Law Project for Psychiatric Rights
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

Case No. 3AN 04-5802 CI

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff has moved for a preliminary injunction prohibiting Defendant, the Alaska Department of Corrections (Corrections), from involuntarily medicating Plaintiff under Defendant's Policy #807.16, Involuntary Psychotropic Medication,[1] pending final resolution of this matter or further order of this court. This court denied Plaintiffs' April 2, 2004, Motion for Temporary Restraining Order (TRO Motion) that same day prior to Plaintiff being served with the Defendant's opposition thereto (TRO Opposition) and therefore without having an opportunity to respond thereto. An analysis of (1) the affidavits filed in support of the TRO Opposition as well (2) as written admissions from

[1] Exhibit A.

Defendant's counsel which the court has not previously seen, along with (3), Grace E. Jackson, M.D.'s report[2], and (4) the subsequent actions of the "Mental Health Review Committee," taken together, establish Plaintiff's right to the requested preliminary injunction.

A FACTS

On February 23, 2004, James B. Gottstein, esq., of the Law Project for Psychiatric Rights (Counsel) wrote Corrections advising he was going to assist Ms. Bavilla in resisting being subject to another forced drugging order upon the expiration of the existing one and stated he needed copies of any paperwork that might be associated with such an effort, including her chart.[3] Corrections never responded to this letter.

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

The Alaska Department of Law, among other things, denied the requested

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[2] Exhibit B.

[3] Exhibit 1 to the Memorandum in Support of Motion for Temporary Restraining Order (TRO Memorandum). Attached hereto are Exhibit lists for the TRO Memorandum as well as this one.

[4] Exhibit C, paragraph 6.

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

Approximately 9:00 a.m., the following morning, Friday, April 2, 2004, a complaint and the temporary restraining order application was served upon counsel for Corrections and filed with this court, commencing this action. At approximately 4:00 p.m., Counsel was notified by the Superior Court Judge's clerk that the TRO Motion had been denied.[7]

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

Mr. Bodick responded by fax to this letter at the end of the day, stating (a) Dr.

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[5] See Exhibit 2 to TRO Memorandum.
[6] See, Exhibit 3 to TRO Memorandum.
[7] In spite of a certificate of service that Plaintiff's Counsel had been served, such was not the case.
[8] Exhibit E.

Jackson would not be allowed to testify, (b) refusing to allow Ms. Bavilla to call requested witnesses, and (c) Counsel would not be allowed to represent Ms. Bavilla:

> I am in receipt of your letter in which you request that psychiatrist Dr. Grace E. Jackson be permitted to appear and testify at Ms. Bavilla's hearing. Please be advised that this request is denied. Dr. Jackson has no personal knowledge regarding Ms. Bavilla and her medication needs. . . . The Department already has three psychiatrists scheduled to appear at the hearing; two as witnesses and one as a decision-maker on the committee. These licensed Alaska professionals should be able to provide sufficient expertise to evaluate the risks involved in the recommended medication and compare these risks to the benefits of the medication.
>
> In regard to your requests regarding the designation of witnesses or other statements, it appears that you have misunderstood the nature of these hearings. This is not an adversarial hearing where attorneys will appear and argue on behalf of their clients. As approved by the Supreme Court in Washington v. Harper, Ms. Bavilla will be assisted by an independent lay advisor. Consequently, your participation will be limited to the telephonic testimony you provide as to your personal observations of Ms. Bavilla's behavior.[9]

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

> Ms. Bavilla has a fixed delusion that she has a sexually transmitted disease. . . . There was a noticeable decline in her mental functioning [after she stopped taking medications in 2003] and she was placed on involuntary medications August 18, 2003. . . . When not taking medications, Ms. Bavilla has exhibited increased delusional thinking and maintains she has

[9] Exhibit F.
[10] Exhibit C.

> been injected with a manipulated sexually transmitted disease designed to keep her sick. She has claimed she is vulnerable to spirits and those spirits are responsible for her having been diagnosed with a mental illness. She becomes increasingly hostile towards staff, making nonsensicial statements, gesturing and talking to "spirits" in her cell. . . .[11]

On Sunday, April 4, 2004, Dr. Jackson issued her report, which was given to Ms. Bavilla to present to the Mental Health Review Committee.[12] This report describes the serious harm faced by Ms. Bavilla if involuntary medication is allowed to proceed. Among them are medication caused (iatrogenic) psychosis,[13] cognitive losses, [14] extreme weight gain,[15] diabetes, even apart from the weight gain,[16] and a shortened life.[17] This report suggests Ms. Bavilla's psychiatric symptoms may be due to the medications -- both from taking them and from discontinuing them.[18]

On Monday, April 5, 2004, at the same time the "Due Process Hearing" was being held, a Petition for Review of the order denying the TRO Motion was served on Defendant and filed in the Alaska Supreme Court, along with an Emergency Motion for Interim Injunctive Relief. At the 8:30 a.m., "Due Process Hearing," Plaintiff provided the Mental Health Review Committee a copy of the exhibits to the TRO Memorandum and Dr. Jackson report. These documents run over 200 pages. By 11:18 a.m., according to the fax time stamp on the Mental Health Review Committee Hearing Summary, the

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[11] Exhibit C, pages 2-3.
[12] Exhibit B.
[13] Exhibit B, page 14.
[14] Exhibit B, page 15.
[15] Exhibit B, page 12.
[16] Id.
[17] Exhibit B, page 16.

Mental Health Review Committee, without having a chance to read Plaintiff's submissions, found that she suffers from a mental illness and that the proposed medications were in her best interest.[19] The Mental Health Review Committee also held it "fully supports forced medication" of Plaintiff, but deferred the forced drugging until such time as she becomes gravely disabled or presents a substantial danger.[20]

B ANALYSIS

1. Summary

There is no doubt but that even convicted prisoners have a constitutional right to due process before psychotropic drugs can be involuntarily administered. Washington v. Harper, 494 U.S. 201, 110 S.Ct. 1028 (1990). Washington v. Harper holds "the forcible injection of medications into a nonconsenting person's body represents a substantial interference with that person's liberty."[21] Any over-riding of this fundamental interest by "medical personnel"[22] in the penological setting,[23] but still must be under "fair procedural mechanisms."[24] and in the inmate-patient's medical best interest.[25] Even though in the prison setting "constitutional rights are judged under a 'reasonableness' test less restrictive

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[18] Exhibit B, pages 7, 10-13, 18.
[19] The timing makes clear that Ms. Bavilla's submissions were not read or considered by the Mental Health Review Committee. Exhibit I.
[20] Exhibit I.
[21] 494 US at 229, 110 S. Ct. at 1041.
[22] 494 US at 231, 110 S. Ct. at 1042.
[23] 494 US at 223, 110 S. Ct. at 1037.
[24] 494 U.S. at 231, 110 S. Ct. at 1042.
[25] 494 U.S. at 227, 110 S. Ct. at 1040.

than that ordinarily applied,"[26] and "reasonably related to legitimate penological interests,"[27] the "Due Process Clause does require certain essential procedural protections."[28] These essential procedural requirements include (i) an unbiased, independent decision maker,[29] (ii) "notice, [30] (iii) the right to be present at an adversary hearing, and (iv) the right to present and cross-examine witnesses."[31] The procedures employed by Corrections here under Policy #807.16 fail to satisfy every one of these "essential procedural protections" required in Harper.

In Alaska Public Utilities Commission v. Greater Anchorage Area Borough, 534 P.2d 549, 554, (Alaska 1975), this Court held that where injury to the movant is certain and irreparable and harm to the non-movant inconsiderable, injunctive relief should normally be granted. This is known as the "balancing of hardships" test. A.J. Industries v. Alaska Public Service Commission, 470 P.2d 537 (Alaska 1970). Otherwise, "probable success on the merits" is required. State of Alaska v. United Cook Inlet, 815 P.2d 378 (Alaska 1991)

Thus, there are two independent standards for granting the preliminary injunction:

(1) balancing the hardships.

(2) probable success on the merits.

These will be addressed in turn.

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[26] 494 US at 225, 110 S. Ct. at 1038.
[27] 494 US at 223, 110 S. Ct. at 1037.
[28] 494 US at 236, 110 S. Ct. at 1044.
[29] 494 US at 233, 110 S. Ct. at 1043.
[30] 494 US at 235, 110 S. Ct. at 1044

2. Balancing of Hardships.

Currently, Corrections has decided to defer forced drugging for the time being.[32] However, it is clear they expect to do so some time in the not distant future. If the past is any guide, Corrections will attempt to do so in a very short time frame. In such event, the harm to Ms. Bavilla is great.

In such event if the preliminary injunction is not granted, Ms. Bavilla will have to obtain expedited injunctive relief or she will almost certainly be forced to take mind-altering, life sapping drugs with serious -- even life threatening -- side effects of dubious, at best, efficacy until such time as the question is decided on the merits, which could be a considerable amount of time.[33] She is faced with the unwanted modification of her very thought processes.[34] She will become lethargic. She faces serious side effects, including the irreversible neurologic disease known as Tardive Diskenesia that affects approximately 5% of patients a year on an additive basis, which is essentially neuroleptic induced Parkinsons Disease. Depending on which medications are forced on her, she faces a great risk of diabetes and extreme weight gain.[35] A shortened life span is also to

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[31] 494 US at 225, 110 S. Ct. at 1044.
[32] Exhibit I.
[33] In addition to Exhibit B, for an excellent review of the scientific evidence on this see, "The case against antipsychotic drugs: a 50-year record of doing more harm than good,"in Medical Hypotheses, Volume 62, Issue 1 , 2004, which was attached as Exhibit 4 to the TRO Motion Many of the studies cited therein are included in subsequent exhibits to the TRO Memorandum.
[34] Steele v. Hamilton County Community Mental Health Board, , 736 N.E.2d 10, 16-17 (Ohio 2000)
[35] See, e.g., Exhibit B, page 12.

be expected.[36] She will be faced with a diminished chance to recover from mental illness and the increased likelihood of psychotic relapse caused by the medications.[37]

For now, though, the prospect of such a proceeding is merely hanging over Ms. Bavilla's head. Since Corrections is not now seeking a forced drugging order under Policy #807.16, it will not suffer any harm by granting the preliminary injunction because the requested preliminary injunction allows Corrections to come back to the Court if it deems the circumstances warrant it. Issuing the preliminary injunction as requested would not be the occasion of any cognizable harm to Corrections.

Ms. Bavilla respectfully suggests the balance of hardships in this case weighs heavily in her favor even though the threatened harm is temporarily on hold. However, because, as is shown in the following section, since Corrections' procedures under Policy #807.16 is patently unconstitutional, preliminary injunctive relief is mandated under the probable success on the merits standard.

3. Probable Success on the Merits

Ms. Bavilla's United States and Alaska constitutional rights to due process will be being violated by the procedures employed by Corrections. The 1990 United States case of Washington v. Harper, speaks directly to this question with respect to the United States constitution. There are no Alaska cases directly on point.

As mentioned previously, Washington v. Harper holds "the forcible injection of medications into a nonconsenting person's body represents a substantial interference with

[36] Exhibit B, page 16.

that person's liberty."[38] Any over-riding of this fundamental interest by "medical personnel"[39] in the penological setting,[40] but still must be under "fair procedural mechanisms."[41] and in the inmate-patient's medical interest.[42] Even though in the prison setting "constitutional rights are judged under a "reasonableness" test less restrictive than ordinarily applied, the "Due Process Clause does require certain essential procedural protections."[43] These essential procedural requirements include (a) an impartial, independent decision maker,[44] (b) notice,[45] (c) the right to be present at an adversary hearing,[46] and (d) the right to present and cross-examine witnesses."[47] It may also very well be that the Alaska Constitution mandates greater protection than the United States Constitution in a number of respects.[48]

The procedures employed by Corrections here fail to satisfy every one of the "essential procedural protections" required in Harper.

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[37] Exhibit B.
[38] 494 US at 229, 110 S. Ct. at 1041.
[39] 494 US at 231, 110 S. Ct. at 1042.
[40] 494 US at 223, 110 S. Ct. at 1037.
[41] 494 U.S. at 231, 110 S. Ct. at 1042.
[42] 494 U.S. at 227, 110 S. Ct. at 1040.
[43] 494 US at 236, 110 S. Ct. at 1044.
[44] 494 US at 233, 110 S. Ct. at 1043.
[45] 494 US at 235, 110 S. Ct. at 1044
[46] 494 US at 235, 110 S. Ct. at 1044
[47] 494 US at 225, 110 S. Ct. at 1044.
[48] Ms. Bavilla has filed a motion for summary judgment contemporaneously herewith regarding the unconstitutionality of Corrections' procedures.. The motion for summary judgment addresses such issues as the right to counsel, the right to judicial determination of best interests under both the United States and Alaska constitutions as well as the unconstitutionality of the current procedures. For purposes of this motion for preliminary

(a) Impartial, Independent Decision Maker.

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

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

Here, unlike the situation in Harper, the chair of the decision maker has clearly pre-judged the case and even filed testimony against Ms. Bavilla in resisting the temporary restraining order.[49]

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

This testimony by the chair of the hearing body has clearly shown she pre-judged both the issue of mental illness and the need for medication. This is not an unbiased,

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injunction, however, all that needs to be shown is the current procedures are unconstitutional.

independent decision maker and is unconstitutional under Washington v. Harper.

(b) Notice.

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

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

The Washington v. Harper court also noted the procedure used there was adequate because, "The Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses," noting the "requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[50]

Here, while notice of the hearing was given verbally, Corrections refused to give Ms. Bavilla or her counsel anything in writing and refused to provide notice of the grounds for the forced drugging. The notice procedures are constitutionally deficient, to the point of Corrections flauting any such requirement.[51]

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

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

Under Washington v. Harper, 494 US at 235, 110 S. Ct. at 1044, the United States Supreme Court ruled an adversary hearing was an essential due process element before forced psychiatric medication could occur in the prison context. Here, the Department of Corrections has admitted its procedures do not include an adversarial hearing.[52] The Department of Correction's response that Ms. Bavilla would not be allowed to call an independent psychiatrist as a witness because Department employed psychiatrists had sufficient expertise also shows its procedures are not adversarial in nature.

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

Washington v. Harper, 494 US at 235, 110 S. Ct. at 1044, also requires that a prisoner faced with forced drugging be allowed to present and cross examine witnesses. Here, Ms. Bavilla, designated, Grace E. Jackson, M.D., a board certified psychiatrist with penal experience to be a witness on her behalf.[53] However, Dr. Jackson was not allowed to testify:

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

[52] Exhibit F.
[53] Exhibit E.

testimony.[54]

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

That the Department of Corrections' Policy #807.16 does not allow Ms. Bavilla to call witnesses of her choosing renders it unconstitutional under Washington v. Harper as well as Brandon v. Dept. of Corrections. [55]

It is clear beyond cavil that proceeding under Department of Corrections' Policy #807.16 is unconstitutional. Therefore, Ms. Bavilla respectfully suggests that issuance of the preliminary injunction is mandated under applicable Alaska law.

C OTHER ISSUES

1. AS 09.19.200

AS 09.19.200 sets forth certain restrictions on the court's ability to remedy constitutional violations. This may or may not be constitutional in itself.[56] With respect to preliminary injunctions, specifically, section AS 09.19.200(b) provides

> (b) In a civil action with respect to correctional facility conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief only if the court finds that the relief is (1) narrowly drawn and extends no further than

[54] Exhibit F.

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

[56] The motion for summary judgment filed contemporaneously herewith addresses the constitutionality of AS 09.19.200

> is necessary to correct the harm that requires preliminary relief, and (2) the least intrusive means necessary to correct that harm. In making the findings required under this subsection, the court shall give substantial weight to any adverse effect on public safety or the operation of a criminal justice system caused by the preliminary relief. Preliminary injunctive relief shall automatically expire 90 days after the entry of the order unless the court orders final relief in the civil action before the expiration of the 90-day period.

It would not appear any of the restrictions contained in AS 09.19.200 are impediments to granting the current motion, although the 90-day automatic expiration provision presents an issue with regard to the duration of such a preliminary injunction. With the 90-day limitation in mind, however, Ms. Bavilla filed a motion for summary judgment contemporaneously herewith so that the court may enter the final relief required by AS 09.19.200 within the 90 day time frame if it so chooses.

2. Security

Civil Rule 65(c) provides for security in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by a party found to have been wrongfully enjoined. It is unclear whether the requirements of AS 09.19.200(b) replace the Civil Rule 65(c) provision here, but it is pretty clear security bonds are generally not in the picture for equitable prison litigation. In Brandon, supra., the Alaska Supreme Court held the court should have issued an injunction (stay) where the claim was the prison was violating the prisoner's due process rights in an analogous situation. In North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough, 850 P.2d 636, 639 (Alaska 1993), the court made it very clear that a

preliminary injunction should issue even if there was no security bond where the movant showed probable success on the merits.

D CONCLUSION

For the foregoing reasons, Ms. Bavilla respectfully requests this court GRANT her Motion for Preliminary Injunctive Relief prohibiting the Department of Corrections (Corrections) from enforcing any involuntary psychotropic medication order against her under Corrections Policy #807.16 pending final disposition of this case or further order of the court.

Dated this 20th day of May, 2004 at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

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