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

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

ETTA BAVILLA,	)
	)
Plaintiff,	)
	)
	)
ALASKA DEPARTMENT OF CORRECTIONS,	)
	)
Defendant.	)
	)

Case No. 3AN 04-5802 CI

OPPOSITION TO MOTION TO DISMISS

COMES NOW, plaintiff Etta Bavilla, by and through counsel and opposes the Department of Corrections' (Corrections) Motion to Dismiss (Motion).

I. MS. BAVILLA HAS STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In *Guerrero v. Alaska Housing Finance Corporation*, 6 P.3d 250, 253-4 (Alaska 2000), the Alaska Supreme Court reiterated:

> [A] motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted. To survive, "the complaint need only allege a set of facts 'consistent with and appropriate to some enforceable cause of action.' " Thus, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

(footnotes omitted).

Here, the Motion recasts the Complaint as being one under 42 U.S.C. §1983, which it is not, by asserting "the Alaska Supreme Court has not recognized a direct cause of action under the Alaska Constitution so Bavilla's claims are brought under 42 U.S.C. §1983," citing *Vest v. Schafer*, 757 P.2d 588 (Alaska 1988). Then it asserts the "state is not subject to suit under 42 U.S.C. §1983 because it is not a 'person.'" This is bootstrapping at its worst.

The Complaint in this matter is for declaratory and injunctive relief with respect to a violation of the United States and Alaska constitutions. *Vest* was concerned with damages actions based solely on a constitutional claim that a statute constitutes a civil rights violation. In fact, on the very page cited by Corrections, in *Vest*, the Alaska Supreme Court said, "When a court finds a statute unconstitutional, the traditional remedy is declaratory or injunctive relief." 757 P.2d at 594. That is precisely the relief requested here. Of course, Ms. Bavilla is entitled to a declaration of her rights and any appropriate injunctive relief to prevent their violation.

Since the filing of the Complaint in this matter, in response to Ms. Bavilla's Motion for a Temporary Restraining Order, Corrections has demonstrated that not only is Ms. Bavilla entitled to the relief requested in her complaint, but that Defendant's Policy #807.16, Involuntary Psychotropic Medication, is unconstitutional. Currently pending are Ms. Bavilla's motions for summary judgment and for a preliminary injunction, both of which were filed on May 20, 2004. Since then Corrections has made technical objections

to the form of service of process, a single point at a time,[1] and then filed what appears to be the patently meritless motion to dismiss, all apparently in furtherance of a strategy to delay consideration of this matter on the merits.

Because, as set forth above, the Alaska Supreme Court has held a motion to dismiss for failure to state a claim upon which relief can be granted must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," it seems desirable to set forth the facts and the legal analysis of those facts.[2]

II. FACTS

On February 23, 2004, James B. Gottstein, esq., of the Law Project for Psychiatric Rights (Counsel) wrote Corrections advising he was going to assist Ms. Bavilla in resisting being subject to another forced drugging order upon the expiration of the

[1] Ms. Bavilla does not concede that service was ineffective, but has gone ahead and accomplished the additional services alleged to have been deficient. There is at least the argument, contrary to Corrections' assertions in its Notice Regarding Lack of Service, that service of the complaint was effected on April 2, 2004. *State of Alaska, Department of Corrections v. Kila, Inc.*, 884 P.2d 661 (Alaska 1991), cited by Corrections is quite distinguishable. There, the issue was setting aside a default judgment without service as specified in Civil Rule 4. However, unlike the situation here, there the State did not enter an appearance and was apparently unaware of the motion for default. Here, the Attorney General's Office entered an appearance on April 2, 2004, and contested the motion for a temporary restraining order on the merits. It is unclear, at best, that it can claim lack of proper service of the Complaint under such circumstances.

[2] Substantially the same material appears in the pending motions for a preliminary injunction and summary judgment, which were filed on May 20, 2004.

existing one and stated he needed copies of any paperwork that might be associated with such an effort, including her chart.[3] Corrections never responded to this letter.

Instead, on Thursday, April, 1, 2004, Counsel was informed by Ms. Bavilla that Corrections was going to obtain an involuntary medication order against her folowing a "Due Process Hearing,"[4] the following Monday, April 5, 2004, at 8:30 a.m. This resulted in a letter from Counsel to Corrections,[5] in which he indicated he believed the procedures being employed violated Ms. Bavilla's constitutional rights, suggested Corrections consult with its counsel to review compliance with constitutional requirements and moved for a one week continuance to allow for preparation of a defense.

The Alaska Department of Law, among other things, denied the requested continuance.[6] At this point, which was after the close of business on Thursday, April 1, 2004, Counsel still did not have any knowledge of the grounds for seeking the forced drugging order, including no notice of any witnesses or other evidence Corrections intended to rely upon.

Approximately 9:00 a.m., the following morning, Friday, April 2, 2004, a complaint and a temporary restraining order application was served upon counsel for Corrections and filed with this court, commencing this action. At approximately 4:00

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[3] Exhibit 1 to the Memorandum in Support of Motion for Temporary Restraining Order (TRO Memorandum). Attached hereto are Exhibit lists for the TRO Memorandum as well as the Memorandum in Support of Motion for Summary Judgment (S/J Memorandum).
[4] Exhibit C, paragraph 6 of S/J Memorandum.
[5] *See* Exhibit 2 to TRO Memorandum.
[6] *See*, Exhibit 3 to TRO Memorandum.

p.m., Counsel was notified by the Superior Court Judge's clerk that the TRO Motion had been denied.[7]

In between, Plaintiff's Counsel faxed Mr. Bodick a letter which as most relevant here, (a) expressed concern about not being able to make formal submissions on behalf of his client directly to the Mental Health Review Committee, the decision making body, (b) noted he had still not received the documentation which Mr. Bodick had indicated would be available early in the day, (c) designated Grace E. Jackson, M.D., a board certified psychiatrist with penal experience, as a witness on behalf of Ms. Bavilla, and (d) designated other witnesses designed to ensure Ms. Bavilla would be able to present an effective defense.[8]

Mr. Bodick responded by fax to this letter at the end of the day, stating (a) Dr. Jackson would not be allowed to testify, (b) refusing to allow Ms. Bavilla to call requested witnesses, and (c) Counsel would not be allowed to represent Ms. Bavilla:

> I am in receipt of your letter in which you request that psychiatrist Dr. Grace E. Jackson be permitted to appear and testify at Ms. Bavilla's hearing. Please be advised that this request is denied. Dr. Jackson has no personal knowledge regarding Ms. Bavilla and her medication needs. . . . The Department already has three psychiatrists scheduled to appear at the hearing; two as witnesses and one as a decision-maker on the committee. These licensed Alaska professionals should be able to provide sufficient expertise to evaluate the risks involved in the recommended medication and compare these risks to the benefits of the medication.
>
> In regard to your requests regarding the designation of witnesses or other statements, it appears that you have misunderstood the nature of these

[7] In spite of a certificate of service that Plaintiff's Counsel had been served with Correction's opposition, such was not the case.
[8] Exhibit E of S/J Memorandum.

> hearings. This is not an adversarial hearing where attorneys will appear and argue on behalf of their clients. As approved by the Supreme Court in *Washington v. Harper*, Ms. Bavilla will be assisted by an independent lay advisor. Consequently, your participation will be limited to the telephonic testimony you provide as to your personal observations of Ms. Bavilla's behavior.[9]

The TRO Opposition includes the affidavit of Laura Brooks, the Director of Mental Health Services for Corrections and who is also the chair of the Mental Health Review Committee which is the designated decision making body to conduct the "Due Process Hearing," under Corrections policy #807.16 and decide whether Ms. Bavilla should be forcibly medicated.[10] In this affidavit, Ms. Brooks, the chair of this hearing board, among other things, states:

> Ms. Bavilla has a fixed delusion that she has a sexually transmitted disease. . . . There was a noticeable decline in her mental functioning [after she stopped taking medications in 2003] and she was placed on involuntary medications August 18, 2003. . . . When not taking medications, Ms. Bavilla has exhibited increased delusional thinking and maintains she has been injected with a manipulated sexually transmitted disease designed to keep her sick. She has claimed she is vulnerable to spirits and those spirits are responsible for her having been diagnosed with a mental illness. She becomes increasingly hostile towards staff, making nonsensicial statements, gesturing and talking to "spirits" in her cell. . . .[11]

On Sunday, April 4, 2004, Dr. Jackson issued her report, which was given to Ms. Bavilla to present to the Mental Health Review Committee.[12] This report describes the serious harm faced by Ms. Bavilla if involuntary medication is allowed to proceed.

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[9] Exhibit F of S/J Memorandum.
[10] Exhibit C of S/J Memorandum.
[11] Exhibit C, pages 2-3 of S/J Memorandum.
[12] Exhibit B of S/J Memorandum.

Among them are medication caused (iatrogenic) psychosis,[13] cognitive losses, [14] extreme weight gain,[15] diabetes, even apart from the weight gain,[16] and a shortened life.[17] This report suggests Ms. Bavilla's psychiatric symptoms may be due to the medications -- both from taking them and from discontinuing them.[18]

On Monday, April 5, 2004, at the same time the "Due Process Hearing" was being held, a Petition for Review of the order denying the TRO Motion was served on Defendant and filed in the Alaska Supreme Court, along with an Emergency Motion for Interim Injunctive Relief. At the 8:30 a.m., "Due Process Hearing," Plaintiff provided the Mental Health Review Committee a copy of the exhibits to the TRO Memorandum and Dr. Jackson report. These documents run over 200 pages. By 11:18 a.m., according to the fax time stamp on the Mental Health Review Committee Hearing Summary, the Mental Health Review Committee, without having a chance to read Plaintiff's submissions, found that she suffers from a mental illness and that the proposed medications were in her best interest.[19] The Mental Health Review Committee also held it "fully supports forced medication" of Plaintiff, but deferred the forced drugging until such time as she becomes gravely disabled or presents a substantial danger.[20]

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[13] Exhibit B, page 14 of S/J Memorandum.
[14] Exhibit B, page 15 of S/J Memorandum.
[15] Exhibit B, page 12 of S/J Memorandum.
[16] *Id.*
[17] Exhibit B, page 16 of S/J Memorandum.
[18] Exhibit B, pages 7, 10-13, 18 of S/J Memorandum.
[19] The timing makes clear that Ms. Bavilla's submissions were not read or considered by the Mental Health Review Committee. Exhibit I of S/J Memorandum.
[20] Exhibit I of S/J Memorandum.

III. ANALYSIS

A. Summary

There is no doubt but that even convicted prisoners have a constitutional right to due process before psychotropic drugs can be involuntarily administered. *Washington v. Harper*, 494 U.S. 201, 110 S.Ct. 1028 (1990). *Washington v. Harper* holds "the forcible injection of medications into a nonconsenting person's body represents a substantial interference with that person's liberty."[21] Any over-riding of this fundamental interest by "medical personnel"[22] in the penological setting,[23] must be under "fair procedural mechanisms"[24] and in her medical best interest.[25] Even though in the prison setting "constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied,"[26] and "reasonably related to legitimate penological interests,"[27] the "Due Process Clause does require certain essential procedural protections."[28] These essential procedural requirements include (i) an unbiased, independent decision maker,[29] (ii) "notice, [30] (iii) the right to be present at an adversary hearing, and (iv) the right to present and cross-examine witnesses."[31] The procedures employed by Corrections here

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[21] 494 US at 229, 110 S. Ct. at 1041.
[22] 494 US at 231, 110 S. Ct. at 1042.
[23] 494 US at 223, 110 S. Ct. at 1037.
[24] 494 U.S. at 231, 110 S. Ct. at 1042.
[25] 494 U.S. at 227, 110 S. Ct. at 1040
[26] 494 US at 225, 110 S. Ct. at 1038.
[27] 494 US at 223, 110 S. Ct. at 1037.
[28] 494 US at 236, 110 S. Ct. at 1044.
[29] 494 US at 233, 110 S. Ct. at 1043.
[30] 494 US at 235, 110 S. Ct. at 1044
[31] 494 US at 225, 110 S. Ct. at 1044.

under Policy #807.16 fail to satisfy every one of these "essential procedural protections" required in *Harper*. In addition, for the reasons that follow, Plaintiff believes she is entitled to the provision of counsel as well as a judicial determination of medical best interest before she can be forcibly drugged.

B. Policy #807.16 is Unconstitutional

Ms. Bavilla's complaint is that her United States and Alaska constitutional rights to due process are being violated by the procedures being employed by Corrections. The 1990 United States case of *Washington v. Harper*, speaks directly to this question with respect to the United States constitution, although it is respectfully submitted, the 2003 United States case of *Sell v. United States*, 123 S.Ct. 2174 (2003), casts doubt on *Washington v. Harper's* core holding that a judicial decision maker is not required. In reaching its conclusion that a judicial decision maker was not required in the prison context *Washington v. Harper* expressed the view that having medical professionals make the decision might be better for the prisoner than a court determination. 494 U.S., at 231, 110 S.Ct. at 1042. *Sell's*, core holding, however, is that it is the court that must make the best interests determination and not the institutional psychiatrists. This undermines the entire rationale of *Washington v. Harper*.

In *Sell*, 123 S.Ct. at 2185, the U.S. Supreme Court totally abandoned the concept that doctor knows best and required judicial determinations, in the first instance, as to medical best interests.

> the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical

> interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

Thus, it is an open question whether *Washington v. Harper's* core holding even still applies. There are no Alaska cases directly on point, but principles enunciated by the Alaska Supreme Court make clear Alaska Constitutional protection are sometimes greater than under the United States Constitution. *See* e.g., *McGinnis v. Stevens*, 543 P.2d 1221, 1232, 1236 (Alaska 1975).

However, even assuming that *Washington v. Harper* still authorizes a non-judicial forced medication procedure, Corrections' policy here does not even meet the minimum due process requirements set forth in *Washington v. Harper*. As set forth above, in *Washington v. Harper*, in order to fulfill due process requirements, the United States Supreme court required (1) an impartial, independent decision maker,[32] (2) notice,[33] (3) the right to be present at an adversary hearing,[34] and (4) the right to present and cross-examine witnesses."[35] Ms. Bavilla respectfully suggests the Alaska Constitution and the circumstances revealed here require (5) the assistance of counsel and (6) judicial approval of any forced drugging.

The procedures employed by Corrections here fail to satisfy every one of the "essential procedural protections" required in *Harper* and do not satisfy the additional

[32] 494 US at 233, 110 S. Ct. at 1043.
[33] 494 US at 235, 110 S. Ct. at 1044
[34] 494 US at 235, 110 S. Ct. at 1044
[35] 494 US at 225, 110 S. Ct. at 1044.

protections Ms. Bavilla respectfully suggests are required under the Alaska constitution and under the circumstances revealed here.

(1) Impartial, Independent Decision Maker.

Washington v. Harper, at 494 US at 233-4, 110 S. Ct. at 1043, holds that minimum due process requires an impartial, independent decision maker:

> A State's attempt to set a high standard for determining when involuntary medication with antipsychotic drugs is permitted cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account. . . . [I]ndependence of the decisionmaker is addressed to our satisfaction by these procedures. None of the hearing committee members may be involved in the inmate's current treatment or diagnosis. . . . In the absence of record evidence to the contrary, we are not willing to presume that members of the staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the Policy.

Here, unlike the situation in *Harper*, the chair of the decision maker has clearly pre-judged the case and even filed testimony against Ms. Bavilla in resisting the temporary restraining order.[36]

> 5. . . . When not taking medications, Ms. Bavilla has exhibited increased delusional thinking and maintains she has been injected with a manipulated sexually transmitted disease designed to keep her sick. She has claimed she is vulnerable to spirits and those spirits are responsible for her having been diagnosed with a mental illness. She becomes increasingly hostile toward staff, making nonsensical statements, gesturing and talking to "spirits" in her cell. Ms. Bavilla adamantly denies she has a mental illness and blames mental health staff for "covering up and lying about perverse practices of forcing people to live diseased and then labeling them mentally ill." Ms. Bavilla has also expressed suicidal ideation in journal entries and has stated that she cannot think of her son or she will "give in to the destroyer" and die.

[36] *See*, Exhibit C of S/J Memorandum.

This testimony by the chair of the hearing body shows she has clearly pre-judged both the issue of mental illness and the need for medication. This is not an unbiased, independent decision maker and is unconstitutional under *Washington v. Harper*.

(2) Notice.

The United States Supreme Court in *Washington v. Harper, at* 494 US at 216, 110 S. Ct. at 1033 also held that adequate notice is a constitutional due process requirement:

> Third, the inmate has certain procedural rights before, during, and after the hearing. He must be given at least 24 hours' notice of the Center's intent to convene an involuntary medication hearing, during which time he may not be medicated. In addition, he must receive notice of the tentative diagnosis, the factual basis for the diagnosis, and why the staff believes medication is necessary.

The *Washington v. Harper* court also noted the procedure used there was adequate because, "The Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses," noting the "requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[37]

Here, while notice of the hearing was given verbally, Corrections failed to provide Ms. Bavilla or her counsel anything in writing, nor any notice of the grounds for the forced drugging. Notice was thus totally deficient.[38]

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[37] *Id*.

[38] Counsel wrote Corrections as long ago as February 23, 2004, requesting notice (Exhibit 1 to TRO Memorandum). There was never any response to this letter and it wasn't until after the temporary restraining order had been denied without Counsel having received a copy of Corrections' opposition that he was informed by Corrections that he would not be allowed to participate in the "Due Process Hearing."

(3) The Right To Be Present At An Adversary Hearing.

Under *Washington v. Harper*, 494 US at 235, 110 S. Ct. at 1044, the United States Supreme Court ruled an adversary hearing was an essential due process element before forced psychiatric medication could occur in the prison context. Here, the Department of Corrections has admitted its procedures do not include an adversarial hearing.[39] Corrections' response that Ms. Bavilla would not be allowed to call an independent psychiatrist as a witness because Department employed psychiatrists had sufficient expertise also shows its procedures are not adversarial in nature.

(4) The Right To Present And Cross-Examine Witnesses.

Washington v. Harper, 494 US at 235, 110 S. Ct. at 1044, also requires that a prisoner faced with forced drugging be allowed to present and cross examine witnesses. Here, Ms. Bavilla designated Grace E. Jackson, M.D., a board certified psychiatrist with penal experience to be a witness on her behalf.[40] However, Dr. Jackson was not allowed to testify:

> I am in receipt of your letter in which you request that psychiatrist Dr. Grace E. Jackson be permitted to appear and testify at Ms. Bavilla's hearing. Please be advised that this request is denied. Dr. Jackson has no personal knowledge regarding Ms. Bavilla and her medication needs. She is also not licensed to practice in Alaska. The Department already had three psychiatrists scheduled to appear at the hearing; two as witnesses and one as decision-maker on the committee. These licensed Alaska professionals should be able to provide sufficient expertise to evaluate the risks involved in the recommended medication and compare these risks to the benefits of the medication. Thus, there is no need for Dr. Jackson's testimony.[41]

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[39] Exhibit F of S/J Memorandum.
[40] Exhibit E of S/J Memorandum.
[41] Exhibit F of S/J Memorandum.

The Alaska Supreme Court has also held the right of a prisoner to call witnesses in an internal Corrections proceeding is a fundamental due process right and the failure to allow it is constitutionally fatal. *Brandon v. Dep't. of Corrections*, 865 P.2d 87, 90 (Alaska 1993).

That the Department of Corrections' Policy #807.16 does not allow Ms. Bavilla to call witnesses of her choosing renders it unconstitutional under *Washington v. Harper* as well as *Brandon v. Dept. of Corrections*.[42]

(5) Staff Assistant

Policy #807.16 §G.1. provides that a staff assistant will be assigned to assist the inmate-patient. However, the staff assistant's role is to "act in the prisoner's best interest," rather than be an advocate. This is consistent with Corrections' "Due Process Hearing" not being adversarial, but is inconsistent with actual due process.

(6) Assistance of Counsel

Corrections' position, citing *Washington v. Harper*, is Ms. Bavilla is not allowed to have counsel assist her in defending against forced drugging under Policy #807.16.[43] First, it is not entirely clear that *Washington v. Harper* allows the denial of counsel as opposed to not requiring the appointment of counsel. Second the Alaska Supreme Court has specifically held Corrections must provide the assistance of counsel under the Alaska

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[42] It can also be noted that while Policy #807.16 §H.3., purports to allow cross-examination of witnesses, the form adopted to implement this only allows the inmate-patient to designate a witness to be "interviewed by the Mental Health Review Committee" and have the Mental Health Review Committee ask a single question. See Exhibit A, page 12 of S/J Memorandum.

[43] Exhibit F of S/J Memorandum.

Constitution when the United States Supreme Court would not require access to counsel at all under the United States Constitution. In *McGinnis v. Stevens*, 543 P.2d 1221, 1232, 1236 (Alaska 1975), the Alaska Supreme Court held under the Alaska Constitution, "a departure from the general no-counsel standard ordained by *Wolff* was in order:"[44]

> In light of the possibility of prolonged specialized housing pending disposition of the conduct referred to the district attorney's office, the possible loss of other privileges, the close nexus with possible criminal prosecution, and the inherently coercive circumstances flowing from the interim imposition of specialized housing and suspension of other prison privileges, we believe that Miranda rights can be best assured through provision of counsel to the inmate.

The question presented here then is whether the forcible administration of psychotropic drugs into an inmate rises to the level of protection which requires the provision (or allowance) of counsel under the Alaska Constitution. Ms. Bavilla respectfully suggests it does.

Even though *Washington v. Harper*, itself did not require the provision of counsel, it did recognize that the right to be free from unwanted psychotropic medication was a fundamental right under the due process clause of the United States Constitution (prisoners possess a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment") *Washington v. Harper*, 494 U.S. at 221-222, 110 S.Ct. at 1036; see also id., at 229, 110

[44] The full citation to *Wolff* is *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

S.Ct., at 1041 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty").[45]

In the relatively recent case of *Steele v. Hamilton County Community Mental Health Board*, , 736 N.E.2d 10, 16 (Ohio 2000), the Ohio Supreme Court confirmed "persons suffering from a mental illness have a 'significant liberty interest' in avoiding the unwanted administration of antipsychotic drugs" protected by the due process clauses of both the Fourteenth Amendment of the U.S. Constitution and the Ohio Constitution.

> The liberty interests infringed upon when a person is medicated against his or her wishes are significant. "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." This type of intrusion clearly compromises one's liberty interests in personal security, bodily integrity, and autonomy.
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> The intrusion is "particularly severe" when the medications administered by force are antipsychotic drugs because of the effect of the drugs on the human body. Antipsychotic drugs alter the chemical balance in a patient's brain producing changes in his or her cognitive processes. . . .
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> The interference with one's liberty interest is further magnified by the negative side effects that often accompany antipsychotic drugs, some of which can be severe and/or permanent.

Id, at 16-17, citations omitted.

The Massachusetts Supreme Court, in *Guardianship of Roe*, 421 N.E.2d 40, 52-3 (Mass 1981), held:

> We can identify few legitimate medical procedures which are more intrusive than the forcible injection of antipsychotic medication. "In

[45] On at least three other occasions, the United States Supreme Court has found the right to be free of unwanted psychiatric medications to be fundamental: *Mills v. Rogers*, 457 U.S. 291, 303, 102 S.Ct. 2442, 2450 (1982) ("assumed" in n. 6); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); and *Sell v. U.S.*, __ U.S. __, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003).

> general, the drugs influence chemical transmissions to the brain, affecting both activatory and inhibitory functions. Because the drugs' purpose is to reduce the level of psychotic thinking, it is virtually undisputed that they are mind-altering. . . . The drugs are powerful enough to immobilize mind and body. Because of both the profound effect that these drugs have on the thought processes of an individual and the well-established likelihood of severe and irreversible adverse side effects, see Part II A(2) infra, we treat these drugs in the same manner we would treat psychosurgery or electroconvulsive therapy.

(footnote and citations omitted).

The question then, is whether under the Alaska Constitution, the constitutional right involved rises to a level requiring the provision of counsel as under *McGinnis*. Ms. Bavilla, respectfully suggests the right to be free from the forcible injection of psychiatric drugs rises to at least the same level as the right against self-incrimination and other factors involved there.

(7) Judicial Determination

In *Washington v. Harper*, the United States Supreme Court did hold, <u>in the facts of that case</u>, that judicial determination of the forced drugging was not constitutionally required. The facts relied upon are the ones set forth above, to wit: (a) an impartial, independent decision maker, (b) proper notice, (c) the right to be present at an adversary hearing, and (d) the right to present and cross-examine witnesses." As has been shown Corrections violates all of these constitutional requirements under Policy #807.16. This removes the very foundation upon which the lack of judicial involvement was approved in *Washington v. Harper* and, it is respectfully suggested the authorization to force drug anyone without judicial approval is therefore removed as well.

In a stinging dissent, Justice Stevens expresses disagreement with the majority's acceptance in *Washington v. Harper* that all will go as set forth on paper and therefore the courts must be involved to protect people's rights.[46] The circumstances here completely vindicate Justice Stevens' dissent in that while Policy #807.16 was clearly written to follow the strictures of *Washington v. Harper*, the practice under Policy #807.16 makes a mockery of people's due process rights. Thus, even under the majority opinion in *Washington v. Harper*, a judicial determination of best interests is required because the required due process elements are not, in fact, provided under Policy #807.16. In other words, it is clear that procedural safeguards promulgated in Corrections' policies can not be relied upon to be carried out in practice. In such circumstances judicial determination is required. *Washington v. Harper* at n. 13, essentially held as much ("That such a practice may take place in some institutions in some places affords no basis for a finding as to [Washington's] program,") because Corrections has made admissions that show it is not complying with the *Washington v. Harper* due process standards notwithstanding the provisions of Policy #807.16 purporting to do so.

There is, however, an additional reason why judicial approval of forced drugging is constitutionally required. *Washington v. Harper*, does make clear that such forced

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[46] 110 S. Ct. at 1045:

> The Court has undervalued respondent's liberty interest; has misread the Washington involuntary medication Policy and misapplied our decision in Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); and

drugging may occur only where medically appropriate.[47] It is respectfully suggested the facts here show that only through a judicial approval process may there be any assurances this will be the case.

Justice Stevens discusses this in his dissent and other courts have considered the propensity of institutional psychiatrists to subjugate patients' interests to institutional ones. For example, the Massachusetts Supreme Court, in *Rogers*, 458 N.E. 2d 308, 317 (Mass 1983), held because of the inherent conflicts of interest, the doctors should not be allowed to make the forced drugging decision.

> The doctors who are attempting to treat as well as to maintain order in the hospital have interests in conflict with those of their patients who may wish to avoid medication.

Rogers at 382-3, citation omitted. The court also found additional sources of conflicts of interest between the patient and doctors:

> Economic considerations may also create conflicts between doctors and patients. Because medication with antipsychotic drugs "saves time, money, and people," Zander, Prolixin Decanoate: Big Brother by Injection? 5 J. Psychiatry & Law 55, 56 (1977)
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> * * *
>
> [T]he temptation to engage in blanket prescription of such drugs to maintain order and compensate for personnel shortages may be irresistible. See Guardianship of Roe, supra, 383 Mass. at ---, Mass.Adv.Sh. (1981) at 1004 n. 11, 421 N.E.2d 40 (citation to literature documenting "abuses of antipsychotic medication by those claiming to act in an incompetent's best interests").

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has concluded that a mock trial before an institutionally biased tribunal constitutes "due process of law."

[47] 110 S. Ct. 1039.

Id., n. 19.

Thus, the assumption Corrections employed psychiatrists and the other Corrections employees on the Mental Health Committee will make decisions based solely upon the patient's best medical interests turns out to be factually dubious at best.

Moreover, without a patient having the right to judicial determination of medical best interests, there is no real opportunity to challenge the medical basis of the decision. In *Washington v. Harper*, the United States Supreme Court accepted the conventional wisdom of the time that "the therapeutic benefits of antipsychotic drugs are well documented."[48] Currently, though, a debate rages over whether there are in fact any significant therapeutic benefits of "antipsychotic" drugs and even if there are, whether the proposed class of medications are in the patients' best interests. This controversy is demonstrated by Exhibits 4-20 of the TRO Memorandum, which are hereby incorporated by reference as though fully set forth herein.

These exhibits demonstrate the lack of scientific support for the safety and efficacy of the proposed forced drugging.

> Although the standard of care in developed countries is to maintain schizophrenia patients on neuroleptics, this practice is not supported by the 50-year research record for the drugs. A critical review reveals that this paradigm of care worsens long-term outcomes . . . . Evidence-based care would require the selective use of antipsychotics, based on two principles: (a) no immediate neuroleptisation of first-episode patients; (b) every patient stabilized on neuroleptics should be given an opportunity to gradually withdraw from them. This model would dramatically increase recovery rates and decrease the percentage of patients who become chronically ill.

[48] 110 S.Ct. 1041.

"The case against antipsychotic drugs: a 50-year record of doing more harm than good," by Robert Whitaker, Medical Hypotheses, Volume 62, Issue 1 , 2004, Pages 5-13[49]

Another review notes the ability of neuroleptics (NLPs)[50] to reduce "relapse" in schizophrenia affects only one in three medicated patients; the overall usefulness of NLPs in the treatment of schizophrenia is far from established; and that an analysis of 1,300 published studies which found neuroleptics were no more effective than sedatives. "A Critique of the Use of Neuroleptic Drugs" by David Cohen, Ph.D., in *From Placebo to Panacea, Putting Psychiatric Drugs to the Test*, edited by Seymour Fisher and Roger Greenburg, John Wiley and Sons, 1997, a comprehensive review of the scientific evidence regarding the safety and efficacy of neuroleptics (Cohen Critique).[51]

The side effects of these drugs are also addressed:

> [T]he negative parts [the side effects] are perceived as quite often worse than the illness itself. . . . even the most deluded person is often extraordinarily articulate and lucid on the subject of their medication. . . . their senses are numbed, their willpower drained and their lives meaningless.

Concluding, Dr. Cohen states:

> Forty-five years of NLP use and evaluation have not produced a treatment scene suggesting the steady march of scientific or clinical progress. . . . Unquestionably, NLPs frequently exert a tranquillizing and subduing action on persons episodically manifesting agitated, aggressive, or disturbed behavior. This unique capacity to swiftly dampen patients' emotional reactivity should once and for all be recognized to account for NLPs' impact on acute psychosis. Yet only a modestly critical look at the

[49] Exhibit 4, to TRO Memorandum
[50] This class of drugs is commonly known by a number of names, including "neuroleptics" and "anti-psychotics."
[51] Exhibit 5 to TRO Memorandum.

> evidence on short-term response to NLPs will suggest that this often does not produce an abatement of psychosis. And in the long-run, this outstanding NLP effect probably does little to help people diagnosed with schizophrenia remain stable enough to be rated as "improved" -- whereas it is amply sufficient to produce disabling toxicity.
>
> A probable response to this line of argument is that despite the obvious drawbacks, NLPs remain the most effective of all available alternatives in preventing relapse in schizophrenia. However, existing data on the effectiveness of psychotherapy or intensive interpersonal treatment in structured residential settings contradicts this. Systematic disregard for patients' own accounts of the benefits and disadvantages of NLP treatment also denigrates much scientific justification for continued drug-treatment, given patients' near-unanimous dislike for NLPs. Finally, when social and interpersonal functioning are included as important outcome variables, the limitations of NLPs become even more evident . . .
>
> The positive consensus about NLPs cannot resist a critical, scientific appraisal.

Id.

In an even more recent analysis, Dr. Cohen concludes the systematic flaws and biases pervading the published research on neuroleptics, including the "atypicals," "raise serious doubts about the scientific justifications for the widespread use of neuroleptics." "Research on the Drug Treatment of Schizophrenia: A Critical Appraisal and Implications for Social Work Education," by David Cohen, Ph.D., Social Work Education, volume 38, issue 2 (Spring 2002).[52]

> These observations have been confirmed by Dr. Emmanual Stip as follows:
>
> "At this point in time, responsibility and honesty suggest we accept that a large number of our therapeutic tools have yet to be proven effective in treating patients with schizophrenia." . . . "One thing is certain: if we wish to base psychiatry on EBM [Evidence Based Medicine], we run the genuine risk of taking a closer look at what has long been considered fact."

[52] Exhibit 6 to TRO Memorandum.

"Happy birthday neuroleptics! 50 year later: la folie du doute," by Emmanuel Stip, European Psychiatry 2002 ; 17 : 1-5.[53]

People given medications for schizophrenia have reduced functioning in attention and declarative memory, including auditory and visual memory and complex attention. Doses of psychiatric medication within the range of routine pharmacotherapy practice may have clinically significant effects on memory and complex attention in patients with schizophrenia and these effects may contribute as much as one-third to two-thirds of the memory deficit typically seen in patients with schizophrenia. "Association of Anticholinergic Load With Impairment of Complex Attention and Memory in Schizophrenia," by Michael J. Minzenberg, M.D., John H. Poole, Ph.D., Cynthia Benton, M.D., Sophia Vinogradov, M.D. in the American Journal of Psychiatry 2004; 161:116–124).[54]

New-generation medications do not provide symptomatic improvement in the broader spectrum of clinical outcomes which include social competence and problem solving and do not produce substantial changes in social role functioning or social problem-solving capacity. "Do Clozapine and Risperidone Affect Social Competence and Problem Solving?" by Alan S. Bellack, Ph.D., Nina R. Schooler, Ph.D., Stephen R. Marder, M.D., John M. Kane, M.D., Clayton H. Brown, Ph.D., Ye Yang, M.S. in American Journal of Psychiatry, 2004, 161:364–367).[55]

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[53] Exhibit 7 To TRO Memorandum.
[54] Exhibit 8, to TRO Memorandum.
[55] Exhibit 9, to TRO Memorandum.

"Drug treated patients tend to have longer periods of hospitalization." "An Approach to the Effect of Ataraxic Drugs on Hospital Release Rates," *American Journal of Psychiatry*, 119 (1962), 36-47[56].

Relapse rates rise in direct relation to neuroleptic dosage--the higher the dosage patients are on before the drugs are withdrawn, the greater the relapse rates. "Relapse in Chronic Schizophrenics Following Abrupt Withdrawal of Tranquillizing Medication," *British Journal of Psychiatry*, 115 (1968), 679-86.[57]

Psychotropic drugs are not indispensable and the data suggests neuroleptics prolong social dependency. "Comparison of Two Five-Year Follow-Up Studies: 1947 to 1952 and 1967 to 1972," *American Journal of Psychiatry*, 132 (1975), 796-801.[58]

Prolonged use all of the neuroleptics studied, except clozapine, cause an increase in dopamine receptors in the brain) which results in a supersensitivity. "Dopaminergic Supersensitivity after Neuroleptics: Time-Course and Specificity, *Psychopharmacology* 60 (1978), 1-11.[59] The "tendency toward psychotic relapse" is caused by the medication itself and that this and other deleterious effects can be permanent. "Neuroleptic-induced supersensitivity psychosis," *American Journal of Psychiatry*, 135 (1978), 1409-1410;[60]

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[56] Exhibit 10 to TRO Memorandum.
[57] Exhibit 11 to TRO Memorandum.
[58] Exhibit 12, to TRO Memorandum.
[59] Exhibit 13 to TRO Memorandum.
[60] Exhibit 14 to TRO Memorandum.

"Neuroleptic-induced supersensitivity psychosis: clinical and pharmacologic characteristics," *American Journal of Psychiatry*, 137 (1980), 16-20.[61]

The relapse risk is relatively high within six months of discontinuation; most patients who remain stable for 6 months continued to do so for long periods without medication; and the risk of relapse is lower when the medication is gradually discontinued as compared to abrupt discontinuation. "Clinical Risk Following Abrupt and Gradual Withdrawal," by Adele C. Viguera, MD, Ross J. Baldessarini, MD, James D. Hegarty, MD, MPH, Daniel P. van Kammen, MD, PhD, Maricio Tohen, MD, DrPH, Archives of General Psychiatry, 1997, 54: 49-55.[62]

Patients with schizophrenia in poor countries (where neuroleptic use was uncommon) "had a considerably better course and outcome than [patients] in . . . developed countries (where neuroleptic use is common). This is true whether clinical outcomes, social outcomes, or a combination of the two are considered." "The International Pilot Study of Schizophrenia: five-year follow-up findings," *Psychological Medicine*, 22 (1992), 131-145 conducted by the World Health Organization.[63]

"Being in a developed country is a strong predictor of not attaining a complete remission." "Schizophrenia: manifestations, incidence and course in different cultures, A World Health Organization ten-country study," *Psychological Medicine*, suppl. 20

[61] Exhibit 15, to TRO Memorandum.
[62] Exhibit 16 to TRO Memorandum.
[63] Exhibit 17 to TRO Memorandum.

(1992), 1-95, conducted by the World Health Organization because the previous study's finding was so unexpected, confirmed the earlier study.[64]

Dr. Courtenay Harding addressed what she called myths surrounding the treatment of schizophrenia as follows:

> This paper presents empirical evidence accumulated across the last two decades to challenge seven long-held myths in psychiatry about schizophrenia which impinge upon the perception and thus the treatment of patients. Such myths have been perpetuated across generations of trainees in each of the mental health disciplines. These myths limit the scope and effectiveness of treatment offered. These myths maintain the pessimism about outcome for these patients thus significantly reducing their opportunities for improvement and/or recovery. Counter evidence is provided with implications for new treatment strategies.

"Empirical Correction of Seven Myths About Schizophrenia with Implications for Treatment," *ACTA Psyciatrica Scandinava*, 1994: 90 (suppl 384): 140-146 (Schizophrenia Myths).[65]

Myth Number One in Schizophrenia Myths is "Once a schizophrenic always a schizophrenic:"

> *Evidence*: Recent worldwide studies have . . . consistently found that half to two thirds of patients significantly improved or recovered, including some cohorts of very chronic cases. The universal criteria for recovery have been defined as no current signs and symptoms of any mental illness, no current medications, working, relating well to family and friends, integrated into the community, and behaving in such a way as to not being able to detect having ever been hospitalized for any kind of psychiatric problems.

[64] Exhibit 18 to TRO Memorandum.
[65] Exhibit 19, to TRO Memorandum.

Myth Number 5 in Schizophrenia Myths is "Patients must be on medication all their lives. Reality: It may be a small percentage who need medication indefinitely . . . *Evidence:* There are no data existing which support this myth. "

After a systematic and rigorous statistical analysis it was found that "There is no clear evidence that atypical antipsychotics are more effective or are better tolerated than conventional antipsychotics." "Atypical antipsychotics in the treatment of schizophrenia: systematic overview and meta-regression analysis," by Geddes J, Freemantle N, Harrison P, Bebbington P., BMJ (British Medical Journal) 2000 Dec 2;321(7273):1371-6.[66]

Other articles attached to the TRO Memorandum demonstrate that many "relapses" are actually caused by what is known as "Neuroleptic Discontinuation Syndrome" where it is the withdrawal from the drugs that is causing the psychosis, not any underlying mental illness.[67]

Most of the articles attached to the TRO Memorandum were presented to the Alaska Superior Court, Third Judicial District a little over a year ago in the case of *In the Matter of the Hospitalization of Faith J. Myers*, 3AN 03-277 PR.[68] There, after a review of these materials and the testimony of two expert witnesses for Ms. Myers and two expert witnesses for the hospital, the Superior Court found:

> The relevant conclusion that I draw from them is that there 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.

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[66] Exhibit 20, to TRO Memorandum.
[67] *See*, e.g., Exhibits 10, 11, 12, 13, 14, 15 and 16 to the TRO Memorandum.
[68] On appeal to the Alaska Supreme Court in Case No. S-11021.

* * *

> [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.[69]

Unless inmate-patients have the right to judicially contest the medical appropriateness of the proposed forced drugging there can be no assurances their constitutional rights to have such medically appropriate treatment is being honored.

As mentioned above, *Sell* may even mandate a judicial determination of best interests. There, in the context of force drugging someone to make him competent to stand trial, the United States Supreme Court rejected the notion that the institutional psychiatrist's determination of medical appropriateness was sufficient, holding instead:

> the court must conclude that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

(*United States v. Sell, supra.*, 123 S.Ct. at 2185. Italics in original, underlining added).

While the court in *Sell* did not explicitly overrule *Washington v. Harper* it also did not explicitly examine whether institutional psychiatrists' determination of medical best interest in the prison context can still be immune from judicial scrutiny. However, in rejecting the concept in the competence to stand trial context it did reaffirm that in the context here, i.e., the prison context, *Washington v. Harper* stands for the proposition that

> "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the

[69] Exhibit H, pages 8, 13 of S/J Memorandum.

> inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[70]

There is no indication in *Sell* that the same reasoning as to why the courts can no longer defer to institutional psychiatrists' determination of medical best interests in the competence to stand trial context should not apply in the context here. The Alaska Court of Appeals in the unpublished decision[71] of *State v. Baker*, No. A-8435, 2003 WL 21663992 (Alaska App. 2003) recognized that the reasoning of *Sell* extended beyond the competence to stand trial situation, holding it was also applicable to parole conditions.

Moreover, even if "penological interests" can still theoretically justify a non-judicial approval of forced psychiatric drugging, in addition to the structural defects in the procedures under Policy #807.16 vitiating such theoretical permissibility, there can be little question the Corrections process will not provide for an unbiased evaluation of the medical appropriateness issue. This is demonstrated in this case and is a critical difference from the facts in *Washington v. Harper*. Ms. Bavilla presented the Mental Health Review Committee at the "Due Process Hearing" with all of the Exhibits from the TRO Memorandum, as well as Dr. Grace E. Jackson's report.[72] These documents run over 200 pages and, at a minimum, raise grave doubts as to the medical appropriateness of the proposed forced drugging, if not prove outright it is not in her medical best interest,

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[70] 123 S. Ct. at 2183, emphasis added.
[71] While unpublished decisions may not be cited as "precedent" that control or restrict future judicial decisionmaking under Appellate Rule 214(d), they may be cited for whatever persuasive power they may have. *McCoy v. State*, 59 P.3d 747 (Alaska App. 2002).
[72] Exhibit B of S/J Memorandum.

as well as question the diagnosis of any underlying mental illness.[73] Yet the Mental Health Review Committee found the medication in Ms. Bavilla's best interest for medical reasons and that she was suffering from a mental disorder without even reading Ms. Bavilla's submissions.

In this case, Justice Stevens' concerns in his dissent in *Washington v. Harper* regarding the likelihood of non-judicial proceedings being "a mock trial before an institutionally biased tribunal"[74] has been proven true for the Alaska Department of Corrections. Even under the majority opinion in *Harper* this is not permitted. It is thus clear the only way to afford inmate-patients their due process right to be free from forced psychiatric drugging is through requiring a court order.

(8) Summary re: Policy #807.16.

It is clear beyond cavil that proceedings under Department of Corrections' Policy #807.16 are unconstitutional under *Washington v. Harper*. In addition, the facts in this case demonstrate that both the provision of counsel and requiring a court order before drugging someone against their will by the Alaska Department of Corrections is required in order to protect inmate-patients' constitutional due process rights.

IV. CONCLUSION

As set forth, above and in the motions for summary judgment and preliminary injunction, which are hereby incorporated herein by reference, Defendant's Policy #807.16, Involuntary Psychotropic Medication is unconstitutional. Through resort to its

[73] *See*, Exhibit B, pages 7, 10-13, 18 for the latter of S/J Memorandum.
[74] 110 S. Ct. at 1045.

dilatory tactics, Corrections has delayed responding to these motions for two months and has not answered the complaint, which was served upon counsel for Corrections on April 2, 2004, almost four months ago. Now it has filed a motion to dismiss that mischaracterizes the complaint as one for damages, rather than for the declaratory and injunctive relief it actually requests. As set forth above, not only does the Complaint state a claim upon which relief may be granted, but it appears Ms. Bavilla is entitled to judgment as a matter of law. For the foregoing reasons Ms. Bavilla respectfully urges the court to deny the Motion to Dismiss forthwith. In such event, this case can hopefully proceed to the merits without further delay.

Dated this 19th day of July, 2004 at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

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