PsychRights®
Law Project for
Psychiatric Rights, Inc.

September 2, 2010

Sharon L. Gleason, Presiding Judge, Courtroom 603

Judge Eric A. Aarseth, Courtroom 602

Judge Stephanie E. Joannides, Courtroom 604

Judge Patrick J. McKay, Courtroom 381

Judge William F. Morse, Courtroom 601

Judge Frank Pfiffner, Courtroom 501

Judge Mark Rindner, Courtroom 403

Judge John E. Suddock, Courtroom 401

Judge Sen K. Tan, Courtroom 504

Re: Proposed Mental Commitment Rules

Dear Judges Gleason, Aarseth, Joannides, McKay, Morse, Pfiffner, Rindner, Suddock and Tan:

I see you have submitted comments on the proposed changes to the Probate Rules concerning involuntary commitment and administration of psychotropic medication and thought I would provide you with a copy of the Minority Report accompanying the subcommittee's recommendations. The three issues raised in the Minority Report may be summarized as follows:

Involuntary Commitment. It is not possible to refer 30-day involuntary commitments to probate masters, allow for any meaningful consideration by the assigned Superior Court judge, and meet the 72 hour rule in AS 47.30.725(b).

Involuntary Medication. The Minority Report objects to the proposed rule because it does not comport with *Myers*, 138 P.3d 238 (Alaska 2006), *Wetherhorn*, 156 P.3d 371, (Alaska 2007) and *Bigley*, 208 P.3d 168 (Alaska 2009), in that (1) a petition for involuntary medication may not be considered before the respondent is subject to a commitment order signed by a judge, and (2) the extremely expedited schedule can constitute a Due Process violation.

Ex Parte Orders. The Minority Report also addresses the problems with the way *Ex Parte* Orders are handled, in Anchorage at least, which the Probate Rules Subcommittee failed to address in its recommendations. The problems with the way *Ex Parte* Orders are handled in Anchorage are, (1) they cannot properly be issued until after the screening investigation report required under AS 47.30.700(a) has been received, and (2) in order to satisfy Due Process, there must be a finding of a sufficient exigency justifying lack of notice to the respondent.

AS 47.30.700(a) provides in pertinent part:

> (a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a . . . mental health professional . . . to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious

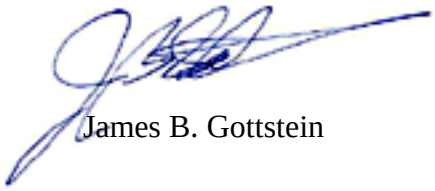
406 G Street, Suite 206, Anchorage, Alaska 99501 ~ (907) 274-7686 Phone ~ (907) 274-9493 Fax
http://psychrights.org

> harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, . . .

The practice, in Anchorage at least, of issuing *ex parte* orders based solely on an *ex parte* petition is unauthorized by the statute. Under the statute, they may be issued only after receipt of the required screening investigation. Under Due Process orders may be issued only if there is sufficient justification for dispensing with meaningful notice and opportunity to heard before an order of confinement can properly be issued.

There are some significant benefits to following the statutory and constitutional requirements in addition to complying with the law. The screening investigation, with appropriate support to the person of concern, including desired help, can de-escalate the situation where such drastic action is not required. It can forestall the extreme trauma of being collared and cuffed by the police without any notice, which inherently escalates, rather than de-escalates the situation. This in turn can reduce the load on the court system by reducing the number of evaluations and commitments ordered.

Yours truly,



James B. Gottstein

Enc:

Minority Report
Probate Rules Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication

May 21, 2010

Submitted by Jim Gottstein

I. Summary

In advance of the first subcommittee meeting held on August 17, 2007, I submitted a Memorandum (Revised) regarding important topics for the subcommittee to address. Appendix A. The subcommittee chose instead to devote its attention solely to the process and paperwork flow problems arising from the Third Judicial District's standing referral of these cases to the probate master(s). The two proposed rules are titled (1) Involuntary Commitment and (2) Involuntary Administration of Psychotropic Medication. The fundamental objection to the proposed rule on involuntary commitment is that the statutory mandated 72 hour time limit can not properly be met when a master is interjected into the process in light of the superior court judges' responsibilities to review a transcript or listen to a recording and address objections, if any. The fundamental objection to the proposed rule on involuntary medication is that, in the words of the Alaska Supreme Court, "in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed." In addition to objections to the Subcommittee proposed rules, this Minority Report recommends immediate adoption of a rule, proposed herein, on *ex parte* applications/orders because of its extreme importance.

II. Subcommittee Proposed Rule on Involuntary Commitment

The proposed Involuntary Commitment rule primarily involves reducing the amount of time available to object to masters' recommendations and proceedings thereon. The reason for such reduction in time is that involuntary commitment respondents who are locked up in a psychiatric hospital are entitled to a speedy determination by the superior court that such incarceration is proper and justified. AS 47.30.655 states that in enacting the 1981 major revision of Alaska's civil commitment law:

> The legislature has attempted to balance the individual's constitutional right to physical liberty and the state's interest in protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves by providing due process safeguards at all stages of commitment proceedings

In this balancing of Due Process rights and the public's interests, AS 47.30.725(b) provides that a respondent is entitled to a court hearing within 72 hours after arrival at the facility to determine whether there is cause for detention after the 72 hours have expired.

Before 2008, it appears, at least in Anchorage, that the superior court judges did not engage in any meaningful review of the masters' recommendations, essentially treating issuing the commitment orders as ministerial acts. However, in *Wayne B. v. Alaska Psychiatric Institute*, 192 P.3d 989, 991 (Alaska 2008), the Alaska Supreme Court considered whether the requirement that a transcript accompany the master's recommendation must be strictly complied with, holding:

> We conclude that it was. We take a strict view of the transcript filing requirement because, as we noted in *Wetherhorn v. Alaska Psychiatric Institute*, involuntary commitment for a mental disorder is a "massive curtailment of liberty." Given the nature of the liberty interest at stake, it was critical that the superior court have full knowledge of the evidence that was said to justify committing Wayne B. to a mental institution.

(Footnote omitted).[1]

The rule proposed by the subcommittee provides that the master's recommendation is to be issued within 48 hours after the hearing, then allows 48 hours for the parties to file objections, then another 48 hours for the superior court to hold a hearing <u>if no application to file new evidence is made</u>. This is an additional 144 hours of being locked up in a psychiatric facility after the 72 hours time limit set by the Legislature before the matter is even presented to the superior court for decision. This does not seem permissible.

It is just inherently impossible to insert a recommendation, meaningful objection time, review, and possible *de novo* determination, into the process and meet the 72 hour requirement. Thus, it is this Minority Report's recommendation that referrals to master referrals for at least 30-day commitments be eliminated.

The concern expressed by Subcommittee members to this view was that it was too hard to find/schedule judge hearing time to conduct the hearings directly. Leaving aside that this is an insufficient reason to violate the 72 hour rule in AS 47.30.725(b), since *Wayne B.* requires the superior court to listen to the recording of the full proceeding before making a decision because transcripts are not being transmitted with the masters' recommendations, the current situation is that both the masters and the judges have to spend the hearing time. This is clearly inefficient.

[1] The Supreme Court did also hold that listening to the recording of the full proceeding could substitute for the transcript requirement. *Id*.

III. Subcommittee Proposed Rule On Involuntary Administration of Psychotropic Medication

The subcommittee's proposed rule on Involuntary Administration of Psychotropic Medication is based on the faulty premise that the same sort of extremely expedited time frame required of involuntary commitments is required for forced medication petitions. The subcommittee's view was explicitly rejected in *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 381-2 (Alaska 2007):

> The expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily. In contrast, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse psychotropic medications remain intact. Therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.

(footnote omitted). There is even less reason for constitutional protections to be neglected in the interests of speed.

Wetherhorn also held that the respondent has to be committed prior to a hearing on involuntary medication taking place. 156 P.3d at 382 ("The second step requires that the State prove by clear and convincing evidence that: (1) **the committed patient** . . .") (emphasis added) Since the capacity hearing has to be held within 72 hours of filing of an involuntary meds petition, this necessarily implies such petition can not be filed until the person has been committed. Thus, unless waived, where the hospital wants to drug someone against their will in connection with a 30-day commitment petition, the medication petition can not be filed until after the commitment has been ordered.[2]

Bigley v. Alaska Psychiatric Institute, 208 P.3d 168, 183 (Alaska 2009), held, "Denial of a motion for continuance constitutes an abuse of discretion 'when a party has been deprived of a substantial right or seriously prejudiced,'" and then went on to conclude:

> We have determined in this case that Bigley did not receive adequate notice of the nature of API's treatment proposal and was denied access to information needed to prepare his case under the *Myers* best interests factors. While it is possible that these due process violations constituted harmless error, it is also possible that they deprived Bigley of the opportunity to properly develop his case on best interests.

[2] This only applies to the initial 30-day commitment. Involuntary medication petitions may be filed concurrently with 90-day and 180-day commitment petitions under AS 47.30.839(h).

(208 P.3d at 187, footnotes omitted).

In light of the holdings in *Wetherhorn* and *Bigley*, there is no reason why the normal time frames where matters are referred to masters should be dispensed with. Extremely short time frames to object to the master's recommendations are inherently prejudicial. If the court wants to avoid the extra time inherent in such referrals to masters, the petitions should not be referred to masters, rather than give short shrift to respondents' rights. However, attached as Appendix B, is the marked up version of the proposed rule that it is believed minimally complies with *Wetherhorn* and *Bigley*.

IV. Minority Report Proposed Rule Re: Initiation of Involuntary Commitment Procedures

Currently, in Anchorage at least, the issuance of *ex parte* orders routinely violate the requirements of AS 47.30.700 and Due Process. This Minority Report believes this is the most important issue that should be addressed by the Committee.

AS 47.30.700, titled, Initiation of Involuntary Commitment Procedures, but commonly referred to as *Ex Parte* Applications. AS 47.30.700(a) provides:

> (a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a . . . mental health professional . . . to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(emphasis added).

The practice in Anchorage at least is the court essentially automatically issues an *ex parte* order whenever an AS 47.30.700(a) application is filed.[3] This violates the emphasized portion of AS 47.30.700(a), above. In addition it violates Due Process. More specifically, AS 47.30.700(a) does not allow an *ex parte* order to be issued in advance of a screening investigation, yet that is what is uniformly done. In addition, only when most or all of a class of cases involve exigent circumstances may the State always proceed *ex parte*. *Waiste v. State*, 10 P.3d 1141, 1145-46 (Alaska 2000). Nothing justifies dispensing with notice and an opportunity to be heard in the whole class of cases in which a mental evaluation is sought.[4] In other words, the practice of treating *ex parte* orders essentially as ministerial acts as is done at least in Anchorage vitiates the careful balancing of rights the Legislature crafted in the 1981 amendments, as set forth in AS 47.30.655. Attached as Appendix A is a proposed rule that was drafted to comply with AS 47.30.700(a) and Due Process:

In addition to compliance with the statute and Due Process, if the procedure mandated by AS 47.30.700(a) were followed, there would be a substantial reduction in the number of involuntary commitment hearings and traumatized people hauled off to the hospital in handcuffs, if the screening investigation process involved engaging the respondents with respect to the behavior giving rise to concern and offering wanted help.

Correcting the practice of improperly issuing *ex parte* orders in Anchorage can go a long ways towards addressing the burden on the superior court from the high number of expedited hearings in Anchorage that has resulted in involuntary commitment petitions being referred to the probate masters for efficient, but improper, processing.

There is an additional possible benefit to following AS 47.30.700(a)'s requirement of a screening investigation before issuance of any order. If the screening investigation also includes active efforts by the mental health professional(s) doing the screening to de-escalate whatever the situation is that is causing concern regarding the respondent, including telling the respondent what behavior is causing the concern and offering help, the respondent has an opportunity to try to deal with it and many psychiatric incarcerations might be avoided. This not only conserves judicial resources but is far more humane than the current practice which could hardly be worse in terms of escalating people's emotional problems. Under the current practice, the first thing a

[3] In fact, it is expected to be so automatic it appears common that people are picked up and taken to the hospital before the order is even signed by a superior court judge.

[4] Even assuming *arguendo* that *ex parte* orders were to be permitted in this whole class of cases, the court still has the "duty to make a searching inquiry as to the validity of the facts," *State v. Malkin*, 772 P.2d 943, 947 (Alaska 1986), as to AS 47.30.700's requirement that "that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others" before issuing an *ex parte* order. Just as in the search warrant situation, the court "must be willing to investigate the truthfulness of the material allegations of the underlying affidavit in order to protect against the issuance of [*ex parte* application] based on conjured assertions of probable cause." *State v. Davenport*, 510 P.2d 78, 82 (Alaska 1973).

respondent knows is when the police show up to handcuff him or her to be hauled off to the hospital.

As set forth above, there may be times when there is such an exigency that dispensation with notice and an opportunity to be heard is warranted, but in the absence of such exigency, a de-escalation, helping, approach would pay huge dividends as well as comport with AS 47.30.700(a) and the requirements of Due Process.

PsychRights®
Law Project for
Psychiatric Rights, Inc.

MEMORANDUM
(Revised)

TO: Probate Rules Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication
FROM: Jim Gottstein
DATE: August 16, 2007
RE: Random Thoughts

It seemed like it might be useful for me to set forth some of the things I have thought about in terms of the rules. The following is certainly not meant to be exhaustive and I suspect others will arise as we go along. I understand the committee may conclude some of the issues are not a proper subject of court rules.

Table of Contents

1 Initial Screening Investigation (*Ex Parte* Petition & Order)

AS 47.30.700 provides:

> Sec. 47.30.700 Initiation of involuntary commitment procedures.
>
> (a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody

406 G Street, Suite 206, Anchorage, Alaska 99501 ~ (907) 274-7686 Phone ~ (907) 274-9493 Fax
http://psychrights.org

and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

(emphasis added).

There are a number of ways in which this statute is violated as a matter of course which might be addressed in the rules.

1.1 Proper Issuance of *Ex Parte* Orders

While there may be individual circumstances justifying *ex parte* orders for someone to be taken into custody for an evaluation, AS 47.30.700 only provides that the court "may issue such an *ex parte* order." Unlike the search warrant situation, meaningful notice and an opportunity to be heard can not be constitutionally dispensed with as a class in these cases. In *Waiste v. State*, 10 P.3d 1141, 1145-6 (Alaska 2000) the Alaska Supreme Court held:

> [E]ven if the public interest in a class of cases will justify *ex parte* seizure in some of those cases, due process still requires that the State make a particularized showing, in each such case, that exigent circumstances warrant ex parte seizure in that case. Only if all or most cases in a class involve such exigency may the State always proceed *ex parte*.

Waiste involved a property interest, but the "massive curtailment of liberty" represented by psychiatric confinement deserves at least as much protection. This was explicitly recognized by the Washington Supreme Court in *In re: Harris*, 654 P.2d 109, 113 (Wash. 1982) ("The danger must be impending to justify detention without prior process").

1.2 Screening Investigation

The statute clearly requires a screening investigation prior to issuance of a custody order and I can not recall ever having seen that done. My experience is the court automatically issues *ex parte* orders for the respondent to be taken into custody. I believe the only fair reading of this statute is that the allegations in the petition may not be substituted for the screening investigation. Thus, even if it is a mental health professional who signs the petition, then either the judge or some other mental health professional must conduct the screening.

1.3 Findings

The statute also clearly requires the court set forth its "findings on which the conclusion [there is probable cause to believe respondent is a danger to self or others or gravely disabled] is

based." A copy of the non-confidential *Ex Parte* Order issued in the *Wetherhorn* case[1] is attached hereto as Exhibit A. My experience is this order is typical and I think demonstrates how these orders fail to comply with the requirement to set forth the "findings on which the conclusion is based."[2]

2 Appointment of Counsel

AS 47.30.700 provides the court is to appoint counsel in the *Ex Parte* Order, which is uniformly the Public Defender Agency. However, people who can pay or otherwise have counsel available to them are entitled to their choice of counsel. The Alaska Supreme Court has long recognized this right under Article I, §11 of the Alaska Constitution for non-appointed counsel in the criminal context. *McKinnon v. State*, 526 P.3d 18, 21(Alaska 1974). The U.S. Supreme Court has recently addressed the fundamental nature of this right in the criminal context in *United States v. Gonzalez-Lopez*, 548 U.S. ___, 126 S.Ct. 2557, 2563 (2006):

> Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.

Because of the extremely short time frames involved, any delay in the implementation of an AS 47.30 Respondent's right to counsel of choice works a denial of counsel because critical preparation time is lost.[3] I have had problems with this in the past and have two recommendations.

The first is that AS 47.30 Respondents be notified by the court of their right to counsel of choice if they can afford it, or counsel is otherwise available to them. The second is that filing an entry of appearance works a substitution of counsel when the Public Defender Agency has been appointed.

3 Referrals to the Probate Masters Should Be Eliminated

At least in Anchorage, there is a standing referral of involuntary commitment and forced drugging cases to the probate masters. The time frames involved do not permit these cases to be properly handled in this way. Current Probate Rules 2(b)3.C & D essentially recognize the timing problem by providing that involuntary commitments and forced drugging orders are effective pending Superior Court review. However, this is improper. Alaska Statutes require Superior Court determinations and these rules are end runs around it for expediency. Also, Civil Rule 54(d)(1) requires a transcript and the other evidence presented at these hearings to

---

[1] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007).

[2] It also seems clear the court has the same "duty to make a searching inquiry as to the validity of the facts" in the *Ex Parte* Application as it does in the search warrant situation. *See*, e.g., *State v. Malkin*, 722 P.2d 943, 947 (Alaska 1986).

[3] The issue is not one of whether counsel could be "effective" even with the delay, but that the denial of immediate entry into the case constitutes a denial of the right to choice of counsel in light of the extremely short time frames. PsychRights filed a Petition for Review on this issue earlier this year, which was not granted. It became moot when the respondent won at trial, but if he had not, it would have been an appeal point.

accompany the masters reports, but my experience and understanding is this is never done.[4] The Superior Court can not properly discharge its duty to decide these cases without such a transcript and it does not seem feasible to provide a transcript within the required time frame. It just doesn't seem possible to me to have these cases properly handled by referrals to masters because of the time frames involved.

Another reason why these cases should not be referred to the Probate Masters is that AS 47.30 Respondents' attorneys should always be objecting to adverse Probate Master recommendations because the failure to do so, in my opinion, is a violation of the attorney's obligation to zealously assert their client's position.[5] In criminal defense cases, negotiating pleas or charges can be justified, but, with rare, if any, exceptions, there are no compromises in involuntary commitment or forced drugging cases. Therefore, in order to discharge their ethical obligations, attorneys representing respondents must object to adverse Probate Master recommendations.

4 Separation of Involuntary Commitment from Forced Drugging Proceedings

The involuntary commitment and forced drugging proceedings should be separated and the forced drugging hearing date set only if involuntary commitment is granted in order to allow better preparation for both proceedings. Two Superior Court Judges (both on this committee), in connection with jury trials, have recently held that the forced drugging issue is to be decided after the involuntary commitment. The same should be true in non-jury trials.

The Alaska Supreme Court has held that once a person is in custody in the hospital there is no exigency to conduct the forced drugging proceedings. *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 381-2 (Alaska 2007):

> Unlike involuntary commitment petitions, there is no statutory requirement that a hearing be held on a petition for the involuntary administration of psychotropic drugs within seventy-two hours of a respondent's initial detention. The expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily. In contrast, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse psychotropic medications remain intact. Therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.

(footnotes omitted).

Proceedings to determine (a) the "best interests" of the respondent and (b) whether there is a "less intrusive alternative," required under *Myers v. Alaska Psychiatric Institute*,[6] should be deferred pending the determination of the respondents capacity to decline the drugs under AS 47.30.839(e), which must be held within 72 hours of the filing of the forced drugging petition. Just as no forced drugging proceeding will be necessary if involuntary commitment is denied, no

[4] This issue is currently on appeal in *WSB v. Alaska Psychiatric Institute*, Case No. S-12677.
[5] *See*, *In re: K.G.F.*, 29 P.3d 485 (Mont. 2001) for a discussion of the types of things counsel must do to be effective.
[6] 138 P.2d 238 (Alaska 2006).

best interests and less intrusive alternative determination will be required if the court finds the respondent competent to decline the medication.

Another reason for conducting the forced drugging proceeding after the involuntary commitment proceeding is that AS 47.30.839(c) explicitly only allows the Public Defender Agency to be appointed if the respondent is indigent. Thus, the court must make an indigency determination before appointment of the Public Defender Agency.[7]

Most importantly, involuntary commitment proceedings are about safety, while forced drugging proceedings are, after *Myers*, about the person's best interests and whether there are any less intrusive alternatives. Prior to *Myers* when the court only considered the person's competence to decline the medication and if found incompetent, "the court shall approve the facility's proposed use of psychotropic medication,"[8] there was, perhaps, a rationale for holding them together. *Myers*, however, made clear these are entirely different proceedings, with different interests involved for both the government and the AS 47.30 respondents. Speedy resolution of involuntary commitment petitions is required to protect the respondents liberty interests there.[9] A more deliberate consideration of best interests and less intrusive alternatives is required to protect people's liberty interests in forced drugging proceedings.

5 Notice of Rights and Filing Petitions

AS 47.30.725(a), provides in part, "When a respondent is detained for evaluation under AS 47.30.660 - 47.30.915, the respondent shall be immediately notified orally and in writing of the rights under this section." (emphasis added). AS 47.30.730(b), provides, " A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing."

It is not uncommon, if not standard practice, for the hospital in Anchorage to wait until just before the involuntary commitment hearing to serve the respondent with either of these notices. Attached hereto as Exhibit B are the non-confidential documents pertaining to this in the *Wetherhorn* case. There, Ms. Wetherhorn was brought to the hospital on or before April 5, 2005, and a petition was filed on April 5th. However, neither the notice of rights required to be given "immediately" when brought to the hospital, nor the petition were served on Ms. Wetherhorn until an hour before the hearing.

The rules regarding filing petitions for involuntary commitments should require a certificate of service that (a) the notice of rights was served on the respondent immediately upon detention and the respondent was orally notified of their rights at that time as well, and (b) the petition(s) have been served on the respondent prior to filing.[10]

---

[7] In the interest of full disclosure, it is not unlikely that in the future I will enter an appearance solely with respect to a forced drugging proceeding(s).

[8] AS. 47.30.839(g).

[9] It is imperative to note, however, that having these proceedings so expedited that adequate preparation and trial is impossible does just the opposite.

[10] This is a situation where the service really needs to have occurred prior to the filing of the certificate of service.

6 State-paid Expert Witnesses

For those who can not afford one, an independent expert witness selected by the Respondent should be paid for by the State. Without this, these proceedings mostly only pretend to protect people's rights.

7 Elections.

AS 47.30 respondents have the right to make a number of elections of which they have rarely been advised. The court should therefore ask the respondent in court about them. These include:

(a) To have the hearing open or closed to the public pursuant to AS 47.30.735(b)(3), AS 47.30.745(a) and AS 47.20.770(b);

(b) To have the hearing in a real courtroom pursuant to AS 47.30.735(b);

(c) To be free of the effects of medication pursuant to AS 47.30725(e), AS 47.30.745(a) and AS 47.20.770(b); and

(d) To have a jury trial pursuant to AS 47.30.745(c) and AS 47.30.770(b) for 90 and 180 day commitments.

8 Notice of Right to State-paid Attorney for Appeal and *Habeas Corpus* or Civil Rule 60(b) Proceedings

In connection with briefing before the Alaska Supreme Court regarding the right to full attorney's fees for prevailing on appeal because AS 47.30 respondents were entitled to state-paid representation just as much as criminal defendants, the State defended on the grounds that the State was obligated to pay for such appeals by the Public Defender Agency and therefore PsychRights should not be awarded full fees.[11] The State is bound by this and it necessarily extends to challenges to the effectiveness of representation through *habeas corpus* or Civil Rule 60(b) motions the Supreme Court held were the proper routes to challenge the effectiveness of representation in *Wetherhorn.*[12]

The court should advise non-prevailing AS 47.30 respondents of the right to have the State pay for an appeal and a challenge to the effectiveness of their representation.

[11] The relevant pages of this brief is attached hereto as Exhibit C. The entire briefing is available on the Internet at http://psychrights.org/States/Alaska/CaseFour.htm#Wetherhorn_I.
[12] 156 P.3d at 384.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE

In the Matter of the Necessity for the Hospitalization of:	)	
ROSLYN WETHERHORN, Respondent.	)	Case No. 3AN-05-0459 PR
	)	EX PARTE ORDER (TEMPORARY CUSTODY FOR EMERGENCY EXAMINATION/ TREATMENT)

FINDING AND CONCLUSIONS

Having considered the allegations of the petition for initiation of involuntary commitment and the evidence presented, the court finds that there is probable cause to believe that the respondent is mentally ill and as a result of that condition is gravely disabled or presents a likelihood of causing serious harm to him/herself or others.

ORDER

Therefore, it is ordered that:

1. Alaska Psychiatric Institute take the respondent into custody and deliver him/her to Alaska Psychiatric Institute, in Anchorage, Alaska, the nearest appropriate evaluation facility for examination.
2. The respondent be examined at the evaluation facility and be evaluated as to mental and physical condition by a mental health professional and by a physician within 24 hours after arrival at the facility.
3. The evaluation facility personnel promptly report to the court the date and time of the respondent's arrival.
4. The examination and evaluation be completed within 72 hours of the respondent's arrival at the evaluation facility.
5. A petition for commitment be filed or the respondent be released by the evaluation facility before the end of the 72 hour evaluation period (unless respondent requests voluntary admission for treatment).
6. Public Defender Agency is appointed counsel for respondent in this proceeding and is authorized access to medical, psychiatric or psychological records maintained on the respondent at the evaluation facility.

April 5, 2005
Date

Superior Court Judge

I certify that on _____ a copy of this order was sent to: AG, PD, API, RESP

Clerk:

Recommended for approval on April 5, 2005

Master
AS 47.30.700, .710 & .715

C00014

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT Anchorage

In the Matter of the Necessity for the Hospitalization of:

Wetherhorn Rosly,

Respondent.
WETHERHORN

Case No. 3AN05 459 PR

PETITION FOR 30-DAY COMMITMENT

As mental health professionals who have examined the respondent, the petitioners allege that:

1. The respondent is mentally ill and as a result is

   ☒ likely to cause harm to himself/herself or others.

   ☒ gravely disabled and there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought.

2. The evaluation staff has considered, but has not found, any less restrictive alternatives available that would adequately protect the respondent or others.

3. APL is an appropriate treatment facility for the respondent's condition and has agreed to accept the respondent.

4. The respondent has been advised of the need for, but has not accepted, voluntary treatment.

The petitioners respectfully request the court to commit the respondent to the above-named treatment facility for not more than 30 days.

The facts and specific behavior of the respondent supporting the above allegations are:
manic state homeless & no insight
and non med compliant x 3 months

Exhibit B, page 1 of 6

Case No. 3AN05 459 PR

The following persons are prospective witnesses, some or all of whom will be asked to testify in favor of the commitment of the respondent at the hearing:

4-5-05
Date

Signature

Printed Name

Title

4-5-05
Date

Signature

Laurel Silberschmidt
Printed Name

LCSW
Title

Note: This petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. AS 47.30.730(a).

Exhibit B, page 2 of 6

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

In the Matter of the Necessity for the Hospitalization of:	
Roslyn Wetherhorn	Case No. 3AN-05-00459PR
Respondent.	NOTICE OF 30-DAY COMMITMENT HEARING

To: Respondent

Respondent's Attorney: PD

State's Attorney: Attorney General's Office

Petitioner/Facility: API

The court has received a petition requesting examination and evaluation of the respondent to determine if the respondent is mentally ill and as a result of that condition is gravely disabled or presents a likelihood of causing serious harm to himself/herself or others. The court has also received a petition for commitment of the respondent for up to 30 days pursuant to AS 47.30.730 (copy attached).

A hearing to decide whether commitment of respondent is necessary will take place in the Superior Court at **Anchorage**, Alaska, in **API Anchorage** on **April 08, 2005** at **1:30 pm** before the Honorable John E Duggan.

The court has appointed as counsel for the respondent in this matter.

At the hearing, the respondent has the following rights:

1. Representation by counsel
2. To be present at the hearing
3. To view and copy all petitions and reports in the court file on respondent's case.
4. To have the hearing open or closed to the public as the respondent elects.
5. To have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence.
6. To have an interpreter if the respondent does not understand English.

7. To present evidence on his/her own behalf.

8. To cross-examine witnesses who testify against him/her.

9. To remain silent.

10. To call experts and other witnesses to testify on the respondent's behalf.

11. To appeal any involuntary commitment.

If commitment or other involuntary treatment beyond the 30 days is sought, the respondent shall have the right to a full hearing or jury trial.

Before the court can order the respondent committed, the court must find by clear and convincing evidence that respondent is mentally ill and as a result of that condition is gravely disabled or presents a likelihood that he/she will cause harm to himself/herself or others.

4/8/2005	SHarris
Date	Judge/Clerk

I certify that on 4/8/2005
A copy of this notice and the Petition for
30-Day Commitment were sent to the persons
listed on page one.

Clerk: SHarris

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT Anchorage

In the Matter of the Necessity for the Hospitalization of:
Roslya Wetherbee
Respondent.

Case No. 3AN 05 459 PR

NOTICE OF RIGHTS UPON DETENTION FOR EVALUATION

TO: Roslya Wetherbee

You are entitled to a court hearing within 72 hours of your arrival at this facility. The hearing will determine whether there is cause to detain you after the 72 hours have expired for up to an additional 30 days on the grounds that you are mentally ill and as a result of that condition are gravely disabled or are likely to cause serious harm to yourself or others.

You have the right to communicate immediately (at the state's expense) with your guardian, if any, or an adult designated by you. You may also communicate with the attorney designated by the court or an attorney of your choice.

You have the right to be represented by an attorney, to present evidence and to cross-examine witnesses who testify against you at the hearing.

You have the right to be free of the effects of medication and other forms of treatment to the maximum extent possible before the 30-day commitment hearing.

I certify that on ~~4~~ 4/8, 2005, at 1230 .m., I verbally advised the respondent of his/her rights under AS 47.30.725 and delivered a copy of this document to the respondent.

4/8/05
Date

Signature

Print Name and Title

Distribution:

Original to court
Copy to respondent
Copy to evaluation facility

The respondent's guardian, if any, and if the respondent requests, an adult designated by the respondent, shall also be notified of the respondent's rights explained on this notice.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT Anchorage

In the Matter of the Necessity for the Hospitalization of:
Roslyn Wetherborn,
Respondent.

Case No. 3AN05 459 PR

AFFIDAVIT OF SERVICE OF DOCUMENTS

I state on oath or affirm that on 4/8/05, ~~19~~____,
at 1230 .m., I served a copy of POA/Petition/Ex Parte/Pet 30/Notice
(title of document)
on respondent and API
(institution)
by hand delivery.
(manner in which service was accomplished)

4/8/05
Date

Signature

Print Name

Title

Subscribed and sworn to or affirmed before me at _____,
Alaska, on _____, 19____.

(SEAL)

Notary Public for Alaska
My commission expires: _____

Exhibit B, page 6 of 6

IN THE SUPREME COURT OF THE STATE OF ALASKA

ROSYLYN WETHERHORN,
Appellant,
v.
ALASKA PSYCHIATRIC INSTITUTE,
Appellee.

Supreme Court No. S-11939

Case Number 3AN-05-0459 PR

RESPONSIVE SUPPLEMENTAL BRIEFING RE: APPLICATION FOR FULL REASONABLE FEES

In its May 22, 2007 Order, this Court requested supplemental briefing addressing the effect of its recent decision in *State v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007), including whether Ms. Wetherhorn's request for full fees was subject to apportionment. The Order also requested that Ms. Wetherhorn provide an accounting of the time her counsel spent on any successful constitutional claim. Ms. Wetherhorn filed her supplemental briefing and API now offers its response.

I. Background and Introduction.

Ms. Wetherhorn's original fee request was premised upon her claim of public interest litigant status. API responded to that request by arguing that the Court's original award of $1000 in fees was reasonable, as would be no fee award, given the lack of a clear victor in the case. In addition, API noted that the public interest litigant exception had been modified by changes to AS 09.60.010 that the legislature made in

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

representation at state expense by her private counsel.[12]

No one disputes that due process requires representation on appeal, the appointment of counsel to those who cannot afford it, and for such representation to be effective. However, such rights–which are already protected–do not translate into a mandate to order state payment of full reasonable fees to private counsel who choose to displace state paid and provided appointed counsel. Ms. Wetherhorn's request is particularly unmoving given that the pervasive failures upon which she grounds her request for full fees have failed once already to prompt this Court's intervention. *See Wetherhorn*, 156 P.3d at 384.

A. Wetherhorn and other respondents are afforded a right to counsel under present practice and procedure.

The right to counsel in civil commitment proceedings is not in doubt. In these civil proceedings, the right to counsel is guaranteed by the due process clauses of both the Alaska and United States constitutions. *Id.* at 383-84. The right to counsel is recognized by statute, which also provides for appointment of counsel within forty-eight hours.[13] For individuals that are indigent, counsel is provided at public expense by the state.[14] The Public Defender Agency appointment statute, AS 18.85.100, covers persons

---

[12] As Ms. Wetherhorn notes, her counsel, the Law Project for Psychiatric Rights (PsychRights) is a private firm, formed in 2002 "to mount a strategic litigation campaign against unwarranted forced psychiatric drugging and electroshock around the country." Wetherhorn Supp. Br. at 17.

[13] *See* AS 47.30.725(d) (right to counsel); AS 47.30.700(a) (appointment within forty-eight hours).

[14] *See* 47.30.905(b)(2); Administrative Rule 12; AS 18.85.100(a). This Court has

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

subject to commitment proceedings and is not limited to trial level proceedings. Appeals are not mentioned in the text, but the statute is not reasonably interpreted to exclude representation for that purpose. Where representation is limited, the statute makes express provision.[15] Appeals are not excluded. Moreover, this Court can take judicial notice of the fact that the Public Defender routinely appears in appeals in matters where eligible indigent persons are appointed counsel under AS 18.85.100(a), including criminal matters, and delinquency and child in need of aid cases. That capacity to provide representation on appeal extends to eligible persons subject to commitment proceedings as well.[16]

Given that the right to counsel and state payment for appointed counsel is provided for persons subject to commitment proceedings, Ms. Wetherhorn must take a

---

stated that:

> The constitutional guarantee (of assistance of counsel) would have little meaning if it did not also encompass the right of the poor person to have counsel appointed at public expense to represent him in a criminal action when he could not afford a lawyer.'

Alexander v. City of Anchorage, 490 P.2d 910, 913 (Alaska 1971).

[15] *See* AS 18.85.100(c) (providing that representation is not provided for the pursuit of successive or untimely post conviction relief or for certain other discretionary review.)

[16] Near the end of her supplemental briefing, Ms. Wetherhorn questions for the first time whether the Public Defender Agency believes it has the authority to appeal and suggests that such belief provides more reason to grant her request for full fees. Wetherhorn Supp. Br. at 18, n.37. Neither premise stands up. First, as discussed above there is no reason to believe that the Public Defender considers its appointments under AS 18.85.100(a) to be limited to trial level proceedings. Second, if the Public Defender were deliberately withholding representation on appeal to its eligible clients, the solution would be to direct them to provide it, not to offer full fees to private counsel.

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

Involuntary Administration of Psychotropic Medication

(a) Unless waived by respondent, a petition for the involuntary administration of medication shall not be accepted for filing unless and until the respondent is the subject of an order of involuntary commitment issued by a judge.

(b) Within 72 hours after a petition for the involuntary administration of psychotropic medication being filed, the court shall hold a competency hearing on the respondent's capacity to give or withhold informed consent and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication.

(c) If upon the completion of the competency hearing the court finds the respondent has capacity to give or withhold informed consent or had capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication, the court shall issue an order directing that the respondent's decision about the use of psychotropic medication be honored.

(d) If upon the completion of the competency hearing the court finds the respondent does not have capacity to give or withhold informed consent and did not have capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication, the court shall hold a hearing on whether the involuntary administration of psychotropic drugs is in the respondent's best interests and there is no less intrusive alternative. This hearing may immediately follow the competency hearing if such time frame is consistent with the respondent's due process rights, including an adequate time to prepare. In any event, the court shall hear and determine whether the involuntary administration of psychotropic medication is in the respondent's best interests and there is no less intrusive alternative available with as great promptness as the exigencies of the case will permit, including respondent's due process right of an adequate time to prepare.

(e) Following any hearing held before a judge, the judge may enter a final order immediately but not later than 48 hours after the hearing, which order shall be effective immediately.

(f) At the end of any hearing or continued hearing held before a master, the master shall make a recommendation on the record and provide the non-prevailing party the following options:

(i) object to the master's recommendation;
(ii) reserve the right to object to the master's recommendation;
(iii) not object to the master's recommendation.

(g) If the respondent does not object, the master's recommendation shall take effect immediately.

(h) If the respondent reserves the right to object, or objects, the master's recommendation is not effective unless and until an order is entered by a judge. The master's written findings and recommendations shall be distributed within 48 hours after the hearing if the respondent reserves the right to object or objects.

(i) Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.

(j) Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the

Deleted: Involuntary Commitments¶
¶
<#>Within 72 hours after respondent arrives at a designated treatment facility the court shall hold an involuntary commitment hearing.¶
<#>If the hearing is before a master, the master's written findings and recommendation shall be distributed within 48 hours after the hearing to the parties and the superior court. If the hearing is before a judge, the court's order on the petition shall be issued within 48 hours of the hearing.¶
<#>Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.¶
<#>Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation, or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. ... [1]

Formatted: Bullets and Numbering

Deleted: Upon receipt

Deleted: of

Deleted: s

Deleted: as soon as possible

Deleted: is

Deleted: . Once entered, the judge's order is effective

Deleted: If the

Deleted: ,

Deleted: , is

Formatted: Bullets and Numbering

Deleted: and medications may be administered

Deleted: for 48 hours and no medication may be administered except as authorized by AS 47.30.838

superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Involuntary Commitments

Within 72 hours after respondent arrives at a designated treatment facility the court shall hold an involuntary commitment hearing.

If the hearing is before a master, the master's written findings and recommendation shall be distributed within 48 hours after the hearing to the parties and the superior court. If the hearing is before a judge, the court's order on the petition shall be issued within 48 hours of the hearing.

Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.

Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation, or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Initiation of Commitment Procedures (Screening Investigation).

(a) **Screening Investigation**. Upon the filing of a petition under AS 47.30.700, the court shall immediately conduct or order a screening investigation as provided in AS 47.30.700(a).

(b) **Justification for *Ex Parte* Order**. A petition seeking the issuance of an *ex parte* order under AS 47.30.700 to direct a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility shall include sworn statements setting forth specific facts, which if true, establish exigent circumstances warranting proceeding *ex parte*.

(c) **Proceedings on Petition**. Upon receipt of a petition under AS 47.30.700 seeking the court to issue an order *ex parte*, the court shall first determine whether sufficient exigency exists to warrant dispensing with notice to the respondent. In such case, the court shall set forth the facts upon which the determination is based.

(i) If the court determines an emergency exists warranting dispensing with notice to the respondent, and there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, the court may issue an order *ex parte* directing that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for evaluation. Such order shall also appoint an attorney to represent the respondent.

(ii) If the court determines there is no emergency warranting dispensing with notice to the respondent, the respondent shall be given a copy of the petition, an attorney appointed to represent the respondent, and a hearing shall be set. If the petition, the results of the screening investigation, any opposition, and other sworn testimony, including at a hearing, establish probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others, the court shall provide findings on which the conclusion is based, and order the respondent to report to the nearest appropriate facility for evaluation. Such order shall also authorize a peace officer to take the respondent into custody and deliver the respondent to the nearest appropriate facility in the event the respondent fails to do so voluntarily.

(d) **Setting Hearing for Retention Beyond 72 Hours, Notice Thereof**. If the respondent has been delivered to a facility pursuant to an

order under subsection (c), hereof, the court shall set a hearing for not later than 72 hours of arrival at the facility to determine whether there is cause for detention after the 72 hours have expired. Notice of the hearing and the following shall immediately be given orally and in writing to respondent:

(i) The respondent has the right to communicate immediately, at the facility's expense, with the respondent's guardian, if any, or an adult designated by the respondent and the attorney designated in the order, or an attorney of the respondent's choice;

(ii) The respondent has the right to be represented by an attorney, to present evidence, and to cross-examine witnesses who testify against the respondent at the hearing.

(iii) A respondent, if represented by counsel, may waive, orally or in writing, the 72-hour time limit on the 30-day commitment hearing and have the hearing set for a date no more than seven calendar days after arrival at the facility. The respondent's counsel shall immediately notify the court of the waiver.

Notice must be in a language understood by the respondent. The respondent's guardian, if any, and if the respondent requests, an adult designated by the respondent, shall also be notified of the respondent's rights under this section.