NO. 96773

IN THE SUPREME COURT OF ILLINOIS

IN RE ROBERT S.,	)	Appeal from the Appellate Court
	)	Second Judicial District
	)	No. 2-02-0262
Alleged to be a person subject to authorized involuntary administration of psychotropic medication	)	
	)	Original Appeal from the Circuit Court
	)	Sixteenth Judicial Circuit
	)	Kane County, Illinois
Respondent-Appellant	)	No. 01-MH-261
	)	
	)	Honorable Franklin D. Brewe
	)	Judge Presiding

BRIEF AND ARGUMENT OF RESPONDENT-APPELLANT

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Oral Argument Requested

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ARGUMENT

NATURE OF THE CASE

This case involves a petition seeking authorization to administer involuntary non-emergency administration of psychotropic medication to Respondent-Appellant, Robert S., pursuant to the Mental Health and Developmental Disabilities Code, and specifically 405 ILCS 5/2-107.1 (West 2001), *as amended.* 405 ILCS 5/1-100, *et seq.*; 405 ILCS 5/2-107.1. The petition was filed on November 19, 2001, in Kane County Circuit Court. (A.14)

On January 18, 2002, and February 1, 2002, a bench trial was held before the Honorable Franklin D. Brewe. On February 1, 2002, Judge Brewe granted the petition, authorizing that respondent be administered four (4) psychotropic medications against his will for up to 90 days. (A. 13)

Respondent appealed Judge Brewe's order authorizing the involuntary treatment, and it was affirmed by the Second District Appellate Court on June 30, 2003. See, *In re Robert S.*, 341 Ill. App. 3d 238, 792 N.E.2d 421 (2nd Dist. 2003) (A. 1)

Respondent filed in this Court a Petition for Leave to Appeal pursuant to Supreme Court Rule 315. On October 7, 2003, the Court allowed that Petition. (A. 12)

ISSUES PRESENTED FOR REVIEW

Whether 405 ILCS 5/2-107.1, a statute exercising the *parens patriae* interest of the State of Illinois, which authorizes non-emergency administration of psychotropic medications and electro-convulsive therapy (ECT) to mental health recipients, on an involuntary basis, was unconstitutionally applied to Roberts S., a pretrial detainee who had been found unfit to stand trial.

Whether Robert S. was deprived of due process of law when trial court failed to appoint a psychiatrist as an independent examiner pursuant to 405 ILCS 5/3-804, and instead appointed an unlicensed intern with a masters degree in counseling psychology.

(2) The court shall hold a hearing within 7 days of the filing of the petition. The People, the petitioner, or the respondent shall be entitled to a continuance of up to 7 days as of right. An additional continuance of not more than 7 days may be granted to any party (i) upon a showing that the continuance is needed in order to adequately prepare for or present evidence in a hearing under this Section or (ii) under exceptional circumstances. The court may grant an additional continuance not to exceed 21 days when, in its discretion, the court determines that such a continuance is necessary in order to provide the recipient with an examination pursuant to Section 3-803 or 3-804 of this Act, to provide the recipient with a trial by jury as provided in Section 3-802 of this Act, or to arrange for the substitution of counsel as provided for by the Illinois Supreme Court Rules. The hearing shall be separate from a judicial proceeding held to determine whether a person is subject to involuntary admission but may be heard immediately preceding or following such a judicial proceeding and may be heard by the same trier of fact or law as in that judicial proceeding.

(3) Unless otherwise provided herein, the procedures set forth in Article VIII of Chapter 3 of this Act, including the provisions regarding appointment of counsel, shall govern hearings held under this subsection (a-5).

(4) Authorized involuntary treatment shall not be administered to the recipient unless it has been determined by clear and convincing evidence that all of the following factors are present:

(A) That the recipient has a serious mental illness or developmental disability.

(B) That because of said mental illness or developmental disability, the recipient exhibits any one of the following: (i) deterioration of his or her ability to function, (ii) suffering, or (iii) threatening behavior.

(C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.

(D) That the benefits of the treatment outweigh the harm.

(E) That the recipient lacks the capacity to make a reasoned decision about the treatment.

(F) That other less restrictive services have been explored and found inappropriate.

(G) If the petition seeks authorization for testing and other procedures, that such testing and procedures are essential for the safe and effective administration of the treatment.

(5) In no event shall an order issued under this Section be effective for more than 90 days. A second 90-day period of involuntary treatment may be authorized pursuant to a hearing that complies with the standards and procedures of this subsection (a-5). Thereafter, additional 180-day periods of involuntary treatment may be authorized pursuant to the standards and procedures of this Section without limit. If a new petition to authorize the administration of authorized involuntary treatment is filed at least 15 days prior to the expiration of the prior order, and if any continuance of the hearing is agreed to by the recipient, the administration of the treatment may continue in accordance with the prior order pending the completion of a hearing under this Section.

(6) An order issued under this subsection (a-5) shall designate the persons authorized to administer the authorized involuntary treatment under the standards and procedures of this subsection (a-5). Those persons shall have complete discretion not to administer any treatment authorized under this Section. The order shall also specify the medications and the anticipated range of dosages that have been authorized.

(b) A guardian may be authorized to consent to the administration of authorized involuntary treatment to an objecting recipient only under the standards and procedures of subsection (a-5).

(c) Notwithstanding any other provision of this Section, a guardian may consent to the administration of authorized involuntary treatment to a non-objecting recipient under Article XIa of the Probate Act of 1975.

(d) Nothing in this Section shall prevent the administration of authorized involuntary treatment to recipients in an emergency under Section 2-107 of this Act.

(e) Notwithstanding any of the provisions of this Section, authorized involuntary treatment may be administered pursuant to a power of attorney for health care under the Powers of Attorney for Health Care Law or a declaration for mental health treatment under the Mental Health Treatment Preference Declaration Act.

405 ILCS 5/2-107.1 (West 2001), *as amended*

§ 405 ILCS 5/3-804. Independent examination; court order; compensation

§ 3-804. The respondent is entitled to secure an independent examination by a physician, qualified examiner, clinical psychologist or other expert of his choice. If the respondent is unable to obtain an examination, he may request that the court order an examination to be made by an impartial medical expert pursuant to Supreme Court Rules or by a qualified examiner, clinical psychologist or other expert. Any such physician or other examiner, whether secured by the respondent or appointed by the court, may interview by telephone or in person any witnesses or other persons listed in the petition for involuntary admission. The physician or other examiner may submit to the court a report in which his findings are described in detail. Determination of the compensation of the physician, qualified examiner, clinical psychologist or other expert and its payment shall be governed by Supreme Court Rule.

405 ILCS 5/3-804 (West 2001)

STATEMENT OF FACTS

A Petition for Administration of Authorized Involuntary Treatment against Robert S. was filed in the circuit court of Kane County on November 19, 2001. (C.2-3) The petition sought the authority to administer non-emergency authorized involuntary treatment. Cf., 405 ILCS 5/2-107.1 (West 2001), *as amended* (non-emergency grounds and hearing afforded to respondent) and 405 ILCS 5/2-107(a) (West 2001) (emergency grounds and no hearing afforded where involuntary treatment is "necessary to prevent the recipient from causing serious and imminent physical harm to the recipient or others, ..."). [1]

Pursuant to its definition within the Mental Health and Developmental Disabilities Code, "Authorized involuntary treatment" included treatment by both psychotropic medication and electro-convulsive therapy (ECT). 405 ILCS 5/1-121.5; 405 ILCS 5/1-100, *et seq.*. "Psychotropic medication" meant medication used for "antipsychotic, antidepressant, antimanic, antianxiety, behavioral modification or behavioral management purposes...." 405 ILCS 5/1-121.1. The Mental Health and Developmental Disabilities Code did not, and does not, include a definition of the term "electro-convulsive therapy." See, Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-100, *et seq.*.

The petition sought authority to administer Risperidone, Haldol, Haldol Decanoate and Cogentin. (C. 2) Robert had refused to take the proposed medications voluntarily. (R.1/18 57)[2]

An attorney from the Illinois Guardianship and Advocacy Commission's Legal Advocacy Service was appointed to represent Robert, and notice and petition copies were served on that attorney. (C.4-5, 7-8) The Legal Advocacy Service provided legal counsel in judicial

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[1] All citations to Illinois statutory law are to that version in effect at the time of the non-emergency involuntary treatment hearing of November 19, 2001, unless otherwise specified.

[2] Transcripts of the five reported proceedings in the record are cited as: "R.11/30" for November 30, 2001; "R.1/4" for January 4, 2002; "R.1/18" for January 18, 2002; "R.2/1" for February 1, 2002; and, "R.3/8" for March 8, 2002.

proceedings under the Mental Health and Developmental Disabilities Code and related laws, including but not limited to admission, civil commitment, legal competency and discharge. See, 20 ILCS 3955/10 (West 2000). It did not represent individuals in criminal cases; and it could not have represented Robert S. in the underlying criminal charge pending against him for which he was being detained at the mental health center's forensic unit. (Id.) An attorney in a forced treatment cases serves not as guardian *ad litem*, but "as an advocate for the respondent's possibly ill-advised desires [with regard to the proposed treatment]." *In re Jones*, 318 Ill. App. 3d 1023, 1027, 743 N.E.2d 1090 (5th Dist. 2001).

The record discloses that no attorney representing respondent in his pending criminal case was served notice of the hearing and/or a copy of the petition for involuntary authorized treatment. (C.1-39)

In a pre-trial hearing, Robert moved that the same psychiatrist that had been appointed in his two previous forced psychotropic treatment petitions, be also appointed as independent examiner in the third, or instant, case. (R.11/30 5) The State had no objection to the independent examination, but requested that the Kane County Diagnostic Center be appointed as examiner on this third occasion, since it was less costly. (R.11/30 5)

Robert's GAC/LAS attorney objected to the appointment of the Kane County Diagnostic Center, since the group had no psychiatrists among its practitioners, who were, instead, psychologists. (R.11/30 6) He argued that the lack of expertise as to medication made a psychologist an improper choice as an independent examiner in an involuntary treatment case. (Id.) It was his position that, because the Center was comprised of psychologists only, Robert was "starting behind the 8-ball because of that very thing." (Id.)

Counsel's objection was overruled, and the Kane County Diagnostic Center was appointed to perform the independent examination. (R.11/30 6-7; C.15)

However, instead of a psychologist, an intern with the group, possessing only a master's degree in counseling psychology, performed Robert S.'s independent examination. (R.11/30 93-94, 96, 108, 126) She did not hold a doctorate, or a Psy.D, in psychology; and she was unlicensed. (Id.)

Hearing on the merits began on January 18, 2002, before the Honorable Franklin D. Brewe. (R.1/18 1-192) Robert S. appeared *pro se*. (Id.)

The State called Dr. Romulo Nazareno, a full-time staff psychiatrist at Elgin Mental Health Center, whose duties in the forensic program were to evaluate the patients, to diagnose them, to assess their fitness to stand trial, to treat them either with medication or counseling, and to testify in court regarding fitness or sanity. (R.1/18 14-15)

Dr. Nazareno had almost 30 years experience as a physician and 15 years as a psychiatrist. (R.1/18 12-13) He had personally treated over 200 patients at Elgin Mental Health Center, and he had been qualified to testify as an expert on more than 200 occasions. (R.1/18 13-14) He testified that he was licensed to practice medicine in Illinois, and licensed to prescribe psychotropic drugs. (R.1/18 15) He had prescribed psychotropic medications to about 200 psychiatric patients, and Robert S. was one of the 25 forensic patients that he was currently treating. (R.1/18 15-16)

Doctor Nazareno wanted to administer Risperidone, in pill form. (C.3; R.1/18 55, 63) However, on the contingency that Robert might refuse to comply with the judge's order for Risperidone, Dr. Nazareno also sought authority to administer Haldol Decanoate, an injectable medication. (C.3; R.1/18 55, 56-57, 62) The doctor did not know whether Robert had ever had

Haldol, and, when asked if he had any reason to believe that Robert would have an adverse reaction to it, responded: "I don't know." (R.1/18 64-65) One dose of Haldol Decanoate might take two months to clear out of a person's system. (R.1/18 64) Authority to force Cogentin was also sought, but its use was also contingent upon Robert's refusal of a court order to take Risperidone, and only if Robert had a bad reaction to Haldol, or Haldol Decanoate. (R.1/18 55-56, 65)

According to Dr. Nazareno, the side effects for both Risperidone and Haldol were dizziness, light-headedness, seizure, nausea, vomiting, muscular rigidity, difficulty swallowing, constipation, tardive dyskinesia or neuroleptic malignant syndrome. (R.1/18 59, 62-64) But Haldol was more prone to side effects than Risperidone, and the side effects were more severe. (R.1/18 62-63) For Cogentin, side effects included drooling of saliva, tremors, rigidity, constipation and blurred vision, and possibly confusion. (R.1/18 65-66)

Although Dr. Nazareno initially testified that Robert suffered no side effects from Risperidone that he took pursuant to a previous court order, he acknowledged on cross-examination that Robert had probably complained of general tiredness, drowsiness, nausea and several other side effects. (R.1/18 59, 72-73) However, he discounted that, since there were no objective signs. (R.1/18 73)

Robert had no physiological medical problems. (R.1/18 46) When Dr. Nazareno offered Robert medication, Robert said that the medication did not help. (R.1/18 43-44) He said that the voices were kind to him, they were quiet at night, and they let him sleep. (R.1/18 44)

Dr. Nazareno testified that Robert had taken Reperidone previously, by court order for 90 days, and his socialization and sleep improved. (R.1/18 43-46, 60-61, 80) During this time period, Robert told him that the voices stopped. (R.1/18 43-46, 60) Robert was not agitated or

threatening, and he was attending activities and functioning very well at that time. (R.1/18 43-46, 61) He was attending all of the counseling, the library, the gym and the relaxation group. (R.1/18 67) He was even getting out of the unit. (R.1/18 67)

But, the only reason that Dr. Nazareno did not file a petition to continue with the forced medication beyond the 90 days ordered, was because Robert told him that he would accept them voluntarily. (R.1/18 61) In a conversation that took place between Dr. Nazareno and Robert the day before the doctor testified, he told Robert that sometimes the administration requests that he file 2-107.1 petitions. (R.1/18 81)

It was Dr. Nazareno's opinion that Robert lacked capacity, that the benefits of the medications outweighed their side effects, and that they were the least restrictive service that was effective. (R.1/18 63, 66-67)

When questioned as to Robert's legal status at the facility, Dr. Nazareno testified that Robert was not a voluntary patient, but was unfit to stand trial. (R.1/18 58) Robert's court – appointed independent examiner later confirmed this, testifying that she tried to determine why he was found unfit to stand trial, as a part of her examination. (R.1/18 102-103) In sustaining Robert's objection to the State's attempt to call him as a witness against himself, trial court stated:

> As I understand it from previous testimony, there has been an unfitness to stand trial finding made in this case which obviously indicates there is an underlying criminal proceeding. Therefore, I will sustain your objection and will not permit the State to call Mr. [S.] as a witness. (R.1/18 190)

So, there was no question that Robert's status at Elgin Mental Health Center was that of a pretrial detainee who had been found unfit to stand trial.

When the state asked Dr. Nazareno what the proposed medication would do for Robert, and what were the benefits and side effects, the expert responded: "Psychotropic medication like

Risperidone and Haldol is to decrease psychosis, decrease agitation, prevent aggression, violence, increase socialization, improve his sleep, decrease suffering and so he can also attend activities and make him fit to stand trial." (R.1/18 58-59)

Instead of being examined by a psychologist, however, Robert was examined by an intern with a master's degree in counseling psychology. She did not hold a doctorate, or a Psy.D, in psychology. (R.11/30 93-94, 96, 126) Yet, upon calling her as a witness, the prosecutor introduced her to the court as "Dr. Leslie Kane, M.S." (R.1/18 91)

Ms. Kane had testified in court before as an expert, but no information as to the number of occasions, or the type of cases, was ever disclosed. (R.1/18 96) When Robert asked Ms. Kane if she was licensed to practice psychology and make mental diagnoses, her response was: "I am not licensed, but I do have the ability to diagnose." (R.1/18 108)

Ms. Kane admitted that she was not allowed to examine without supervision, because she was unlicensed. (R.1/18 125-126) When Robert asked her why she was able to examine him without supervision, she said: "Because this evaluation doesn't require that you need a license." (R.1/18 127) Later, she testified that she was supervised, but that her supervisor did not need to be present "for this type of evaluation." (R.1/18 127) She explained that, for a fitness evaluation, a licensed psychologist had to assist in the evaluation. (R.1/18 128) However, she testified that she could perform evaluations, without supervision, in involuntary medication cases. (Id.) When Robert asked her why it was not a requirement, she said: "I didn't develop the law. I don't know." (Id.)

Robert's objection to Ms. Kane's credentials was overruled, for the sole reason that she had testified as an expert before. (R.1/18 109) Her opinion testimony was in agreement with Dr. Nazareno's. (R.1/18 93-138)

Because the criminal charge(s) that was pending against Robert S. was never disclosed, it is not known whether it was a felony, or a misdemeanor. (C.1-39; R.11/30 1-9; R.1/4 1-9; R.1/18 1-193; R.2/1 1-97; R.3/8 1-14) Further, it is not known whether Robert S. had raised the defense of insanity in his pending criminal case, or any other defense addressing his mental capacity to commit the unknown charged criminal offense. (Id.) There was no evidence of how the medications may have changed Robert's behavior, or affected his demeanor, ability to communicate with counsel, or assist in his own defense. (Id.)

Trial court found Robert S. subject to involuntary administration of non-emergency psychotropic treatment, and authorized all of the requested medications (substituting Resperidol for Risperidone) for up to ninety (90) days. (C.27; R.2/1 94) The sole basis for the court's judgment forcing the treatment was to alleviate the almost nightly suffering that Robert experienced by hearing voices, and losing sleep. (R.2/1 87-88, 90; R.3/8 10-11) Trial court's findings of fact were limited to the criteria set forth in the statute authorizing forced treatment in non-emergency circumstances. (R.2/1 85-94); see, 405 ILCS 5/2-107.1(a-5)(4)(A)-(G) (West 2001), *as amended.*

The judgment of the Appellate Court affirming the trial court was entered on June 30, 2003. See, *In re Robert S.*, 341 Ill.App.3d 238, 275 Ill.Dec. 190, 792 N.E.2d 421 (2nd Dist. 2003). Relying in part on the recent decision of *In re Evelyn S.*, 337 Ill. App. 3d 1096, 273 Ill. Dec. 1 (5th Dist. 2003), *petition for leave to appeal pending*, the appellate court held that the Illinois statute authorizing the involuntary administration of non-emergency psychotropic medications to recipients of mental health services was constitutionally applied to criminal case pretrial detainees, to criminal case pretrial detainees who had been found unfit to stand trial, and

to Robert S.. *In re Robert S., supra*, 341 Ill.App.3d at 258-59, 275 Ill.Dec. at 205-06, 792 N.E.2d at 436-37; 405 ILCS 5/2-107.1 (West 2001), *as amended.*

The appellate court further held that Robert was not deprived of due process when the trial court appointed a psychologist, instead of a psychiatrist, to perform the independent examination of Robert in his involuntary treatment case. *In re Robert S., supra*, 341 Ill.App.3d at 255-57, 275 Ill.Dec. at 203-04, 792 N.E.2d at 434-35. The court also ruled that Robert was not deprived of due process when the independent evaluation was actually performed by an unlicensed intern with neither a doctorate, nor a Psy.D, in psychology, who was allowed to testify adversely to him, as an expert, over his objection. *In re Robert S., supra*, 341 Ill.App.3d at 255-57, 275 Ill.Dec. at 203-04, 792 N.E.2d at 434-35.

Finally, the appellate court rejected Robert's claim that due process, and the treatment statute itself, required that the State provide notice of the action to force psychotropic medications to the attorney representing Robert in the pending criminal case for which he had been found unfit to stand trial. *In re Robert S., supra*, 341 Ill.App.3d at 259, 275 Ill.Dec. at 206, 792 N.E.2d at 437.

SUMMARY OF ARGUMENT

The opinion of the Appellate Court sitting in the Second District failed to address or distinguish *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), which is on point and requires reversal. It also misapplied and wholly undercut *Sell v. United States*, ___ U.S. ___, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), by holding that, as long as any separate ground other than raising to fitness is joined with an action to force treatment, the safeguards set forth in *Sell* may be wholly ignored as to UST defendants. *In re Robert S.*, slip op. at 25.

Robert S.'s right to refuse psychotropic medications was deprived of him through the unconstitutional application of section 2-107.1 of the Code. As a criminal defendant refusing such medications, the State's *parens patriae* power was either non-existent, or so minimal, relative to his right to refuse, that application of 2-107.1 to him was unconstitutional.

Once it chose to prosecute Robert, the State's relationship was adverse to him, and constituted an application of the police power. It was ordered to render him fit to be tried, not to perform involuntary therapy upon him. Section 2-107.1 is authority for therapy, only – utilizing it against refusing defendants with pending criminal cases is *ultra vires,* an abuse of the *parens patriae* power, and a violation of due process.

The Second District's opinion implicity and erroneously held that the State's *parens patriae* interest in forced non-emergency psychotropic drug treatment of adults was compelling. It further impliedly held that the proofs required under 2-107.1, stated essential and overriding state interests, in effect creating a third legal justification to overcome a defendant's right to avoid unwanted psychotropic medications or ECT.

Previous to *Robert S.*, the justifications to force psychotropic medications against defendants were limited to: (1) emergency situations, described as where the defendant presents

a risk of danger to himself or others, or is gravely disabled (referred to as "*Harper*-type grounds," per *Sell*), or (2) for the purpose of raising a defendant who had been found unfit for trial to fitness (*Sell*). See, *Sell v. United States, supra,* 123 S. Ct. at 2183; *Riggins, supra*, 504 U.S. at 135; *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990). There was no finding by trial court that Robert S. was dangerous, or disabled. Since Robert S. was a pretrial detainee who had also been found unfit to stand trial (UST), he was subject to forced psychotropic medications only pursuant to the strict criteria set forth in *Sell*. No such judicial scrutiny occurred in his case.

Relying, in part, on the recent decision of *In re Evelyn S.*, 337 Ill. App. 3d 1096, 273 Ill. Dec. 1 (5th Dist. 2003), *petition for leave to appeal pending*, the Second District Appellate Court erroneously held that the Illinois statute authorizing the involuntary administration of nonemergency psychotropic medications to recipients of mental health services (405 ILCS 5/2-107.1 (West 2001), *as amended*) was constitutionally applied to criminal case pretrial detainees, to criminal case pretrial detainees who had been found unfit to stand trial, and to Robert S.. *In re Robert S.*, slip op. at 24-25. In combination, *Robert S.* and *Evelyn S.* hold that the procedural safeguards provided by the Mental Health and Developmental Disabilities Code are adequate for pretrial detainees and unfit defendants, for the sole reason that there is no statutory authority found in the Criminal Code to force treatment. *In re Robert S.*, slip op. at 24; *In re Evelyn S., supra*, 273 Ill. Dec. at 15; Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-100, *et seq.* (2002) (hereinafter cited only as "the Code").

The Second District's opinion also failed to address or distinguish *In re Branning*, 285 Ill. App. 3d 405, 416, 220 Ill. Dec. 920 (4th Dist. 1996). *Branning* held that due process requires a "psychiatric examination" in a 2-107.1 case, pursuant to section 3-804. Robert's court-appointed

examiner was neither a psychiatrist, nor a psychologist. She was an intern with a master's degree, and was unqualified to serve in Robert's case. Her qualifications and expertise were so lacking that an non-level playing field was created, prejudicing Robert.

Since psychotropic medications and ECT are the province of psychiatrists, Robert should have received the services of a psychiatrist as court-appointed independent examiner.

The State's failure to notify Robert's criminal case attorney of the action to forcibly treat him with psychotropic medications, on a non-emergency basis, was a violation of due process, and the plain language found in 2-107.1. The criminal case attorney has access to crucial information that the non-criminal defense attorney lacks.

ARGUMENT

I. THE APPELLATE COURT ERRED IN HOLDING THAT 405 ILCS 5/2-107.1, A STATUTE EXERCISING THE *PARENS PATRIAE* INTEREST OF THE STATE OF ILLINOIS, WHICH AUTHORIZES NON-EMERGENCY ADMINISTRATION OF PSYCHOTROPIC MEDICATIONS AND ELECTRO-CONVULSIVE THERAPY (ECT) TO MENTAL HEALTH RECIPIENTS ON AN INVOLUNTARY BASIS, WAS CONSTITUTIONALLY APPLIED TO ROBERT S., WHO WAS A CRIMINAL CASE PRETRIAL DETAINEE, AND A PRETRIAL DETAINEE WHO HAD BEEN FOUND TO BE UNFIT TO STAND TRIAL.

When confronted with a claim that a statute violates the due process guarantees of the United States and Illinois Constitutions, the scrutiny applied depends on the nature of the right upon which the statute allegedly infringes. *Lulay v. Lulay*, 193 Ill. 2d 455, 470, 739 N.E.2d 521 (2000); *Tully v. Edgar*, 171 Ill. 2d 297, 304, 664 N.E.2d 43 (1996). Ordinarily, a relaxed scrutiny applies, looking only to see whether the statute bears a rational relationship to a legitimate state interest. *Lulay v. Lulay, supra*; *Tully v. Edgar, supra*. However, in cases where the right infringed upon is among those considered a "fundamental" constitutional right, courts

subject the statute to "strict" scrutiny. *Id.* To survive strict scrutiny, the means employed by the legislature must be "necessary" to a "compelling" state interest, and the statute must be narrowly tailored thereto, *i.e.*, the legislature must use the least restrictive means consistent with the attainment of its goal. *Id.*

The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. The due process clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000), citing *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). Statutes that significantly interfere with fundamental constitutional rights, such as those guaranteed by the due process clause of the fourteenth amendment, should be found unconstitutional as applied. See, *Lulay v. Lulay, supra*, 193 Ill. 2d at 470-471; *Tully v. Edgar, supra*, 171 Ill. 2d at 310.

Relative Interests of the State and Robert S.

Section 2-107.1, which was adopted and took effect on August 13, 1991, delineated the non-emergency circumstances under which psychotropic medication could be administered against the wishes of the recipient. *In re C.E.*,161 Ill.2d 200, 206, 641 N.E.2d 345 (1994); see, 405 ILCS 5/2-107.1 (West 1992). Some three years later, this Court acknowledged that recipients of mental health services had a right to refuse unwanted non-emergency psychotropic drugs. *In re C. E.*, 161 Ill. 2d 200, 213, 641 N.E.2d 345 (1994). This was based upon the substantially invasive nature of the medications, their significant side effects, and their history of misuse by medical personnel, and even governments. *In re C. E.*, 161 Ill. 2d at 214-15.

As a recipient receiving mental health services, *C.E.* made it clear that there was no doubt that Robert S. possessed a federal constitutional right under the due process clause of the fourteenth amendment to refuse the administration of psychotropic medication under the "liberty" interests recognized in constitutional jurisprudence. *In re C. E., supra.* In *In re Barbara H.*, 183 Ill. 2d 482, 702 N.E.2d 555 (1998), this Court indicated that the right of a recipient to refuse unwanted psychotropic drugs implicated a fundamental liberty interest, requiring narrow statutory construction. *Barbara H.*, 183 Ill. 2d at 498.

But at the same time, the *C.E.* panel found that section 2-107.1 embodied Illinois' "significant" *parens patriae* interest in providing for persons who suffer from a serious mental illness or development disability and, therefore, lack capacity to make rational decisions concerning their need for medication. *C.E.*, 161 Ill. 2d at 217; see also, *In re Jill R.*, 336 Ill. App. 3d 956, 962, 785 N.E.2d 46 (4th Dist. 2003) ("significant parens patriae interest"); *In re Branning*, 285 Ill. App. 3d 405, 411, 674 N.E.2d 463 (4th Dist. 1996) ("significant *parens patriae* interest"); *In re Floyd*, 274 Ill. App. 3d 855, 862, 655 N.E.2d 10 (5th Dist. 1995) ("significant *parens patriae* interest"). By way of comparison, the State's *parens patriae* interest in protecting the welfare of children is "compelling." See, *In re R.C.*, 195 Ill. 2d 291, 305, 745 N.E.2d 1233 (2001); *In re O.R.*, 328 Ill. App. 3d 955, 960, 767 N.E.2d 872 (2nd Dist. 2002).

The term "*parens patriae*" means "parent of the country." BLACK'S LAW DICTIONARY, 1114 (6th ed. 1991). The concept of *parens patriae* recognizes the State's duty to protect and provide for the well-being of those unable to take care of themselves, including the mentally ill. *In re Floyd*, 274 Ill. App. 3d 855, 863, 655 N.E.2d 10 (5th Dist. 1995). The State's duties under the *parens patriae* doctrine are humanitarian and benevolent in nature. *In re K.G.F.*, 306 Mont. 1, 12-13, 29 P.3d 485, 495 (2001).

Prior to the use of antipsychotic medication in the treatment of schizophrenia and related psychoses, persons suffering from these illnesses were placed in hospitals with little chance of being released. Because there was a lack of effective treatment for the mental illnesses, hospitals were providing nothing more than custodial care to these patients. Since physicians began treating mental illnesses with antipsychotic medication in the 1950s, the number of mentally ill persons requiring long-term hospitalization has been greatly reduced. *Steele v. Hamilton County Community Mental Health Board*, 90 Ohio St. 3d 176, 188, 736 N.E.2d 10 (2000). The p*arens patriae* power, as it relates to forced non-emergency treatment, is grounded on the goal of providing freedom to the recipients, not prosecuting them.

Since persons who suffer from mental illness have constitutionally protected liberty interests that permit them to refuse the forced non-emergency administration of psychotropic medications, any legislation that infringes upon these liberty interests must bear an "important and substantial relationship" to the State's interest as *parens patriae* in providing for mentally ill people who lack the capacity to make informed decisions concerning psychotropic medications. *In re Williams*, 305 Ill. App. 3d 506, 509, 712 N.E.2d 350 (5th Dist. 1999). Because the involuntary administration of medications affects important liberty interests, strict compliance with statutory procedures is required. *Id.* The statute was found to be constitutional, in part, because it was "narrowly tailored" to address only those recipients in whom the State had a *parens patriae* interest. *In re C. E., supra*, 161 Ill. 2d at 217-9.

The Code is also intended to protect recipients from the potential misuse of psychotropic medication by medical staff. *C.E., supra.* Section 2-107.1 was supposed to ensure that involuntary treatment would be used "...for therapeutic purposes only...." *In re Mary Ann P.*, 202 Ill. 2d 393, 403, 781 N.E.2d 237 (2002) citing *C.E.*, 161 Ill. 2d at 218-19. It was not to be

used "...as a means to manage or discipline recipients of mental health services." *Id.* As such, 2-107.1 actions do not lie against defendants whose criminal cases are pending.

Robert S. was not only a recipient, but he was also a pretrial detainee. The sixth amendment right to counsel attaches at or after the initiation of adversarial judicial proceedings-whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *United States v. Gouveia*, 467 U. S. 180, 187-88, 104 S.Ct. 2292 (1984). It is at that point where the government has committed itself to prosecute and where the adverse positions of the government and the defendant have solidified. *Id.*, 467 U.S. at 189. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. *Id.*, 467 U.S. at 189. So, this is not the case of a mentally ill person who is debilitated to the point of not understanding his treatment needs, so that the government must step in and act in a parental role on his behalf; to the contrary, he was a criminal defendant asserting his constitutionally protected rights against the government that was seeking to prosecute him. The State was his opponent, not his supportive parent.

Once it chose to prosecute Robert, the State's relationship was adverse to him, and constituted an application of the police power. Pursuant to its police powers, the state investigates, prosecutes, tries and punishes criminal misconduct. *Phillips v. Iowa*,185 F.Supp.2d 992, 1007 (N.D.Ia. 2002) Criminal prosecutions are punitive in nature; a while civil commitments are not. See, *Boggs v. New York City Health and Hospitals Corp.*, 132 A.D.2d 340, 342-43, 523 N.Y.S.2d 71 (N.Y.A.D. 1st 1987)

Section 2-107.1 is authority for therapy, only – utilizing it against refusing defendants with pending criminal cases is *ultra vires,* an abuse of the *parens patriae* power.

As a pretrial criminal case detainee, Robert had a significant constitutionally protected liberty interest under the fourteenth amendment's due process clause in avoiding the unwanted administration of antipsychotic drugs. *Riggins v. Nevada*, 504 U.S. 127, 134-35, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). The use of psychotropic medication implicates Sixth Amendment and Due Process rights to a fair trial. *Id.* It is worth noting that *In re C.E.* failed to cite or mention *Riggins*, which was decided some two years prior. *In re C.E.*,161 Ill.2d 200. It did, however, cite *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990). *In re C.E.*,161 Ill.2d at 211, 213. The inescapable conclusion is that the *C.E.* panel never intended for 2-107.1 to be utilized against defendants pending their trials.

In *Riggins*, a state court conviction for murder was reversed where the defendant was involuntarily treated with antipsychotic medication prior to, and during, his criminal trial, due to the risk to him of suffering criminal trial prejudice. *Riggins, supra*, 504 U.S. at 138. The basis for the treatment in *Riggins* was virtually identical to that supporting the order herein appealed from, in that both Riggins, and Robert S., were involuntarily treated with psychotropic medication in order to alleviate their hearing voices and having problems sleeping. *Riggins, supra*, 504 U.S. at 127, 129. Just as the trial court found herein, the *Riggins* Court found that the administration of the psychotropic medication upon the defendant was medically appropriate. *Riggins, supra*, 504 U.S. at 133. But medical appropriateness is just the initial scrutiny that must be applied.

Since the medication may cause a change in the behavior of the defendant, the concerns are similar to those in cases of manipulation of material evidence. *Riggins, supra*, 504 U.S. at 139 (Kennedy, J., concurring). Side effects may make it difficult for a defendant to focus on testimony of the witness, or to assist counsel in his defense. *Riggins, supra*, 504 U.S. at 137

(Kennedy, J., concurring). They may adversely effect jurors' perceptions of a defendant's character, especially with demonstrations of remorse or compassion. *Riggins, supra*, 504 U.S. at 143-4 (Kennedy, J., concurring).

The concerns addressed in *Riggins* apply to pretrial detainees across the board, not just those who have been found to be unfit to stand trial. It is important to note that Mr. Riggins was not found to be unfit when he attempted, unsuccessfully, to decline the forced medications. *Riggins, supra*, 504 U.S. at 130. All pending criminal defendants have a due process right to a fair trial and the assistance of counsel - not just UST defendants.

This constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs" is an interest that only an "essential" or "overriding" state interest may overcome. *Riggins*, 504 U.S., at 134, 135. In addition, a court forcibly medicating a criminal defendant must determine whether the side effects of the antipsychotic medication are likely to undermine the fairness of the criminal trial. *Sell v. U.S., supra,* 123 S. Ct. at 2187, citing *Riggins, supra*, 504 U.S. at 142-145 (Kennedy, J., concurring).

In *Riggins*, the United States Supreme Court reversed "because the record contained no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy...." *Riggins*, 504 U.S., at 138. The Court held that forcing antipsychotic drugs on Mr. Riggins was impermissible, absent a finding of overriding justification and a determination of medical appropriateness. *Riggins, supra*, 504 U.S. at 135.

Therefore, it is abundantly clear that the administration of involuntary non-emergency psychotropic medication to Robert S., a pretrial detainee, in order to alleviate hearing voices at night and losing sleep, is an unconstitutional application of 2-107.1. The State's parens partriae

interest is "significant," only. See, *C.E.*, 161 Ill. 2d at 217; see also, *In re Jill R.*, 336 Ill. App. 3d at 962; *In re Branning*, 285 Ill. App. 3d at 411; *In re Floyd*, 274 Ill. App. 3d at 862. It doesn't approach an "essential" or "overriding" state interest, so Robert's is paramount.

Finally, as a pretrial detainee who had been found unfit to stand trial (UST), Robert S. had a significant constitutionally protected liberty interest under the fourteenth amendment's due process clause in avoiding the unwanted administration of antipsychotic drugs that only an "essential" or "overriding" state interest could overcome. *Sell v. United States*, __ U.S. __, 123 S. Ct. 2174, 2183, 156 L. Ed. 2d 197 (2003).

Upon finding a defendant not fit, the court must order the defendant to undergo treatment to render him mentally fit to stand trial. 725 ILCS 5/104-16(d). There is no State goal to provide treatment that would enable him to be free – and no authority to utilize the *parens patriae* power to potentially infringe his trial rights, whatever the intent may be. But, what conclusion is to be drawn from a system where *the administration* of a forensic mental health facility initiate 2-107.1 petitions against USTs, as opposed to their treating physicians?

Sell vs. United States

The following language from the United States Supreme Court describes the appropriate criteria to utilize to determine when a UST may be constitutionally force non-emergency psychotropic medications:

> These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare. That is because the standard says or fairly implies the following:

First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security. See *Riggins*, supra, at 135-136, 112 S.Ct. 1810 (" '[P]ower to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace' " (quoting *Illinois v. Allen*, 397 U.S. 337, 347, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring))).

Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill--and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b)). Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.

Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially *2185 unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. See *Riggins*, *supra*, at 142-145, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment).

Third, the court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. Cf. Brief for American Psychological Association as *Amicus Curiae* 10-14 (nondrug therapies may be effective in restoring psychotic defendants to competence); but cf. Brief for American Psychiatric Association et al. as *Amici Curiae* 13-22 (alternative

treatments for psychosis commonly not as effective as medication). And the court must consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods.

Fourth, as we have said, 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.

We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial*. A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U.S., at 225-226, 110 S.Ct. 1028. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent. *Riggins*, 504 U.S., at 140, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment). The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication--when in the best interests of a patient who lacks the mental competence to make such a decision. E.g., Ala.Code §§ 26- 2A-102(a), 26-2A-105, 26-2A-108 (Michie 1992); Alaska Stat. §§ 13.26.105(a), 13.26.116(b) (2002); Ariz.Rev.Stat. Ann. §§ 14-5303, 14-5312 (West 1995); Ark.Code Ann. §§ 28-65-205, 28-65-301 (1987). And courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others. See, e.g., 28 CFR § 549.43 (2002); cf. 18 U.S.C. § 4246.

> If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. At the least, they will facilitate direct medical and legal focus upon such questions as: Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is *not* dangerous *and* (2) *is* competent to make up his own mind about treatment? Can bringing such an individual to trial *alone* justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial? We consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.
>
> When a court must nonetheless reach the trial competence question, the factors discussed above, *supra*, at 2183-2185, should help it make the ultimate constitutionally required judgment. Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? See *Harper*, *supr*a, at 221-223, 110 S.Ct. 1028; *Riggins*, supra, at 134-135, 112 S.Ct. 1810. *Sell v. United States*, __ U.S. __, 123 S.Ct. 2174, 2184-87 (2003) (emphasis in original).

From the above passage, several conclusions can be drawn. It is never acceptable to force psychotropic treatment on a defendant with capacity, unless he is dangerous. Such treatment would be medically inappropriate, and there is no State interest.

The State has an essential and overriding interest in forced treatment against a defendant, based upon "*Harper*-type grounds," in emergency situations, where the defendant presents a risk of danger to himself or others, or is gravely disabled. *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990) However, it lacks an essential and overriding interest when grounds to force treatment are not "*Harper*-type grounds." *Riggins*. Section 2-107.1, grounded in therapy and non-emergency, is not a

"*Harper*-type ground," and Robert should not have been treated against his will to reduce the suffering attendant to hearing voices and losing sleep.

Before an attempt is made to restore a UST with such medications, "*Harper*-type grounds" should be considered as a basis to medicate. Illinois recognizes that defendants can be UST due to either a mental condition or a physical condition, and "*Harper*-type grounds" are consistent with those grounds. See, 725 ILCS 5/104-13(a) and (b). *Sell* requires that, if "*Harper*-type grounds" would require a civil action, a guardian must be appointed to the defendant, in order to exercise his right to refuse and to act in his best interest, *vis-à-vis* the government prosecuting him.

In Illinois, psychotropic medications or ECT may be administered to a recipient over his objection, without a hearing or court order, when "...necessary to prevent the recipient from causing serious and imminent physical harm to the recipient or others and no less restrictive alternative is available." 405 ILCS 5/2-107(a) and (b). Illinois doctors and dentists may perform emergency medical and dental procedures upon incapable recipients without their consent, and without a hearing or court order. 405 ILCS 5/2-111. These are "*Harper*-type grounds." Other States may require civil action.

The police power is the only State interest that can support an action to force treat a defendant with psychotropic medications. Even then, only in rare cases will the State's police power interest be paramount to a UST's right to refuse.

However the *parens patriae* interest might be defined, it is clear that the government's exercise of its police power to thwart serious crime is a more important interest. *Khiem v. United States*, 612 A.2d 160, 169 (D.C. 1992). Since the governmental interest in bringing a defendant to trial is more compelling than its interest in forcing psychotropics in non-emergency

circumstances upon a recipient, *Sell* and *Riggins* clearly demonstrate that any such civil statute applied to a pretrial detainee will be applied in an unconstitutional fashion. The defendant's fundamental right to refuse will be paramount.

The State of Utah's claim that its *parens patriae* interest would permit it to force a pretrial detainee to receive unwanted non-emergency antipsychotic drugs was soundly rejected by the only court that appears to have considered the issue. *Woodland v. Angus*, 820 F. Supp. 1497, 1516-18 (D. Utah 1993). The court noted that, in cases involving a pretrial detainee, "The State ... cannot merely assert its *parens patriae* interest and ignore a [pretrial detainee's] significant liberty interest in the unwanted administration of antipsychotic medication." *Woodland,* 820 F. Supp. at 1517.

Therefore, as alluded to in *Sell*, if the State wants to utilize the *parens patriae* function to medicate with psychotropics, it must dismiss the criminal charges and proceed against the former UST defendant civilly.

Even where "*Harper*-type grounds" exist, the medications must be medically appropriate and not infringe on fair trial rights (*Riggins* fair trial). If "*Harper*-type grounds" do not exist, then the exercise of the police power allows forced psychotropic restoration in rare instances, according to the strict criteria described (*Sell* trial competence).

According to the *Sell* criteria, psychotropic medications may be involuntarily administered to a mentally ill defendant facing "serious criminal charges" in order to render him fit to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. *Sell v. U.S., supra,* 123 S. Ct. at 2184-5. The crime must be serious, and the

governmental interest must be important. *Sell v. U.S., supra,* 123 S. Ct. at 2185. A court must first consider the facts of the individual case in evaluating the governmental interest in prosecution. *Sell v. U.S., supra,* 123 S. Ct. at 2185. It must find that the drugs are substantially likely to raise a defendant to fitness, but at the same time, be substantially unlikely to have side effects that would interfere significantly with a defendant's ability to assist counsel in conducting a defense, thereby rendering the trial unfair. *Sell v. U.S., supra,* 123 S. Ct. at 2185, citing *Riggins, supra*, 504 U.S. at 142-5 (Kennedy, J., concurring). The court must also consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods. *Sell v. U.S., supra,* 123 S. Ct. at 2185.

It is apparent that the safeguards afforded USTs in *Sell* are more expansive, and stricter, than *Riggins*. But, in the instant case, Robert S. was afforded none of the safeguards mandated by either these two Supreme Court cases. Trial court's findings of fact were limited to the criteria set forth in the statute authorizing forced treatment in non-emergency circumstances. (R.2/1 85-94); see, 405 ILCS 5/2-107.1(a-5)(4)(A)-(F) (West 2001), *as amended.* But, section 2-107.1 grounds are not "*Harper*-type grounds," nor are they *Sell* grounds.

To involuntarily treat a person by ECT or psychotropic medication, it must be determined that the following factors are present:

> (A) That the recipient has a serious mental illness or developmental disability.
>
> (B) That because of said mental illness or developmental disability, the recipient exhibits any one of the following: (i) deterioration of his or her ability to function, (ii) suffering, or (iii) threatening behavior.
>
> (C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms as set forth in

item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.

(D) That the benefits of the treatment outweigh the harm.

(E) That the recipient lacks the capacity to make a reasoned decision about the treatment.

(F) That other less restrictive services have been explored and found inappropriate. 405 ILCS 5/2-107.1(a-5)(4)(A) - (a-5)(4)(F) (West 2001), *as amended* (emphasis added).

The procedural safeguards set forth in *Riggins* and *Sell* have little in common with section 2-107.1 of the Code. For instance, the seriousness of the crime charged is irrelevant to 2-107.1, and there is no record of Robert's charge. Nor was there a finding of how potential side effects might effect Robert's ability to participate in his ability to assist in his own defense in the criminal trial, or his demeanor. There was no finding that the State was exercising a compelling or overriding interest. These omissions caused the Supreme Court to reverse in *Riggins*.

When applied to criminal defendants, section 2-107.1 is the proverbial square peg. Trial court's order allowing the psychiatrist to administer Haldol Decanoate, if Robert refused the Risperidone, runs afoul of *Sell*, which requires that a contempt action be initiated first, as a way of exhausting less intrusive methods. *Sell,* 123 S. Ct. at 2185. On the other hand, 2-107.1 treatment decisions are within the sole discretion of the treating physician. See, *In re Mary Ann P.*, 202 Ill. 2d at 412-13. *Mary Ann P.* conflicts also with those cases that are interpreting the "less intrusive" requirement in *Sell* to require a try on pills, before long-acting psychotropic medications are forced. See, *United States v. Dumeny*, 2004 WL 33057 (D.Me. 2004).

Trial court found that Robert lacked capacity, in part, because he was an involuntary patient, but this is a misapplication of a concept that is limited to civil commitment. See, *In re*

Israel, 278 Ill. App. 3d 24, 216 Ill. Dec. 104 (2nd Dist. 1996). Obviously, USTs do not get an opportunity to sign voluntary admission forms, which are probably not found on the forensic unit, anyway. See, *In re Hatsuye T.*, 293 Ill. App. 3d 1046, 1052, 228 Ill. Dec. 376 (1st Dist. 1997)(staff's acceptance of voluntary admission form indicates respondent has capacity at that time). So, the 2-107.1 criminal defendants begin the hearing with a handicap as to the capacity issue.

For the above reasons, Robert S. submits that 405 ILCS 5/2-107.1 was unconstitutionally applied to him.

II. THE APPELLATE COURT ERRED IN HOLDING THAT ROBERT S., A RESPONDENT IN A FORCED PSYCHOTROPIC MEDICATIONS ACTION, WAS NOT DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW, WHERE A PSYCHOLOGIST WAS APPOINTED TO PERFORM AN INDEPENDENT EXAMINATION, AS OPPOSED TO A PSYCHIATRIST; AND WHERE THE EXAMINATION WAS ULTIMATELY PERFORMED BY AN UNLICENSED INTERN WITH ONLY A MASTER'S DEGREE IN COUNSELING PSYCHOLOGY, WHOSE TESTIMONY AGREED WITH THE TREATING PSYCHIATRIST'S.

Involuntary administration of mental health treatment implicates fundamental liberty interests. *In re Barbara H.*, 183 Ill. 2d 482, 498, 702 N.E.2d 555 (1998). Even a person involuntarily admitted retains a constitutional and statutory right to refuse psychotropic drugs. *In re Williams*, 305 Ill.App.3d 506, 509, 712 N.E.2d 350 (5th Dist. 1999). Proceedings to force involuntary nonemergency mental health treatment must at least meet minimum due process requirements. *In re Branning*, 285 Ill. App. 3d 405, 674 N.E.2d 463 (4th Dist. 1996). The Code's procedures are even more important to protect due process, when the respondent is a pretrial detainee who has been found unfit to stand trial. *In re Evelyn S.*, 337 Ill.App.3d 1096, 1103, 788 N.E.2d 310, 317 (5th Dist. 2003), *petition for leave to appeal pending*.

A fundamental requirement of due process is an opportunity to be heard. *Williams v. Ill. State Scholarship Comm'n*, 139 Ill. 2d 24, 33, 563 N.E.2d 465 (1990) citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). It is well established that the Code's procedural safeguards are essential to protecting the liberty interests of respondents in mental health cases. *In re Rovelstad*, 281 Ill. App. 3d 956, 964, 667 N.E.2d 720 (2nd Dist. 1996). The Code's procedural safeguards are not mere technicalities, but essential tools to safeguard these liberty interests. *In re John R.*, et al., 339 Ill. App. 3d 778, 785, 792 N.E.2d 350 (5th Dist. 2003). One of the ways in which the Code assures that respondents are not deprived of their interests in refusing unwanted non-emergency medication without due process is by affording respondents the right to an independent examination. 405 ILCS 5/3-804 (West 2001).

The purpose of permitting respondents to have independent examinations in such cases is to aid them and their counsel in preparation and presentation of a defense. Because a respondent's liberty is at stake, the assistance of an independent expert is essential to a fair and impartial hearing. *In re Williams*, 133 Ill. App. 3d 232, 235, 478 N.E.2d 867 (3rd Dist. 1985) citing Report, Governor's Commission for Revision of the Mental Health Code of Illinois 60 (1976) (Governor's Commission).

In recommending the enactment of section 3-804, the Governor's Commission recognized,

> [T]he rights to counsel and to be heard in a civil commitment proceeding will often fail to adequately protect the respondent unless he is able to secure the advice or testimony of his own examiner. Otherwise, the respondent and his lawyer will have difficulty in rebutting or exposing errors and other deficiencies in the testimony of the expert state witnesses. *Williams*, *supra*, 133 Ill. App. 3d at 235, quoting Governor's Commission at 60.

Since the respondent's liberty is at stake, the assistance of an independent expert is essential to a fair and impartial hearing. *Williams*, 133 Ill. App. 3d at 235.

For section 2-107.1 respondents who request an independent examination, state and federal due process require that they be provided a "psychiatric examination." *In re Branning*, 285 Ill. App. 3d 405, 417, 674 N.E.2d 463 (4th Dist. 1996); U.S. Const., amend XIV; Ill. Const. 1970, art. I, sec. 2. In *Branning*, the trial court had denied the request of a respondent in a forced non-emergency electro-convulsive therapy (ECT) petition for the appointment of an independent examiner. *Branning*, *supra*, 285 Ill. App. 3d at 408. The appellate court held that, among other mandated procedural safeguards, a respondent was due an independent psychiatric examination, when requested. *Branning*, 285 Ill. App. 3d at 417. It noted the value of the independent examination to both parties, and found that the fiscal and administrative burdens did not outweigh the important protection it would provide. *Id.*

A psychiatrist is a medical doctor who has trained postgraduate to become a specialist in psychiatry. The term "psychiatrist" is defined by the Code as a physician who has successfully completed an accredited residency program in psychiatry, at section 5/1-121. See, 405 ILCS 5/1-121. The definitions of the terms "psychotropic medication" and "authorized involuntary treatment" are subsections of the same Code section that defines the term "psychiatrist." See, 405 ILCS 5/1-121; 1-121.1; 1-121.5. Statutes should be construed in conjunction with other statutes addressing the same subject. *People v. Badoud*, 122 Ill. 2d 50, 55, 118 Ill. Dec. 407, 521 N.E.2d 884 (1988). The placement of this series of definitions within the Code support the conclusion that involuntary non-emergency treatments by psychotropic medications and/or ECT are solely within the province of psychiatry.

In the case at bar, Robert S. moved for appointment of an independent examiner. (R.11/30 5) Robert requested that the court appoint the same psychiatrist who had been appointed to, and had, examined him in the two previous cases where he had faced petitions for involuntary treatment. (R.11/30 5) The State did not object to the request for appointment of an independent examiner, but asked the circuit court to appoint the Kane County Diagnostic Center so that the examination would be less costly. (R.11/30 5)

Robert S. demurred, advising the court that while the Diagnostic Center employed psychologists, it did not have a psychiatrist on its staff. (R.11/30 6) An independent examiner who lacked the qualifications to give advice or testify about medication would not adequately aid Robert in the preparation and presentation of a defense to a petition seeking involuntary treatment with psychotropic drugs; thus, he argued that the appointment of a psychologist was insufficient. (R.11/30 6) The trial court sided with the State, and the Diagnostic Center was appointed to perform the independent examination. (R.11/30 6-7; C.15)

However, psychologists and psychiatrists are not of the same medical discipline. *In re B.D. and B.D.*, 321 Ill. App. 3d 161, 166, 746 N.E.2d 822 (1st Dist. 2001). The primary difference between psychiatry and psychology is the power to prescribe controlled substances. *People v. McDonald*, 186 Ill. App. 3d 1096, 1100, 134 Ill. Dec. 759 (5th Dist. 1989). It was precisely this difference -- prescription of medication -- that was the subject matter of the petition for involuntary treatment.

The relative differences in the training of the two disciplines is set forth in a recent position statement by the American Psychiatric Association, advocating against extending prescribing privileges to psychologists:

> "**BACKGROUND**: The psychotropic medications used to treat mental illnesses are among the most powerful available to modern medicine. If not appropriately prescribed and monitored, they can cause potentially disabling and life-threatening side effects. For example, many anti-depressants can cause stroke, coma, seizures and tremors.
>
> Fifty percent of persons whose mental illness require psychotropic medications also have other serious medical conditions requiring medications. This interaction of different medications, which can magnify or nullify the effects of certain drugs or even result in a deadly combination, presents an extremely complex challenge to the most knowledgeable and skilled physicians. Effective use of medications to treat brain disorders requires medical training, with a thorough understanding of physiology, chemistry, drug interactions and medical problems that masquerade as or cause brain malfunctions. Diagnosing and using medications to treat mental illnesses such as clinical depression and schizophrenia requires the same level of medical skill and knowledge as diagnosing and treating heart disease or diabetes.
>
> **Psychologists are not qualified to prescribe medication.** Psychologists, who can earn a Ph.D. by taking only a single course in the biological basis of behavior, are trained in the social and behavioral sciences and provide services that do not physically invade the body cavity, such as psychological assessment and psychotherapy. During their training, which typically occurs in a non-medical setting, they do not observe or participate in the treatment of patients with mental illnesses or patients with comorbid physical and mental illness. Their training and experience is relating to patients with mental health conditions. This limited training does not adequately prepare psychologists to detect and treat concomitant

> non-mental illnesses or to understand and deal with the interactions of psychotropic with other medications prescribed to help other body systems.
>
> Psychiatrists are medical doctors who specialize in the diagnosis and treatment of mental disorders and substance abuse disorders. Like other physicians, psychiatrists spend 12 or more years in math and science baccalaureate graduate education, medical school, internship and residency, and complete 10,000 hours of training. Moreover, their training occurs in a hospital setting under an approved program of supervision by senior physicians, and a psychiatric physician manages the care of 200-300 patients with a range of emotional and other physical illnesses. Management of care includes performing physical examinations, ordering and evaluating medical tests, making medical diagnoses, prescribing medication for medical illness (including mental illness) and other treatments, and monitoring the effects of such treatment upon the entire body system not only the mental illness medication response.' Scope of Practice: Psychologist Prescribing Legislation, American Psychiatric Association, May 2003

The disparity in training between the two disciplines raises a safety issue, which is only compounded by the prospect of forced non-emergency ECT. Not only must an expert in a 2-107.1 case understand the effects of combining several psychotropic medications, or treating with ECT, but for some cases, he or she must understand how ECT is used in combination with the several medications. See, *In re Stephen P.*, 343 Ill. App. 3d 455, 797 N.E.2d 1071 (4th Dist. 2003); *In re Emmett J.*, 333 Ill. App. 3d 69, 775 N.E.2d 193 (3rd Dist. 2002).

Forcible administration of psychotropic medication on a non-emergency basis is permitted only when the court finds evidence of each of section 2-107.1's elements by clear and convincing proof. *In re C.E.*, 161 Ill. 2d 200, 208, 641 N.E.2d 345 (1994). The elements that the State was required to establish, in the case *sub judice*, were the following:

> (A) That the recipient has a serious mental illness or developmental disability.
>
> (B) That because of said mental illness or developmental disability, the recipient exhibits any one of the following: (i) deterioration of his or her ability to function, (ii) suffering, or (iii) threatening behavior.

(C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms as set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.

(D) That the benefits of the treatment outweigh the harm.

(E) That the recipient lacks the capacity to make a reasoned decision about the treatment.

(F) That other less restrictive services have been explored and found inappropriate. 405 ILCS 5/2-107.1(a-5)(4)(A) - (a-5)(4)(F) (West 2001), *as amended*.

The appointment of a non-psychiatrist as an independent examiner in a forcible medication proceeding cannot assist a respondent in rebutting each element of the State's case. Therefore due process requires a psychiatrist, to perform a "psychiatric examination." *Branning*, 285 Ill. App. 3d at 417

While a non-psychiatric expert might be able to aid a respondent in defending against *some* of the elements of the statute, it is questionable how a non-psychiatrist could assist in defense of the claim that the benefit of a particular treatment regimen of medications, or ECT, outweighs the harm. As this Court has noted, neither the jury, nor the Court, may pass on the propriety of the treatment proposed by the treating physician in the petition. *In re Mary Ann P.*, 202 Ill.2d 393, 405-6, 781 N.E.2d 237 (2002) (mental health treatment is a "highly specialized area of medicine which is better left to the experts.")

Furthermore, the independent examiner's role includes, at least in the hypothetical, the providing of opinions and advice upon which resolution without court order may occur. An independent examiner without prescribing privileges cannot fulfill this role, since it "dangerously approaches the practice of medicine." See, *In re Mary Ann P.*, *supra*, 202 Ill.2d at 406. The

independent examiner must be qualified to give any opinion or advice about the benefits and side effects of, or the alternatives to, the medications requested in the petition.

Respondent submits that, in the first instance, due process can be satisfied only when the independent examiner appointed by the court is a "psychiatrist," as that term is defined in section 1-121 of the Code. Because the independent examiner appointed to Robert S. was not a "psychiatrist," he was deprived due process.

But, alas, Robert S. did not receive his independent examination by either a psychiatrist, or a psychologist. Instead, Ms. Kane, an employee of the Diagnostic Center, examined him in response to the court's order for an independent examination. (R.1/18 49-95) She was not a licensed psychologist and did not have a doctorate, only a master's degree. (R.1/18 94, 108) Indeed, without a license, Ms. Kane admitted she could not perform an examination independently without supervision.[1] (R.1/18 125-126) Had she been a physician or psychiatrist, the mere fact of non-licensure would have foreclosed her testimony. See, 405 ILCS 5/1-120, 5/1-121. The unlicensed intern that performed the examination of Robert could in no way be considered to be an expert. Her "credentials" are not even found in the Code.

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[1] Substituting the opinions of unlicensed therapists, where the advice and testimony of properly trained and accredited mental health professionals is needed, invites an unacceptable and real risk of injustice. A clear example is California's notorious McMartin Preschool child abuse case, in which 369 children were diagnosed as having been sexually abused—when few, if any actually were. The charges were predicated upon the flawed examinations of the children conducted primarily by a therapist, like Kane, who had a master's degree, but was unlicensed. See Jean Montoya, Something Not so Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses, 35 Ariz. L. Rev. 927 (1993) (and sources cited therein); Diana Younts, Evaluating And Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke L. J. 691 (1991); Terence W. Campbell and Demosthenes Lorandos, Cross Examining Experts in the Behavioral Sciences, 2 Cross Exam. Exp. in Beh. Sci. § 10:67.1 (2003).

Ms. Kane testified on behalf of the State. (R.1/18 93-138) In her opinion, Robert suffered from a serious mental disease, *i.e.*, schizophrenia, paranoid-type. (R.1/18 120) She also testified that the administration of the medication outweighed the adverse effects. (R.1/18 123)

Ms. Kane opined that Robert lacked insight into his illness, because he did not agree that he suffered from a mental illness. (R.1/18 123) He lacked capacity because he lacked insight into his illness. (Id.) And, because psychosocial therapy required that an individual have insight into their illness, too, there were no less restrictive services for Robert available. (R.1/18 123-124)

Although not a clinical psychologist, Ms. Kane verified the opinions in her report "to a reasonable degree of psychological certainty" and concluded that Mr. S. met the criteria to involuntarily receive psychotropic medication "to a reasonable degree of psychological certainty." (R1/18 106-7, 124)

In order to be subject to forced treatment, the mental illness must be "serious." See, 405 ILCS 5/2-107.1(a-5)(4)(A). The presence of a serious mental illness in Robert was a matter of some *bona fide* dispute at trial.

Robert denied delusions and hallucinations, taking the position that he did not suffer from a mental illness. (R.1/18 119-120, 123) On cross-examination, both Dr. Nazareno and Ms. Kane admitted that they did not observe any symptoms of mental illness in Robert during their testimony. (R.1/18 84, 136) Ms. Kane saw no delusions or hallucinations when she examined him. (R. 1/18 136-137) Robert, who appeared *pro se*, was complimented by trial court, who said he did "an exemplary job" in representing himself. (R.3/8 11)

Robert's chart indicated that he was originally diagnosed with delusional disorder, which was later changed to schizophrenia paranoid-type. (R.1/18 110, 121) A debate exists amongst

clinicians regarding the treatment of delusional disorder, some finding psychotropic medications generally not effective, while others disagree. David M. Siegel, Psychoactive Medication and Your Client: Better Living and (Maybe) Better Law Through Chemistry, Champion 22 (Dec. 2003). Robert's independent examiner should have been qualified to review the accuracy of Dr. Nazareno's diagnosis, the seriousness of the illness, the efficacy of the proposed medications, and to testify on an equal footing.

Although the trial court was correct to grant Robert S.'s motion for an independent examination, the appointment of a non-psychiatrist to serve as an independent examiner in a section 2-107.1 proceeding defeated the purpose of allowing independent examinations. Respondents named in petitions for involuntary treatment are entitled to an independent examination. 405 ILCS 5/3-804; *In re R.C.*, 338 Ill. App. 3d 103, 788 N.E.2d 99 (1st Dist. 2003). The intern's lack of education and training in the field of psychiatric medicine made it impossible for her to "provide a check" on Robert's treating psychiatrist. Robert suffered prejudice when the court appointed him an examiner who was not an expert in the field -- the equivalent of no examiner at all.

As noted by the Governor's Commission, the purpose of an independent examination is not only to obtain the advice of an independent expert but also his or her testimony. Governor's Commission at 60. Although the trial court allowed Ms. Kane, lacking any license, to testify that the benefits of the specified medical treatment would outweigh the harm, it is difficult to fathom that any court would permit a non-licensed physician or psychiatrist—much less an individual not even trained as either—to give an expert opinion on the subject. An expert's opinion can only be as valid as the reasons for the opinion. *In re O.C.*, 338 Ill. App. 3d 292, 296, 788 N.E.2d 1163 (2003).

It is also significant that only a physician can determine whether an individual like Robert S. has the capacity to make a reasoned decision about treatment with medication. Only a physician is authorized to "ascertain and document whether [a] recipient [of mental health services] is capable of giving informed consent" for psychotropic medication or ECT. 59 Ill. Adm. Code 112.90(b) (West 2003). Not being a physician, Ms. Kane was not competent to determine whether Mr. S. lacked capacity to give, or withhold, his consent to treatment with medications. She was thus unqualified to aid Mr. S's defense by either advising or testifying on the subject of capacity.

Perhaps an independent examiner who was a clinical psychologist or a licensed clinical social worker might be of *some* use to a respondent in defending against a petition for involuntary treatment. A clinical psychologist or licensed clinical psychologist could render advice, testimony, or both, about whether Robert S. had a mental illness, whether he exhibited specific symptoms because of his mental illness, and whether less-restrictive treatment alternatives had been explored and found inappropriate. 405 ILCS 5/2-107.1(a-5)(4)(A) -- (a-5)(4)(F). But Ms. Kane was not a clinical psychologist. See, 405 ILCS 5/1-103 (definition of clinical psychologist).

The Appellate Court mistakenly dwelled upon the observation that Ms. Kane might have been a "qualified examiner" and, thus, the plain language of section 3-804 authorized her appointment as an independent examiner. *In re Robert S.*, slip op. at 20-24. The Appellate Court failed to apply the precept of statutory interpretation that in construing a statute, this Court presumes that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *In re Lieberman*, 201 Ill.2d 300, 309 (2002).

Section 3-804 does authorize the trial court to order "an examination to be made by an impartial medical expert pursuant to Supreme Court Rules or by a qualified examiner, clinical psychologist or other expert." 405 ILCS 5/3-804. But section 3-804 appears in Chapter III of the Code, which governs the admission, discharge, and transfer of mentally ill persons. In cases involving admission, discharge, or transfer, it is entirely reasonable for the court to appoint a qualified examiner other than a psychiatrist. The testimony of a psychiatrist is not required before a person can be found subject to involuntary admission. 405 ILCS 5/3-807. Just as qualified examiners might complete a certificate or testify at an involuntary admission hearing, a qualified examiner would be able to assist a respondent in defending against an involuntary admission case, thereby furthering the purpose of section 3-804.

Chapter III does *not* govern involuntary treatment with psychotropic medication. Treatment with medication is governed by Chapter II of the Code and incorporates the procedures set forth in Chapter III for proceedings for involuntary treatment. 405 ILCS 5/2-107.1(a-5)(3). When the procedures contained in Chapter III were drafted, the legislature did not contemplate independent examinations in proceedings for involuntary treatment; indeed, it was not until a decade later that procedures for authorizing the involuntary administration of psychotropic medication in nonemergency situations were added to the Code. Anthony E. Rothert, Involuntary Administration Of Psychotropic Drugs In Illinois: Balancing Safety And Civil Liberties, 91 ILBJ 496, 498 (Oct 2003).

There are differences between proceedings for involuntary treatment and proceedings for involuntary admission such that the literal language of the statutory procedure could produce a result that is absurd, inconvenient, or unjust. *In re Robert R.*, 338 Ill.App.3d 343, 788 N.E.2d 122 (5th Dist. 2003). In circumstances where adhering to the literal language of the statute

would yield a result that is "clearly and demonstrably at odds with the obvious intent of the General Assembly," courts may disregard, modify, or supply language to give effect to the legislative design. *Robert R.*, 338 Ill.App.3d at 352, quoting *Lieberman*, 201 Ill.2d at 320.

The legislature intended to assure that forced treatment respondents were not deprived of due process by providing for the advice or testimony of their own examiner to aid in rebutting or exposing errors and other deficiencies in the testimony of the expert state witnesses. Governor's Commission at 60. The appointment of a person who is unqualified to provide advice or testimony on the subjects about which the expert state witnesses are required to testify is clearly and demonstrably at odds with the obvious intent of the General Assembly. See *Lieberman*, 201 Ill.2d at 320.

While the Appellate Court's literal interpretation of section 3-804 frustrates the intent of the legislature, this Court may disregard, modify, or supply language to give effect to the legislative design. *Lieberman*, 201 Ill.2d at 320. The obvious intent of the legislature was to provide respondents a chance to enlist the aid of an independent expert who would be capable of providing expert review, advice and testimony; the intent of the General Assembly can be revived by interpreting section 3-804 as requiring the appointment of an independent psychiatrist when applied to cases seeking the involuntary treatment of a respondent by either psychotropic medications and/or ECT.

The Appellate Court's interpretation of section 3-804 does not square with the Court's previous pronouncements of what due process requires. This Court declined review of the opinion in *In re R.C.*, 338 Ill. App. 3d 103, 110, 788 N.E.2d 99 (1st Dist. 2003) (*petition for leave to appeal denied*, Table No. 96151, Oct. 7, 2003), which noted, *inter alia.*, "... Illinois requires an independent *psychiatric* examination in proceedings for involuntary treatment." *R.C.*,

788 N.E.2d at 103, citing *In re Branning*, 285 Ill. App. 3d 405, 417, 674 N.E.2d 463 (4th Dist. 1996) (emphasis added). The *Robert S.* Court failed to distinguish from *Branning*.

Branning's requirement that a forcible medical treatment respondent is entitled to an independent examination by a psychiatrist is supported by recent Appellate Court decisions. The Court has held that, as under the Code, persons named in proceedings under the Sexually Dangerous Person Act are entitled to due process, which requires that the respondent be given a fundamentally fair trial. *In re Detention of Trevino*, 317 Ill. App. 3d 324, 330-31, 740 N.E.2d 810 (2nd Dist. 2000); *In re Detention of Kortte*, 317 Ill. App. 3d 111, 115-16, 738 N.E.2d 983 (2nd Dist. 2000). Respondents are entitled to defend themselves on a level playing field with the State. The State is not permitted to maintain a strategic advantage over the respondent when "that advantage casts a pall on the proceedings." *Trevino*, 317 Ill. App. 3d at 330. Yet, this level playing field was denied respondent.

Dr. Nazareno had almost 30 years experience as a physician and 15 years as a psychiatrist. (R.1/18 12-13) He had personally treated over 200 patients at Elgin Mental Health Center, and he had been qualified to testify as an expert on more than 200 occasions. (R.1/18 13-14) He testified that he was licensed to practice medicine in Illinois, and licensed to prescribe psychotropic drugs. (R.1/18 15) He had prescribed psychotropic medications to about 200 psychiatric patients, and Robert S. was one of the 25 forensic patients that he was currently treating. (R.1/18 15-16)

When the State was afforded the advice and testimony of a Dr. Nazareno, but Robert S. was in turn allowed someone less competent than a clinical psychologist to aid in his defense, the State enjoyed an insurmountable strategic advantage. As the court below implicitly recognized, Ms. Kane would not have been *permitted* to give advice or testimony about the reasonableness of

the particular medications and dosages that constituted the treatment sought by the petition. *Robert S.*, 341 Ill.App.3d at 255. But due process requires that access to expert evidence of equal quality be provided. *Kortte*, 317 Ill. App. 3d at 118 (emphasis added).

A respondent's inability to challenge the contents of the proposed treatment necessarily deprives him due process and bestows a great advantage upon the State. The State had the advantage of presenting as expert testimony a specific treatment plan that faced no real challenge from the respondent, who did not have the advice or testimony of an expert competent on the subject. In these cases, the court is supposed to determine whether the benefits of the proposed treatment outweighs the harm as well as whether the proposed treatment is the least restrictive appropriate for the respondent. Without appointment of an independent psychiatrist, a respondent is "...virtually incapable of rebutting the State's evidence." See, *Kortte*, 317 Ill. App. 3d at 116. The State's ability to present unopposed evidence is an advantage that casts a pall on the proceedings.

The trial court and the Appellate Court wrongly interpreted section 3-804 of the Code as only assuring Robert S. the assistance of a psychology intern to assist in the preparation and presentation of his defense to a petition for involuntary treatment, effectively denying him an independent examination. This noncompliance with the procedural protections of the Code deprived Mr. S. of the opportunity to adequately prepare and present a defense so that he might be heard; thus, the failure to appoint an independent examiner competent to provide advice and testimony about section 2-107.1 of the Code impermissibly deprived Mr. S. of due process.

III. THE APPELLATE COURT ERRED IN HOLDING THAT ROBERT S., A RESPONDENT IN A FORCED PSYCHOTROPIC MEDICATIONS ACTION, WHO WAS ALSO A PRETRIAL DETAINEE, AND A PRETRIAL DETAINEE WHO HAD BEEN FOUND TO BE UNFIT FOR TRIAL, HAD NO RIGHT TO HAVE NOTICE OF THE FORCED TREATMENT ACTION PROVIDED TO HIS CRIMINAL CASE ATTORNEY, UNDER DUE PROCESS OF LAW OR 405 ILCS 5/2-107.1

The appellate court rejected Robert's claim that due process, and the treatment statute itself, required that the State provide notice of the action to force psychotropic medications to the attorney representing Robert in the pending criminal case for which he had been found unfit to stand trial. *In re Robert S.*, slip op. at 26-27. But it is clear that, in Illinois, the criminal defense attorney will have a great deal of crucial information about a UST than any other lawyer could ever have access to. The provisions most relevant to fitness procedures are found at 725 ILCS 5/104-10 -- 5/104-31.

In the first place, even though the circuit court retains jurisdiction of the case, the 2-107.1 hearings take place at DHS's forensic unit, usually hundreds of miles distant. See, 725 ILCS 5/104-23(b) and (c), and 104-25(g)(2). The probability is high that the civil case attorney will have no knowledge of what event may be the basis for criminal charges, or even the existence of criminal charges, as the forensic units are located at facilities that house civil recipients, as well. The condition of the defendant will most likely undercut his ability to be a reliable historian, as he has been determined to be unable to understand the nature and purpose of the proceedings against him, or to assist in his criminal defense. See, *Johnson v. Brelje*, 521 F. Supp. 723, 726-28 (D.C. Ill. 1981). It is just as likely that the judge, the prosecutor, and the defense attorney in the criminal matter are unaware of what is happened at the DHS forensic unit. There is no statutory obligation to inform anyone when a defendant is ordered to undergo authorized

involuntary treatment. As such, forced non-emergency treatment cases constitute *ex parte* proceedings *vis-à-vis* the criminal case.

Numerous reports about the defendant are generated, but the civil attorney cannot have access to them. Any report filed of record with the court that concerns the diagnosis, treatment or treatment plans made are not filed in the defendant's court record, are kept confidential, and are available only to the circuit court, the appellate court, the State and the criminal defense. See, 725 ILCS 5/104-19.

The criminal case defense counsel may have access to the report of a qualified expert, per sections 13(a), 13(b), 13(e), and/or 15. That report would include the qualified expert's diagnosis of the defendant, an explanation of how it was reached and facts upon which it was based. See, 725 ILCS 5/104-15(a)(1). It would also include a description of a defendant's mental or physical disability, if any, and its severity. See, 725 ILCS 5/104-15(a)(2). It would include an opinion as to what extent the disability impaired the defendant's ability to understand the nature and purpose of the proceedings against him or to assist in his defense, or both. Id.

When an unfit defendant is committed to the Department of Human Services to be restored, the clerk of the circuit court provides DHS with the order, the county and municipality in which the offense was committed, and additional matters that the circuit court directs. See, 725 ILCS 5/104-17(d). Within 30 days of the order to undergo treatment, the person supervising defendant's treatment must provide a report to the court, the State and defense counsel with required information, including a diagnosis. See, 725 ILCS 5/104-17(e).

The defendant's treatment supervisor is required to submit reports to the court, the State and the defense. See, 725 ILCS 5/104-18(a). These reports are required: (a) within 7 days of a fitness hearing; (b) whenever the supervisor believes that the defendant has attained fitness; and,

(c) whenever the supervisor believes that there is not a substantial chance that the defendant will attained fitness, with treatment, within one year of the original finding of fitness. See, 725 ILCS 5/104-18(a)(1), (2) and(3).

These several reports, which be crucial to avoiding what happened to Robert S., are no doubt confidential. The civil attorney will not have access to them. Of course, the obvious way to rectify this shortcoming is to notify a criminal defense attorney when a 2-107.1 petition is filed against his client.

Almost ten years ago, a respondent claimed that 2-107.1 violated due process, because it did not require that patients be served with notice of the proceedings against them. *In re C. E.*, 161 Ill. 2d 200, 225, 641 N.E.2d 345 (1994). He was correct, in that the statute had no such language. But, in finding that 2-107.1 complied with due process, this Court imposed a notice requirement, stating: "We conclude that the trial court must ensure that notice of the date, time and place of the section 2-107.1 hearing is served upon the mental health recipient, his attorney, his guardian (if any), and any other interested parties to the proceeding." *In re C. E.*, 161 Ill. 2d 200, 225-6, 641 N.E.2d 345 (1994). This is a clear statement that procedural due process requires notice to the criminal defense attorney. It is abundantly clear that DHS would know who the criminal case defense attorney was, or could easily make determination.

Robert's criminal case attorney was an interested party to the forced treatment case against his client. It is clear from *Riggins* and *Sell* that facts concerning the criminal case must be presented, and analyzed, before forced treatment may occur. Effectuation of the constitutional procedural safeguards set forth in the above cases will require an understanding of the facts of the criminal case.

Section 2-107.1(a)(1) itself requires service "to the respondent, *his or her attorney*, any

known agent or attorney-in-fact, if any, and the guardian, if any...." 405 ILCS 5/2-107.1(a)(1) (*emphasis added*). A plain reading of the statute requires that the attorney representing the defendant in the criminal case should be served. This is the most reliable indicator of the legislature's intent, and the language must be given its plain and ordinary meaning. *In re Mary Ann P.*, 202 Ill. 2d 393, 405, 781 N.E.2d 237 (2002).

No record was made of Robert S.'s charge, but it could involve the death penalty. The American Bar Association, in establishing its guidelines for such cases, also reflect the importance of the matter:

> Counsel at all stages of the case should engage in continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as: ... relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists) ...
>
> ***
>
> For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications, and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed... Thus, the failure to maintain such a relationship is professionally irresponsible. American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1006, 1010-11 (2003)

If this Court holds that criminal defendants, and UST defendants, are amenable to 2-107.1 petitions, it should hold further that their criminal case attorneys should receive notice of such actions.

CONCLUSION

For the foregoing reasons, Respondent-Appellant, Robert S., respectfully requests that Honorable Court reverse the judgments of the Second District Appellate Court and the Kane County Circuit Court, and grant such other and further relief as is just and proper, under that circumstances.

Respectfully submitted,

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APPENDIX

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In re ROBERT S., Alleged to be a Person in Need of Involuntary Psychotropic Medication (The People of the State of Illinois, Petitioner-Appellee, v. Robert S., Respondent-Appellant).

No. 2-02-0262

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

341 Ill. App. 3d 238; 792 N.E.2d 421; 2003 Ill. App. LEXIS 856; 275 Ill. Dec. 190

June 30, 2003, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication August 1, 2003.

PRIOR HISTORY: Appeal from the Circuit Court of Kane County. No. 01--MH--261. Honorable Franklin D. Brewe, Judge, Presiding.

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: For Robert S., Appellant: Teresa L. Berge and William J. Conroy Jr., Guardianship & Advocacy Commission, Rockford, IL, Jeffery M. Plesko, Guardianship & Advocacy Commission, Chicago, IL.

For People of the State of Illinois, Appellee: Honorable Meg Gorecki, Kane County State's Attorney, St. Charles, IL, Martin P. Moltz Deputy Director and Diane L. Campbell, State's Attorneys Appellate Prosecutor, Elgin, IL.

JUDGES: JUSTICE GROMETER, delivered the opinion of the court. BOWMAN and BYRNE, JJ., concur.

OPINIONBY: GROMETER

OPINION: [*423] [***192] JUSTICE GROMETER delivered the opinion of the court:

Respondent, Robert S., appeals from an order of the circuit court of Kane County granting the State's petition to involuntarily administer psychotropic medication. We affirm.

I. BACKGROUND

Respondent was charged with a crime not specified in the record. Subsequently, respondent was found unfit to stand trial and admitted to the Elgin Mental Health Center (EMHC). On November 19, 2001, respondent's psychiatrist, Dr. Romulo Nazareno, filed a petition seeking to involuntarily administer psychotropic medication to respondent. A hearing on the petition was originally scheduled for November 26, 2001. However, it was continued four times, and it not did commence until January 18, 2002. Respondent represented himself at the hearing.

On January 18, 2002, the State indicated it was ready to proceed. [**2] However, respondent requested a two-week continuance in order to subpoena his witnesses. The State objected and suggested that the court begin the hearing, noting that it was unlikely that the hearing could be completed in one day. The trial court decided to commence the hearing with the understanding that after the State presented its case, the matter would be continued to give respondent time to subpoena his witnesses.

The State's first witness was Dr. Nazareno. Dr. Nazareno diagnosed respondent with paranoid schizophrenia. Dr. Nazareno testified that respondent's symptoms included hallucinations, delusions, and a deterioration in the ability to function. For instance, respondent complained of sleep deprivation as a result of auditory hallucinations. Moreover, respondent believed that the government implanted a microchip in his brain in an effort to read his mind. Respondent claimed that

EMHC staff and patients were sending messages to a "mind reader" by actions such as rubbing their chins or adjusting [***193] [*424] their eyeglasses. In addition, respondent threatened to kill an EMHC patient who respondent believed was having a relationship with women intended for respondent.

Dr. Nazareno noted [**3] that respondent's symptoms subsided when he was medicated on a previous occasion. However, once the medication order expired, defendant began hearing voices, having trouble sleeping, and believing that female celebrities had fallen in love with him. Respondent also threatened to kill a member of the EMHC staff.

Dr. Nazareno recommended administering Risperidone to respondent because in the past he responded well to the drug, without side effects. As alternatives, Dr. Nazareno recommended Haldol, Haldol Deconate, and, for side effects, Cogentin. Dr. Nazareno opined that the benefits of administering the psychotropic medication would outweigh the harm. He also stated that respondent lacks the capacity to make a reasoned decision about potential side effects and benefits of the treatment. According to Dr. Nazareno, respondent's psychosis is the reason he cannot make a knowledgeable decision whether to take the medication. Dr. Nazareno tried less restrictive treatments, such as counseling and group therapy, but they were not effective without medication.

On cross-examination, Dr. Nazareno admitted that respondent never threatened him and that he has never personally witnessed respondent [**4] threaten others. Dr. Nazareno also acknowledged that during the court proceeding, he did not see a deterioration in respondent's functioning and noted that respondent did not exhibit his ususal symptoms, such as talking to himself. However, Dr. Nazareno stated that respondent's behavior and the way in which he asked questions showed some paranoia and delusions. For instance, during questioning, respondent insinuated that Dr. Nazareno hears voices. Dr. Nazareno pointed out that there are times during which an individual can contain delusions by focusing on a task.

Over respondent's objection, the State called Lesley Kane, an intern at the Kane County Diagnostic Center (KCDC). Kane conducted a court-ordered independent examination of respondent. Kane's examination consisted of interviewing respondent for 60 to 90 minutes, talking to respondent's case worker, and reviewing two to three years of respondent's records. The trial court qualified Kane as an expert over respondent's objection.

Citing symptoms similar to those identified by Dr. Nazareno, Kane diagnosed respondent with paranoid schizophrenia. With respect to whether respondent exhibited a deterioration of his ability to function, [**5] suffering, or threatening behavior, Kane stated that respondent has become increasingly tense and agitated, verbally aggressive, and more threatening. In addition, his sexual preoccupations have increased and EMHC staff noted an increase in the use of profanity. Kane further testified that respondent's illness has existed for a period marked by the continuing presence of symptoms, noting that respondent has had a history of delusions since the 1970s. Kane believed that the benefits of psychotropic medication would outweigh the harm. Kane noted that respondent's behavior poses a risk to himself and to others and that the side effects of the medication can be dealt with effectively. Kane opined that respondent's suffering, the deterioration of his ability to function, and his violent and threatening behavior would decrease with medication.

Kane also concluded that respondent lacked the capacity to make a reasoned decision about psychotropic medication. According to Kane, respondent is unaware of the severity of his illness. Regarding [***194] [*425] less restrictive alternatives, Kane stated that respondent has been offered psychosocial therapy, but, because respondent does not have insight into his [**6] illness, "it doesn't seem as though that alone is going to be helpful." Kane also noted that in individuals with schizophrenia, therapy is more of an augment to medication. Kane opined "to a reasonable degree of psychological certainty" that respondent meets the criteria for psychotropic medication.

On cross-examination, Kane admitted that during her independent examination of respondent she did not observe defendant suffering from delusions or hallucinations. She also indicated that respondent did not exhibit such symptoms at the hearing.

The State recalled Dr. Nazareno. He testified that respondent does not have the capacity to make a reasoned and rational choice regarding whether he needs medication. Dr. Nazareno noted that respondent does not believe he is ill. Dr. Nazareno added that respondent's judgment is so impaired by his illness that he sees only the risks, and not the benefits, of the medication.

Kelli Childress, a former assistant State's Attorney, testified that she first met respondent in 1999 when she was assigned to a hearing in which respondent was involved. On or about October 31, 2001, Childress received a telephone call from respondent. Respondent told Childress [**7] that he remembered her from the 1999 hearing and he had been thinking about her ever since. Respondent accused Childress of helping the government with a scheme to read his mind. Respondent believed that he and Childress were supposed to be together and that the government indicated to him that

Childress felt the same way about him. Respondent asked Childress if she would help him get out of EMHC so that they could be together. Childress told respondent that she was involved with someone else and that the information he had was incorrect. Childress stated she felt threatened during the conversation.

Respondent called Childress again on December 31, 2001. According to Childress, the tone of this conversation was less accusatory and more romantic. Respondent told Childress that she was beautiful, that he had feelings for her, and that the government informed him that they were supposed to be together. Respondent stated that he thought about marrying Childress, having children, and moving to California. Respondent told Childress that the government informed him that she was romantically involved with other patients at EMHC and with a player for the Chicago Bears.

Childress testified [**8] that she was familiar with respondent's case and why he was at EMHC. She was afraid that if respondent believed that she was part of some government scheme to read his mind, he could become violent. As a result, after both calls, Childress contacted the State's Attorney's office and the court liaison at EMHC. In addition, following the first call, she contacted local police. Childress has not heard from respondent since the second call. On cross-examination, Childress admitted that respondent did not specifically threaten her.

Mark Thomas, a licensed clinical social worker at EMHC, testified that he is respondent's primary therapist. Thomas stated that respondent's psychiatric diagnosis is paranoid schizophrenia. According to Thomas, respondent's condition had been deteriorating over the four-or five-month period prior to the hearing, with increased agitation, verbal outbursts, and verbal aggression.

[***195] [*426] According to Thomas, respondent believes that the voices he hears are caused by a chip implanted by the government. Respondent believes that the chip enables the government to read his mind. On two occasions in the three months prior to the hearing, respondent became agitated with Thomas [**9] because respondent believed that Thomas was "signaling the mind readers" by rubbing his limbs. A third incident occurred when Thomas sided with a technician who had a dispute with respondent. At that time, respondent cursed at Thomas within inches of his face. Thomas considered respondent's behavior during the third incident to constitute a threat.

Thomas testified that respondent told him that he suffers from hallucinations and delusions. The hallucinations and delusions center on female celebrities, but have included staff at EMHC. In addition, respondent told Thomas that he wanted to have a relationship with Childress and he hoped to have babies. Respondent also told Thomas that his conversations with Childress had gone well and that she had been receptive.

Thomas also stated that respondent believes that certain women have been "reserved" for him by the mind readers. Respondent becomes verbally abusive when he believes these women have ignored him or when he believes the women have been having relationships with other EMHC patients. Respondent confronted one patient who he believed was having a sexual relationship with one of his "reserved" women.

Thomas opined that respondent [**10] suffers as a result of hearing voices. Thomas believed that respondent's ability to function has deteriorated in the three months prior to the hearing. Thomas also stated that of the 36 patients he is in charge of or monitors, respondent poses the highest risk. Thomas stated that respondent is "in the upper echelon" of patients of who frighten him.

On cross-examination, Thomas testified that respondent has a "remarkable ability" to contain his psychosis. Nevertheless, he thought that respondent had exhibited evidence of mental illness in the courtroom. For instance, Thomas noted respondent's allusions to government mind readers and his claim that the government implanted a chip in his body.

The State then called respondent as a witness. Respondent objected. The trial court sustained respondent's objection on the basis that respondent was at EMHC because he was found unfit to stand trial in an underlying criminal proceeding. The State then rested. Respondent requested two weeks to subpoena his witnesses, and the court continued the matter until February 1, 2002.

At that time, respondent first called Denise Dojka, Psy.D., a clinical psychologist at EMHC and respondent's psychological [**11] therapist. She stated that respondent suffers from paranoid schizophrenia. Dojka has never seen respondent participate in any violent behavior. Nevertheless, based on a risk assessment she conducted of respondent, Dojka believed that he was one of the more dangerous people in his unit.

On cross-examination, Dojka testified that respondent hears voices that call him derogatory names and wake him at night. Respondent believes that the voices are from the government and that they are transmitted through an implant in his head. The voices inform respondent that women who would like to have a sexual relationship with him are being brought to other patients. Respondent told Dojka that he would have liked to have a relationship with Childress and that he wanted

Childress to have his children. However, he no longer believed that it was possible [***196] [*427] to have a relationship with Childress because he believes that Childress was given large sums of money to have sex with another patient who respondent believes is inferior to himself.

Dojka testified that she considered respondent dangerous because he has several risk factors. According to Dojka, respondent's history of violence, symptoms of mental [**12] illness, refusal of treatment, anger, and the lack of feasibility of future plans all contribute to a finding that respondent has at least a moderate risk of committing violence in the future, especially since he is not medicated.

Dojka feared that respondent would commit violence against Childress and Lynette Krueger, Dojka's diagnostic psychology student. Respondent wanted to have relationships with these women, but he believed that they were sleeping with others. This made respondent feel betrayed and resentful.

Dojka believed that respondent needs to be medicated. She noted that on a previous occasion he was medicated for a 90-day period and his sleeping improved, he was much more relaxed, he participated in activities, and he seemed to be functioning at a higher level. Dojka also believed that respondent is suffering. She noted that he told her he felt "tormented" by the voices.

Becky Mitchell, an activity therapist at EMHC, testified that between October 2001 and February 2002, she accompanied respondent to two or three activities. Mitchell testified that during these activities, respondent did not cause her any problems and he did not have any problems with the other patients. [**13] However, Mitchell opined that respondent had the potential to be dangerous to others. Mitchell's opinion was based on respondent's status as a mental health patient, the statements of clinicians, and her past experiences with other patients. On cross-examination, Mitchell testified that respondent told her that he hears voices that "torment" him.

Respondent's last witness was Jose Padilla, an activity staff member at EMHC. Padilla testified that he never had to restrict respondent as a result of his behavior. Padilla did not observe respondent express any anger towards other patients. On cross-examination, Padilla acknowledged that he sees respondent only about once a month.

The trial court found respondent subject to the involuntary administration of medication for a period not to exceed 90 days. In addressing the factors relied on in making its determination, the trial court noted, among other things, that respondent lacked the capacity to make a reasoned decision about the treatment. The trial court denied respondent's motion to reconsider, and this timely appeal followed.

II. ANALYSIS

Before addressing the merits of respondent's appeal, we note that this case is moot. The [**14] trial court order authorizing the administration of psychotropic medication was limited to a period of 90 days. That period has long since passed. Nevertheless, because this case involves "an event of short duration which is 'capable of repetition, yet evading review' " (In re Barbara H., 183 Ill. 2d 482, 491, 234 Ill. Dec. 215, 702 N.E.2d 555 (1998), quoting In re A Minor, 127 Ill. 2d 247, 258, 130 Ill. Dec. 225, 537 N.E.2d 292 (1989)), we will address the issues raised by respondent. See In re Cathy M., 326 Ill. App. 3d 335, 339, 260 Ill. Dec. 162, 760 N.E.2d 579 (2001).

Initially, respondent claims that the trial court's order should be reversed because it fails to comply with section 2-107.1 of the Mental Health and Developmental Disabilities [***197] [*428] Code (Mental Health Code or Code) (405 ILCS 5/2-107.1 (West 2000)) in three respects. First, respondent argues that the hearing on the petition to administer psychotropic medication was held outside the statutorily mandated time frame. Second, respondent contends that the court's order does not designate the persons authorized to administer the medication. Third, [**15] respondent asserts that the petition listed a criterion for involuntary treatment that is no longer recognized by statute. These inquiries constitute questions of law, which we review de novo. In re M.A., 293 Ill. App. 3d 995, 998, 228 Ill. Dec. 266, 689 N.E.2d 138 (1997). We address each contention in turn.

Respondent first argues that the State failed to comply with the timing provisions for a hearing on a petition to administer psychotropic medication. According to respondent, section 2--107.1(a--5)(2) of the Code (405 ILCS 5/2-107.1(a-5)(2) (West 2000)) requires the trial court to hold a hearing on a petition to administer psychotropic medication no later than 42 days after the petition is filed. Respondent notes that the hearing in this case did not commence until 60 days after the petition was filed. Accordingly, respondent urges reversal of the trial court's order.

Section 2-107.1(a-5)(2) governs the time frame within which the trial court must hold a hearing on a petition to involuntarily administer psychotropic medication. That provision provides in relevant part:

"The court shall hold a hearing within 7 days of the filing [**16] of the petition. The People, the petitioner, or the respondent shall be entitled to a continuance of up

to 7 days as of right. An additional continuance of not more than 7 days may be granted to any party (i) upon a showing that the continuance is needed in order to adequately prepare for or present evidence in a hearing under this Section or (ii) under exceptional circumstances. The court may grant an additional continuance not to exceed 21 days when, in its discretion, the court determines that such a continuance is necessary in order to provide the recipient with an examination pursuant to Section 3-803 or 3-804 of this Act, to provide the recipient with a trial by jury as provided in Section 3-802 of this Act, or to arrange for the substitution of counsel as provided for by the Illinois Supreme Court Rules." 405 ILCS 5/2-107.1(a-5)(2) (West 2000).

Here, the petition to administer psychotropic medication was filed on November 19, 2001. Pursuant to section 2-107.1(a-5)(2), the trial court was required to hold a hearing within seven days. In fact, a hearing on the petition was scheduled for November 26, 2001. The record suggests that at the November [**17] 26 hearing, the trial court denied respondent's motion to proceed pro se. The court then continued the matter on respondent's motion until November 30, 2001.

On November 30, 2001, the trial court denied respondent's motion to reconsider its decision denying respondent's request to represent himself. Respondent then moved for an independent examination to be conducted by F.P. Johnson. See 405 ILCS 5/2-107.1(a-5)(2), 3-804 (West 2000). The trial court granted respondent's motion for an independent examination and continued the cause to December 21, 2001. See 405 ILCS 5/2-107.1(a-5)(2) (West 2000) (granting trial court the discretion to continue matter for a period not to exceed 21 days in order to provide the recipient with an examination pursuant to Section 3-804 of the Code). However, the court appointed the KCDC to conduct the examination.

The record reflects that on December 21, 2001, the trial court entered an order [***198] [*429] continuing the matter until January 4, 2002, on respondent's motion. On January 4, 2002, respondent renewed his motion to represent himself. The trial court granted the motion. The court then entered an [**18] order continuing the matter until January 18, 2002. The record shows that the matter was continued "on the State's motion for cause, Respondent agreeing to such motion, also seeking continuance." On January 18, 2002, the State indicated it was ready to proceed. However, respondent requested a two-week continuance in order to subpoena his witnesses. The State objected and suggested that the court begin the hearing, noting that it was unlikely that the hearing could be completed in one day. The trial court decided to commence the hearing with the understanding that after the State presented its case, the matter would be continued to give respondent time to subpoena his witnesses. Consequently, the hearing on the petition did not commence until 60 days after the petition was originally filed.

In interpreting the Code's procedural safeguards, this court has advocated strict construction in favor of the respondent. In re Janet S., 305 Ill. App. 3d 318, 320, 712 N.E.2d 422, 238 Ill. Dec. 700 (1999). However, it is well established that when a party acquiesces in proceeding in a certain manner, he cannot later complain prejudice on appeal. Hill v. Cowan, 202 Ill. 2d 151, 159, 269 Ill. Dec. 875, 781 N.E.2d 1065 (2002) [**19] ("One cannot complain of error which he induced or in which he participated at trial"); see also People v. Villarreal, 198 Ill. 2d 209, 228, 260 Ill. Dec. 619, 761 N.E.2d 1175 (2001); People v. Abston, 263 Ill. App. 3d 665, 671, 200 Ill. Dec. 361, 635 N.E.2d 700 (1994). Under the facts of this case, it is apparent that all but one of the delays in commencing the hearing on the petition were attributable to respondent. Only the continuance granted on January 4, 2002, was not solely attributable to respondent. However, the record reveals that the continuance on January 4, 2002, was a mutual request by both parties. The order continuing the matter reflects that the continuance was granted on the State's motion, but that respondent agreed to the continuance and asked for a continuance himself. Accordingly, while the hearing on the petition was not held within the statutorily mandated time frame, we decline to reverse the trial court's order because respondent either agreed to the delays or they were attributable to him.

Respondent also complains that the trial court's order violated section 2-107.1 of the Code because it did not designate the persons [**20] authorized to administer medication. Section 2-107.1(a-5)(6) provides that an order authorizing the administration of psychotropic medication "shall designate the persons authorized to administer the authorized involuntary treatment under the standards and procedures of this subsection." 405 ILCS 5/2-107.1(a-5)(6) (West 2000). Here, the trial court order authorizing involuntary treatment provides:

"The petition is granted, and ROBERT S[.] shall receive psychotropic medication to be administered by DR. NAZARENO (or designee whose license and credentials permit) at Elgin Mental Health Center for a period not to exceed 90 days."

Relying on two recent cases from this court (In re Richard C., 329 Ill. App. 3d 1090, 264 Ill. Dec. 234, 769 N.E.2d 1071 (2002); In re Cynthia S., 326 Ill. App. 3d 65, 259 Ill. Dec. 959, 759 N.E.2d 1020 (2001)), respondent argues that the trial court's order is defective

because it does not limit treatment to specific health care professionals who are familiar with his condition. We disagree.

[***199] [*430] In Cynthia S., this court reversed the trial court order authorizing the administration of [**21] psychotropic medication because the court's order failed to designate the persons authorized to administer the prescribed psychotropic medication. Cynthia S., 326 Ill. App. 3d at 69. In Cynthia S., the trial court order provided " 'The petition is granted, and Cynthia [S.] shall receive psychotropic medication (including the necessary lab work and medical examinations) to be administered by the Illinois Department of Human Services for a period not to exceed 90 days, by those staff whose license allows them to administer psychotropic medication pursuant to Illinois law.' " Cynthia S., 326 Ill. App. 3d at 68. We found that requiring the trial court to list named individuals authorized to administer medication ensures involvement by a qualified professional familiar with the recipient's individual situation and health status. Cynthia S., 326 Ill. App. 3d at 68-69. See also In re Mary Ann P., 202 Ill. 2d 393, 408, 269 Ill. Dec. 440, 781 N.E.2d 237 (2002) ("We believe that the specificity requirement for involuntary treatment orders reflects the legislature's legitimate concern that only qualified health care professionals, [**22] familiar with the respondent's mental and physical status, be permitted to administer the treatment and that the respondent, as well as the treaters, be notified of the exact nature of the treatment authorized").

Similarly, in Richard C., this court reversed the trial court order authorizing the administration of psychotropic medication because the trial court order failed to designate the persons authorized to administer the prescribed psychotropic medication. Richard C., 329 Ill. App. 3d at 1094. In Richard C., the trial court order provided, " 'It is hereby order [sic] the patient is to receive haloperidol decanoate IM of 12.5-100 mg/monthly with EKG as needed to monitor respondent's cardiac state, CBC and differential blood testing yearly and blood chemistries yearly.' " Richard C., 329 Ill. App. 3d at 1094.

The court orders in both Cynthia S. and Richard C. did not specifically list named individuals authorized to administer psychotropic medication. In contrast, here the trial court order listed Dr. Nazareno or a designee. At the hearing on the petition, Dr. Nazareno, a staff psychiatrist at EMHC, testified that he is licensed [**23] to practice medicine in Illinois and to administer psychotropic medication in this state. Furthermore, Dr. Nazareno testified that he has been treating respondent since April 1999. Accordingly, Dr. Nazareno is a qualified professional familiar with the recipient's individual situation and health status.

Respondent argues, however, that allowing a "designee" to administer the medications runs contrary to established case law. See In re Jennifer H., 333 Ill. App. 3d 427, 431, 266 Ill. Dec. 776, 775 N.E.2d 616 (2002) (holding trial court's involuntary treatment order invalid for failure to list persons authorized to administer treatment); Cynthia S., 326 Ill. App. 3d at 68-69. According to respondent, the trial court's order authorizes anyone with a license and permitting credentials to administer the medications. We disagree.

As noted above, the trial court order authorizes the administration of psychotropic medication by Dr. Nazareno "or designee whose license and credentials permit." A "designee" is defined as "[a] person who has been designated to perform some duty or carry out some specific role." Black's Law Dictionary 457 (7th ed. 1999). [***200] [*431] We [**24] read the trial court order as allowing Dr. Nazareno to name, in his absence, an individual whose license and credentials permit him or her to administer the medication to respondent. This interpretation recognizes the reality that Dr. Nazareno may not always be available to personally administer the prescribed treatment. It also reinforces the concern of the legislature by ensuring that respondent's treatment is administered under the guidance of Dr. Nazareno, a qualified health care professional who is familiar with respondent's situation and health status. Thus, we find that the trial court's order complied with section 2-107.1(a-5)(6) of the Code.

Respondent next contends that the petition did not comply with section 2-107.1 of the Code because it listed "disruptive behavior," which is no longer a statutory prerequisite for involuntary treatment. According to respondent, the inclusion of this factor in the petition resulted in an invalid pleading, which prejudiced him. We disagree.

Prior to June 2, 2000, section 2-107.1 of the Code authorized the involuntary administration of psychotropic medication if, among other things, the State proved by clear and convincing evidence [**25] that the recipient had a serious mental illness or developmental disability and that because of said condition, "the recipient exhibits any one of the following: (i) deterioration of his ability to function, (ii) suffering, (iii) threatening behavior, or (iv) disruptive behavior." 405 ILCS 5/2-107.1(a)(4)(B) (West 1998). Effective June 2, 2000, the legislature amended section 2-107.1 to delete the reference to "disruptive behavior." Pub. Act 91-726, eff. June 2, 2000 (amending 405 ILCS 5/2--107.1 (West 1998)). See Jennifer H., 333 Ill. App. 3d at 431.

In the present case, the petition to administer involuntary medication consisted of a preprinted form completed and signed by Dr. Nazareno. Among other things, the petition stated that respondent refuses to submit to treatment by psychotropic medication, that he lacks capacity to give informed consent, and that because of his mental illness, respondent "exhibits any one of the following; [sic] deterioration of ability to function, suffering, threatening behavior, or disruptive behavior." (Emphasis in original.) In examining the petition, it is apparent [**26] that Dr. Nazareno underscored the terms "deterioration of ability to function," "suffering," and "threatening behavior." By preparing the form in this manner, we believe that it was Dr. Nazareno's intention to proceed on the petition by demonstrating that respondent suffered from a serious mental illness and that he exhibited a deterioration of his ability to function, suffering, or threatening behavior. It would have been better practice to excise the term "disruptive behavior" from the petition. Nevertheless, we cannot say that the presence of the term in the petition rendered the pleading invalid.

Moreover, as respondent concedes, the trial court did not mention the "disruptive behavior" factor in making its decision. Instead, the court found that the State had proven by clear and convincing evidence that respondent had experienced a deterioration in his ability to function, was suffering, and had displayed threatening behavior. Thus, we fail to see how respondent was prejudiced.

Next, respondent argues that the trial court's order must be reversed because the State failed to prove by clear and convincing evidence that respondent lacked the capacity to make a reasoned decision [**27] about the proposed treatment. More specifically, respondent asserts that the State failed [***201] [*432] to present sufficient evidence that he was informed in writing about the risks and benefits of the proposed course of medication.

When reviewing the sufficiency of the evidence, a court of appeals will reverse the fact finder's determination only if it is against the manifest weight of the evidence. In re Edward S., 298 Ill. App. 3d 162, 165, 232 Ill. Dec. 348, 698 N.E.2d 186 (1998). A trial court's decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. Edward S., 298 Ill. App. 3d at 165.

Section 2--107.1(a--5)(4)(E) of the Code (405 ILCS 5/2--107.1(a--5)(4)(E) (West 2000)) provides that the State must prove by clear and convincing evidence that the recipient lacks the capacity to make a reasoned decision about the proposed course of treatment. Cathy M., 326 Ill. App. 3d at 341. To this end, the Code requires the proposed recipient's physician or the physician's designee to advise the recipient "in writing[] of the side effects, risks, and benefits of the treatment, [**28] as well as alternatives to the proposed treatment, to the extent such advice is consistent with the recipient's ability to understand the information communicated." 405 ILCS 5/2-102(a-5) (West 2000). If the patient is not informed of the side effects, risks, and benefits of the proposed involuntary treatment, the trial court order authorizing such treatment must be reversed. Cathy M., 326 Ill. App. 3d at 342; Edward S., 298 Ill. App. 3d at 166.

In both Cathy M. and Edward S., we reversed the trial court orders authorizing the administration of psychotropic medication because the State failed to present clear and convincing evidence that the respective respondents were informed of the risks and the benefits of the proposed course of treatment. Cathy M., 326 Ill. App. 3d at 343; Edward S., 298 Ill. App. 3d at 166. In Cathy M., the respondent was not given any written information regarding the proposed treatment. Cathy M., 326 Ill. App. 3d at 342. In Edward S., there was hearsay testimony regarding the contents of a note given to the respondent by a doctor. [**29] However, this court held that this evidence was insufficient to demonstrate that the State provided the respondent with the necessary information from which he could make an informed decision. Edward S., 298 Ill. App. 3d at 166.

In contrast, the record discloses that Dr. Nazareno informed respondent in writing about the side effects, risks, and benefits of the proposed involuntary treatment. Dr. Nazareno testified that on several occasions he discussed psychotropic medication with respondent. According to Dr. Nazareno, when he tried to discuss the drugs he wished to administer, respondent told him he did not need the medication. Dr. Nazareno also testified that when he attempted to give respondent information regarding each drug, respondent told him that he "knows the medication." Dr. Nazareno testified that the last time he tried to give respondent information about the drugs was two or three weeks before the hearing. At that time, respondent stated that "he [did] not need it." Thus, it appears that each time Dr. Nazareno attempted to present respondent with written information, respondent refused to accept the information. We cannot accept respondent's request [**30] that we reverse the trial court's order where his own actions made it impossible for Dr. [***202] [*433] Nazareno to accomplish his statutory duties. See In re Barry B., 295 Ill. App. 3d 1080, 1086, 230 Ill. Dec. 404, 693 N.E.2d 882 (1998). Based on this evidence, we cannot say that the trial court's order to administer psychotropic medication was against the manifest weight of the evidence.

Respondent next challenges the trial court's decision to appoint psychologist Leslie Kane as an independent examiner. Respondent asserts that the trial court erred in qualifying Kane as an expert because she lacked sufficient education and training in the field of psychiatric medicine. Alternatively, respondent argues that the trial court should have limited Kane's testimony to "non-psychiatric subjects."

Whether an individual is an expert is a matter generally reserved to the sound discretion of the trial court. People v. Miller, 173 Ill. 2d 167, 186, 219 Ill. Dec. 43, 670 N.E.2d 721 (1996). An individual will be allowed to testify as an expert where his or her experience and qualifications provide him or her with knowledge that is not common to laypersons and where the testimony [**31] will aid the trier of fact in reaching its conclusions. People v. Henney, 334 Ill. App. 3d 175, 184, 267 Ill. Dec. 681, 777 N.E.2d 484 (2002). There is no precise requirement as to how the expert acquires specialized knowledge or experience. People v. Novak, 163 Ill. 2d 93, 104, 205 Ill. Dec. 471, 643 N.E.2d 762 (1994). An expert may develop expertise through research, education, scientific study, training, practical experience, or a combination of each. Miller, 173 Ill. 2d at 186; Novak, 163 Ill. 2d at 104. At least one court has concluded that an expert's education alone is sufficient to qualify him or her as an expert. In re J.J., 327 Ill. App. 3d 70, 79, 761 N.E.2d 1249, 260 Ill. Dec. 693 (2001) (finding that trial court did not err in qualifying witness as an expert where witness had bachelor's and master's degrees in psychology and was working on his doctorate in the same field). We will not reverse the trial court's determination absent an abuse of discretion. Henney, 334 Ill. App. 3d at 184.

Here, the record shows that Kane was not licensed to practice psychology. However, Kane testified that she performed the [**32] examination of respondent under the supervision of a licensed clinical psychologist. Moreover, she testified regarding her education and experience. Kane had a bachelor's degree in psychology and a master's degree in counseling psychology. At the time of the hearing, Kane was completing her eighth and final year in a doctorate program. While Kane was working towards her master's degree, she interned at a counseling agency where she worked with adolescents and their families. After completing her master's degree, Kane spent eight years at a community counseling center where she performed crisis intervention counseling for juvenile delinquents. Kane also worked as an extern at the Kane County Diagnostic Center and the Cook County jail. In September 2001, Kane started an internship at the Kane County Diagnostic Center. According to Kane, she has extensive experience with psychiatric and psychological patients. In addition, Kane testified that she had previously testified in court as an expert. The trial court qualified Kane as an expert because she had previously testified in court as an expert witness.

Although we do not necessarily agree that the fact that Kane previously testified [**33] as an expert in court was a sufficient basis to qualify her as an expert on this occasion, we may affirm the result below on any basis that is supported by [***203] [*434] the record. Krilich v. American National Bank & Trust Co. of Chicago, 334 Ill. App. 3d 563, 573, 268 Ill. Dec. 531, 778 N.E.2d 1153 (2002). In this case, we find that the combination of Kane's education, training, and experience provided a valid basis to qualify her as an expert.

Moreover, we do not accept respondent's alternate argument that the trial court should have limited Kane's testimony to nonpsychiatric subjects. As respondent notes in his brief, the primary difference between a psychiatrist and a psychologist is that the former has the power to prescribe controlled substances while the latter does not. See People v. McDonald, 186 Ill. App. 3d 1096, 1100, 134 Ill. Dec. 759, 542 N.E.2d 1266 (1989). Here, although Kane testified that she believed that the administration of psychotropic medications would benefit respondent, she did not testify regarding the type or dosage of the psychotropic medications Dr. Nazareno wanted authorization to administer to respondent. Accordingly, we find that [**34] the trial court's decision did not constitute an abuse of discretion.

Respondent also claims that the admission of Kane's testimony deprived him of due process. According to respondent, the trial court should have appointed a psychiatrist as an independent examiner.

Section 3-804 of the Code governs independent examinations in mental health proceedings. That provision provides in relevant part:

"The respondent is entitled to secure an independent examination by a physician, qualified examiner, clinical psychologist, or other expert of his choice. If the respondent is unable to obtain an examination, he may request that the court order an examination to be made by an impartial medical expert pursuant to Supreme Court Rules or by a qualified examiner, clinical psychologist or other expert." (Emphasis added.) 405 ILCS 5/3-804 (West 2000).

Whether the statute mandates the appointment of a psychiatrist is a question of statutory construction, which we review de novo. People v. Roake, 334 Ill. App. 3d 504, 510, 268 Ill. Dec. 286, 778 N.E.2d 272 (2002). The primary rule of statutory construction is to ascertain and give effect [**35] to the legislature's intent. Regency

Savings Bank v. Chavis, 333 Ill. App. 3d 865, 867, 267 Ill. Dec. 504, 776 N.E.2d 876 (2002). Generally, the most reliable indicator of legislative intent is the plain language of the statute. In re Kenneth F., 332 Ill. App. 3d 674, 684, 266 Ill. Dec. 189, 773 N.E.2d 1259 (2002). The plain language of section 3-804 of the Code does not require the trial court to appoint a psychiatrist as an independent examiner. Rather, the statute allows the court to appoint an impartial medical expert pursuant to supreme court rules or a qualified examiner, clinical psychologist, or other expert. As we previously discussed, Kane was properly qualified as an expert.

Despite the plain language of the statute, respondent insists that he was deprived of due process by the trial court's failure to appoint a psychiatrist as his independent examiner. According to respondent, the trial court's decision to appoint a psychologist effectively foreclosed any chance that he could obtain a judgment in his favor. Citing to In re Ashley K., 212 Ill. App. 3d 849, 156 Ill. Dec. 925, 571 N.E.2d 905 (1991), respondent contends that [**36] the trial court was required to accept the testimony of the State's psychiatric experts over any testimony by experts in the field of psychology that he presented.

In Ashley K., the trial court entered an order precluding the subject minor from undergoing any therapy and from visiting her former foster parents. In so acting, the trial court rejected the testimony of two child psychiatrists, Drs. Leventhal and [***204] [*435] Zinn, in favor of the testimony of two other individuals, the minor's therapist and Anne Brown, a licensed psychologist.

On appeal, the reviewing court noted that Brown was not a medical doctor and that at the time Brown testified, she had been a licensed psychologist for only 3 1/2 years and had not seen or spoken to the minor in almost 3 years. Brown's testimony was based on reports from medical experts which Brown deemed "confusing." The minor's therapist had been out of school for only 1 1/2 years and had been licensed for only 9 months. In addition, the court took judicial notice that another court had cast doubt on Brown's conclusions and held that her testimony was questionable because it was based on a test she was too inexperienced to administer. In contrast, Dr. [**37] Leventhal had been a medical doctor for 16 years and had been board certified in child adolescent psychiatry for 10 years. Dr. Zinn had been a medical doctor for 20 years and board certified in child psychiatry for 13 years. The court then stated:

"The circuit court cannot disregard expert medical testimony that is not countervailed by other competent medical testimony or medical evidence. Moreover, the circuit court, itself, cannot second-guess medical experts. If the circuit court does not follow medical evidence that is not refuted by other medical evidence, the circuit court is acting contrary to the evidence." Ashley K., 212 Ill. App. 3d at 890.

It is this language from Ashley K. that respondent claims foreclosed any chance that the trial court would rule in his favor.

We question the applicability of this language from Ashley K. to the present case. First, we note that Ashley K. did not involve the interpretation of the Code. In fact, mandating the trial court to adopt the opinion of a psychiatrist over the opinion of a psychologist in mental health cases renders the independent-examination provision of the Code virtually meaningless. It would [**38] require the trial court to disregard language authorizing it to appoint a "qualified examiner, clinical psychologist or other expert." See 405 ILCS 5/3-804 (West 2000). This clearly ignores the plain language of the statute.

More importantly, however, we do not interpret Ashley K. to compel the trial court to accept psychiatric testimony over psychological testimony. In In re C.B., 248 Ill. App. 3d 168, 188 Ill. Dec. 28, 618 N.E.2d 598 (1993), the court interpreted the passage we quote from Ashley K. as "reaffirming the notion that the best interest of the child is the paramount consideration and that qualified and competent medical testimony concerning the child for whom the custody decision is being made must not be disregarded when determining what is in the child's best interest." (Emphasis in original.) C.B., 248 Ill. App. 3d at 179. In other words, the decision in Ashley K. turned on the credibility, or lack thereof, of the witnesses. In this regard, we believe that Kane was a credible, qualified individual, and her appointment did not predispose the trial court to rule against respondent. Significantly, [**39] we note that Kane's examination consisted of interviewing respondent for 60 to 90 minutes, talking to respondent's case worker, and reviewing two to three years of respondent's records. Further, Kane conducted her examination just weeks before respondent's hearing, and her examination was performed under the supervision of a licensed psychologist. Moreover, there is no indication that Kane's credentials had previously been called into question. These factors distinguish Kane's testimony from that of the witnesses in Ashley K. Accordingly, we conclude that the trial court did not err in appointing Kane as respondent's independent examiner.

[***205] [*436] Next, respondent argues that section 2-107.1 of the Code "was never intended to be applied to non-dangerous pretrial detainees." According to respondent, when the statute is applied to such individuals, it is constitutionally infirm. In this regard,

respondent complains that section 2-107.1 fails to take into consideration the seriousness of the crime charged. Respondent also claims that the trial court failed to determine whether he would be able to participate in a fair trial.

At the outset, we note that section 2-107.1 of the Code does [**40] not exempt pretrial detainees from its coverage. In In re Evelyn S., 337 Ill. App. 3d 1096, 337 Ill. App. 3d 1096, 788 N.E.2d 310, 273 Ill. Dec. 1, the Fifth District rejected the proposition that the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/100-1 et seq. (West 1998)), rather than the Mental Health Code, governs the administration of psychotropic medication to pretrial detainees found unfit to stand trial. Evelyn S., 337 Ill. App. 3d at 1102. The court noted that while the Criminal Code includes procedures for the involuntary commitment of defendants found unfit to stand trial, it does not contain provisions for determining whether the treatment of a pretrial detainee found unfit to stand trial may include the involuntary administration of psychotropic medication. Evelyn S., 337 Ill. App. 3d at 1104. As the Evelyn S. court aptly suggested, in the absence of the procedural safeguards provided by the Mental Health Code, there would be no procedural safeguards at all. Evelyn S., 337 Ill. App. 3d at 1104. Thus, respondent's argument that section 2-107.1 does not apply to pretrial detainees is not well taken. [**41]

In addition, we find little merit in respondent's argument that the application of section 2-107.1 deprived him of his constitutional right to a fair trial. In support of his position, defendant cites principally to United States v. Gomes, 289 F.3d 71 (2d Cir. 2002), vacated & remanded, ___ U.S. ___, ___ L. Ed. 2d ___, ___ S. Ct. ___ (2003), United States v. Sell, 282 F.3d 560 (8th Cir. 2002), vacated & remanded, 539 U.S. ___, 156 L. Ed. 2d 197, 123 S. Ct. 2174 (2003), and United States v. Brandon, 158 F.3d 947 (6th Cir. 1998). In Gomes, Sell, and Brandon, the courts addressed whether the government could forcibly administer psychotropic medication for the sole purpose of rendering a detainee competent to stand trial. Gomes, 289 F.3d at 75; Sell, 282 F.3d at 562; Brandon, 158 F.3d at 949. The Supreme Court recently reviewed the decision in Sell, and held that the Constitution permits the involuntary administration of psychotropic medication for the sole purpose of rendering a defendant competent to stand trial "if the treatment is medically [**42] appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." Sell, 539 U.S. ___, ___ L. Ed. 2d ___, ___, 156 L. Ed. 2d 197, 123 S. Ct. 2174, 2184 (2003). See also Gomes, 156 L. Ed. 2d 625, 123 S. Ct. 2605, 2003 U.S. LEXIS 4810 (vacating the decision of the lower court and remanding for further consideration in light of Sell).

Here, the trial court was not asked to decide whether respondent could be subject to the involuntary administration of psychotropic medication solely for the purpose of rendering him competent to stand trial. Indeed, the record is barren of any evidence that the petition to administer psychotropic medication was filed solely for the purpose of fitness for trial. Moreover, respondent never argues that the purpose of the State's petition was to render him fit for trial. Instead, the trial [***206] [*437] court reviewed each of the factors listed in section 2--107.1(a--5)(4) of the Code (405 ILCS 5/2-107.1(a)(4) [**43] (West 2000)) and found that the State proved each factor by clear and convincing evidence. The court found that respondent suffered a mental illness, the result of which resulted in a deterioration of his ability to function, suffering, and threatening behavior. Moreover, the court found that the benefits of the proposed treatment outweighed the harm and that less restrictive alternatives were inappropriate. It is evident that the trial court granted the State's petition because it found the involuntary administration of psychotropic medication to be medically appropriate. Notably, in rendering its decision the trial court never mentioned respondent's fitness to stand trial. Accordingly, respondent's reliance on Gomes, Sell, and Brandon is misplaced, and we reject respondent's constitutional challenges. See United States v. Keeven, 115 F. Supp. 2d 1132, 1137 (E.D. Mo. 2000) (finding procedural safeguards outlined in Brandon inapplicable where purpose of petition was to manage and prevent the recipient's dangerousness).

Lastly, respondent urges reversal of the trial court's order on the basis that the attorney in his criminal trial was not notified [**44] of the hearing on the petition. Section 2--107.1(a--5)(1) of the Code (405 ILCS 5/2-107.1(a--5)(1) (West 2000)) provides that "the petitioner shall deliver a copy of the petition, and notice of the time and place of the hearing, to the respondent, his or her attorney, any known agent or attorney-in-fact, if any, and the guardian, if any." Although the statute does not require notice to the attorney representing the respondent in a criminal trial, respondent asserts that "notions of fundamental fairness and due process" require notification of his criminal defense attorney. Respondent asserts that information regarding a client's regimen of psychotropic medication can be crucial to the criminal defense attorney at hearings on his client's fitness.

A criminal defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2000); People v. Easley, 192 Ill. 2d 307, 318, 249 Ill. Dec. 537, 736 N.E.2d 975 (2000). Once a criminal defendant is found unfit to stand

trial, the defendant must be found fit before any trial can occur. In this regard, the Criminal Code requires the defendant's treatment supervisor to submit [**45] to the defense a written progress report containing information regarding, inter alia, "the type, the dosage and the effect of the medication on the defendant's appearance, actions and demeanor." 725 ILCS 5/104-18 (West 2000). This information must be presented to the defense under certain circumstances, including prior to the date for any hearing on the issue of the defendant's unfitness or when the treatment supervisor believes that the defendant has attained fitness. Thus, contrary to respondent's argument, the Criminal Code contains a provision requiring notification to a criminal defendant's attorney regarding his or her client's drug treatment. Although this notice comes after the decision to involuntarily administer psychotropic medication has been made, it resolves respondent's concern that the criminal defense attorney be aware of a respondent's drug regimen prior to any further proceedings on the respondent's fitness.

III. CONCLUSION

For the reasons stated above, we affirm the judgment of the circuit court of Kane County.

Affirmed.

BOWMAN and BYRNE, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

96773

October 7, 2003

Mr. William J. Conroy, Jr.
Legal Advocacy Service
Rockford Regional Office
4302 N. Main St.
Rockford, IL 61103-5202

No. 96773 - In re Robert S., etc. (People State of Illinois, respondent, v. Robert S., petitioner). Leave to appeal, Appellate Court, Second District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(g) concerning certain notices which must be filed.

STATE OF ILLINOIS
CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT
KANE COUNTY

Deborah Seyller
Clerk of the Circuit Court
Kane County, IL
FEB 0 1 2002
FILED 034
ENTERED 34

ORDER FOR THE AUTHORIZED INVOLUNTARY TREATMENT

IN THE MATTER OF: ROBERT S 01 MH 261

This matter coming to be heard on the petition of DR. ROMULO NAZARENO for administration of psychotropic medications.

It is hereby ordered that:

[ ] The petition is denied.

[ ] The matter is continued until:

[X] The petition is granted, and ROBERT S shall receive psychotropic medication to be administered by DR. NAZARENO (or designee whose license and credentials permit) at Elgin Mental Health Center for a period not to exceed 90 days.

The medications authorized to be administered are; for up to 90 DAYS:

RESPERIDOL - 6mg to 16mg a day
HALDOL, ORAL MEDICATION - 5mg to 20mg a day
HALDOL, DECONOATE - 200mg a day
Cogentin, if necessary, for side effects 4mg a day

The necessary testing and lab procedures to be authorized are:

CBC, Liver Profile, and EKG
(Complete Blood Counts)

[ ] It is further ordered that:

Date: 02/01/2002 Enter: J. O. Brown
Judge

NOTICE TO PERSONS RECEIVING THIS ORDER

If you are affected by or interested in this order you should know that:

1. A final order of the Court may be appealed. The court must notify the respondent of the right to appeal and the indigent's right to free transcripts and counsel. If the client wishes to appeal and cannot obtain counsel, counsel will be appointed by the court. Notice of appeal must be filed with the Clerk of the Court within thirty (30) days of this order.
2. An order authorizing administration of psychotropic medication is valid for no more than 90 days.
3. If the respondent's treatment needs change, then upon proper method of review the court may modify this order.

MHDD-25, EMHC, 011801 ref: 405 ILCS 5, sections 2-107.1, 3-800 et. seq.

Ref.: 405 ILCS 5/2-107.1

PETITION FOR ADMINISTRATION OF AUTHORIZED INVOLUNTARY TREATMENT

STATE OF ILLINOIS

CIRCUIT COURT FOR THE Kane JUDICIAL CIRCUIT

Kane COUNTY

IN THE MATTER OF)
Robert S)
)
)

DOCKET NUMBER

Who is alleged to be a person who has **mental illness/developmental disability** and for whom this petition for
(circle either one or both)

administration of authorized involuntary treatment is initiated for the following reasons (briefly explain reasons individual meets the criteria for each of the following):

1. ✓ The individual has refused to submit to treatment by psychotropic medication or electro convulsive therapy; and (circle either one or both)

   ✓ The individual lacks capacity to give informed consent; and

2. That because of said mental illness or developmental disability, the individual exhibits any one of the following; deterioration of ability to function, suffering, threatening behavior, or disruptive behavior; and

3. That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (2) above, or the repeated episodic occurrence of these symptoms; and

4. That the benefits of the treatment clearly outweigh the harm; and

5. That the individual lacks the capacity to make a reasoned decision about the treatment; and

6. That other less restrictive services were explored and found inappropriate.

7. The petition seeks authorization for testing and other procedures, that said testing and procedures are essential for the safe and effective administration of treatment.

8. The petitioner has made a good faith attempt to determine whether the individual has executed a Power of Attorney for Health Care Law or a declaration for mental health treatment under the Mental Health Treatment Preference Declaration Act. If either of the above are available, they are attached to the Petition.

FILED
ENTERED
2001 JUL 19 A 8:58
CLERK OF THE CIRCUIT COURT
KANE COUNTY, IL.

WHEREFORE, The Petitioner requests the court for an order authorizing the clinical staff member Romulo Nazareno, MD (psychiatrist name) at the Elgin Mental Health Center (name of institution) facility/hospital to administer one or more of the below listed checked options to the individual Robert S (individual's name).

PSYCHOTROPIC MEDICATION

To administer psychotropic medication to the individual for 90 days (not to exceed 90 days)

Psychotropic medications to be given to the individual.

	Name of Medication	Dosage Range
1st Choice	Risperidone, oral medication	6mg to 16 mg a day
Alternatives	Haldol, oral medication	5mg to 20 mg a day
	Haldol Decanoate injection	200 mg a month
	Cogentin, if necessary for side effect	4 mg a day

ELECTRO CONVULSIVE THERAPY

To administer electro convulsive therapy to the individual for _____ days (not to exceed 90 days)

The initial number of treatments to be administered will be _____ (number) treatments.

Additionally, the following _____ (number) electro convulsive maintenance treatment will be given to the individual within the timeframe specified.

TESTING (If applicable)

Specific testing and procedures necessary to administer the above are as following:

Complete Blood Count, Liver profile, EKG

I have read and understood this Petition and affirm that the statments made by me are true to the best of my knowledge. I affirm that I advised the individual, in writing, of the risks and benefits of the proposed treatment.

Dated: Nov. 16, 2001 Signed: J. Rao

Address: EMHC, 750 South State St
Elgin, IL 60123

Relationship to Respondent: Psychiatrist

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Trial Witness	Page No.				
	Direct	Cross	Redirect	Reopen	Cross
Romulo Nazareno, M.D.	12-23,41	69		139	141
Kelli Childress	24	36			
Lesley Kane	93	125			
Mark Thomas	145	168			

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Trial Witness	Page No.			
	Direct	Cross	Redirect	Re-Cross
Denise Dojka	6	26	42	49
Becky Mitchell	50	58	61	
Jose Padilla	63	68	70	71

March 8, 2002

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