THE COURT: I'm going to ask her.

MR. GOTTSTEIN: I think it's probably -- in the past how long did you ask?

THE COURT: Let's say in the last year. Or tell me if you only know in the last six months. I don't care.

MR. GOTTSTEIN: I think it's probably half a dozen in 2008, but I'm not sure.

THE COURT: All right. That gives me --

MR. GOTTSTEIN: A lot of them were very short, though.

THE COURT: Do you think that that's roughly right? Half dozen admissions, some a matter of a day or two and others perhaps longer?

MS. DERRY: I'm sorry. Was that addressed to me, Your Honor?

THE COURT: Yes.

MS. DERRY: Your Honor, it's actually -- my concern here, the date that I would like to really worry

about is the date from April 2008 to the present, which is what the --

THE COURT: The question I posed to you is, do you know how often he has been admitted in the past year?

MS. DERRY: Well, I can tell you with certainty that since April of this year that he has been there at least ten times, at API.

THE COURT: And are those -- to your current knowledge, do you think that those are mostly 24, 48-hour admissions or are they longer?

MS. DERRY: Of those ten that I mentioned, Your Honor, they -- I'm not sure. I couldn't tell you the exact amount of time that he was there. Some of them were two or three days for sure, and others were simply screenings, because all ten of those were initiated by the police department because those were after Mr. Bigley had been arrested.

THE COURT: Okay. Let's assume that I order at least that API turn over the last year of charts.

MS. DERRY: Uh-huh.

THE COURT: Is that something that you think API could comply with in the next day?

MS. DERRY: Would it be possible to give Mr. Gottstein access to them and not have the staff necessarily make the copies? Because we -- as far as the

State's position, Mr. Gottstein is entitled to those records as Mr. Bigley's attorney for the medications position, and we have nothing to hide. It's a matter of -- I can't tell you what the staffing situation is for making copies, but having access to the files would be appropriate.

THE COURT: What do you want?

MR. GOTTSTEIN: Your Honor, I need copies to work with.

THE COURT: I'm going to give him immediate access, but I'm also going to require API to start generating copies.

MS. DERRY: Yes, Your Honor.

THE COURT: And just let me ask: It's not clear to me -- Mr. Gottstein, what's your position in terms of the role of the public defender agency? I know Master Duggan appointed them, probably as a matter of routine. Is your relationship with Mr. Bigley such that you are his exclusive and sole attorney going forward or are you here on a more limited basis?

MR. GOTTSTEIN: I'm his attorney, his exclusive and sole attorney with respect to any forced medication petitions or even efforts.

THE COURT: So I'm going to have the public defender appear as well because whatever happens at these

various hearings will likely impact his commitment status and thus -- if I'm understanding you, the PDs are his commitment lawyers and you're his medication lawyer?

MR. GOTTSTEIN: That's correct, Your Honor.

THE COURT: So I'm going to have the PDs participate -- require them to participate unless they balk, because I think that there's an overlap. So let's -- let's say that Mr. Gottstein says, due process trumps the 72-hour statutory provision and we should have a hearing next Tuesday, the 4th of November, is the State prepared to respond to that assertion now?

MS. DERRY: Your Honor, I would ask for it not to be on a Tuesday because then I have all of the other API cases in the afternoon and it's very difficult for me to find coverage.

However, the State's position on this is that if that's what the Court should find that it indeed -- that the due process does trump the 72 hours, that the hospital's position will be to continue to treat Mr. Bigley as they see medically appropriate following the typical standard of care which may include --

THE COURT: You're putting it in the wrong sequence.

MS. DERRY: I'm sorry?

THE COURT: Your position can't be whatever the

Court rules. Your position has to be, here's your position, and then I'm going to hear your position, I'm going to hear Mr. Bigley's position, and then I'm going to make a decision.

MS. DERRY: Okay. My position, Your Honor, is that the hospital would like to move forward as quickly as possible because our concern that Mr. Bigley's due process rights actually may be at risk because emergency medications may have to be continued after the 72 hours runs out on Wednesday morning, and so we would ask that we could move forward tomorrow.

THE COURT: Let's assume, just for purposes of my sort of thinking through these conflicting due process assertions, that I say the hearing takes place next Monday or next Wednesday.

MS. DERRY: Uh-huh.

THE COURT: I -- am I correct in assuming that the State will basically medicate Mr. Bigley to the extent that they think is medically appropriate and legally authorized under 838 between now and then?

MS. DERRY: If that is the -- what's absolutely necessary, Your Honor, because that has -- that is what occurred, is that in honor of this question about the stay and trying to work through the legal side of this but also to protect Mr. Bigley's health and mental illness, the

hospital has made it so that the emergency medication is absolutely the last resort when they feel they can't do anything else to protect him.

MR. GOTTSTEIN: Your Honor, in the past, API has administered medication pursuant to that 838 without the legal predicate being -- existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually -- what actually happened. So, I mean, it really puts me in a difficult position because, you know, they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.

THE COURT: I'm going to give you an opportunity to certainly gather the charts, to immediately inspect the charts, and to get physical copies of them in a short but reasonable period of time. Obviously there's a little bit of copying turnaround time, but you can certainly have access to what I assume will be the most relevant ones. The ones that are generated here in the last 24 hours, 72 hours, three weeks, are clearly more -- are likely to be more significant than the ones that were generated in January of '08, but you can have access to all of them.

And what the State does under 838 authority

is -- I'm not going to make any rulings in advance, because by definition there's at least the possibility that his medical state changes, and what might be appropriate yesterday may or may not be appropriate tomorrow, and I'm not going to do anything on the 838 thing yet. But is there a preference from the State's perspective over Monday or Wednesday?

MS. DERRY: One moment, Your Honor.

THE COURT: I'm going to -- Mr. Gottstein, the same to you. Is there a preference?

MR. GOTTSTEIN: Yes. I think I need to have it Wednesday because --

THE COURT: Okay. All right.

MS. DERRY: Wednesday is fine, Your Honor, if that's what Mr. Gottstein would prefer.

THE COURT: I'm going to grant Mr. Bigley's motion to cancel tomorrow's hearing. I'm going to set that up at API for Wednesday the 5th of November on the existing petition filed October 27th. Mr. Gottstein has -- shall be granted access to the charts immediately, and that's -- he will have access to them as they continue to be generated. I realize he can't stand there and watch them while they write things down, but as they are written, he needs to be -- as they are created, he gets pretty rapid access to them, as long as he's not

interfering with the physicians on the floor.

MS. DERRY: Uh-huh.

THE COURT: But he can get them within a matter of hours as they're generated. And I'll leave it to you, Mr. Gottstein, unless you want me to play some role. You are going to conduct some discovery, and I will leave it to you and the State to arrange that.

MR. GOTTSTEIN: Thank you, Your Honor. It does seem like I should say one other thing, which it concerns me to proceed in the face of the Supreme Court stay, and my --

THE COURT: Let me tell you my thoughts on that. I'm going to hold this hearing on Wednesday. I'm going to make a decision based on the now current medical world that Mr. Bigley finds himself in. If I deny the petition, I don't have to deal with the stay. If I grant the petition, I'm going to then hear from each side about what is the impact of the earlier stay, which I think is five months old, based on -- based on whatever happens five months ago, whether that stay has any legal impact on the current -- or on my granting of the petition, if that's in fact what I do. So we'll address the relationship of the old stay and any current medication or -- only after I grant the order.

And I've been thinking, let's -- I'm not making

any ruling, but obviously if I were to say, petition granted, I have two basic options. I either say the old stay trumps, or this order and the new facts situation trumps. If I do that, if I say the latter, that the new order supercedes the stay of an old order, because the old order is obsolete, if you will, then I'm likely to grant a very brief stay to allow Mr. Bigley, if he chooses, to go to the Supreme Court and say stay the new medication order. And that way the Supreme Court will have the benefit of a more current record and can decide what it wants to do with a new medication order, if that's in fact what I do. Okay?

So I'm saying that just so both sides can sort of know that's my thinking. I'm not ruling that way, but since this is all going to be happening relatively quickly, I think it's better for me to reveal my tentative thoughts so that you folks can inform me of any applicable facts, statutes, court rules, you know, constitutional provision that I should know about.

MS. DERRY: Yes, Your Honor.

MR. GOTTSTEIN: Thank you, Your Honor. That all seems very reasonable.

I -- one other thing that's actually written down, and it occurred to me, it seems to me that in light of this being a public proceeding, that really any hearing

should be held here, because it's not really possible for a public hearing to be held behind the locked doors at API.

THE COURT: As of now the hearing is going to take place at API. I'm not familiar with the -- his particular needs or the logistical ability of API. But as of now it's taking place at API. I will explore at least that possibility of having it done here. Obviously that would require him being transported over here. I'm not sure that's appropriate and/or necessary, but I'll let -- as of now, it's at API, and if you want to present to me additional facts between now and then as to why it should be here, I'll consider them.

THE CLERK: What time?

THE COURT: Oh, the hearing that was set for tomorrow was starting at 9:00 a.m. I'm going to, at least at this point, say the hearing on the 5th starts at 9:00 a.m. as well. I'm going to simply contact API, see if that works. I realize that there's a hearing room over there that is used occasionally for other purposes, so I need to see if that room is available. If it is not, then I'll do something else and I will also hold in abeyance and request that the hearing take place in the Nesbit courtroom building.

Is there anything else from the State?

MS. DERRY: No, Your Honor.

THE COURT: And Mr. Gottstein, from you?

MR. GOTTSTEIN: Your Honor, it does seem to me that the State should respond to the motion for a summary judgment. It seems to me I'm entitled to file one and entitled to have them respond.

THE COURT: The State --

MS. DERRY: Your Honor --

THE COURT: -- I mean, since you haven't seen the document, I'm not going to require you to make a motion as to the timing of your response, but let's do this. The State presumably will receive it in your -- I mean, in the attorney's hands here later on today.

MS. DERRY: Uh-huh.

THE COURT: So I would like a response from the State tomorrow at noon -- by noon as to when your response ought to be due.

MS. DERRY: When it's due -- yes, Your Honor.

THE COURT: Okay. And then I will let Mr. Gottstein reply briefly as to the due date, and I'll rule on the due date for the motion.

MS. DERRY: Yes, Your Honor.

THE COURT: Okay.

MR. GOTTSTEIN: Your Honor, it -- the attorney general's office tends to mail things to me even when

they're --

THE COURT: Both parties will hand-deliver pleadings to each other and file pleadings in chambers, and that means in the Superior Court, not at API, not in probate court. Superior Court. Upstairs in my chambers.

MS. DERRY: And I'm sorry. I missed that last part. You said to hand-deliver also to your chambers, Your Honor?

THE COURT: You need to -- both sides need to file any documents in chambers, and both sides need to hand-deliver documents -- or hand-deliver documents to the other parties.

MS. DERRY: Yes, Your Honor.

MR. GOTTSTEIN: Your Honor, is it permissible for us to file it probate and then --

THE COURT: You can file it probate --

MR. GOTTSTEIN: -- and provide a chambers copy?

THE COURT: That's fine. That's fine. But I want them in my hands, at least a copy, by any deadlines. Okay?

MR. GOTTSTEIN: And, Your Honor, one other thing. I was a little confused about the ruling on the motion to dismiss. Was that denied?

THE COURT: The motion to dismiss, the earlier petition is moot because the State pulled it.

MR. GOTTSTEIN: May I just resubmit it?

THE COURT: You can file whatever you want to file.

MR. GOTTSTEIN: Do you want me to file a new one? I mean it's -- the only -- I can file a new one, but it's -- the petition seems --

THE COURT: They're going to be exactly the same, right?

MR. GOTTSTEIN: There's one other point that I could probably add to it, which I --

THE COURT: You can -- I don't need to have you generate paper for the sake of me having paper. So if you want to file a piece of paper that's saying you're refiling the old motion and adding another paragraph, you know, that one-page document will suffice.

MR. GOTTSTEIN: Thank you, Your Honor.

THE COURT: Okay. Is there any questions at all?

MS. DERRY: No, Your Honor.

THE COURT: All right. Thank you. We'll be in recess.

MS. DERRY: Thank you.

(End of recording)

(10:15:03)

TRANSCRIBER'S CERTIFICATE

I, Deirdre J.F. Radcliffe, hereby certify that the foregoing pages numbered ____ through ____ are a true and accurate transcript of proceedings in Case No. 3AN-08-01252 PR, In the Matter of WB, transcribed by me from a copy of the electronic sound recording, to the best of my knowledge and ability.

_____ _____

Date Deirdre J.F. Radcliffe, Transcriber

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-08-01252 PR

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE WILLIAM MORSE

Pages 1 - 23, inclusive

November 3, 2008

8:47 a.m.

APPEARANCES:

For WB: James Gottstein, Esq.
For the State of Alaska: Laura Derry, Esq. (by telephone)

ANCHORAGE, ALASKA; MONDAY, NOVEMBER 3, 2008; 8:47 a.m.

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(8:47:35)

THE COURT: We're on record in 3AN-08-01252. Mr. Gottstein is in the courtroom.

Ms. Derry, you're on the phone?

MS. DERRY: Yes, Your Honor.

THE COURT: I set this on earlier this morning simply to issue rulings on various pending motions. There have been a flurry of filings, so I also want to use this opportunity to see if there are -- if I'm missing something. So -- and I just received a packet of documents filed five minutes ago from Mr. Gottstein.

There was an original petition filed on the 21st of October for commitment and medication, a second petition for medication on October 27th. There is a motion to dismiss the 838 petition, the commitment petition, which was filed on October 30th.

MR. GOTTSTEIN: Your Honor, may I clarify? Do you mind if I interrupt?

THE COURT: Go ahead.

MR. GOTTSTEIN: The motion to dismiss 838 count -- Your Honor, I think it's count -- the forced drugging petition really has two bases. One is the basis that was under reviewing Myers, and then the second one is

the police power emergency medication under AS 47.30.838, and so that's what that motion to dismiss 838 motion is about. It's still about the forced drugging petition.

THE COURT: The eight -- the motion to dismiss 838 is denied because I have issued an order committing him already, and the State's second motion to commit is, as far as I can tell, duplicative for an effort to perhaps extend the timing, and so he's committed.

MR. GOTTSTEIN: Your Honor --

THE COURT: The second petition is dismissed. The second petition by the State for commitment is moot, as far as I can tell.

MR. GOTTSTEIN: Your Honor, we're not -- none of this is about commitment. It's about forced drugging.

THE COURT: I appreciate that. But you filed a motion to dismiss the 838 petition.

MR. GOTTSTEIN: The 838 count, which is part one of two counts of the forced drugging petition, but has nothing to do with the commitment. It has to do with emergency --

THE COURT: The motion to dismiss is denied.

The motion for summary judgment, I have just received from Mr. Gottstein a reply to an opposition that I haven't seen yet. So I assume that the State filed an opposition to the motion for summary judgment?

MS. DERRY: Yes, Your Honor. I ran it over before the close of business on Friday.

THE COURT: All right. Did you file it in chambers?

MS. DERRY: Your Honor, I filed it in the probate and supplied a chambers copy.

THE COURT: All right. I haven't seen that, so I won't rule on it until I get the opposition, but it seems to me that it is highly unlikely that I'm going to grant a motion for summary judgment, because it seems to me that there's almost certainly a dispute over facts. But I haven't read the opposition yet, so I won't rule, but I will certainly rule here in the next -- shortly so that the parties know whether the hearing on the 5th is going forward.

I am denying the motion to hold the hearing at the courthouse. It will take place, at least the initial hearing -- on the assumption that it might be longer than one day, the first day is going to take place at API. I will review the request to have any subsequent hearings at the courthouse based on my observation of several things: Mr. Bigley's then current mental state and apparent ability to control himself and to -- and to minimize any risk to the public; and secondly, since I have not personally seen the API's new -- not so much the

room itself, but I haven't been into API in quite some time. I will review that request after I experience the entry process and the publicness, if you will, of the entire setting.

The motion for expedited consideration of the various motions concerning the depositions and discovery, the motion for expedited consideration is granted.

The motion for a protective order, to the extent that it asserts that there is no discovery permissible, is denied. Discovery is not only permissible implicitly by 825(b) and 839(d), but also the respondent has access to information by court order which, by virtue of AS 47.30.852 and 3 and probate rule 1(e) says that if a probate rule is not specific to a particular procedural issue, then the civil rules apply.

I think that the civil discovery rules are applicable, at least the concept of discovery is applicable. They may need to be modified to reflect the timing requirements that are unique to these proceedings. But nonetheless, there is a due process right to discovery of information that is going to be used against you in any hearing and particularly in one in which the requested remedy, the medication, the involuntary psychotropic medication, clearly requires that sort of disclosure of information.

And the motion to quash the deposition notices is denied with one caveat. And I think that this has actually been corrected or there is a reference in the Ron Adler notice of a 9:00 p.m. time, and then I saw in some of the filings this morning that that was conceded to be a typographic error. The State has not requested me to change the specific timing of any deposition. I will require the parties to coordinate the, I believe, three depositions to accommodate, to the extent that is reasonable, the three deponents.

And I don't know what the 9:00 p.m. Adler deposition actually was intended to be. 9:00 p.m. might not be reasonable, although the reason I'm hedging is that I don't know what the shift schedules are of those three individuals. I assume that the State's attorney normally doesn't work at 9:00 p.m.

Have the two of you been able to rearrange deposition times? Mr. Gottstein.

MR. GOTTSTEIN: Your Honor, I think we have an understanding that if the Court denies the motion to quash, that we would hold Mr. Adler's deposition tomorrow, and it was meant to be 9:00 a.m., not 9:00 p.m., but --

THE COURT: That's fine. And that's supposed to be on the 4th of November?

MR. GOTTSTEIN: Correct.

THE COURT: And Ms. Derry, are there any -- does that resolve the scheduling problems of the three depositions?

MS. DERRY: I'll -- it definitely resolves Mr. Adler's problem as long as -- he's down on the Kenai Peninsula today, Your Honor, and so I won't be able to speak to him, but I think that that will work for Ron, for Mr. Adler, and I think that Mr. Gottstein and I can -- if there are any other scheduling problems, can meet to discuss that.

THE COURT: All right. Purely for scheduling purposes, if I'm recalling, we're to begin at -- is it 9:00 a.m. Wednesday morning?

MS. DERRY: Yes, Your Honor.

THE COURT: And the State has filed a lengthy witness list. As a practical matter, how long do you think the State's case-in-chief, setting aside cross-examination, will last?

MS. DERRY: If I feel like I need to call most of those witnesses, Your Honor, it would definitely take a day.

THE COURT: And that's direct only, without cross?

MS. DERRY: Yes.

THE COURT: Mr. Gottstein, I appreciate that

this depends on what the State presents, but do you know now whether you will have a direct testimony case-in-chief? I appreciate you will have cross-examination, but do you think you will have your own affirmative, direct testimony?

MR. GOTTSTEIN: Yes, Your Honor. And I did file a witness list, a preliminary witness list on Friday --

THE COURT: Maybe you have.

MR. GOTTSTEIN: -- and I assume you've got it somewhere.

THE COURT: It's somewhere.

MR. GOTTSTEIN: I've got it somewhere too. Yeah, you know, I think we might assume a day too. I filed a lot of testimony, actually, in writing, written testimony, and using that, I think can shorten things, but I think still it will be a day.

THE COURT: Some of that testimony -- I mean, I know that there's a packet that just showed up today that includes affidavits and some articles and a variety of other things, and some prior testimony in prior cases. So the State's going to have to sort of go through that and raise whatever objections it wants. But at this point, if we do go Wednesday and we need at least an additional day, it's my understanding that Thursday is the normal day for -- or Tuesdays and Thursdays are normal days for

API hearings?

MS. DERRY: No. Your Honor, it's Tuesday afternoon and Friday afternoon.

THE COURT: All right. So would the parties be ready to go Thursday in the day?

MS. DERRY: Yes, Your Honor.

MR. GOTTSTEIN: Yes, Your Honor.

THE COURT: I'll have to look and see what exactly -- I don't remember whether I have this trial that's about to start scheduled for Thursday or whether I have something else. But obviously this case has time requirements that will likely trump anything else. We'll assume at that point that we're going both Wednesday and Thursday. I will give you information to the contrary as soon as I receive it, if I do receive it.

MS. DERRY: And Your Honor, my -- I would like to ask that the Court keep the hearing on Wednesday and Thursday, if we go into that, to the four issues at hand that Mr. Gottstein has brought up and that are clear in both the statute and under Myers and Weatherhorn, that the issues are whether or not the patient refused -- whether or not the patient is capable of informed consent and whether or not the medicating is within the best interest and the less restrictive alternative to protect the patient.

And if we could agree that those are the issues and not the extraneous issue of whether -- of the controversial issue of whether or not medications are appropriate or the other things been adjudicated that are going to appeal now. If we can stick to the four issues that are actually at hand of whether or not we can care for Mr. Bigley, then this hearing -- my witness list would become markedly shorter, Your Honor.

THE COURT: I assume that we will be delineating those four issues. Are there other issues?

MS. DERRY: It's -- the way that I'm reading the multiple --

THE COURT: Let me -- let Mr. Gottstein speak, because he'll tell us what the issues are beyond those four.

MS. DERRY: Yes, Your Honor.

THE COURT: If any.

MR. GOTTSTEIN: Your Honor, as an initial matter, I note that the harm of the drugs and the relative lack or -- lack of benefit or effectiveness, of course, is an extremely important part of the best interests finding. Okay. So -- but that's with respect to what I'm calling the parens patriae account. With respect to the police power account that they've also asserted under 47.30.838, there's a lot of issues about that, whether or not they're

entitled to -- entitled to an order, and there's been no reported decision on that statute, and so I think we'll have to sort out exactly what the requirements of that -- that statute are.

THE COURT: I'm not sure I understand what you're saying.

MR. GOTTSTEIN: Excuse me?

THE COURT: I'm not sure I understand what you are...

Okay. Maybe I misunderstood something when I was referring to the 838. The 838 is the provision regarding emergency psychotropic -- the administration of emergency medication. Can I assume that at least going -- that the State simply wants to proceed on its 839?

MS. DERRY: Yes, Your Honor. What's happening is that because Mr. Bigley has been committed, the hospital is doing everything they can to help him, and because of his condition, he is so severely psychotic that he requires a tremendous amount of care and another option would be to actually strap him down and restrain him on a bed, and that is absolutely something that the hospital is unwilling to do because Mr. Bigley isn't capable of informed consent and he's not capable of rationalizing things.

The hospital actually sees that as a form of

torture, something from a horror movie from the 1950s, and that's the position that we're in right now, Your Honor, and we're asking that this can move forward and that we can look to just simply sticking to what the statute says, rather than bringing up the extraneous constitutional issues that are really controversial and up in the air. And Mr. Gottstein --

THE COURT: Ms. Derry, the question was, are you proceeding under 838 and seeking emergency powers, which would seem to be unnecessary if I granted your 839 petition?

MS. DERRY: Oh, no, Your Honor, I'm not seeking -- the 838 motion, that's strictly Mr. Gottstein. I have -- I have to seek an 839 petition because the hospital is having to emergency medicate.

THE COURT: Are you asking me to do anything under 838 or to somehow ratify whatever emergency medication API is administering?

MS. DERRY: Your Honor, what's -- no. I'm asking whether or not -- I'm asking to move forward on the medications petition under 839, which is required by 838 --

THE COURT: That's fine.

MS. DERRY: -- because --

THE COURT: So now let's assume I either -- I

have two options. I deny the 839 petition, in which case Mr. Gottstein, are you then seeking some additional request under -- that would restrict API's 838 authority?

MR. GOTTSTEIN: Your Honor, I think there's some confusion. There's certainly some confusion in my mind. If you look at the petition, forced drugging petition, there's two checked boxes, checked, one under the 838 ground -- but they're both made under AS 47.30.839. And one is if the patient is incapable of giving or withholding informed consent, and it seems that's what Ms. Derry is speaking about.

There's another one that says if the hospital seeks authority to administer emergency medications for longer than a certain period of time, it has to get court approval to do so. And so that's also under -- that application is made under 47.30.839, but the standards applicable to that are under AS 47.30.838, and that's why I called it the 838 count.

THE COURT: Let me look at 839 again.

839(a) allows API to seek court approval of the administration of psychotropic medication in one of two circumstances: Either that there will be repeated crisis situations that would nominally authorize API on its own to issue emergency medication, or if they want to use the psychotropic medication in a noncrisis situation and he's

incapable of giving informed consent, the State -- correct me if I'm wrong -- the State clearly is seeking that second authority, that there is a noncrisis situation and he's not capable of giving informed consent. That at least in the first instance that's true, right?

MS. DERRY: Yes, Your Honor. But also we're referring -- what we're required to do under 838(c) is that because they aren't continually medicating Mr. Bigley in a noncrisis situation, they're having to wait for him to go into a crisis, and then if they can't use any other form of treatment in order to help him get calmed down and to ensure the safety of the other people, the other patients at API, they've had to now, since this has gone longer than 72 hours without making a decision, they are required under Section C of 838 to seek this court order, because it says that they can't administer psychotropic medications during no more than three crisis periods without the patient's informed consent, only with Court approval.

THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria. Doesn't that moot out the 838 -- the 839(a)(1) petition?

MS. DERRY: Yes, Your Honor. It's -- my

understanding is that the hospital has done what's necessary. They were adhering to the statute and requesting a medications petition within the appropriate amount of time under 838, which says that they couldn't medicate without appropriate court order after the three crisis periods, but they also were required to do anything it takes in order to protect Mr. Bigley as well as the other patients at the hospital, and because of that, they have continued to emergency medicate if that is the last resort without causing any harm to Mr. Bigley who has done several things that are definitely disconcerting and have caused his primary treating psychiatrist to be very, very concerned about his well-being. And so the hospital has --

THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) in the first instance and present only the information it thinks is necessary there? If I grant that petition, then any need for 839(a)(1) authorization is moot?

MS. DERRY: Yes. I believe that, Your Honor.

THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority. Is that fair from the State's perspective?

MS. DERRY: It is. It also -- Your Honor, between the two, of 839 (1) or (2), that's basically what the hospital is having to do right now, that whether they're --

THE COURT: But I'm talking about your comment that you want to somehow restrict the evidence.

MS. DERRY: Yes, Your Honor. I want to simply stick to the statute which is saying that we are asking the Court to grant us the ability to treat Mr. Bigley within the appropriate standard of care as seen all across the United States and --

THE COURT: That's fine rhetoric, but you don't get to say -- all I'm trying to figure out is how we focus your presentation so that we deal with one set of evidence rather than all sets of evidence, because that's what you're asking for.

MS. DERRY: Yes.

THE COURT: So if you proceed under the 839(a)(2) criteria, that's a smaller set of evidence, according to you, right?

MS. DERRY: Yes.

THE COURT: Okay. And then if I grant that petition, it moots out the necessity for the broader set of testimony?

MS. DERRY: Yes, Your Honor.

THE COURT: Okay. Now, Mr. Gottstein gets to make whatever constitutional arguments he wants under whatever theory the State chooses to pursue first. So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --

THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?

MR. GOTTSTEIN: Yes, Your Honor. May I --

THE COURT: Okay.

MR. GOTTSTEIN: May I just say one other thing about that. And, you know, in a lot of ways what you're suggesting, you know, I could say that that really benefits my client because the State is going to run out of its authorization to use the police power authorization

to emergency drug him during -- you know, during that pendency because the statute gives them three -- basically three 72-hour periods, and if they don't have a court order at the end of three 72-hour crisis periods, they can no longer do it. So I think that actually their petition makes sense in that regard, and I'm perfectly fine to limit it to the 839 -- you know, just the 839 -- what is it?

THE COURT: (A)(2)

MR. GOTTSTEIN: (A)(2). You know, if that's the ruling and we're going to limit it to that, I'm very -- I'm very happy with that.

THE COURT: Okay. We're both in agreement. We're going -- we'll go with -- the State will present what it thinks is necessary under 839(a)(2). If I grant the petition, then I have to deal with the subsequent question of what do I do with the Supreme Court stay in effect in May in a different case with a different set of facts. Not a different set of facts, but a set of facts that ended in May.

And one of the things that I am going to want the State to tell me is where Mr. Bigley has been or when he has been at API, if at all, since May '08. And the reason I want that is I want the Supreme Court, if I grant any of the State's requests and authorize medication, I'm

going to have to deal with the issue of the prior stay. And if I rule that the prior stay is, in essence, obsolete and overridden by subsequent events, I'm going to give Mr. Bigley, Mr. Gottstein an opportunity to go to the Supreme Court and petition for a stay of that authorization order.

And I want the Supreme Court to have in this record a history of when he's been -- at a minimum, when he's been at API, if at all, since the first authorization order and the first stay.

MS. DERRY: Yes, Your Honor.

THE COURT: Is there anything else?

MR. GOTTSTEIN: Your Honor, may I have an idea of how much time I might have to prepare for an 838 hearing if we end up going to that?

MS. DERRY: Your Honor, Mr. Gottstein is arguing that we're running out of time, and what's happening is that we're actually being forced to deviate from the statute as well as deviate from protecting Mr. Bigley's due process because this case continues to be delayed because of Mr. Gottstein --

THE COURT: This case is going to be done, if not Thursday, then shortly after Thursday, at least from the Superior Court's perspective. I'm going to issue an order in the first instance on the 839(a)(2) petition, and

if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second type of authorization. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.

MR. GOTTSTEIN: Your Honor, I think I'll probably just continue preparation.

MS. DERRY: I'm sorry. I didn't hear you, Mr. Gottstein.

THE COURT: He's going to continue preparation. That doesn't surprise me, given the several hundred pages of documents that have shown up already. But I'm not being -- I'm not being -- I expected that. I'm not being sarcastic.

At any rate, is there anything else out there that -- any motion that someone thinks has been filed that I haven't now dealt with, other than the motion for summary judgment?

MS. DERRY: I also had a motion for the protective orders to protect the people that Mr. Gottstein is going to depose from him issuing anything on his Web

site or making them look bad.

THE COURT: Is there any -- I'm not -- if you filed a response to that, I just haven't had a chance to read it.

So is there an objection to me issuing an order that says that the depositions and the paperwork generated in this case cannot be disseminated to the -- to the public outside of the courtroom setting?

MR. GOTTSTEIN: Yes, Your Honor. I do object to that. And I have filed a response to that. And what I -- what I proposed to Ms. Derry was that -- first off, her request is with respect to depositions. And what I said, that I'll hold those confidential for a week, and that she can then make an application under Civil Rule 26 -- I think it's C -- for a protective order. At that point we'll know actually what the testimony is and the judge -- and Your Honor will have a factual basis to make a determination whether or not a protective order is warranted.

THE COURT: Is there any objection to me issuing a protective order that says, no deposition, no materials can be disseminated to any member of the public except in open court at least until November 12th, and then once we actually identify what all that information is, we'll fine-tune the protective order? State opposed to that?

MS. DERRY: No, Your Honor.
THE COURT: All right. That's the order.
Anything else?
MS. DERRY: Not from the State, Your Honor.
THE COURT: Thank you.
(End of recording)
(9:19:26)

TRANSCRIBER'S CERTIFICATE

I, Deirdre J.F. Radcliffe, hereby certify that the foregoing pages numbered ____ through ____ are a true and accurate transcript of proceedings in Case No. 3AN-08-01252 PR, In the Matter of WB, transcribed by me from a copy of the electronic sound recording, to the best of my knowledge and ability.

_____ _____

Date Deirdre J.F. Radcliffe, Transcriber

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-08-1252 PR

MOTION FOR CLARIFICATION OF ORDER

The State of Alaska, Alaska Psychiatric Institute ("API"), by and through the Office of the Attorney General, hereby moves for clarification of this Court's order of November 25, 2008 ("the order"), granting the administration of court-ordered medication and 90-day commitment for Respondent William S. Bigley ("Mr. Bigley"). Specifically, given the conclusions reached in the order regarding Mr. Bigley's mental health status, Mr. Bigley's continued instability and commitment at API, and the stay in place for this order, API respectfully requests that this Court clarify the order to allow for the administration of emergency medication under the guidelines of AS 47.30.838.

In his continued commitment at API, Mr. Bigley has not yet stabilized. As noted in the attached affidavits from his treating physician, Dr. Kahnaz Khari, and the Interim Medical Director of API, Dr. Jenny Love, Mr. Bigley exhibits at times self-harming behaviors or violent tendencies.[1] When Mr. Bigley exhibits such behaviors, the medical staff at API may evaluate him and determine that the administration of emergency medication is medically appropriate to prevent significant physical harm to Mr. Bigley or to others. Generally, emergency medication is the standard of care in emergency psychiatric situations.[2] Thus far in Mr. Bigley's most-recent commitment,

[1] *See* Affidavit of Dr. Kahnaz Khari ("Khari Affidavit"), attached at Exhibit 1, and Affidavit of Dr. Jenny Love ("Love Affidavit"), attached at Exhibit 2.

[2] *See* Love Affidavit.

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recent commitment, emergency medication has been administered three times.[3] Under AS 47.30.838(c), API's staff may administer emergency medication no more than three times without court approval under AS 47.30.839. API filed for and was granted approval for the administration of medication by order of this Court on November 25, 2008. Due to the stay also issued in the order, however, API may not administer this medication to him until December 17, 2008. As a result of the stay and the statutory limits on emergency medication, API is unable to administer either the medication ordered by this Court or further dosages of emergency medication should Mr. Bigley become a danger to himself or others.

As noted in the order, if Mr. Bigley "...were released from API without having first been stabilized with psychotropic medication, he would not be able to care for himself." Mr. Bigley has not yet achieved a level of stability that would allow for release from API, and has exhibited a variety of psychotic behaviors.[4] Given Mr. Bigley's current commitment to API, and this Court's own conclusion that without stabilization, he would be unable to care for himself outside of API, API requests clarification of the order to allow for the administration of emergency medication if a crisis period should arise. Such a clarification would allow API to keep Mr. Bigley within the safety of the facility, and would further ensure the safety of Mr. Bigley and others within the hospital. Without such a clarification, API may be left with no choice but to release Mr. Bigley from the hospital, as it cannot continue to house a patient who presents a danger to himself or to others with no appropriate method of treating that patient. At this point, releasing Mr. Bigley would be detrimental to the patient and in opposition to the opinions expressed in the order. As such, API requests that this Court

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3 *See* Khari Affidavit.

4 *See* Khari Affidavit.

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clarify the order so as to allow the continued administration of emergency medication as necessary and appropriate under AS 47.30.838.

DATED: 12/3/08

TALIS J. COLBERG
ATTORNEY GENERAL

By: Erin A. Pohland
Erin A. Pohland
Assistant Attorney General
Alaska Bar No. NA14009

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IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

IN THE MATTER OF THE NECESSITY)
FOR THE HOSPITALIZATION OF)
WILLIAM S. BIGLEY,)
)
Respondent.)
)
Case No. 3AN-08-1252 PR

DEPOSITION OF RON ADLER

Tuesday, November 4, 2008
9:00 a.m.

Taken by Counsel for William S. Bigley
at
The Offices of Law Project for
Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska

A-P-P-E-A-R-A-N-C-E-S

For William S. Bigley:
James B. Gottstein
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406 G Street, Suite 206
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For The State of Alaska:
Laura Derry
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Court Reporter:
Sonja L. Reeves, RPR
PACIFIC RIM REPORTING
711 M Street, Suite 4
Anchorage, Alaska 99501

I-N-D-E-X

ANCHORAGE, ALASKA; NOVEMBER 4, 2008
9:00 A.M.
-o0o-
RON ADLER,
deponent herein, being sworn on oath,
was examined and testified as follows:

MS. POHLAND: The state would like to make an objection. The state does not believe that discovery is permissible in this matter.

The state will be filing a motion for reconsideration on its motion to quash, and, additionally, file a motion for protective order to keep these deposition transcripts confidential.

The state also believes that notice was improper in these depositions.

EXAMINATION

BY MR. GOTTSTEIN:

Q. I noticed you gave me -- first off, have you ever had your deposition taken before?

A. With you, no.

Q. Does that mean you have otherwise? So you know what a deposition is all about?

A. Yes.

MR. GOTTSTEIN: And then before we get going, will you accept subpoenas for API employees at this point?

MS. DERRY: No, it's not the practice of the human services department, the division.

MR. GOTTSTEIN: So that's a no.

BY MR. GOTTSTEIN:

Q. And you handed me, Mr. Adler, a copy of -- is this your resume?

A. Yes, sir.

MR. GOTTSTEIN: Could we mark this as Exhibit A?

(Exhibit A marked.)

Q. You were also ordered to bring a copy of the training materials relating to emergency drugging, weren't you?

A. I don't understand. I don't know what the word "emergency drugging" means.

Do you want to refer to these questions per the statute and the law?

Q. Sure. This is a copy of the subpoena that was served on you, wasn't it?

A. Uh-huh.

Q. And on the other side, this was an attachment to it?

A. Uh-huh.

MR. GOTTSTEIN: Could we mark this as

Exhibit B?
(Exhibit B marked.)
Q. So what it is is basically paragraph two here.
MS. DERRY: I object to the subpoena demand because it was not timely noticed. Mr. Adler wouldn't have had time to prepare that amazing amount of documents from January 1st, 2007 to date, and then saying that in September 2007 the policy may have changed.
And Mr. Adler isn't responsible for creating any discovery for you. Because of the timeliness of the notice, he wasn't able to prepare those documents for you.
BY MR. GOTTSTEIN:
Q. Do you understand what question two was asking for, or what item two, I guess, was asking for?
A. It's my understanding that you already have these.
Q. No, I don't have them. I mean, if I do, I don't know that I do. So can you -- can you provide those to me within the next day or so?
A. I will be glad to provide them to our legal counsel who can then make arrangements to have them delivered to you.
Q. All right. Well --

MS. POHLAND: The notice has to be proper. The request has to be proper. If you would like to file a document request or a request for production, the state would be happy to reply as it sees fit, whether it be objection or through the proper documentation.
MR. GOTTSTEIN: Well, luckily, we're not holding a hearing on this tomorrow, so we have a little time, but you can take your reason for not complying with the subpoena to the judge.
BY MR. GOTTSTEIN:
Q. Okay. So who does training in emergency drugging procedures? Do you have anybody that does training?
MS. DERRY: Objection; relevance. I'm also going to make a second objection that Mr. Adler has asked you to refer to the administration of emergency medications as per the statute and to not continue to call them "forced drugging".
MR. GOTTSTEIN: Objection noted.
BY MR. GOTTSTEIN:
Q. Do you have someone who trains your personnel on drugging under AS 47.38.38?
A. Yes.
Q. Who is that?
A. In the past, it has been our -- a combination of our medical director and the assistant attorney general

from the Alaska Department of Law who is assigned to API.
Q. Can you give me the names of those people from January 1st, 2007 to date?
MS. POHLAND: Can I make a continuing objection as to relevance? I'm not sure what the drugging under 838 has to do with the hearing at hand, which is for court-ordered medication.
MR. GOTTSTEIN: You can have a continuing objection.
A. Previously, it was Dr. R. Dwayne Hobson, who is no longer with the hospital. And I would have to go back and research who the assistant attorney general was who was providing us consultation on this.
I just -- I have to go back and look at our medical staff minutes.
Q. Does Elizabeth Russo, Tim Twomey and now Ms. Derry sound right?
A. Pardon me?
Q. Was Elizabeth Russo doing it initially?
A. I have to go back and read -- I don't attend every medical staff meeting, so I would have to go back and read the minutes.
Q. So can you provide that to me?
A. I will provide anything you request through our

attorneys.
Q. All right. Well, this deposition is for you to do that. Now, my understanding is that the policy changed sometime after September of 2007; is that correct?
A. Again, I don't have all of the dates and timelines. I would have to research that.
Q. Okay. Well, what I'm looking for is just kind of a chronology or at least something that will let me understand the policy and how people were getting trained in it before September of 2007, and then I understand that policy changed after 2007.
MS. POHLAND: Object to form. Objection; asked and answered.
Q. I'm trying to explain what I'm looking for. Okay.
And then how that -- as I understand that, it did change after September of 2007, and then so what I want is what the policy was before that.
And then, you know, I actually do have -- excuse me. I have an old one. I have one from when I was on the mental health board from -- when was it I got off the board? In 2003 or something like that.
You know, maybe that was the one before 2007. I don't know. Although, frankly, I didn't see one.

MR. GOTTSTEIN: Can we go off record for a minute?

(There was a short break.)

Q. Sorry about the delay. We have got Exhibits A and B, right? I'm going to show you a copy of what looks like the table of contents of your policies and procedures; is that right?

A. Uh-huh.

Q. I'm not going to hold you -- I mean, that's just -- I mean, that's what I had.

MR. GOTTSTEIN: So could we mark this as Exhibit C?

(Exhibit C marked.)

A. Just for the record, can I read that once again?

Q. It's out of date.

A. Yeah. I just wanted to make sure that it's noted in this hearing that this is probably very much out of date.

Q. That's why I didn't -- you know, when you said you thought I had them, I didn't think I did, but this is what I have.

A. Okay.

Q. What I did then is go through and find really -- could you identify that?

MS. DERRY: I object to this. This is

dangerous testimony because this is so out of date. This one is dated effective 8/17/2000.

And we do know that the policy not only has changed, but also since the statute has changed since the Myers and Weatherhorn cases that any testimony that Mr. Adler gives on this could be conceived as something that isn't actually going to prove any of the substance of what's at hand in the case.

MR. GOTTSTEIN: This was --

MS. DERRY: Can we move on away from the old policy manuals?

BY MR. GOTTSTEIN:

Q. Does this look like a copy of the policy, what date, like, was it 2000?

A. Jim, you and I know each other. Why are you giving me Title 12 stuff when we're talking about a Title 47 hearing?

Q. Here is what I did --

A. I mean --

Q. I'm just trying to -- here is what I did is I looked through the --

A. Are there things substantial that you want to get to that we can just go right to the --

Q. I'm trying to. All I'm saying is that this is the only thing that I identified on emergency medication

in this policy, so what I'm looking for is the current policies as they existed.

A. We will get that to you.

MR. GOTTSTEIN: So let's mark this as Exhibit D.

(Exhibit D marked.)

BY MR. GOTTSTEIN:

Q. Now, what's the current daily rate that gets charged out for patients at API?

MS. POHLAND: Objection; relevance.

A. I don't know.

Q. Who would know?

A. I would have to look that up.

Q. Could you get that to me?

A. Do you want the Medicaid rate? You have to be clearer, Jim.

Do you want our established Medicaid rate or do you want the cost because you know that we're an IMD and we don't bill for the population 22 through 65, so, once again, this doesn't have any relevance to the --

Q. I don't understand. 22 through 65, what is that?

A. Well, we are classified as an Institution for Mental Disease, and as an IMD, we have a certain exclusion according to CMS.

And we are --

Q. Could you say what "CMS" means?

A. The Center for Medical Services. It's a branch of the United States Government.

And we're not allowed to bill for Medicaid patients between the ages of 21 and 65, so --

Q. But my understanding is that there is a daily rate?

A. Yes.

Q. And that's what I'm asking for.

A. Okay.

Q. And that -- my understanding is that actually patients get a bill and then you, of course, don't collect on most of them, but don't you actually send out bills?

A. Once again, we are required by law to make a good faith effort to make a collection.

Q. So that's the rate we're talking about?

A. On that rate, yes.

Q. So that's just what I'm looking for.

A. I can tell you it is approximately $1,018, and that is approximate, Mr. Gottstein.

Q. And my last question is, you know, I made a number of attempts to try and sit down and talk to you about working things out with respect to Mr. Bigley.

And I am just wondering why you never agreed to

do that.
MS. POHLAND: Objection to form. Objection; relevance.
MS. DERRY: Don't answer that question. Do not answer that question.
MS. POHLAND: We object based on privilege as well.
THE WITNESS: Can we go off the record so that I may meet with my legal counsel?
MR. GOTTSTEIN: Absolutely.
(There was a short break.)
BY MR. GOTTSTEIN:
Q. The last -- do you have anything else you want to add?
A. No.
MR. GOTTSTEIN: No further questions.
EXAMINATION
BY MS. DERRY:
Q. Mr. Adler, do you have anything to do with whether or not Bill Bigley gets medicated?
A. No.
MS. DERRY: No further questions.
MS. POHLAND: At this time, the State of Alaska would like to move to strike the deposition testimony as irrelevant as pertains to the hearing which

is taking place tomorrow, which is exclusively on the subject matter of court-ordered medication for Mr. Bigley.
MR. GOTTSTEIN: You can take it up with the judge.
(Proceedings concluded at 9:25 a.m.)
(Signature reserved.)
-o0o-

CERTIFICATE

I, SONJA L. REEVES, Registered Professional Reporter and Notary Public in and for the State of Alaska, do hereby certify that the witness in the foregoing proceedings was duly sworn; that the proceedings were then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed by computer transcription; that the foregoing is a true record of the testimony and proceedings taken at that time; and that I am not a party to nor have I any interest in the outcome of the action herein contained.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 4th day of November 2008.

_____
SONJA L. REEVES, RPR
My Commission Expires 8/7/11

WITNESS CERTIFICATE
RE: IN THE MATTER OF THE NECESSITY FOR THE HOSPITALIZATION OF WILLIAM S. BIGLEY
CASE NO. 3AN-08-1252 PR
DEPOSITION OF: RON ADLER
DATE TAKEN: NOVEMBER 4, 2008
I hereby certify that I have read the foregoing deposition and accept it as true and correct, with the following exceptions:

Page	Line	Description/Reason for Change
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SIGNATURE DATE

Please sign your name and date it on the above line. As needed, use additional paper to note corrections, dating and signing each page.
(SLR)

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

IN THE MATTER OF THE NECESSITY)
FOR THE HOSPITALIZATION OF)
WILLIAM S. BIGLEY,)
)
Respondent.)
)
Case No. 3AN-08-1252 PR

DEPOSITION OF KAHNAZ KHARI, M.D.

Tuesday, November 4, 2008
10:00 a.m.

Taken by Counsel for William S. Bigley
at
The Offices of Law Project for
Psychiatric Rights
406 G Street, Suite 206
Anchorage, Alaska

A-P-P-E-A-R-A-N-C-E-S

For William S. Bigley:
James B. Gottstein
LAW PROJECT FOR PSYCHIATRIC RIGHTS
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686

For The State of Alaska:
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Attorney General's Office
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Anchorage, Alaska 99501
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Court Reporter:
Sonja L. Reeves, RPR
PACIFIC RIM REPORTING
711 M Street, Suite 4
Anchorage, Alaska 99501

I-N-D-E-X

ANCHORAGE, ALASKA; NOVEMBER 4, 2008
10:00 A.M.
-o0o-
KAHNAZ KHARI,
deponent herein, being sworn on oath,
was examined and testified as follows:

MS. POHLAND: The state would like to object that discovery is taking place. We believe discovery is impermissible under the statute, and that, furthermore, notice was improper for these depositions.

The state is going to be filing a motion for reconsideration on its motions to quash, and the state will also be filing an additional protective order to maintain the confidentiality of these deposition transcripts.

EXAMINATION

BY MR. GOTTSTEIN:

Q. What's your name?

A. Kahnaz Khari.

Q. I'm going to give you a copy of the subpoena. Does that look familiar?

A. Yes, it does.

Q. And then the back side had this attached to it.

A. Yes, I do.

MR. GOTTSTEIN: Could we mark that as

EXHIBIT A.

(Exhibit A marked.)

Q. It listed a number of things for you to bring. Did you bring any of those?

A. The only thing that I thought that is appropriate to bring was my resume and my board certification, and my resume is not the most update.

It's the one that I wrote two years ago, but very much everything is the same. And my board certification is the most recent one.

Q. Okay. But you have been employed at API since then, right; is that correct?

A. Yes.

MR. GOTTSTEIN: Could we mark that as B, I guess?

(Exhibit B marked.)

Q. And then the third thing is -- the second thing is a chart, but API provided me a copy of that, so that's fine.

Then the third one, so you don't have -- you didn't bring a report, right?

A. No, I did not.

Q. Have you ever had your deposition taken before?

A. No. I don't recall. I think this may be my first deposition.

Q. Do you know what it's for? I should have started that out --
A. No. If you would educate me, that would be great.
Q. Of course, you filed, or API has filed a petition to give the respondent drugs against his wishes, and so I'm his attorney.
This part is what's called discovery, which Ms. Pohland doesn't think that I'm entitled to do, but in any event, the idea is for me to get a chance to find out what -- well, you know, what your version of the facts are, let us say, in order to allow me to prepare.
So this is -- it's like testimony in court, except that, you know, the idea is that we will kind of hone things down so we don't have to take that much time with everybody in the courtroom, so that's the way I would describe it.
You filed a petition -- I think -- did you sign the petition?
A. Yes.
Q. So did you consider -- do you know about the Myers case?
A. To some level. To some level, but if you want to review it, that would be great.
Q. So I guess my question is what factors under

Myers did you consider before filing the petition?
MS. POHLAND: Objection. The deponent has already stated that she is not that familiar with the case.
Can you rephrase the question, please? She is not an attorney.
Q. Are you unfamiliar with the Myers' requirements?
A. As I said, I am familiar to the superficial level, so in order for me to answer that question, probably I would ask you to review in the summary of a few statements then I would be more comfortable.
Q. Have you ever consulted -- I'm not asking about any content, but have you ever consulted with anybody at the attorney general's office about the requirements of Myers?
A. Actually, I should be honest, API is very good at it, continuously updates us with some of these cases.
But for me, I need to recall it again, review it and make sure my understanding is exactly what API educated me about.
Q. What did they educate you about --
A. As I said --
Q. -- with respect to --
A. It had to do -- the case had to do with that individual, with Myers, who has taken medication against

his wishes and he did not want that and that went to the court.
Q. What medications are you -- medication or medications are you seeking authorization to use to administer to the respondent, Mr. Bigley, under that petition, not counting the emergency medications, just the regular ones?
A. I think it's still early. I still would like to see if I could bring it up to discuss it, even though Bill or Mr. Bigley is in a state that cannot make a rational thinking, but I would like to bring it up before I start any medication to give him a chance and discuss a few options that I have in mind, and then to finalize my decision.
Q. So at this point, you don't really know what medication you are going to ask the court to authorize?
A. No, I'm not saying that. I am considering both, more favoring towards the typical antipsychotic, the new antipsychotic medication, which is newer, but, again, I would like to give that opportunity to Mr. Bigley and then give him a few options of the old antipsychotic medication versus new antipsychotic medication.
And I am favoring more towards new antipsychotic medication because the record has indicated some sensitivity to the older antipsychotic medication.

Q. Here is my problem is that under Myers, and your lawyers may disagree with you, that -- or with me, I should say, that you need to seek specific authorization to administer specific drugs against his wishes with specific doses, and so -- and I'm trying to find out what you're going to ask the court tomorrow.
What I understand is that you don't really know at this point?
A. No, I do know. As I said, to be specific, at this point, I am focusing more on Risperidone, or second choice is probably I go to Zyprexa.
And the main part of it is sticking more with Risperidone versus Zyprexa is because Mr. Bigley has a long-standing medication noncompliance, and the Risperidone comes in the long-acting form, which he could receive some injection form, could say more stable and then helps him be more compliant.
So in that aspect, as I said, probably that is what I'm focusing on, but just like any of my other patients, I like to give them that opportunity to discuss it with them to see if they could give a rational thought and give me choices that is more favorable to them versus what I recommend to them.
Q. Would Risperidone be basically the same as what you were asking for in May?

A. I believe so, but I have to look at that record, but high probability it was Risperidone.
Q. That dosages and stuff?
A. Well, dosages probably would be the same. However, the long-acting form is very fixed. You start with 25 milligrams. The next one is 37 and a half, and then 50 milligram every two weeks.
Just like any other patient, I try to start low dose. Even though he has been exposed to that medication in the past, still I like to go very safe, very conservative, low dose, and then gradually increase it based on how he responds to the first initial dose.
Q. What side effects would you consider in making that decision?
A. Well, overall with the newer antipsychotic medication, I would disclose to the patient that they have lower possibility of tardive dyskinesia and EPS that they have faced with older antipsychotic medication, and this is the side effect, the TD.
I haven't seen it, but his old chart indicated that he may have shown or he has shown some sensitivity, so keeping that in mind that they have a lower risk, the possibility is a lot lower.
But the side effect of Risperidone specifically would be weight gain, which in this case for Mr. Bigley

probably would be beneficial; some sedation, which, again, giving it perhaps it improves his sleep. And I said about weight gain.
Hypertension, some mild headache and hyperprolactinemia. Those are some of the main significant side effects that I would be concerned and I would be monitoring very closely.
And if Bill has the threshold to listen and be able to rationally process, I would share it with him. And along with the other side effects which I mentioned, but is not as -- of course, every side effect is significant, but is not -- the percentage of it is kind of in a lower rate.
Along with those side effects, with every patient, we do monitor for any other side effects because every individual may respond to a medication and have a different side effect that may not have been -- have not been observed in other individuals.
Q. Okay. So if Mr. Bigley agreed to take the medications then that would be -- then that's what you would give him?
MS. DERRY: Objection. That's a leading question that is going to one of the elements of the charge.
MR. GOTTSTEIN: It's not --

MS. DERRY: Mr. Gottstein, are you asking her -- for my own clarification to decide whether or not she should answer the question -- whether or not if she asks him if he would take a medication that that means he is capable of informed consent?
Are you asking her that in the guise of a hidden question?
MR. GOTTSTEIN: No, I think that's the -- I think that's a legal conclusion from it, so I asked her if he agreed to it, would she give it to him. That was the question.
MS. DERRY: Without a court order? I would like this question to be more specific.
MR. GOTTSTEIN: Yeah, without a court order.
A. Well, I'm not clear without court order. As far as I understand right now, my patient is in a psychotic state. He doesn't have any insight to his mental illness.
He cannot give me informed consent from my evaluation, so I respect the statute. I cannot give any medication against their wishes unless it's an emergency situation, so until the court really does grant me that, I cannot make any conclusion from my approach.
Q. Okay. What do you consider Mr. Bigley's prognosis with and without the medication?

A. Unfortunately, based on his long-standing mental illness and long history of hospitalization, and long history of non-medication compliance, he continues to deteriorate, and every time his baseline is changing.
So putting those together, and then his lack of psychosocial support is really declining his symptoms, so prognosis is gradually declining, and is already, unfortunately, not very promising, very favoring.
But definitely with medication, he has shown some level of stability and was able to have a higher quality of life.
Q. So is it fair to say that his condition has declined over time?
A. It's very difficult for me to answer that question from the aspect of since I have not known Bill -- I got to know Bill for a year or two years, so I'm just only judging based on the record and based on my evaluation.
And definitely since I have been working with him, with more time, admission to API, I have not -- definitely I have seen him deteriorated more by him going more to the prison, not having a stable home setting.
Even the Paradise Inn, which is his residential state, it seems like that is also a challenge, so

putting that on the picture, so I think the answer is that it's not very positive.
Q. So when you say "review his record," how far back did you go?
A. I can't pinpoint -- I could say I have seen it from 2006, but from past, I may have gone further, but I'm not really sure. I have to look at my note.
Every day I look at all of my patients, try to go as far back as I can, so I cannot really specifically say how far back, but, definitely, I have seen his chart sometime from 2006 up to this date.
MR. GOTTSTEIN: You know, let's mark this as C.
(Exhibit C marked.)
Q. So on page one there, it's kind of -- the footer is right in some handwriting there, which I didn't notice before I printed it out.
Is that a record from API?
MS. DERRY: Objection.
A. It looks familiar.
MS. DERRY: Dr. Khari doesn't have personal knowledge of this. This is not the record that she has created herself.
Q. Does it look -- is it a record from API?
A. It says -- it looks like API record. It says

Alaska Psychiatric Institute and our form looks like that, so I would imagine it should be.
Q. Now, down at the bottom there is an asterisk. Again, it got covered up a little bit.
A. Uh-huh.
Q. Can you read what it says?
A. It says, "No emergency IM medication."
Q. So why would that be put there?
MS. DERRY: Objection; speculation. Do not answer that question.
MS. POHLAND: I'm going to object on the relevance given that --
MR. GOTTSTEIN: Are you instructing her not to answer?
MS. DERRY: Mr. Gottstein, if she didn't create this record, how do you expect her to answer that question?
BY MR. GOTTSTEIN:
Q. Let me ask a different question. Reading that, what would you understand that to mean?
MS. POHLAND: Object to relevance. This is for -- it appears to be from April 2008. The hearing at issue is for an October 2008 indication.
Q. You can go ahead and answer that.
A. So as I said, I did not write that order and I do

not -- this is basically -- it means to me that this individual should not be given emergency IM medication.
Usually what that means that if this individual, the crisis does come to the point that it becomes a concern of safety for himself and others, then they need to contact the clinician who is assigned to him or who is on call to be contacted.
Q. So why should it be different for Mr. Bigley than other patients?
A. I don't know if it is different or not. I cannot answer that question.
Q. If it's not different, why would it be written there?
A. Like I say, I cannot answer that question at the present time.
Q. Turning to the second page.
A. Uh-huh.
Q. The second entry.
A. Uh-huh.
Q. Can you read that to me?
MS. POHLAND: Object to relevance. Can we just do a continuing objection based on relevance?
MR. GOTTSTEIN: Sure.
A. Are you talking about the handwritten?
Q. Yeah. The order part. It's 5/6/08, 12:20 is the

time. And then just what does the order say? It's on the back side.
A. It says on 5/6/2008, 12:20, it says, "Haloperidol five milligrams IM every six hours PRN for severe agitation and psychosis, emergency IM, and 24 hours, I think."
Then they are saying Dr. Hobson, who was our medical director at that time, has ordered that medication.
Q. So what does "PRN" mean?
A. It means on a needed base.
Q. As needed?
A. Uh-huh.
Q. So it says -- what -- so does that mean as needed for severe agitation?
A. For severe agitation and psychosis, yes.
Q. So what does "severe agitation" mean?
A. Well, for every -- I don't know what you mean severe agitation, from what aspect you are discussing it.
Q. Well, would that include yelling and screaming and slamming doors, for example?
A. It is a combination of things. Every individual is different. So every individual is different, and the meaning just doesn't go for yelling and screaming.

Q. So have you been given training on emergency medication?
A. I think that is --
MS. POHLAND: Objection to relevance.
A. I don't really know what you mean by "training". As a physician, as a clinician, you're trained for everything that is necessary to manage a patient.
Q. Did you get any training from API on emergency medication?
A. Well, in what aspect? We do have P&P, which talks about emergency medication, and the statute or limitation, and what situation is considered more of an emergency than non-emergency.
Q. And then what's your understanding of what constitutes an emergency under the statute?
MS. POHLAND: Objection; relevance.
A. Emergency is, as I said, every individual patient is different. You cannot just put -- you cannot take it under -- you have to look at the whole aspect of the situation, but in most cases, as the situation comes in, or to be specific for Mr. Bigley, when he is showing marked psychotic symptoms to the point that he may put himself in a vulnerable situation or other people around himself in a vulnerable situation, or become a concern, severe concern that he may hurt himself by, in his case

recently, like hitting his body against the wall may cause a fracture, or through posturing it may invite another individual, another patient to bring harm to him.
So those are in summary of it. And also when the individual is not responding to de-escalation that the hospital takes when the oral medication is offered, when time out is offered, when quiet room is offered, all of those is not -- is not directly -- due to his state of mind at that time, that he cannot process and he cannot evaluate to see the vulnerability that he is putting himself and others basically for his safety and others, then at that situation emergency medication would take place.
Q. So down at the bottom there -- 5/15, 2300 -- and I'm sorry. I just have a hard time reading this, so if you could read that one.
MR. POHLAND: You understand that Dr. Khari did not actually make these?
MR. GOTTSTEIN: But if she can read it, that would be great because then I can understand it.
MS. POHLAND: Is that the point of the deposition though to have her read it for you?
MR. GOTTSTEIN: I'm asking questions about the chart.

MS. POHLAND: Which are irrelevant given that they don't relate to the admission at issue.
MR. GOTTSTEIN: Well, you can prolong this as long as you want.
BY MR. GOTTSTEIN:
Q. So it starts -- I think the first word is "Abilify"?
A. It says, "Abilify 9.75 milligrams IM. Benadryl 50 milligrams IM every six hours PRN for severe agitation, psychosis. Emergency IM times 24 hours if --" I can't read the other word -- "is still agitated, give --"
Probably it is "continues to be still agitated give Ativan 1 milligram times one IM," and so phone order by Dr. Gomez.
Q. What does "IM" mean?
A. Intramuscular, the injection.
Q. What does one milligram times one IM mean?
A. That means only one time. They could give Ativan one milligram only one time.
Q. When it says "Emergency IM times 24," that means what?
A. That means that emergency, it said "every six hours," so that means within 24 hours if another emergency crisis comes and the consent continues to

exist, then another IM -- another order can be given.
Q. So this was written by Dr. Gomez; is that right?
A. The phone order by Dr. Gomez.
Q. And so now, who acts on this?
A. The nursing staff, the staff in the hospital.
Q. And who is that on Taku?
A. I don't know at that time what was under Taku.
Q. Who is it now on Taku?
A. Right now, we have Monica. I forgot her last name. I'm not very good with names.
Q. "Atanik" or something like that?
A. That's his social worker.
Q. Monica something or another. Who else?
A. What do you mean "who else"?
Q. This is telling staff that you can do -- you know, administer these drugs under these conditions, and I want to know who it is that makes those decisions that those conditions exist.
A. The doctor makes the decision to give the order and the nurses give the medication to the patient.
Q. Right. And then I want to know who the nurses are. It's the nurses that decide whether or not the person is severely agitated?
A. No. It's the doctor evaluates -- the doctor gets the information. The doctor decides if the patient

needs the medication or not, but the medication is given by the nurses.

And then the different shifts, different dates we do have different nurses in the unit.

Q. But this says "as needed," so who decides whether it's as needed?

A. Well, for that situation, the order is given by the doctor. When they review the chart, they review the patient, they understand the patient, then they give that.

Yes, at that time, based on the criteria that the hospital follows, then the nurses would take the action to give the medication.

Q. And so what I'm looking for is the names of the nurses that --

MS. DERRY: Objection. Dr. Khari wasn't the doctor who signed this order and cannot tell you who gave that injection that day.

MR. GOTTSTEIN: Well, currently on Taku.

MS. DERRY: What does that have to do with this record though, Mr. Gottstein?

MR. GOTTSTEIN: That's not the question.

MS. DERRY: You're asking her questions about --

MS. POHLAND: Mr. Gottstein, if you would

would like the names of employees who work on Taku, you are more than welcome to serve interrogatories upon API to get that.

Dr. Khari has already testified that she is not good with names. She gave you the name of one nurse that she recalled.

BY MR. GOTTSTEIN:

Q. But I'm asking you now, what are the names of other nurses?

MS. POHLAND: Objection; asked and answered.

A. I can get you the names by tomorrow's court hearing. I would be happy to get the list of all the nurses, different shifts, and it can be provided to you.

Q. Can you do that by fax this afternoon?

A. I will see what the hospital could do.

Q. The next page, it's page 3 of 37, it says, "5/15/ Lorazepam."

A. Uh-huh.

Q. No, up above that, "Six hours PRN AAI." What does "AAI" mean?

A. For agitation, aggression and psychosis -- no, insomnia.

Q. Now, does that mean if either one of those exist? In other words, if someone is -- can it be given just for insomnia?

A. No. No. As I said, you just cannot take it lightly just because what is there. They have to look at the whole aspect.

IM medication usually is not given very lightly to a patient. It's been evaluated and taken very seriously before they consider to give IM medication, so it's not as simple as somebody is agitated or somebody cannot sleep, okay, we give him an IM medication.

API staff have a lot more respect for the patient than to just lightly give that medication in the IM form.

Q. So does that mean that all three of those have to exist?

A. It's not actually exactly just all those three have to exist. Those three exist, plus they look at the whole global aspect of the thing, but sometimes you cannot write three pages of a chart to name everything.

And they are trained, they know, they are trained, and every specific patient is individualized, so it is discussed in the treatment team with the staff.

So every patient we look at differently, but, however, that pneumonic is, as I said, stands for agitation, anxiety and insomnia.

Q. Actually, I think you said aggression.

A. Anxiety, agitation.

Q. Initially, you said agitation, aggression and insomnia.

A. Agitation, aggression and insomnia.

Q. Which one is it?

A. I look at it as agitation, aggression and insomnia.

Q. So someone else might interpret that as agitation, anxiety and insomnia?

MS. DERRY: Objection; calls for speculation.

A. No. Usually, the pneumonic is very standard.

Q. I'm just asking because you just said anxiety, so I was just asking.

So there is -- so let me say, if someone was extremely agitated, but not aggressive or have insomnia, would that apply?

A. Again, it depends on the level of anxiety. As I said, we talked about before what causes the -- what pertains for the emergency medication, so it's not only just because somebody is anxious or anxiety qualifies them to get antipsychotic medication in the IM form.

Very much it stays with what I stated earlier when you asked the question how we give the emergency IM medication.

Q. So the nurses decide when that exists?

MS. POHLAND: Objection; asked and answered.
A. I think I answered that before also.
Q. That was PRN, so this is the same thing?
A. Yeah. This is very much the same thing.
Q. It says "PRN" here too.
A. Yes.
Q. I mean, I don't want to necessarily raise the eye of your lawyers, so it depends basically, is that fair?
A. What do you mean by "depends"?
Q. Depends on the patient?
A. What I tried to say is that the care for every patient is individualized, and it has to be individualized because everybody presents themselves clinically different.
So just because one person -- as I said, every individual person presents different. So in that case, you do go for individualized care, but the emergency medication at the end would conclude very much in a way that then becomes the concern of the safety of that individual or how they put themselves or others around themselves in a high risk of the safety.
Then emergency medication would come when all the other aspect has not -- not able to de-escalate them. It is exactly very much what I mentioned earlier.
Q. I understand that, let's say, with aggression.

Okay. So it seems to me that at a certain level of aggression clearly raises a safety issue, right?
A. Uh-huh.
Q. So let's leave that aside for now, but maybe we'll come back to it. But it's very hard for me to see how insomnia is a safety issue.
MS. POHLAND: Objection to form.
A. I did not say that. Actually, when you asked me earlier about it, I said agitation by itself, insomnia by itself does not -- just because somebody is not sleeping qualifies us to give them IM medication.
I also mentioned earlier do not take that definition lightly. Not just because somebody has insomnia medication is forced.
In that case, if that is the case, probably 90 percent -- I'm just making -- that is not a solid 90 percent. I'm saying a lot of individuals do have problems with sleep, so that means every individual gets IM medication? No.
That is why I mentioned earlier don't get that small word of AAI as a whole global aspect of giving a patient IM medication.
Q. So it seems like it's up to the discretion of the nurse; is that correct?
A. It's not the discretion. At the end it comes

back, when the IM medication comes into the picture, the significant consent exists that individuals could hurt themselves or somebody around themselves, when that is very vivid and seen by every individual with the team, with the nursing, with the other staff that are working on providing care in that unit for that patient.
MS. POHLAND: Mr. Gottstein, could we move onto perhaps something that Dr. Khari actually authored and/or the admission at question?
(There was a short break.)
MS. POHLAND: Note my continued objection to all of this questioning on emergency medication and admissions that don't relate to the current admission.
BY MR. GOTTSTEIN:
Q. Okay. The second one down, that's 5/16?
A. Uh-huh.
Q. 0100. I think that is actually you that signed that one, isn't it?
A. Yes.
Q. Now, I read that -- how do you say that, Thorazine?
A. Thorazine.
Q. "50 milligrams IM, now AAI, locked seclusion."
A. Uh-huh.
Q. So what does "now" mean?

A. It means at that time.
Q. So does that mean give it then?
A. Yes. That means there is no time. The patient is so psychotic -- it always is like that, but, however, that means we need to act on it immediately.
Q. Okay. And is that -- is that -- I have seen that in other places.
Is that standard? When you see "now" on it, that means it's not like a PRN, it's do it now?
A. Exactly.
Q. I'm just trying to understand.
MS. DERRY: Mr. Gottstein, can we clarify here? Are we looking at -- you just mentioned "locked seclusion".
Are we looking at the second entry or the first?
MR. GOTTSTEIN: Second.
A. Also, I want to clarify. That order, I cosigned. Actually, it was ordered by Dr. Gomez, but I cosigned that order.
Q. Why was that?
A. Well, usually it is very common in every hospital, for example, when the doctor -- this has happened in the morning, 1:00, so Dr. Gomez was on call, so they have contacted him and they have expressed the

concern and they presented his clinical symptom.
And Dr. Gomez found it appropriate for the patient to get medication at that time. And the next day, as I was his clinician who provided care for him -- of course, you know, every morning, I review to see where my patients are and how they are doing and what has happened the night before.
I recognized that, and then I confirmed that I have seen that order and that is how it goes.
Q. Okay. Now, what does "locked seclusion" mean?
A. That means the patient has been -- was not following -- from the aspect he was so agitated, he was so psychotic -- again, I wasn't there. I don't know.
But in an aspect of a picture, by seeing that, probably he was markedly psychotic, he was not responding to redirection, he was not taking oral medication, he was not following all the aspects that I talked earlier about emergency medication.
And still they decide to put him in the quiet room, which is different than the room that they stay, and then they locked it because they could not restrain him.
And he was probably putting himself in a more vulnerable situation, so they decided that probably he would benefit from the medication, plus in a place that

the door could be locked that he put himself inside instead of coming out and put himself in more vulnerable state.
Q. So I'm a little confused. Did this authorize locked seclusion or did it ratify locked seclusion?
MS. DERRY: Objection.
A. Explain to me what you mean by "ratify".
Q. Did they -- was he put in locked seclusion and then you signed and say, "Yes that was okay," or does this signing this say it is okay to put him in locked seclusion?
A. This tells me that Dr. Gomez ordered this medication should be given to the patient and he should be put in the quiet room, and then, for that moment, the door should be locked.
Usually, that doesn't mean they stay locked for a long time. It all depends when the patient is calm and could be safe again to come out of that room.
For that moment, it just meant for that moment. Of course, in 10 minutes or 15 minutes or 1 hour later the setting may happen totally different.
As the patient takes medication, he may calm down, respond to the medication and he did not need to be anymore in the locked seclusion.
Q. Now, on the fourth one, or second one up from the

bottom, you know, I can never say --
A. Chlorpromazine.
Q. "50 milligram IM now for AAI," and then it looks like "XT dose due to psychotic agitation."
Is that correct?
A. Uh-huh.
Q. And "XT" means?
A. It means one time, times one time dose, only one time. This is authorized only one time. This is the one I did order because it shows that.
Q. Now, were you actually -- did you actually observe him or was this called in or do you remember?
A. I can't remember. I have to look at the chart.
Q. On page seven, under "prognosis," it says, "The patient refuses psychiatric treatment and this refusal is facilitated by his attorney."
A. Uh-huh.
Q. I assume that's me?
MS. DERRY: Objection; calls for speculation.
Q. Is that me?
A. I'm not really sure. I have to look at the chart and see what it meant.
MS. POHLAND: Mr. Gottstein, just to remind you, Dr. Khari has to get back to work, so we're going

to want to try to wrap things up so Ms. Derry has time to ask some questions as well.
Q. I mean, it's obviously -- okay. And going back to that, so I would read into that that patient's refusal -- by "psychiatric treatment" you mean the drug, right, drugs?
MS. POHLAND: Objection. Dr. Khari didn't author this record.
MR. GOTTSTEIN: I believe she did.
MS. DERRY: Where does it say that?
A. Actually, Dr. Michaud wrote that and then I cosigned it.
Q. So is your understanding that "refuses psychiatric treatment" means refuses the medication?
A. I have to see what Dr. Michaud meant by that, but in my aspect, no, it's not only the medication. It's the whole aspect of getting appropriate --
For example, the treatment intervention that inside the hospital is offered, and probably, in this case, also when he gets discharged, he is not willing to work with his outpatient provider, he is not willing to have case management, he is not willing to work with the structure and social support that the clinician may feel like the patient would benefit from, so it's not only medication.

In the Supreme Court of the State of Alaska

William S. Bigley,	)	
	)	Supreme Court No. **S-13116**
Appellant,	)	
v.	)	**Order**
	)	
Alaska Psychiatric Institute,	)	
	)	
Appellee.	)	Date of Order: **6/25/08**
	)	

Trial Court Case # **3AN-08-00493PR**

Before: Fabe, Chief Justice, and Matthews, Eastaugh, Carpeneti, and Winfree, Justices.

On consideration of appellee's 5/28/08 motion to reconsider the 5/23/08 individual justice order granting appellant's emergency motion to stay the 5/19/08 superior court order granting API's petition to administer psychotropic medication during appellant's period of commitment, and the 6/9/08 opposition,

IT IS ORDERED: the motion is **DENIED.**

Entered by direction of the court.

Clerk of the Appellate Courts

Lori A. Wade, Chief Deputy Clerk

cc: Supreme Court Justices

Exhibit R

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

NOTICE OF FILING WRITTEN TESTIMONY

The following written testimony is hereby filed by Respondent in opposition to any extant or future AS 47.30.839 forced drugging petition(s) filed by petitioner in the above captioned action:

1. Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.
2. Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.
3. Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.
4. Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.
5. Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.
6. Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court Case No. S-13116.
7. Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;
8. Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.
9. Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax

Dr. Mosher is now deceased and therefore unavailable. Ms. Porter lives in New Zealand and is unavailable for that reason. Their testimony is therefore admissible pursuant to Evidence Rule 804(b)(1) because the Petitioner not only had the opportunity and similar motive to develop the testimony by direct, cross, or redirect, it exercised such right.

DATED: October 28, 2008. Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13116)))))) Trial Court Case No. 3AN 08-493 P/R

OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER ON EMERGENCY MOTION FOR STAY PENDING APPEAL

For the reasons that follow, Appellant, William Bigley, respondent below, by and through counsel, hereby opposes the motion by Appellee, Alaska Psychiatric Institute (API) for reconsideration (Motion for Reconsideration) of this Court's May 23, 2008 Order granting a stay pending appeal (Stay Order) of the Superior Court's May 19, 2008 order granting API's petition for forced medication of Appellant (Forced Drugging Order).[1]

In its Motion for Reconsideration, notwithstanding Appellant having shown he faces a danger of irreparable harm, and API failing to show it is not adequately protected, API asks this Court to reject the balance of hardships standard it adopted in the Stay

Order in favor of probable success on the merits. As set forth below, this Court's original determinations that the balance of hardships approach applies is correct, and Appellant meets the standard for obtaining a stay thereunder. Appellant also establishes that even under the probable success on the merits standard, Appellant demonstrates probable success. Because of Appellant's discharge on or around June 5, 2008, however, Appellant first addresses whether or not such discharge renders the Stay Order and the Motion for Reconsideration Order moot.

I. Appellant's Discharge and Mootness

In the Stay Order, this Court noted that it is highly likely the present commitment order will have expired before this Court can rule on the merits of the appeal and that the possibility of technical mootness is substantial, and directed the parties to discuss in their briefing whether the Court should nonetheless reach the merits of the Forced Drugging Order.[2] Appellant was discharged on June 4 or 5, 2008, which raises the same issue with respect to the Stay Order, itself. In other words, has the Stay Order become technically moot, thus also mooting the motion for reconsideration, and if so, should the Court nonetheless reach the merits of the Motion for Reconsideration?

API's Motion for Reconsideration suggests the Motion for Reconsideration has not been rendered moot by Appellant's discharge, when at page 2, it states the Stay Order "effectively precludes API from administering medication for Mr. Bigley during this, or any future, commitment periods." It is unclear, however, whether this statement was

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[1] Exhibit A, is the AS 47.30.839 petition (Forced Drugging Petition), and Exhibit B the Superior Court's Forced Drugging Order.

meant to include only extensions of the then existing commitment under the same case number, as distinct from future commitments in which a new 30-day petition might be filed under a different case number. What is clear is that unless Appellant is provided the sort of community support he seeks as a less intrusive alternative,[3] he is almost certainly going to continue to have the sorts of problems in the community that have been bringing him to API[4] and involved with the criminal justice system.[5]

In *Myers*, this Court invoked the public interest exception to the mootness rule,[6] noting, however, that the United States Supreme Court in *Washington v. Harper*,[7] held such an issue was not moot because the controversy could recur.

Here, as this Court acknowledges in its Stay Order[8] and API in its Motion for Reconsideration,[9] the controversy is at least likely to recur. Appellant suggests it is almost certain to recur. It is also clear that the issue is capable of evading review unless

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[2] §4 of Stay Order.
[3] Whether or not, having invoked the civil commitment and forced drugging statutes to psychiatrically confine and administer psychiatric drugs against Appellant's will, API may evade its constitutional obligation under *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), to provide a less intrusive alternative to the forced drugging by discharging Appellant is the main issue on appeal in S-13015. As a practical matter, the same situation has now occurred here as a result of Appellant's post appeal discharge.
[4] Without the requested community supports, it is almost certain Appellant will continue to experience these difficulties in the community even if he is psychiatrically drugged against his wishes .
[5] Appellant is consistently determined to be incompetent to stand trial without the prospect of becoming competent to stand trial and is then released from criminal custody, often to API for possible civil commitment.
[6] 138 P.3d at 245.
[7] 494 U.S. 210, 218-19, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).
[8] Page 3.
[9] Page 2.

decided, and it is suggested here it raises a matter of grave public concern, which are the criteria for invoking the public exception to the mootness doctrine.[10]

With respect to the grave public concern criteria, unless appellants who make a sufficient showing to obtain a stay of forced drugging orders under AS 47.30.839 are able to do so, the fundamental right to decline psychiatric medication recognized in *Myers* will not have an effective manner of being vindicated on appeal.

It is also respectfully suggested here that under *Washington v. Harper*, the issue is not technically moot, at least with respect to Appellant's rights under the Due Process Clause of the United States Constitution. Appellant respectfully suggests the same should also be true under the Alaska Constitution.

Should this Court hold that the Stay Order and/or the Motion for Reconsideration are moot, the status of the stay in any subsequent forced drugging proceeding during the pendency of this appeal will be unclear unless the order holding the Motion for Reconsideration moot addresses the issue.

II. The Balance of Hardships Standard Applies

Raising the specter that applying the balance of hardships standard in this case means that every person subjected to a forced drugging order under AS 47.30.839 only has to make a "*de minimus* showing that he or she possesses some sort of colorable argument on appeal, "[11] in its Motion for Reconsideration, API asks this Court to hold that the "probable success on the merits" standard should be employed, rather than the

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[10] *Myers*, 138 P.3d at 244.
[11] Page 2.

"balance of hardships" standard.[12] API's argument is flawed. In order to invoke the "balance of hardships" standard an appellant has to raise substantial and serious questions going to the merits, as well as demonstrate both a danger of irreparable harm and that API can be adequately protected.[13]

A. <u>The Evidence of Irreparable Harm Is Compelling and Unrebutted</u>

API has been presented with testimony of irreparable harm and the availability of a less intrusive alternative in defense of forced drugging proceedings against Appellant while represented by PsychRights,[14] at least four times since September of 2007, and has never contested it, including in this case.[15] In order to have the probable success on the

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[12] Pages 1-2.

[13] *State, Div. of Elections v. Metcalfe,* 110 P.3d 976, 978 (Alaska 2005) as made applicable by *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975).

[14] PsychRights has limited its representation of Appellant under Civil Rule 81(d) to the forced drugging petitions. *See*, Exhibit C, pages 1 & 3, and Exhibit M. A limited entry of appearance was also filed in 3AN 07-1064 PR.

[15] The written testimony of Robert Whitaker (Exhibit G), Ronald Bassman (Exhibit I), Paul Cornils (Exhibit J) and the live testimony of Sarah Porter (Exhibit F, pp 12-20), regarding the lack of efficacy, decreased recovery rates and great harm from the drugs as well as the availability of a less intrusive alternative, was originally submitted in 3AN 07-1064 PR. Rather than contest this and also face Appellant's requests for a less intrusive alternative, API discharged Appellant "against medical advice" after he had been involuntarily committed rather than face being ordered to provide the available less intrusive alternative sought there (Exhibit K). *See* also Exhibit C, pp 11-12. This same testimony was presented in 3AN 08-247 PR (Exhibits C, pages 4-57, Exhibits G, I & J. In that case, API lost the commitment petition and was discharged and the forced drugging petition filed in that case was not heard. Exhibit L, page 15 (March 14, 2008, Tr. Page 55, lines 18-20). This same testimony was also presented in 3AN 08-416 PR, Exhibits C, pages 4-57, G, I, J & M. API also lost that commitment petition and Appellant was discharged and the forced drugging petition in that case was not heard. Exhibit N. The fourth time this testimony was presented is in the extant proceeding. It was augmented by the written testimony of Grace E. Jackson, MD and the live testimony of Dr. Jackson and Paul Cornils. Exhibit D is Dr. Jackson's Curriculum Vitae and Exhibit D is the written testimony Dr. Jackson submitted below.

merits standard apply, all API has to do in future cases is present sufficient evidence to rebut the evidence that Appellant faces the danger of irreparable harm. If it can.

Even though API has the option of attempting to rebut irreparable harm in future cases, it failed to do so in this case. The testimony in this case regarding irreparable harm is compelling and unrebutted. This consists of the written and oral testimony of Grace E. Jackson, MD,[16] who was qualified as an expert in psychiatry and psychopharmacology,[17] and the written testimony of Robert Whitaker,[18] which Dr. Jackson testified is "a very accurate and very clear presentation of the information as I understand it myself."[19] It also includes the prior testimony of Loren Mosher, MD, the former Chief for the Center for Studies of Schizophrenia at the National Institute of Mental Health under Evidence Rule 804(b)(1),[20] who testified that Dr. Jackson knows more about the mechanisms of actions of the various psychotropic agents than any clinician of whom he was aware.[21]

In Dr. Jackson's written testimony,[22] she summarizes the brain damage caused by the drug authorized to be forcibly injected in Appellant here[23] as follows:

> Evidence from neuroimaging studies reveals that ***old and new*** neuroleptics contribute to the progressive shrinkage and/or loss of brain tissue. Atrophy is especially prominent in the frontal lobes which control decision making,

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[16] Exhibits E & H and Tr. 107-165 (May 14, 2008).
[17] Tr. 111 (May 14, 2008).
[18] Exhibit G.
[19] Tr. 111-112 (May 14, 2008).
[20] Exhibit F, page 5 (page 171 of transcript, lines 14-16).
[21] Exhibit F, page 7 (page 179 of transcript, lines 3-7).
[22] Exhibit E.
[23] Risperdal, also known as risperidone, is one of the "new neuroleptics." Dr. Jackson specifically testified at the hearing that her testimony pertaining to this class of drugs applied to Risperdal. Tr. 137, 138, 139, 140. There was also a tremendous amount of specific testimony regarding Risperdal throughout Dr. Jackson's testimony. Tr. 107-165.

> intention, and judgment. These changes are consistent with *cortical* dementia, such as Niemann-Pick's or Alzheimer's disease.
>
> Evidence from postmortem analyses in lab animals reveals that ***old and new*** neuroleptics induce a significant reduction in total brain weight and volume, with prominent changes in the frontal and parietal lobes.
>
> Evidence from biological measurements suggests that ***old and new*** neuroleptics increase the concentrations of tTG (a marker of programmed cell death) in the central nervous system of living humans.
>
> Evidence from *in vitro* studies reveals that haloperidol reduces the viability of hippocampal neurons when cells are exposed to clinically relevant concentrations. (Other experiments have documented similar findings with the second-generation antipsychotics.)
>
> Shortly after their introduction, neuroleptic drugs were identified as chemical lobotomizers. Although this terminology was originally metaphorical, subsequent technologies have demonstrated the scientific reality behind this designation.
>
> Neuroleptics are associated with the destruction of brain tissue in humans, in animals, and in tissue cultures. Not surprisingly, this damage has been found to contribute to the induction or worsening of psychiatric symptoms, and to the acceleration of cognitive and neurobehavioral decline.

(boldfacing in original, underlining added)

Dr. Jackson amplified on this in her live testimony, making it clear that Risperdal, as with all the drugs in this class, causes dementia, and other serious health problems, and the types of worsening behavioral symptoms described of Appellant.[24] Dr. Jackson also testified that very few clinicians are aware of the lack of effectiveness and extreme harm caused by the drugs, including Risperdal, because of the ability of the pharmaceutical industry to control the information to which clinicians are exposed.[25] Dr. Jackson further testified that the "improvement" described by clinicians are the lobotomizing effects of

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[24] Tr. 107-65.

the drugs.[26]

Finally, in support of the emergency motion for stay here, largely summarizing her testimony, a further affidavit of Dr. Jackson was presented regarding the irreparable harm to Appellant should API be allowed to drug him against his will pending this appeal:[27]

> Mr. Bigley's initial dose of Haldol guaranteed the induction of Parkinsonian symptoms by day #3 of treatment (4/17/80). Furthermore, the continued administration of Haldol -- a chemical which replicates the mitochondrial effects of rat poison and insecticide -- guaranteed the rapid deterioration of his condition. (p.5) . . .
>
> [T]he materials which I have reviewed (see Section III, #3 above) demonstrate a persistent and continuing failure of API clinicians to consider the most likely diagnosis in the case at hand. In all probability, Mr. Bigley now suffers from a chemical brain injury (CBI). This development should preclude the attachment of any and all psychiatric labels at this time. It should also trigger the legal and medical systems to prioritize the delivery of interventions which promote neuro-rehabilitation, rather than neurodegeneration. (p.5) . . .
>
> 4) risperidone (Consta or oral forms) will potentially kill Mr. Bigley while offering no significant prospect of improvement, and zero probability of recovery . . .
>
> [Risperidone] possesses some features which make it particularly undesirable, even among drug enthusiasts.
>
> First, risperidone is unique among the newer "antipsychotic" drugs in terms of its potential to elevate prolactin. In some studies, hyperprolactinemia has occurred in as many as 90% of the risperidone patients. This is more than a trifling occurrence, due to the fact that hyperprolactinemia has been repeatedly linked to cardiac disease (e.g., via platelet aggregation, cardiomegaly, and heart failure).

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[25] Tr. 115-133..

[26] Tr. 141.

[27] Exhibit H. In this testimony Dr. Jackson discusses the failure of API to conduct needed tests, including for diabetes and other metabolic problems. While Dr. Hopson testified that tests for diabetes and other blood sugar problems were done, based on the records provided by API, this appears to be untrue.

> Second, even at typical or "ordinary" doses (D2 blockade of 60-80%), risperidone induces Parkinsonian side effects at a rate which equals or surpasses the so-called traditional or conventional neuroleptics (e.g., in 30-50% of the patients).
>
> Third, the real-world risk of tardive dyskinesia due to risperidone is significant and far more prominent than API's spokesmen have presumably opined. In Jose de Leon's recent study of patients who began treatment with the newer therapies (65% receiving risperidone), more than 60% of the subjects with treatment histories similar to Mr. Bigley's developed tardive dyskinesia despite the use of these "safer" drugs.
>
> Fourth, given Mr. Bigley's advancing age (55 considered "elderly" in at least one published study); the early onset of Parkinsonian side effects (BPS at age 27); and a pre-existing organic brain syndrome (i.e., chemical brain injury), he is at high risk for tardive dyskinesia. In light of the fact that tardive dyskinesia (TD) reflects extensive damage to the brain - including impairments of judgment and insight, as much as impairment of movement - it is essential to avoid the use of any chemical intervention which might accelerate the emergence of this condition.
>
> Fifth, commensurate with the affidavits, exhibits, and testimony on behalf of the respondent, it is extremely improbable that risperidone will do anything but aggravate the effects of the dysmentia (chemical brain injury) from which Mr. Bigley continues to suffer. To the contrary, risperidone will compound that condition with real and substantial risks of sudden death from stroke, heart attack, pulmonary embolism, diabetes, falls, accidents, pneumonia, NMS, and - ultimately - dementia.
>
> For the aforementioned reasons, a Failure to Grant a Stay of the Superior Court's Order will result in irreparable harm. (pp. 7-8)

The testimony in this case makes clear that Appellant faces the danger of irreparable harm should API be allowed to restart drugging him.

B. <u>API Is Adequately Protected</u>

The Stay Order for which full court reconsideration is sought by API held that API was adequately protected because the evidence presented does not establish that medication is necessary to protect appellant, and API did not identify any need to protect

others from Appellant.[28] While protesting that the Stay Order "gave minimal analysis" to how API's interests are protected,[29] API fails to articulate any way in which its interests are not protected.[30] Thus, it does not appear API disputes that it is adequately protected.

III. Appellant Has Not Only Raised Serious and Substantial Questions Going to the Merits But Also Demonstrates Probable Success on the Merits

Even though it has not presented any evidence rebutting Appellant's evidence that he faces irreparable harm if the stay is not maintained, and even though it has failed to articulate any way in which it is not adequately protected, API argues the probable success on the merits standard should apply. It is hard to understand how the probable success on the merits standard can apply in these circumstances, but Appellant nevertheless demonstrates probable success on the merits.

In order to demonstrate probable success on the merits, a discussion of the legal criteria for granting a forced drugging petition under AS 47.30.839 is necessary. This Court's decision in *Myers v. Alaska Psychiatric Institute* is controlling, with its core holding being:

> [I]n future non-emergency cases a court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available.[31]

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[28] Stay Order, p. 3.
[29] Motion for Reconsideration, page 1.
[30] It does assert at page 2 that the stay prevents it from drugging Appellant in the way it believes it should, but of course, this is the purpose of the stay.
[31] 138 P.3d. 238, 254 (Alaska 2006).

The Superior Court in *Myers*, after listening to the same testimony from Loren Mosher, MD, the former Chief for the Center for Studies of Schizophrenia at the National Institute of Mental Health as submitted herein,[32] and written and oral testimony from Dr. Jackson, who, as set forth above, Dr. Mosher described as knowing more about the mechanisms of actions of the various psychotropic agents than any clinician of whom he was aware,[33] found,

> [T]here is a real and viable debate among qualified experts in the psychiatric community regarding whether the standard of care for treating schizophrenic patients should be the administration of anti-psychotic medication.
>
> * * *
>
> [T]here is a viable debate in the psychiatric community regarding whether administration of this type of medication might actually cause damage to her or ultimately worsen her condition.[34]

The Superior Court in Myers, however, believed AS 47.30.839 unambiguously limited its role "to deciding whether Ms. Myers has sufficient capacity to give informed consent," and felt constrained to adhere to its literal meaning.[35] *Myers's* core holding swept away the statutory limitation on constitutional grounds and in so doing stated:

> [T]he ultimate responsibility for providing adequate protection of [the right to refuse psychotropic medication] rests with the courts; and . . . adequate protection of that right can only be ensured by an *independent judicial determination of the patient's best interests* considered in light of any available less intrusive treatments.[36]

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[32] Exhibit F, page 5 (page 171 of transcript, lines 14-16).
[33] Exhibit F, page 7 (page 179 of transcript, lines 3-7).
[34] *See*, Exc. 299, 304 in S-11021.
[35] *Myers*, 138 P.3d at 240.
[36] 138 P.3d at 251-252, emphasis added.

This Court then required the trial court, in making its *independent* determination of best interests to, at a minimum, consider the information AS 47.30.837(d)(2) directs the treatment facility to give to its patients in order ensure the patient's ability to make an informed choice.[37] This includes:

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
>
> (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
>
> (C) a review of the patient's history, including medication history and previous side effects from medication;
>
> (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
>
> (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][38]

This Court then found helpful and sensible the Supreme Court of Minnesota's holding that in order to determine the "necessity and reasonableness" of a treatment, "courts should balance [a] patient's need for treatment against the intrusiveness of the prescribed treatment," and also citing with approval the following "[f]actors that the Minnesota court believed should be considered included:"[39]

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
>
> (2) the risks of adverse side effects;

---

[37] 138 P.3d at 252.
[38] 138 P.3d n.92.
[39] 138 P.3d 252, citing to *Price v. Sheppard*, 239 N.W.2d 905, 239 (Minnesota 1976).

(3) the experimental nature of the treatment;

(4) its acceptance by the medical community of the state; and

(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[40]

A. Appellant Has Demonstrated Probable Success on the Merits on the Myers Factors

The Superior Court's decision, as does API's defense of that decision in its Motion for Reconsideration, essentially rests entirely upon API's psychiatrists' testimony that what they proposed is the standard of care, i.e., "acceptance by the medical community of the state." However, acceptance by the medical community of the state," is only one of many factors this Court held should, *at a minimum*, be considered by the Superior Court (Myers Factors). As Dr. Hopson, API's Medical Director, admitted there have been many medical standard of care disasters, in which the standard of care has been subsequently found to be very harmful to patients.[41]

The compelling and unrebutted evidence as to the other Myers Factors required to be analyzed by this Court in *Myers* is not addressed by either the Superior Court in its Forced Drugging Order, nor API in its Motion for Reconsideration. Appellant shall address them now.

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[40] *Id.*

[41] The Superior Court, cut off Appellant's questioning of Dr. Hopson about standard of care disasters, specifically stating it understood Appellant's point that the standard of care in the past has often been found to be harmful. Tr. 236, lines 10-15 (May 15, 2008). Tr. 234-237 (May 15, 2008).

(1) An Explanation Of The Patient's Diagnosis And Prognosis, Or Their Predominant Symptoms, With And Without The Medication;

(a) Prognosis With Medication

Dr. Khari testified that even when on medication Appellant maintains his delusional thought content.[42] Dr. Maile testified that Appellant's condition has been declining over time,[43] which is under the 28 year forced drugging regime imposed on him by API. Dr. Jackson testified that Appellant is an example of someone in whom the drugs has caused dementia[44] or dysmentia,[45] and reiterated to this Court that allowing API to administer Risperdal to Appellant will compound that condition with real and substantial risks of sudden death from stroke, heart attack, pulmonary embolism, dieabetes, falls, accidents, psymonia, Neuroleptic Malignant Syndrome, and dementia.[46] Dr. Jackson also testified that allowing API to administer Risperdal will cause further cognitive and behavioral decline in which Appellant will have increasing problems modulating self-control, anger and emotional expression.[47]

(b) Prognosis Without the Medication

Dr. Jackson testified regarding prognosis without the medication that Appellant had a better prognosis off the medication than on it, and because the withdrawal effects

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[42] Tr. 47 (May 12, 2008).
[43] Tr. 22 (May 12, 2008).
[44] Tr. 135, Exhibit H, page 9.
[45] Exhibit H, page 9.
[46] Exhibit H, page 9.
[47] Tr. 136 (May 14, 2008).

manifest themselves as a worsening of psychiatric symptoms over some length of time, Appellant needs to be given a relatively extended period of time off the drugs.[48]

(2) Information About The Proposed Medication, Its Purpose, The Method Of Its Administration, The Recommended Ranges Of Dosages, Possible Side Effects And Benefits, Ways To Treat Side Effects, And Risks Of Other Conditions, Such As Tardive Dyskinesia;

(a) Possible Side Effects

A tremendous amount of evidence is presented elsewhere regarding the possible side effects and is not repeated here.

(b) Possible Benefits

Particularly instructive regarding the possible benefits of the proposed treatment, or more accurately, the lack of such benefit for many if not most of the people taking these drugs, is Robert Whitaker's written testimony, Exhibit G. Dr. Maile testified that Appellant is "a pleasant man" while drugged as opposed to when he is not[49] and it was his wish that he be forced to take the drugs so he would be a friendly, pleasant guy, easy to be around.[50] Dr. Hopson testified he is much calmer and affable when drugged.[51]

Appellant suggests being made more tolerable to others is not cognizable as a benefit to Appellant under the *Myers* best interests requirement.

(3) A Review Of The Patient's History, Including Medication History And Previous Side Effects From Medication;

Dr. Khari testified that based on past experience, she expects Appellant to quit

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[48] Tr. 144-145 (May 14, 2008).
[49] Tr. 24 (May 12, 2008).
[50] Tr. 38. May 12, 2008).
[51] Tr 230 (May 15, 2008).

taking the drug as soon as he is discharged from the hospital.[52] Dr. Hopson testified that is Appellant's history.[53] Paul Cornils testified his experience with Appellant is he discontinues the medication as soon as he is released from the hospital[54] and then:

> That in no way in my personal opinion or experience is beneficial to Mr. Bigley, so my opinion is that unless Mr. Bigley agrees with the course of treatment and would voluntarily continue with it, it's futile.[55]

Mr. Cornils, who spent a considerable amount of time working with Appellant, also testified with respect to Appellant's being on or off drugs as follows:

> Q Did you observe any differences in Mr. Bigley's behavior?
>
> A Beyond the sedative effects, no. His -- his delusions are as strong. His anger and aggression is still present, he just does not express them as strongly. He is less disturbing most of the time. I don't know if that makes sense to you or not. But if you spend a lot of time with him, like I have, he -- I have not noticed much difference except to say that his behavior is more socially acceptable when he's on medication.[56]

Dr. Maile erroneously testified that Appellant has not been diagnosed with Tardive Dyskenesia.[57] In fact, Appellant has been diagnosed with Tardive Dyskenesia.[58] Dr. Khari erroneously testified that Appellant did not show any side effects on Risperdal.[59] For example, Dr. Maile testified that Appellant complains about weight gain and being

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[52] Tr. 63 (May 12, 2008).
[53] Tr. 210 (May 15, 2008).
[54] Tr. 241, 243 (May 15, 2008).
[55] Tr. 243 (May 15, 2008).
[56] Tr. 241-242 (May 15, 2008).
[57] Tr. 39 (May 12, 2008).
[58] *See* page 42 of transcript of September 5, 2007, hearing in 3AN 07-1064 PR, which is part of the record in S-13015 (Dr. Worrall, his treating physician there, testifying "Well, he has tardive dyskinesia, which is most likely from the years and years of getting drugs like Haldol, Prolixin").
[59] Tr. 42 (May 12, 2008).

sleepy (ie, sedated)[60] as did the Court Visitor.[61] Another example is that Appellant has suffered sexual dysfunction as a side effect.[62]

(4) An Explanation Of Interactions With Other Drugs, Including Over-The-Counter Drugs, Street Drugs, And Alcohol; And

API presented a little testimony regarding interactions with other drugs, including over-the-counter, street drugs and alcohol,[63] however, Appellant doesn't have a history of using street drugs or alcohol in any problematic way.[64]

(5) Information About Alternative Treatments And Their Risks, Side Effects, And Benefits, Including The Risks Of Nontreatment[.]

Information about alternative treatments and their risks, side effects and benefits is covered extensively below in §III.(B). Without the less intrusive alternative requested by Appellant he is almost certain to continue to have serious problems in the community resulting in future admissions to API and involvement with the criminal justice system as a result of bothering people (e.g., violating property owners' directions to leave their premises and not return). A key component of the less intrusive alternative requested is to effectively address this problem.

(6) The Extent And Duration Of Changes In Behavior Patterns And Mental Activity Effected By The Treatment;

Dr. Khari testified that even when on medication he maintains his delusional thought content.[65] Dr. Maile testified that Appellant's condition has been declining over

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[60] Tr. 38-39 (May 12, 2008).
[61] Tr. 80 (May 12, 2008).
[62] Tr. 80 (May 12, 2008).
[63] Tr. 52-53 (May 12, 2008)
[64] Tr. 81 (May 12, 2008).

time,[66] which is under the 28 year forced drugging regime imposed on him by API. As set forth above, Dr. Jackson testified this is likely due to the brain damage inflicted by the drugs, which she calls Chemical Brain Injury (CBI).[67] As set forth in §III.A.(3), above, it is unanimous that Appellant uniformly quits taking the drugs when they are not forced upon him.

(7) The Risks Of Adverse Side Effects;

The risks of adverse side effects was one of the factors set forth by the Minnesota Supreme Court in *Price* this Court cited with approval. This factor parallels one of the AS 47.30.837(d)(2)(B) factors, which has been extensively set forth elsewhere herein.

(8) The Experimental Nature Of The Treatment.

Dr. Khari testified the proposed treatment is not experimental.[68] The experimental nature of the treatment has not been made an issue in this case.

(9) Acceptance Of The Proposed Treatment By The Medical Community Of The State.

Both Dr. Khari,[69] and Dr. Hopson[70] testified the proposed treatment conformed to the standard of care in Alaska. Appellant agrees the proposed treatment is generally accepted by the psychiatric community of the state. However, it is respectfully suggested that in light of Dr. Jackson's, Dr. Mosher's and Mr. Whitaker's unrebutted testimony

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[65] Tr. 47 (May 12, 2008).
[66] Tr. 22 (May 12, 2008).
[67] *See*, above written testimony of Dr. Jackson and TR. 135 (May 14, 2008).
[68] Tr. 53 (May 12, 2008).
[69] Tr. 53 (May 12, 2008).
[70] Tr. 234 (May 15, 2008).

regarding how uninformed that acceptance is, and the harm it is causing,[71] as well as the many standard of care disasters, this factor should be downgraded if not eliminated. It is not logically relevant to the "independent judicial determination of the patient's best interests" required under *Myers*.[72]

(10) The Extent Of Intrusion Into The Patient's Body And The Pain Connected With The Treatment.

This Court has noted forced drugging has been equated with the intrusiveness of electroshock and lobotomy.[73] Dr. Hopson testified that if API was authorized to administer the Risperdal as it has requested and Appellant refused, he would be held down and injected.[74]

Appellant has demonstrated probable success on the merits with respect to best interests. Next he does so with respect to a less restrictive alternative.

B. There Is A Less Intrusive Alternative Available

One of the core holdings of *Myers* is the State may not forcibly drug someone with psychotropic medication(s) against his wishes unless "no less intrusive alternative treatment is available."[75] API may not avoid its obligation to provide a less intrusive alternative by choosing to not provide funds. *Wyatt v. Stickney*, 344 F.Supp. 387, 392 (M.D.Ala.1972) ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974)(state legislature is not free to

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[71] Tr. 112, et seq. (May 14, 2008) and Exhibits E, F, pp 2-8, & G.
[72] 138 P.3d at 252.
[73] *Myers*, 138 P.3d at 242; *Wetherhorn* 156 P.3d at 382.
[74] Tr. 185 (May 14, 2008). He also testified that in his experience patients will quite frequently submit when faced with that prospect. *Id.*

provide social service in a way that denies constitutional right). In *Wyatt* the federal courts required the State of Alabama to spend funds in specific ways to provide constitutionally adequate services.

Having invoked its awesome power to confine Respondent and having sought to exercise its similarly awesome power to forcibly medicate him against his will, Appellant's constitutional right to a less intrusive alternative has sprung into being under *Myers*. *Wyatt* holds that API may not avoid its obligation to do so merely by choosing not to provide the less intrusive alternative, *i.e.*, providing a social service in a way that denies Appellant's right to a less intrusive alternative.

In *Hootch v. Alaska State-Operated School System*, in considering an equal protection claim regarding the right to state funding of local schools, this Court held that resolution of the complex problems pertaining to the location and quality of secondary education are best determined by the legislative process, but went on to state, "We shall not, however, hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or United States Constitutions is established."[76] Here, it seems probable this Court would also not hesitate to order the provision of an available less intrusive alternative to satisfy the constitutional due process right to a less intrusive alternative it required in *Myers*. There would likely be some limitation on the State's obligation to provide less intrusive alternatives, such as extreme cost, but if the State

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[75] Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 239 (Alaska 2006).
[76] *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 808–09 (Alaska 1975).

could reasonably provide a less intrusive alternative, it may not constitutionally forcibly drug the person instead.[77]

(1) Appellant Presented Scientific and Expert Opinion Evidence That Outcomes Are Far Better For People Given Choices Other Than the Drugs

Dr. Jackson, Dr. Bassman and Robert Whitaker submitted written testimony as to the overwhelming scientific evidence that many people given a chance to decline the neuroleptics will recover, or at least do far better, including those that have been on them for a long time.[78] In addition transcripts of the prior testimony of Loren Mosher, MD, and Sarah Porter was submitted under Evidence Rule 804(b)(1).[79]

Both Jackson and Whitaker presented numerous scientific studies demonstrating the superiority of non-drug approaches for many.[80] Dr. Bassman's written testimony is to similar effect, and he also notes, "when it is clear that medications are not effective, it is necessary and only humane to offer other options for the individual to choose."[81]

Sarah Porter was qualified as an expert in the area of alternative treatments[82] and testified through Evidence Rule 804(b)(1) to the following:[83]

> A. I've . . . set up and run a program in New Zealand which operates as an alternative to acute mental health services. . . . [O]ur outcomes to date have been outstanding, and the funding body that provided . . . the resources to

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[77] The less intrusive alternative sought by Appellant is not costly when compared to the current costs of the revolving-door incarcerations of Appellant in API and jail.
[78] Exhibits E, G & I, respectively.
[79] Exhibit F.
[80] Exhibit E, pp 12-16. and Exhibit G, pp 6-8, respectively.
[81] Exhibit I, p. 2.
[82] Exhibit F, p.17, (transcript p. 92, September 5, 2007, in 3AN 07-1064 PR).
[83] Exhibit F, pp 12-14 (transcript pp 73-81, September 5, 2007, in 3AN 07-1064 PR).

do the program is extremely excited about the results . . . and [starting] out more similar programs in New Zealand. . . .

there is now growing recognition that medication is not a satisfactory answer for a significant proportion of the people who experience mental distress, and that for some people...it creates more problems than solutions. . . .

Q. Now, I believe you testified that you have experience dealing with those sorts of people as well, is that correct?

A I do.

Q And would that include someone who has been in the system for a long time, who is on and off drugs, and who might refuse them?

A Yes. Absolutely. We've worked with people in our services across the spectrum. People who have had long term experience of using services and others for whom it's their first presentation.

Q And when you say "long term use of services," does that include -- does that mean . . . medication?

A Unfortunately, in New Zealand the primary form of treatment, until very recent times, has been medication. . . .

Q Now, you mentioned -- I think you said that coercion creates problems. Could you describe those kind of problems?

A . . . [C]oercion, itself, creates trauma and further distress for the person, and that that, in itself, actually undermines the benefits of the treatment that is being provided in a forced context. And so our aiming and teaching is to be able to support the person to resolve the issues without actually having to trample . . . on the person's autonomy, or hound them physically or emotionally in doing so. . . . .

Q And -- and have you seen success in that approach?

A We have. It's been phenomenal, actually. . . . I had high hopes that it would work, but I've . . . been really impressed how well, in fact, it has worked . . . .[84]

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[84] Exhibit F, pp 12-19.

Dr. Mosher's testimony included the following:

> Q . . . Now, in your opinion, is medication the only viable treatment for schizophrenia paranoid type?
>
> A Well, no, it's not the only viable treatment. It is one that will reduce the so-called positive symptoms, the symptoms that are expressed outwardly for those kinds of folks. And that way they may seem better, but in the long run, the drugs have so many problems, that in my view, if you have to use them, you should use them in as small a dose for as short a period of time as possible. And if you can supply some other form of social environmental treatment -- family therapy, psychotherapy, and a bunch of other things, then you can probably get along without using them at all, or, if at all, for a very brief period of time. But you have to be able to provide the other things. You know, it's like, if you don't have the other things, then your hand is forced.[85]

(2) <u>Appellant Presented a Well-Thought Out Available Less Intrusive Alternative</u>

Mr. Cornils's written testimony describes in some detail the rationale, prospects and availability of a less intrusive alternative designed specifically for Appellant.[86] Mr. Cornils was also cross-examined with respect to this written testimony and gave redirect testimony at the May 15, 2008, hearing.[87] In this live testimony, Mr. Cornils testified that if Appellant initially had someone with him for up to 24 hours a day and other needed resources, especially housing, he would likely improve to the point where he didn't need someone to be with him as much and could live successfully in the community without

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[85] Exhibit F, pp 5-6.
[86] Exhibit J. This written testimony was originally submitted September 12, 2007, in 3AN 07-1064 PR, and was resubmitted in the two intervening force drugging proceedings in which Appellant was represented by PsychRights, but was not committed, and then resubmitted again in this case.
[87] Tr. 239-262 (May 15, 2008).

psychiatric medication.[88]

Mr. Cornils testimony was equivocal with respect to whether CHOICES would take Appellant as a client if he didn't have a psychiatrist willing to work with him without drugs,[89] but was very clear CHOICES would do so if there was such a psychiatrist.[90] Thus, it appears if API was ordered to provide a less intrusive alternative that did not involve medication, and sufficient resources were made available, CHOICES would be available to work with Appellant.[91] Dr. Jackson testified that the less intrusive alternative to which Mr. Cornils testified to was exceedingly thorough, of which she was envious, and was a very solid and a reasonable proposal as a first step.[92]

However, whether or not CHOICES is available or could become available, it is absolutely clear that API, itself, could provide these types of services and supports.

Dr. Hopson admitted it is Appellant's loss of housing that causes a problem with him being in the community.[93] Dr. Hopson also testified that if Appellant were provided intensive case management, which is the type of services requested by Appellant and described by Mr. Cornils, Appellant might very well never come back to the hospital.[94]

(3) <u>API Refuses to Provide Available Less Intrusive Alternatives</u>

The foregoing makes clear that a much more effective and beneficial less intrusive alternative is available if only API would provide it. It is just as clear API heretofor

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[88] Tr. 245-247 (May 15, 2008).
[89] Tr. 250-252 (May 15, 2008).
[90] Tr. 251 (May 15, 2008).
[91] Tr. 251 (May 15, 2008).
[92] Tr. 150 (May 14, 2008).
[93] Tr. 182 (May 14, 2008).

refuses to do so. Dr. Hopson, API's Medical Director, testified API was unwilling to implement Appellant's proposed less intrusive alternative because it is not its mission.[95] Dr. Hopson further testified that API refuses to do so because "it sets a precedence for us to be providing a different level of care than we're accustomed to doing."[96] These are not permissible bases for providing unconstitutional services. *See*, the *Wyatt v. Stickney*[97] and *Wyatt v. Anderholt*,[98] analysis at §III.B., above.

In sum, just as with respect to best interests, Appellant has shown probable success on the merits with respect to the availability of a less intrusive alternative.

Even if the probable success on the merits standard is held to apply, Appellant only needs to prevail on either best interests or less intrusive alternative, and he has demonstrated probable success on the merits with respect to both.

IV. CONCLUSION

For the foregoing reason, this Court should sustain its May 23, 2008, Order granting a stay of the Forced Drugging Order pending appeal.

Dated this 2nd day of June, 2008, at Anchorage, Alaska.

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By: _____
James B. Gottstein, Esq., Alaska Bar No. 7811100

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[94] Tr. 183 (May 14, 2008).
[95] Tr. 181 & Tr. 183 (May 14, 2008). Tr. 215 (May 15, 2008).
[96] Tr. 215 (May 15, 2008). However, Dr. Hopson admitted API had made an exception in the past for Appellant, by providing outpatient services it doesn't normally provide when it involved drugging. Tr. 233 (May 15, 2008).
[97] 344 F.Supp. at 392.
[98] 503 F.2d at 1315.

Exhibits

A. Petition for Court Approval of Administration of Psychotropic Medication (Forced Drugging Petition).

B. Findings and Order Concerning Court-Ordered Administration of Medication, dated May 19, 2008 (Forced drugging Order).

C. Limited Entry of Appearance with selected attachments thereto.

D. Grace E. Jackson Curriculum Vitae.

E. Report of Grace E. Jackson, MD (Jackson Report).

F. Evidence Rule 804(b)(1) testimony of Loren R. Mosher, MD, in 3AN 07-277 CI (Mosher Testimony) and Sarah Porter in 3AN 07-1064 PR.

G. Affidavit of Robert Whitaker (Whitaker Affidavit).

H. Affidavit of Grace E. Jackson, MD (Dr. Jackson Affidavit).

I. Affidavit of Ronald Bassman, PhD.

J. Affidavit of Paul Cornils.

K. Notice Re: Discharge

L. Transcript of March 14, 2008, 30-Day Involuntary Commitment hearing in 3AN 08-416 PR.

M. Conditional Limited Entry of Appearance in 3AN 08-00416 PR.

N. Order of Dismissal of Petition for Commitment in 3AN 08-416 P/S

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

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

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent, William Bigley, has filed a Motion for Summary Judgment (Motion) to deny the petition and order the Alaska Psychiatric Institute (API) to provide the following less intrusive alternative:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.[1] API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.

4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.

5. The foregoing may be contracted for from an outpatient provider.

The following affidavits and other competent written testimony has been submitted in support of the Motion:

1. Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.

[1] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

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2. Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.
3. Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.
4. Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.
5. Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.
6. Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court case No. S-13116.
7. Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;
8. Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.
9. Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

I. Legal Standards

(A) Best Interests

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

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

(emphasis added).

The Supreme Court further held:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:

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(A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

(C) a review of the patient's history, including medication history and previous side effects from medication;

(D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][2]

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

(1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
(2) the risks of adverse side effects;
(3) the experimental nature of the treatment;
(4) its acceptance by the medical community of the state; and
(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[3]

Robert Whitaker's written testimony establishes that:

(a) Neuroleptics, also called antipsychotics, increase the likelihood that a person will become chronically ill.

(b) Long-term recovery rates are much higher for unmedicated patients than for those who are maintained on neuroleptic drugs.

(c) Neuroleptics cause a host of debilitating physical, emotional and cognitive side effects, and lead to early death.

(d) The new "atypical" neuroleptics are not better than the old ones in terms of their safety and tolerability, and quality of life may even be worse on the new drugs than on the old ones.

(e) Non-medication approaches have been proven far more effective.

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[2] 138 P.3d 252.
[3] *Id.*

(B) Less Intrusive Alternative

With respect to *Myers'* requirement of a less intrusive alternative, API is constitutionally required to provide an available less intrusive alternative. *Wyatt v. Stickney*,[4] ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt*,[5] (state legislature is not free to provide social service in a way that denies constitutional right). In *Wyatt* the federal courts required the State of Alabama to spend funds in specific ways to correct constitutionally deficient services.

Upon API invoking its awesome power to confine Appellant and seeking to exercise its similarly awesome power to forcibly drug him against his will, Appellant's constitutional right to a less intrusive alternative arises under *Myers*. Under *Wyatt* API may not avoid its obligation to do so by adopting a mission that denies Appellant's constitutional right to a less intrusive alternative.

In *Hootch v. Alaska State-Operated School System*,[6] in considering an equal protection claim regarding the right to state funding of local schools, the Alaska Supreme Court held that resolution of the complex problems pertaining to the location and quality of secondary education are best determined by the legislative process, but went on to hold, "We shall not, however, hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or United States Constitutions is established." Here, it is respectfully suggested, this Court should not hesitate to order the provision of

[4] 344 F.Supp. 387 (M.D.Ala.1972).
[5] 503 F.2d 1305, 1315 (5th Cir. 1974).
[6] 536 P.2d 793, 808–09 (Alaska 1975).

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the available less intrusive alternative to satisfy the constitutional due process right to a less intrusive alternative it required in *Myers*. Otherwise, the right is meaningless.[7]

II. Testimony In Support of Summary Judgment

(A) Best Interests

Dr. Jackson's May 16, 2008, affidavit confirms the Whitaker testimony, and describes in some detail the brain damage caused by neuroleptics, summarizing it as follows:

> Evidence from neuroimaging studies reveals that ***old and new*** neuroleptics contribute to the progressive shrinkage and/or loss of brain tissue. Atrophy is especially prominent in the frontal lobes which control decision making, intention, and judgment. These changes are consistent with *cortical* dementia, such as Niemann-Pick's or Alzheimer's disease.
>
> Evidence from postmortem analyses in lab animals reveals that ***old and new*** neuroleptics induce a significant reduction in total brain weight and volume, with prominent changes in the frontal and parietal lobes.
>
> Evidence from biological measurements suggests that ***old and new*** neuroleptics increase the concentrations of tTG (a marker of programmed cell death) in the central nervous system of living humans.
>
> Evidence from *in vitro* studies reveals that haloperidol reduces the viability of hippocampal neurons when cells are exposed to clinically relevant concentrations. (Other experiments have documented similar findings with the second-generation antipsychotics.)
>
> Shortly after their introduction, neuroleptic drugs were identified as chemical lobotomizers. Although this terminology was originally metaphorical, subsequent technologies have demonstrated the scientific reality behind this designation.
>
> Neuroleptics are associated with the destruction of brain tissue in humans, in animals, and in tissue cultures. Not surprisingly, this damage has been

[7] There are likely limits to the right, such as unreasonable cost, but that is not the situation here.

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found to contribute to the induction or worsening of psychiatric symptoms, and to the acceleration of cognitive and neurobehavioral decline.

(boldfacing in original, underlining added)

Dr. Jackson's May 14, 2008, testimony, among other things, establishes that if Petitioner is allowed to continue to drug Respondent as it desires he will likely die within five years. Dr. Jackson's May 14, 2008, testimony also discusses the reasons why typical clinicians do not receive reliable information.

Dr. Jackson's May 20, 2008, affidavit establishes, among other things, that Respondent's current symptoms are from Chemical Brain Injury caused by the long-term psychiatric drugging of Respondent against his will, and no psychiatric diagnoses should be attached to Respondent as a result.

(B) Less Intrusive Alternative

Mr. Whitaker's, Dr. Bassman's, Sarah Porter's and Paul Cornil's testimony establish there are less intrusive alternatives and the following less intrusive alternative should be ordered by this Court:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.[8] API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.

[8] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

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4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.

5. The foregoing may be contracted for from an outpatient provider.

III. Conclusion

There being no genuine issue as to any material fact and Respondent being entitled to judgment as a matter of law, Respondent's Motion for Summary Judgment should be granted, denying the petition and ordering API to provide the following less intrusive alternative:

and Order petitioner to provide the following less intrusive alternative:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.[9] API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.

4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.

5. The foregoing may be contracted for from an outpatient provider.

DATED: October 27, 2008. Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

[9] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

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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

REPLY TO OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, MOTION TO VACATE AND MOTION TO DISMISS AND THE ADDENDUM ATTACHED TO THE MOTION TO DISMISS

API has opposed in one pleading Respondent's separate motions (1) for summary judgment and (2) to dismiss, including the addendum to the motion to dismiss (Dispositive *Parens Patriae* Motions).[1] Respondent therefore files this unitary Reply regarding the Dispositive *Parens Patriae* Motions.

I. THE MOTION TO VACATE SCHEULING ORDER HAS ALREADY BEEN DECIDED

Respondent agrees with API that Respondent's Motion to Vacate the October 29th Hearing has been ruled upon. Section I of Respondent's Memorandum in Support of Motion to Dismiss was written before Respondent had been informed the commitment petition had been granted and is no longer relevant. It is thus unclear of what API is complaining in its Section III.

However, while Respondent accepted the November 5, 2008, hearing date set by the Court, he did not waive his due process rights to meaningful notice and a meaningful

[1] API's unitary response to the Dispositive *Parens Patriae* Motion) does not apparently cover Respondent's separate Motion to Dismiss .838 Count. Thus, at this point, the Motion to Dismiss .838 Count is unopposed.

opportunity to respond, which has been set forth a number of times already and won't be rehashed here, other than to note API has cited no authority in opposition to that cited by Respondent. In addition, all pending motions should be decided before the hearing. As will be shown below, Respondent is entitled to both dismissal of the *Parens Patriae* Count and and an order granting the requested less intrusive alternative as a matter of law.[2] No hearing is needed, at least with respect to the *Parens Patriae* Count, because API has failed to meet its burden in opposing the Dispositive *Parens Patriae* Motions.

II. STANDARDS

API correctly sets forth the standards for dismissal under Civil Rule 12(b)(6),[3] but misapplies them. With respect to its recitation of the standards for Summary Judgment under Civil Rule 56, API failed to acknowledged the key provision, subsection (e), which provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[2] This Reply does not address the pending motion to dismiss the .838 Count, which at this point has not been opposed.

[3] However, in addition to Civil Rule 12(b)(6), in his Motion to Dismiss Respondent relied on due process and that API has admitted a dispositive fact. The admission is discussed a bit further in Section IV, below, but Respondent will rely upon his Memorandum in Support of Motion to Dismiss with respect to the due process issue.

III. THE FORCED DRUGGING PETITION IS FATALLY DEFECTIVE FOR FAILURE TO ALLEGE THE *MYERS* REQUIREMENTS

In *Myers v. Alaska Psychiatric Institute*,[4] the Alaska Supreme Court held:

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

(emphasis added). The Forced Drugging Petition here only alleges the statutory requirement. Thus, the Forced Drugging Petition is legally insufficient. Even with all of the allegations of the Forced Drugging Petition being assumed true, it does not state a legally sufficient claim for relief under *Myers*.

IV. API HAS ADMITTED RESPONDENT'S CAPACITY

In his Motion to Dismiss and Addendum, Respondent has made the point that by offering Respondent the drugs API impliedly admitted he currently has capacity or had capacity "at the time of previously expressed wishes" under AS 47.30.839. In its Opposition, API fails to address the fundamental point that it is illegal for it to administer psychotropic drugs to someone who lacks capacity without receiving court authorization pursuant to a petition filed under AS 47.30.839. Either AI is illegally administering drugs to Respondent when he agrees to take them, or he has the requisite capacity. What API's Opposition shows is the disingenuous, to be charitable, nature of its determinations of

[4] 138 P.3d 238, 254 (Alaska 2006).

capacity.[5] In any event, having made the decision to accept the decisions by Respondent to grant informed consent to take the medication when he makes that decision, which Respondent has done many times, including recently, it must bear the legal consequences when Respondent decides to withhold informed consent. In sum, API has made the legal admission that Respondent has capacity to withhold consent, or had capacity when he previously expressed his wishes to withhold consent.

V. API HAS FAILED TO SET FORTH SPECIFIC FACTS SHOWING A GENUINE ISSUE OF FACT.

As set forth above, Civil Rule 56(e) requires API to produce affidavits or other competent evidence of facts to defeat Respondent's showing of facts. Any unrebutted fact set forth in Respondent's showing has to be deemed true.[6]

(A) The Best Interests Requirement

The Supreme Court held in *Myers*:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:

---

[5] In his deposition in the *Myers* case, Dr. Robert Hanowell explicitly testified that if someone agrees to take the medication he considers the patient competent and if the patient doesn't, he considers the patient incompetent. *See*, http://psychrights.org/States/Alaska/CaseOne/30-Day/Hanowelldepo.htm.

[6] *Bennett v. Weimar*, 975 P.2d 691, 694 (Alaska 1999) ("assertions of fact in unverified pleadings and memoranda cannot be relied on in denying a motion for summary judgment."). Here, the Forced Drugging Petition was verified, but that doesn't save it because it doesn't include the *Myers* requirements.

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
>
> (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
>
> (C) a review of the patient's history, including medication history and previous side effects from medication;
>
> (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
>
> (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][7]

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

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
> (2) the risks of adverse side effects;
> (3) the experimental nature of the treatment;
> (4) its acceptance by the medical community of the state; and
> (5) the extent of intrusion into the patient's body and the pain connected with the treatment.[8]

Respondent has submitted a tremendous amount of admissible evidence with respect to these best interests requirements. Respondent has also submitted a tremendous amount of admissible evidence with respect to the less intrusive alternative requirement.

The following is the admissible evidence submitted by Respondent:

(1) Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.

(2) Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.

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[7] 138 P.3d 252.
[8] *Id.*

(3) Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.

(4) Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court case No. S-13116.

(5) Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;

(6) Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

(7) Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.

(8) Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.

(9) Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.

This is an overwhelming case and Respondent won't try to describe it all here, other than to say it addresses the *Myers* Requirements and the following are particularly germane elements:

(A) The drugs have caused dysmentia or dementia in Respondent.

(B) The drugs otherwise cause a tremendous amount of brain damage.

(C) The drugs are particularly harmful to Respondent at this point in his life, with every dose causing serious harm.[9]

(D) If the drugs are continued to be administered it is likely they will kill Respondent within 5 years.

(E) Respondent's most likely proper diagnosis is Chemical Brain Injury from the drugs and this should preclude the attachment of any and all psychiatric labels at this time.

---

[9] In fact, the Alaska Supreme Court noted in granting the Stay Pending Appeal in S-13116 noted that "even the administration of a single dose, or an additional dose, intravenously may contribute to irreparable harm."

(F) There are alternative treatments that are far less harmful with far better outcomes.

(G) Respondent's prospects will be dramatically improved if he is not forced by this Court to take the drugs.

API has failed to submit any admissible evidence against Respondent's showing[10] and therefore Respondent is entitled to summary judgment on the best interests issue. Respondent respectfully suggests there is no legitimate argument to the contrary.

(B)Less Intrusive Alternative

Respondent has also requested an order requiring API, as the agency exercising the State of Alaska's *parens patriae* power, to provide the following less restrictive alternative:

1. Respondent be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Respondent be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Respondent should he choose it.[11] API shall first attempt to negotiate an acceptable abode, and failing, that procure it and make it available to Respondent.

4. At API's expense, make sufficient staff <u>available</u> to be with Respondent to enable him to be successful in the community.

5. The foregoing may be contracted for from an outpatient provider.

---

[10] Even if the testimony at the involuntary commitment hearing can be used in the context of this summary judgment motion, most of it is completely irrelevant to the facts involved in deciding the *Parens Patriae* Count because it doesn't address most of the *Myers* requirements.

[11] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

Respondent has also clearly set forth unrebutted facts on this, and the issue before this Court is whether these facts entitle him to relief as a matter of law. They do.

Respondent also cited authority establishing that once having invoked its awesome power to lock Respondent up and then file a petition to drug him against his will, API, as the agency exercising the State of Alaska's *parens patriae* power, is obligated to provide this less intrusive alternative.[12]

API addressed none of this authority, instead just asserting the requested less intrusive alternative is not related to the Forced Drugging Petition and "he will have to file a separate legal action." That Respondent has raised the issue multiple times in the past without it having been ruled upon only suggests it should be ruled upon now.[13]

The question is whether this Court will continue to allow the State to discharge Respondent to the revolving door criminal justice interactions that has been occurring since API discharged him "Against Medical Advice" on September 18, 2007,[14] after obtaining a commitment order based on API's sworn testimony that Respondent was so

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[12] *Wyatt v. Stickney*, 344 F.Supp. 387 (M.D.Ala.1972) ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt, 503 F.2d 1305, 1315 (5th Cir. 1974),* (state legislature is not free to provide social service in a way that denies constitutional right); *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 808–09 (Alaska 1975)(Supreme Court won't hesitate to order State to provide constitutionally required services).

[13] It is also a question which the Alaska Supreme Court may decide in S-13116, but it also may not.

[14] Exc. 1 in Alaska Supreme Court Case No S-13116, a copy of which has been filed contemporaneously herewith.

gravely disabled he could not survive safely in the community,[15] in order to avoid being ordered to provide the requested less intrusive alternative then.[16] Respondent has demonstrated his legal right to the less restrictive alternative. The facts are unrebutted, The law is in his favor. It is appropriate for determination by summary judgment. It should be done.

VI. CONCLUSION

There being no genuine issue as to any material fact and Respondent being entitled to judgment as a matter of law, Respondent's Motion for Summary Judgment should be granted, denying the petition and ordering API to provide the following less intrusive alternative:

1. Respondent be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

2. If involuntarily in a treatment facility in the future, Respondent be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.

3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Respondent should he choose it.[17] API shall first attempt to negotiate an acceptable abode, and failing that, procure it and make it available to Respondent.

4. At API's expense, make sufficient staff <u>available</u> to be with Respondent to enable him to be successful in the community.

---

[15] Page 82 of Judicial Notice Appendix filed in Alaska Supreme Court Case No. S-13116, a copy of which has been filed contemporaneously herewith (S-13116 Judicial Notice Appendix).
[16] Pages 149-158 of S-13116 Judicial Notice Appendix.
[17] API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

5. The foregoing may be contracted for from an outpatient provider.

DATED: November 3, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

Subject: Follow-up
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Tue, 21 Oct 2008 18:29:49 -0800
To: Laura Derry <laura.derry@alaska.gov>

Hi Laura,

It was nice to meet you. I wanted to follow up a bit.

The first thing I want to emphasize is I would really like for us all to get together to try and work something out that has a chance for things to work for Mr. B and that maybe having a formal settlement conference or mediator would facilitate things.

The second thing, is I need a copy of everything in Mr. B's API chart for 2007 and so far in 2008 in order to be in a position to prepare if we get to the forced drugging petition.

--

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

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Subject: Records Deposition
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 23 Oct 2008 09:58:39 -0800
To: Laura Derry <laura.derry@alaska.gov>

Hi Laura,

Receiving no response to my demand for a complete copy of Mr. B's chart from the beginning of 2007, I will just go ahead and subpoena the records. If you want input into who and when, you should let me know immediately.

--

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Subject: Khari Deposition Subpoena
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 23 Oct 2008 20:03:52 -0800
To: Laura Derry <laura.derry@alaska.gov>, Jim Gottstein <jim.gottstein@psychrights.org>
CC: Lisa Smith <Lisa@psychrights.org>

Hi Laura,

Not having heard from you, I am going to try and arrange a court reporter for Wednesday morning to take the deposition of Dr. Khari and then subpoena her. I will try and be accommodating as I can to your schedule, but without knowing what time frame I might be dealing with, I feel I need to get this done as soon as possible. Will you accept service of Dr. Khari's subpoena?

--

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Subject: RE: Dismissal of Med Petition
From: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
Date: Fri, 24 Oct 2008 09:45:16 -0800
To: Jim Gottstein <jim.gottstein@psychrights.org>

Jim,

Thank you. I am writing the motion right now, and will have it filed in superior court before noon.

Thank you for your patience, and speaking with me this morning. I enjoy our discussions.

Laura

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Friday, October 24, 2008 9:29 AM
To: Derry, Laura J (LAW)
Cc: Jim Gottstein
Subject: Dismissal of Med Petition

Hi Laura,

This is to confirm our discussion that API is going to dismiss the forced medication petition in 3AN 08-1252 PR and in reliance on this, I am canceling the deposition of Dr. Khari.

--

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President/CEO

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Subject: This 'n That
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Tue, 28 Oct 2008 11:00:55 -0800
To: Laura Derry <laura.derry@alaska.gov>
CC: Jim Gottstein <jim.gottstein@psychrights.org>

Hi Laura,

A few things:

- I need to schedule depositions, but I will need to have the chart for at least a day or so before that.
- I don't see any reason why I shouldn't get all his 2007 & 2008 chart by the end of tomorrow.
- Since it seems like a focus is going to be on the emergency justification, please provide *ex post hasto* (a Latin phrase I made up) all documentation pertaining to AS 47.30.838 medication against Bill for 2007 and 2008. I don't see why this shouldn't be available by the end of today because special record keeping is required.
- I need a copy of API's policy on emergency medication. Will you provide it or do I need to subpoena it.
- Who is in charge of/does training with respect to emergency medication?
- What witnesses other than Dr. Khari do you intend to call? I will need to take their depositions.
- Could you please give me your direct phone number?

--

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Subject: Re: Motion to quash depositions 3 am 08-1252 PR
From: Jim Gottstein <jim.gottstein@psychrights.org>
Date: Thu, 30 Oct 2008 17:56:12 -0800
To: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
CC: Jim Gottstein <jim.gottstein@psychrights.org>, Lisa Smith <Lisa@psychrights.org>
BCC: John McKay <mckay@alaska.net>

Hi Laura,

First, if Ron's subpoena said 9:00 pm, that was a mistake. Lisa was out sick yesterday and I sent her home today before I got your last e-mail because she is still sick and I hadn't located a copy of what we sent out in between your last e-mail and this one. So, that's why I hadn't responded yet.

In any event, yes, your assumption that I don't intend to withdraw the subpoenas is correct. I am, of course, as I've repeatedly said, willing to work with you with respect to the details.

You may also represent that I would be willing to submit my opposition to your motion to quash orally, in argument if we can do it tomorrow afternoon. Otherwise, I should be able to get my opposition in by noon on Monday. With respect to your offer to meet and confer, I have been saying we should do that for days and had to issue the subpoenas (as I said I would) because I ran out of time.

Derry, Laura J (LAW) wrote:

> Jim –
>
> In my most recent email, I don't think I was as clear as I needed to be regarding our disagreement over discovery. We do not believe you are entitled to discovery under a variety of theories. I assume you disagree with that position and are not willing to withdraw your subpoenas. Assuming I am correct, I will be filing motions to quash tomorrow, under an expedited basis. As required by the Civil Rule 77, I am informing you of our intent to move on an expedited basis to quash your subpoenas and assume we can inform the court that we have discussed this matter and have agreed to disagree.
>
> If you are willing to withdraw your subpoenas please advise; if we don't hear from you by noon tomorrow, we will file the above mentioned motions.
>
> Laura Derry

--

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http://psychrights.org/

Subject: RE: Subpoenas
From: "Derry, Laura J (LAW)" <laura.derry@alaska.gov>
Date: Fri, 31 Oct 2008 08:05:39 -0800
To: Jim Gottstein <jim.gottstein@psychrights.org>

Jim,

I will call you mid-morning. Thanks, Laura

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Friday, October 31, 2008 6:06 AM
To: Derry, Laura J (LAW)
Cc: Kraly, Stacie L (LAW); Jim Gottstein
Subject: Re: Subpoenas

Hi Laura,

I have realized that when I responded to this as part of my response to your later e-mail, I didn't include a response about the confidentiality of the transcripts. You can move for a protective order and I will agree to keep it confidential (to the extent not used at trial) for a reasonable amount of time after the relevant deposition(s)--say a week--for you to file for such a protective order. If you want to draft up a stipulation to that effect for me to review, go ahead.

Derry, Laura J (LAW) wrote:
Jim,

I'm sorry if I have inconvenienced you. It is not the practice of the Human Services section to accept service on behalf of our clients. Mr. Adler will be available tomorrow morning for you to serve him with your subpoena—at a reasonable time—around 9am.

As a second and equally important matter, API does not believe that discovery is proper for this type of proceeding, and this specific case. Should discovery occur, we wish to meet and confer with you regarding the depositions. Given the late notice, and the fact that you wish to depose psychiatrists on Monday, and they are responsible for the care of multiple patients, it will be difficult if not impossible to produce these witness at the times requested. Also, the 9pm deposition of Ron Adler is a time that should only be allowed, at the convenience of the witness. We would like to confer with you regarding alternate days and times as mutually agreeable between the witnesses and parties, furthermore the state requests that the transcripts from these requests be maintained as confidential.

Thank you,
Laura Derry

From: Jim Gottstein [mailto:jim.gottstein@psychrights.org]
Sent: Thursday, October 30, 2008 2:55 PM
To: Derry, Laura J (LAW)
Cc: Kraly, Stacie L (LAW); Jim Gottstein
Subject: Subpoenas
Importance: High

Hi Laura,

I will ask you again if you will accept service of subpoenas for API employees? We have served the deposition subpoena on Dr. Khari, but Mr. Adler was not there. His assistant said he was at a conference today and tomorrow and would be out of town on Monday. As I wrote you and left voice mail earlier, I will work with you on the schedule as I can. So, maybe we should do it Saturday or Sunday. I think you are obligated to work with me on this. I will object to your calling any witness(es) whose deposition I was

unable to take, especially due to your refusal to accept service.

--

James B. (Jim) Gottstein, Esq.
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT, AT ANCHORAGE

COPY
Original Received
Probate Division

OCT 22 2008

Clerk of the Trial Courts

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

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respondent has moved to dismiss the Petition for Court approval of Administration of Psychotropic Medication filed herein on October 20, 2008 (Forced Drugging Petition). In the alternative, Appellant has moved for an order requiring petitioner to file a legally sufficient petition which provides Appellant meaningful notice of the factual and legal bases upon which the requested relief is sought.

I. THE FORCED DRUGGING PETITION IS PREMATURE

In *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 382 (Alaska 2007), the Alaska Supreme Court ruled:

> Alaska requires a two-step process before psychotropic drugs may be administered involuntarily in a non-crisis situation: the State must first petition for the respondent's commitment to a treatment facility, and then petition the court to approve the medication it proposes to administer. The second step requires that the State prove by clear and convincing evidence that: (1) the committed patient is currently unable to give or withhold informed consent; . . .

(footnotes omitted).

The second-step requirement that the State must "then petition" for a forced drugging order applies to a "committed patient." Thus, a forced drugging petition under AS 47.30.839 can not be filed until an order for commitment has been signed by a Superior

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Court Judge. The Forced Drugging Petition is therefore premature and should be dismissed on that ground.

II. THE FORCED DRUGGING PETITION IS LEGALLY INSUFFICIENT

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

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

(emphasis added).

The Supreme Court further held:

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

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(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][1]

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

(1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;

(2) the risks of adverse side effects;

(3) the experimental nature of the treatment;

(4) its acceptance by the medical community of the state; and

(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[2]

Over two years after *Myers* the Alaska Psychiatric Institute (API) is still using the "check box" form of forced drugging petition that only alleges in a conclusory fashion the statutory requirements. This is legally insufficient under *Myers* because there the Alaska Supreme Court required "in addition" to "comply[ing] with all applicable statutory requirements," the State must prove "the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*."[3]

Thus, under Civil Rule 12(b)(6), or otherwise, the Forced Drugging Petition is legally insufficient and must be dismissed for failure to allege a sufficient basis on which the requested relief may be granted.

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[1] 138 P.3d 252.
[2] *Id.*
[3] 138 P.3d at 254, emphasis added.

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III. THE FORCED DRUGGING PETITION DOES NOT SATISFY DUE PROCESS REQUIREMENTS

Neither does the Forced Drugging Petition satisfy due process requirements. Meaningful notice and a meaningful opportunity to be heard are the hallmarks of procedural due process.

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

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

Respondent is similarly entitled to "receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions." Therefore, after *Myers*, a petition requesting the court to authorize the forced drugging of an unwilling patient, must include the factual basis supporting the grant of the petition, including, "at a minimum," the factors required under *Myers*, as set forth in the previous section. The petition in this case failed to do so and should therefore be dismissed on that basis. Failing that, the Petitioner should be required to provide such factual basis and give Respondent a fair opportunity to prepare to rebut it prior to any hearing being held.

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IV. API HAS ADMITTED RESPONDENT IS COMPETENT TO MAKE MENTAL HEALTH TREATMENT DECISIONS

AS 47.30.837(c) provides in pertinent part:

> If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

During the October 21, 2008, hearing on involuntary commitment, Dr. Maile testified that Respondent had been offered psychiatric medications and had declined. This constitutes an admission that API had determined Respondent is competent to make mental health treatment decisions, because, as AS 47.30.837 provides, if Respondent was not competent to decide to take the medication API is required to seek authorization under AS 47.30.839. Since Respondent is competent to decide to take the drug(s), he is also competent to decline them. AS 47.30.839 only allows the Court to order Respondent to be drugged against his will if he is incompetent to either accept or decline the medication petition, and the Forced Drugging Petition must therefore be dismissed because API has admitted Respondent is competent to make mental health treatment decisions.

V. CONCLUSION

For the foregoing reasons, the Forced Drugging Petition should be dismissed.

DATED: October 22, 2008.

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