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

In The Matter of the Necessity for the Hospitalization of:

D[redacted] G[redacted]

Respondent

Case No. 3AN 13-00454 PR

MOTION TO VACATE *EX PARTE ORDER*

Respondent D[redacted]. G[redacted] moves to vacate the February 26, 2013, Order on Petition for Involuntary Commitment for Evaluation (*Ex Parte* Order), entered without notice to Respondent or opportunity for Respondent to be heard.

DATED: February 28, 2013.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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MEMORANDUM IN SUPPORT OF MOTION TO VACATE *EX PARTE ORDER*

Respondent D[redacted]. G[redacted] has moved to vacate the February 26, 2013 Order on Petition for Involuntary Commitment for Evaluation (*Ex Parte* Order), entered without notice to Respondent or opportunity for Respondent to be heard.

I. The *Ex Parte* Order Was Entered in Violation of Due Process

The hallmarks of due process are meaningful notice, and a meaningful opportunity to be heard. *Hamdi v. Rumsfeld*, (2004) 542 U.S. 507, 124 S.Ct. 2633, 2648-2649:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' "

In *Hoffman v. State*, 834 P.2d 1218, 1219 (Alaska 1992), the Alaska Supreme Court held, "We have consistently held that, except in emergencies, due process requires the State to afford a person an opportunity for a hearing before the State deprives that person of a protected property interest," citing *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981).

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Certainly, the due process protections from the "massive curtailment of liberty" represented by psychiatric confinement[1] deserves as least as great protection.

The unconstitutionality of non-emergency ex parte orders was explicitly recognized by the Washington Supreme Court. *In re Harris*, 654 P.2d 109, 113 (Wash. 1982) ("The danger must be impending to justify detention without prior process.").

Here, the Respondent was in custody and there is no justification whatsoever to deny him meaningful notice and opportunity to respond.

II. The *Ex Parte* Order is *Ultra Vires*

The *Ex Parte* Order was signed by the Master and implemented without the signature of the a Superior Court Judge and was therefore *ultra vires*—beyond the authority of the Master. Its voidness should be recognized.

III. The *Ex Parte* Order Is Insufficient On Its Face

A. The *Ex Parte* Order Was Issued Without Inquiry

Even assuming *arguendo* that *ex parte* orders are constitutionally permitted without an emergency, 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). The *Ex Parte* Order merely recites the allegations contained in the Petition for Involuntary Commitment for Evaluation (*Ex Parte* Petition) without any inquiry into their validity at all.

It is respectfully suggested that the Alaska Supreme Court's admonition in the forced drugging context in *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 251

[1] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P3d 371 (Alaska 2007)

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(Alaska 2006), citing *Jarvis v. Levine*, 418 N.W.2d 139, 147-148 (Minn.1988) with approval, is also applicable here:

> When medical judgments collide with a patient's fundamental rights, ... it is the courts, not the doctors, who possess the necessary expertise....

In issuing the *Ex Parte* Order, the Court abdicated its responsibility to protect the Respondent's legal rights by failing to make any, let alone a searching, inquiry into the validity of the facts.

B. The Findings Are Insufficient to Support the *Ex Parte* Order

The *Ex Parte* Order found,

> [T]here is probable cause to believe the respondent is mentally ill based on the allegations that Respondent has a diagnosis of mood disorder, not otherwise specified, rule out mood disorder due to TBI, with depression.

However, AS 47.30.915(12) defines mental illness as follows:

> (12) "mental illness" means an organic, mental, or emotional impairment that *has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand*; mental retardation, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness;

(emphasis added). Neither the *Ex Parte* Petition, nor the *Ex Parte* Order contain any facts that support a finding that Respondent is not able to exercise conscious control of his actions or ability to perceive reality or to reason or understand. The *Ex Parte* Order should also be vacated for this reason.

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C. The *Ex Parte* Order's Reliance Solely on Hearsay is Improper

The *Ex Parte* Order relies solely on what appears to be hearsay evidence, explicitly stating it was based solely on the "allegations" in the petition. These allegations are hearsay. The Respondent vigorously disputes a number of these hearsay allegations. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, (2004), the United Supreme Court held such "testimonial" statements are not allowed under the Confrontation Clause of the United States Constitution, regardless of whether they are admissible under the rules of evidence. In *People v. Goldstein*, 843 N.E. 2d 727 (New York 2005), New York's high court held the rule applied to psychiatric testimony. While this isn't a Confrontation Clause case, it is respectfully suggested, reliance on hearsay was improper.

IV. The *Ex Parte Petition* Is Defective

In addition to the facts alleged in the *Ex Parte* Petition being insufficient as a matter of law to support granting an *ex parte* order, AS 47.30.700(b) provides, in pertinent part that "the petition . . . 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." The *Ex Parte* Petition lists only Dr. Silbaugh and Officer Hostetter, neither of whom can have such knowledge.

V. Conclusion

For the foregoing reasons the February 26, 2013 Order on Petition for Involuntary Commitment for Evaluation, entered without notice to Respondent or opportunity for Respondent to be heard should be **VACATED** and **RESPONDENT ORDERED TO BE DISCHARGED IMMEDIATELY**.

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RESPECTFULLY SUBMITTED February 28, 2013.

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