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

In the Matter of the Necessity of the Hospitalization of

[redacted]

Respondent

Case No. 3AN-16-01656PR

FILED IN OPEN COURT
Date: 8-22-16
Clerk:

MOTION and MEMORANDUM TO LIMIT TESTIMONY ON DANGEROUSNESS TO A QUALIFIED EXPERT(S)

Respondent, [redacted] by and through her counsel, James B. Gottstein of the Law Project for Psychiatric Rights, moves under *Kansas v. Crane*,[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*;[2] and *State v. Coon*[3] to prohibit testimony by Petitioner Alaska Psychiatric Institute (API) on the issue of whether Respondent poses a danger to self or others.

A. Proper Evidentiary Standards Are Required

In *Kansas v. Crane*, the United States Supreme Court reiterated that involuntary commitment for mental illness was constitutional only when:

> (1) "the confinement takes place pursuant to proper procedures and evidentiary standards," (2) there is a finding of "dangerousness either to one's self or to others," and (3) proof of dangerousness is "coupled ... with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.' "[4]

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[1] 534 U.S. 407, 409-10, 122 S.Ct. 867, 869 (2002)
[2] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
[3] 974 P.2d 386 (Alaska 1999).
[4] 534 U.S. 407, 409-10, 122 S.Ct. 867, 869 (2002)

One can see that Alaska's statutory involuntary commitment scheme is built around factors (2) & (3). This motion is directed at that part of factor (1), requiring the confinement (commitment) take place pursuant to proper evidentiary standards.

More specifically, testimony regarding whether Respondent is dangerous to herself or others can only be allowed if it is pursuant to proper evidentiary standards. In *State v. Coon*, 974 P.2d 386 (Alaska 1999), the Alaska Supreme Court adopted the United States Supreme Court's *Daubert* standard, replacing the *Frye* "generally accepted" standard"[5] for scientific evidence. The reason to replace the *Frye* Standard was explained in *Coon* as follows:

> Frye is potentially capricious because it excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny.[6]

It is the latter unreliability that is involved in testimony regarding dangerousness.

B. Psychiatrists' and Other Mental Health Professionals' Testimony On Dangerousness is Unreliable

The studies demonstrating the unreliability of psychiatric predictions of violence are legion:

> For the past three decades, virtually all the scholarly literature agreed that such predictions were less accurate than chance, even wrong as much as two out of three times.[7]

(footnotes omitted).

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[5] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).
[6] 974 P.2d at 393-394.
[7] Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal, 3d Edition (2016), *LexisNexis*, §3-4.2.1, footnotes omitted.

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The three justice dissenting in the United the States Supreme Court death penalty case, *Barefoot v. Estelle*,[8] discussed this reality as follows:

> The American Psychiatric Association (APA), participating in this case as *amicus curiae*, informs us that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." Brief for American Psychiatric Association, as *Amicus Curiae*, 12 (APA Brief). The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong. *Id.*, at 9, 13. The Court does not dispute this proposition, see *ante*, at 18–19, n. 7, and indeed it could not do so; the evidence is overwhelming. For example, the APA's Draft Report of the Task Force on the Role of Psychiatry in the Sentencing Process (Draft Report) states that "[c]onsiderable evidence has been accumulated by now to demonstrate that long-term prediction by psychiatrists of future violence is an extremely inaccurate process."

(emphasis in original).[9] Ten years later, in *dicta*, the United States Supreme Court acknowledged in *Heller v. Doe*,[10] "that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate."

Respondent will cite just some of this voluminous virtually unanimous scientific literature that psychiatrists and other mental health professionals, "have absolutely no expertise in predicting dangerous behavior—indeed, they may be *less* accurate predictors than laymen—and that they usually err by overpredicting violence."[11]

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[8] 463 U.S. 880, 920; 103 S. Ct. 3383, 3408 (1983), emphasis in original.
[9] It is likely that the requirements in AS 47.30.740(a)(1) that Respondent "has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation" or initially committed for such acts, is the Legislature's recognition that any prediction of harm can only reliably be based on violence in the recent past and no long-term predictions are reliable.
[10] 509 U.S. 312, 324, 113 S. St.2637, 2645 (1993).
[11] Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal, 3d Edition (2016), *LexisNexis*, §3-4.2.3.

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In a Psychology Today magazine article, Harvard Law School professor Alan M. Dershowitz wrote, "our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions.[12] In his book, *Mental Health and Law: A System in Transition*, Harvard Law Professor and past president of the American Psychiatric Association, Alan Stone, stated, "It can be stated flatly . . . that neither objective actuarial tables nor psychiatric intuition, diagnosis, and psychological testing can claim predictive success when dealing with the traditional population of mental hospitals."[13]

More recently, psychiatric emergency room psychiatrist Paul R. Linde, M.D., makes the point in his book *On the Front Line With an ER Psychiatrist* that psychiatrists are asked by courts to make predictions that they are unable to reliably do:[14]

> Psychiatrists were now charged with a duty to maintain public safety, a responsibility more consistent with police powers than with medical ones. The task of a psychiatrist, which previously involved evaluating a person's need for treatment, had shifted suddenly to that of establishing "dangerousness criteria" and attempting to predict who might constitute a danger to self or a danger to others. ... At the same time, evolving judicial precedents more or less announced that psychiatrists should be able to foresee "preventable" acts of suicide or violence. It became our job to somehow keep those dangerous people locked up, preventing self-harm and mayhem. I refer to this as the crystal ball standard. ... It's still nearly impossible to predict suicides, assaults, or homicides—legal opinions to the contrary notwithstanding.

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[12] "The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways", Psychology Today, February 1969, p. 43 at 47.
[13] A.A. Stone, Mental Health and Law: A System in Transition, *University of California Libraries* (January 1, 1975), at 33.
[14] (University of California Press 2010, pp. 100-102).

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The acknowledged dismal ability of psychiatrists and other mental health professionals to reliably predict dangerousness has resulted in "second generation research methods" that conclude reliability of clinical judgment can perform "somewhat better than chance" and actuarial assessments that increase the rate of reliability of violence predictions from 1 in 3 to 1 in 2.[15] This is not clear and convincing evidence.

Simply put, API should not be allowed to present expert opinion testimony that has been demonstrated to be unreliable. *Marron v. Stromstad*, 123 P.3d 1992 (Alaska 2005); and *Samaniego v. City of Kodiak*, 80 P.3d 216 (2003) do not hold otherwise. The touchstone for admission of expert testimony is reliability[16] and the above establishes that psychiatrists' and other mental health professionals' opinions on dangerousness are shockingly unreliable.

C. Conclusion

Unless API can provide an adequate foundation for the reliability of testimony relating to Respondent being a danger, it should not be allowed.

DATED August 21, 2016.

Law Project for Psychiatric Rights

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[15] Alexander Scherr, Daubert & Danger: The "Fit" Of Expert Predictions In Civil Commitments, 55 Hastings L.J. 1, 17 (2003).
[16] *Marron*, 123 P.3d at 1003.

CERTIFICATE OF SERVICE

I certify that I e-mailed a copy hereof to Steve Bookman on August 21, 2016.

August 21, 2016:

Jim Gottstein

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