IN THE SUPREME COURT FOR THE STATE OF ALASKA

FAITH J. MYERS, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	))))))))	Supreme Court No. S-11021 Superior Court No. 3AN 03-00277 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE MORGAN CHRISTEN, PRESIDING

REPLY BRIEF

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By: _____
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U.S. CONST. amend. XIV §1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AK CONST. ART. 1, § 1

Section 1 Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

AK CONST. ART. 1, § 7

Section 7 Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be INFRINGED.

AK CONST. ART. 1, § 22

Section 22 Right of Privacy.

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

AS 47.30.837

Sec. 47.30.837 Informed consent.

(a) A patient has the capacity to give informed consent for purposes of AS 47.30.836 if the patient is competent to make mental health or medical treatment decisions and the consent is voluntary and informed.

(b) When seeking a patient's informed consent under this section, the evaluation facility or designated treatment facility shall give the patient information that is necessary for informed consent in a manner that ensures maximum possible comprehension by the patient.

(c) If an evaluation facility or designated treatment facility has provided to the patient the information necessary for the patient's consent to be informed and the patient voluntarily consents, the facility may administer psychotropic medication to the patient unless the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions. If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

(d) In this section,

(1) "competent" means that the patient

(A) has the capacity to assimilate relevant facts and to appreciate and understand the patient's situation with regard to those facts, including the information described in (2) of this subsection;

(B) appreciates that the patient has a mental disorder or impairment, if the evidence so indicates; denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions;

(C) has the capacity to participate in treatment decisions by means of a rational thought process; and

(D) is able to articulate reasonable objections to using the offered medication;

(2) "informed" means that the evaluation facility or designated treatment facility has given the patient all information that is material to the patient's decision to give or withhold consent, including

(A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages,

possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

(C) a review of the patient's history, including medication history and previous side effects from medication;

(D) an explanation of interactions with other drugs, including over-the- counter drugs, street drugs, and alcohol;

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment; and

(F) a statement describing the patient's right to give or withhold consent to the administration of psychotropic medications in nonemergency situations, the procedure for withdrawing consent, and notification that a court may override the patient's refusal;

(3) "voluntary" means having genuine freedom of choice; a choice may be encouraged and remain voluntary, but consent obtained by using force, threats, or direct or indirect coercion is not voluntary.

AS 47.30.838

Sec. 47.30.838 Psychotropic medication in emergencies.

(a) Except as provided in (c) and (d) of this section, an evaluation facility or designated treatment facility may administer psychotropic medication to a patient without the patient's informed consent, regardless of whether the patient is capable of giving informed consent, only if

(1) there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse; the behavior or condition of the patient giving rise to a crisis under this paragraph and the staff's response to the behavior or condition must be documented in the patient's medical record; the documentation must include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient; and

(2) the medication is ordered by a licensed physician; the order

(A) may be written or oral and may be received by telephone, facsimile machine, or in person;

(B) may include an initial dosage and may authorize additional, as needed, doses; if additional, as needed, doses are authorized, the order must specify the medication, the quantity of each authorized dose, the method of administering the medication, the maximum frequency of administration, the specific conditions under which the medication may be given, and the maximum amount of medication that may be administered to the patient in a 24-hour period;

(C) is valid for only 24 hours and may be renewed by a physician for a total of 72 hours, including the initial 24 hours, only after a personal assessment of the patient's status and a determination that there is still a crisis situation as described in (1) of this subsection; upon renewal of an order under this subparagraph, the facts supporting the renewal shall be written into the patient's medical record.

(b) When a patient is no longer in the crisis situation that lead to the use of psychotropic medication without consent under (a) of this section, an appropriate health care professional shall discuss the crisis with the patient, including precursors to the crisis, in order to increase the patient's and the professional's understanding of the episode and to discuss prevention of future crises. The professional shall seek and consider the patient's recommendations for managing potential future crises.

(c) If crisis situations as described in (a)(1) of this section occur repeatedly, or if it appears that they may occur repeatedly, the evaluation facility or designated treatment facility may administer psychotropic medication during no more than three crisis periods without the patient's informed consent only with court approval under AS 47.30.839.

(d) An evaluation facility or designated treatment facility may administer psychotropic medication to a patient without the patient's informed consent if the patient is unable to give informed consent but has authorized the use of psychotropic medication in a declaration properly executed under AS 47.30.950 -- 47.30.980 or has authorized an attorney-in-fact to consent to this form of treatment for the patient and the attorney-in-fact does consent.

Sec. 47.30.839 Court-ordered administration of medication.

(a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if

(1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or

(2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

(b) An evaluation facility or designated treatment facility may seek court approval for administration of psychotropic medication to a patient by filing a petition with the court, requesting a hearing on the capacity of the person to give informed consent.

(c) A patient who is the subject of a petition under (b) of this section is entitled to an attorney to represent the patient at the hearing. If the patient cannot afford an attorney, the court shall direct the Public Defender Agency to provide an attorney. The court may, upon request of the patient's attorney, direct the office of public advocacy to provide a guardian ad litem for the patient.

(d) Upon the filing of a petition under (b) of this section, the court shall direct the office of public advocacy to provide a visitor to assist the court in investigating the issue of whether the patient has the capacity to give or withhold informed consent to the administration of psychotropic medication. The visitor shall gather pertinent information and present it to the court in written or oral form at the hearing. The information must include documentation of the following:

(1) the patient's responses to a capacity assessment instrument administered at the request of the visitor;

(2) any expressed wishes of the patient regarding medication, including wishes that may have been expressed in a power of attorney, a living will, or oral statements of the patient, including conversations with relatives and friends that are significant persons in the patient's life as those conversations are remembered by the

relatives and friends; oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, when possible.

(e) Within 72 hours after the filing of a petition under (b) of this section, the court shall hold a hearing to determine the patient's capacity to give or withhold informed consent as described in AS 47.30.837 and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication if previously expressed wishes are documented under (d)(2) of this section. The court shall consider all evidence presented at the hearing, including evidence presented by the guardian ad litem, the petitioner, the visitor, and the patient. The patient's attorney may cross-examine any witness, including the guardian ad litem and the visitor.

(f) If the court determines that the patient is competent to provide informed consent, the court shall order the facility to honor the patient's decision about the use of psychotropic medication.

(g) If the court determines that the patient is not competent to provide informed consent and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes documented under (d)(2) of this section, the court shall approve the facility's proposed use of psychotropic medication. The court's approval under this subsection applies to the patient's initial period of commitment if the decision is made during that time period. If the decision is made during a period for which the initial commitment has been extended, the court's approval under this subsection applies to the period for which commitment is extended.

(h) If an evaluation facility or designated treatment facility wishes to continue the use of psychotropic medication without the patient's consent during a period of commitment that occurs after the period in which the court's approval was obtained, the facility shall file a request to continue the medication when it files the petition to continue the patient's commitment. The court that determines whether commitment shall continue shall also determine whether the patient continues to lack the capacity to give or withhold informed consent by following the procedures described in (b) -- (e) of this section. The reports prepared for a previous hearing under (e) of this section are admissible in the hearing held for purposes of this subsection, except that they must be updated by the visitor and the guardian ad litem.

(i) If a patient for whom a court has approved medication under this section regains competency at any time during the period of the patient's commitment and gives informed consent to the continuation of medication, the evaluation facility or designated treatment facility shall document the patient's consent in the patient's file in writing.

I. Overview

The fundamental issue in this case is whether it is constitutionally permissible for the State to forcibly medicate someone determined to be incompetent to make their own decision without being able to demonstrate it is in the person's best interest and a decision the person would make if competent. The underlying theme of the State's position is the State should be allowed to forcibly medicate an unwilling psychiatric patient because its psychiatrists know best. This then serves as the justification, in the State's view, for (1) exempting institutional psychiatrists from judicial review of whether the medication actually is in the patient's best interest, and (2) failing to make a substituted judgment decision.

The Superior Court found "[T]here is a viable debate in the psychiatric community regarding whether administration of this type of medication might actually cause damage to her or ultimately worsen her condition,"[1] yet concluded whether the proposed treatment might worsen her condition was not relevant because it was not a statutory criteria. Ms. Myers submits this is prohibited by the Due Process Clause of the United States Constitution as well as various provisions of the Alaska Constitution. This

[1] [Exc. 299, 304] It is noteworthy the State chose to not even acknowledge this critical finding of the Superior Court. Instead, the State, totally ignoring the extensive, essentially unrebutted evidence presented in this case, at footnote 3 of its Appellee's Brief, quotes a passage in Steele v. Hamilton County Community Mental Health Board, 736 N.E. 2d 10 (Ohio 200) describing the benefits of psychotropic medications. However, the Steele court was very clear that psychotropic medications could not be forced on someone absent court determinations of (1) incompetency, (2) best interests, and (3) no less intrusive alternative. Id, 736 N.E. 2d at 21.

position is supported by U.S. Supreme Court law, Alaska state constitutional law principles, and case law from virtually every state that has considered these issues.

II. This Appeal Should Be Considered on The Merits

A. Mootness

In its Appellee's Brief, the State argues this matter is moot. However, this was predicated on a Motion to Supplement the Record on Appeal, which was denied by Order of this Court dated December 4, 2003. In that Order, this Court ruled, "If appellee wishes to argue that the appeal is moot, it should file an appropriate motion to dismiss," which the State has done. Therefore the mootness issue has been taken out of this briefing even though it remains in Appellee's Brief.

B. Adequacy of Record

The State charges at Section II.B., that the constitutional issue was not sufficiently raised below and this Court should dismiss this appeal on that ground. At the same time, however, the State concedes it was raised below. Id. The State concedes it was raised in Ms. Myers' Memorandum in Support of Motion to Dismiss and Pre-Hearing Brief (Pre-Hearing Brief) and again in her Standards Relevant to Forced Medication Decision (Standards Memo) and again by counsel in a post trial hearing. Id.

In the Pre-Hearing Brief, Ms. Myers cites Rivers v. Katz, 495 N.E.2d 337, 343-4 (NY 1986) as follows:

> If, however, the court concludes that the patient lacks the capacity to determine the course of his own treatment, the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best

> interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments. The State would bear the burden to establish by clear and convincing evidence that the proposed treatment meets these criteria.

[Exc. 17, emphasis in Pre-Hearing Brief].

Ms. Myers also argued:

> The right to privacy under the Alaska Constitution is perhaps the strongest in the country. See, e.g., Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska,1997), Ravin v. State, 537 P.2d 494 (Alaska 1975); and Breese v. Smith, 501 P.2d 159 (Alaska 1972). The right to be free from unwanted mind-altering chemicals is the type of right that calls for the very highest level protection from state action. . . .
>
> > These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest.

[Exc. 17-18, emphasis in Pre-Hearing Brief]. The State acknowledges much of this material was repeated in the Standards Memo. [Exc. 342-345]

Finally, even though the Superior Court stated it was not going to do anything other than follow the statutory criteria, Ms. Myers raised the constitutional issue again:

> THE COURT: . . . I did not intend then, and you're going to have to convince me otherwise now, if you think that I'm going to be in a position where this statute allows or requires me to actually substitute my judgment for those in this field.
>
> * * *
>
> MR. GOTTSTEIN: . . . as a constitutional matter, because putting the substances -- we're talking about a serious question of permanent brain damage and early death caused by these medications that when a serious question arises over the validity of the expert's opinion on that, that the court necessarily has to examine that question.

[Tr. 206-7, emphasis added].

While the issue could no doubt have been more comprehensively briefed and argued below, Ms. Myers submits this sufficiently raised the issue. Ms. Myers also requests this Court take into consideration the extremely compressed time frame involved below. The Petition for Forced Medication was filed in the morning of February 25, 2003, and the hearing to authorize the forced medication was set for that very afternoon. The hearing was continued until February 28, 2003, over the objections of the State, and the Pre-Hearing Brief was filed prior to the time set for the hearing. Ms. Myers submits her challenge to the constitutionality of the State's procedures for forcing unwanted psychiatric medication on her ought not be dismissed for failure to more comprehensively brief the issue below in these circumstances. Ms. Myers also respectfully suggests that since this is strictly a question of law, which this court reviews de novo, the level of required development below may not be as great as where factual matters are involved.

III. Alaska Statutes Provide for Forced Medication Solely Upon a Finding of Incompetence.

Section III of the State's Brief takes umbrage at Ms. Myers statements it is constitutionally impermissible to forcibly medicate her "solely on a finding of incompetence to refuse the medication," asserting Alaska Statutes require a panoply of other findings. However, the State confuses the requirements for involuntary commitment with those of forced medication. The statute pertaining to forced medication is AS 47.30.839, which provides in pertinent part:

> Sec. 47.30.839 Court-ordered administration of medication.
> (a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if
>
> (1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or
>
> (2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

The balance of AS 47.30.839 contains procedural provisions,[2] while AS 47.30.837 defines informed consent. Clearly, where the Parens Patriae justification for forced medication is employed[3] it is based solely on incompetence. The Superior Court also held the statute provided for entry of a forced medication order solely on the basis of incompetence, a holding which was not cross-appealed by the State. [Exc. 301-302, and Exc. 313] ("The superior court's role appears to be limited to deciding whether Ms. Myers has sufficient capacity to give informed consent, as defined by AS 47.30.839.")

IV. AS 47.30.839 is Unconstitutional

A. The Right to Be Free of Unwanted Psychiatric Drugs is Fundamental.

In Section IV of its brief the State surprisingly disputes Ms. Myers has a fundamental interest in avoiding unwanted medication. The United States Supreme Court, however, has made it clear on at least four occasions that the right to refuse psychiatric medication is a fundamental right located in the 14th Amendment's due

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[2] That Ms. Myers failed to present any previously expressed wishes (See, AS 47.30.839(d)(2) and (g)) does not change that court ordered forced medication is based solely on lack of competency.

[3] Subparagraph (1) pertaining to crisis situations, which is Alaska's enactment of the police power justification for forced medication is not involved in this case.

process clause.[4] As set forth in Appellant's Brief the Alaska constitutional principles enunciated by this Court also seem to mandate the same result.

The State repeatedly cites to Cruzan, v. Director, Missouri Dep't Of Health, 497 U.S. 261, 279, 110 S.Ct. 2841, 2851-52 (1990), which is not even a forced medication case.[5] The State cites to the Brennan dissent at page 24 of Appellee's Brief, but Justice Brennan, joined by Justices Marshall and Blackmum writes:

> The right to be free from medical attention without consent, to determine what shall be done with one's own body, is deeply rooted in this Nation's traditions, as the majority acknowledges. . . . "The inviolability of the person" has been held as "sacred" and "carefully guarded" as any common-law right. Thus, freedom from unwanted medical attention is unquestionably among those principles "so rooted in the traditions and conscience of our people as to be ranked as <u>fundamental</u>."
>
> * * *
>
> Nor does the fact that Nancy Cruzan is now incompetent deprive her of her fundamental rights.
>
> * * *
>
> > Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the <u>best interests</u> of their principals in mind.
> >
> > * * *
>
> Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute, no state interest could outweigh the rights of an individual in Nancy Cruzan's position.
>
> * * *
>
> <u>Missouri has a parens patriae interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she</u>

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[4] Mills v. Rogers, 457 U.S. 291, 303, 102 S.Ct. 2442, 2450 (1982) ("assumed" in n. 6); Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); and Sell v. U.S., __ U.S. __, 71 USLW 4456, 123 S.Ct. 2174 (2003).

[5] Cruzan involved a brain dead person in a "vegetative state" with the question being whether life support should be withdrawn.

> would exercise her rights under these circumstances. . . . [U]ntil Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination. Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

(Cruzan, 497 US at 305-316, underlining added, italics in original, footnotes and citations omitted).

As Justice Brennan notes, the majority agreed with the analysis that the right to be free of bodily intrusion is fundamental under the Constitution. The difference between the majority and minority in Cruzan, was whether it was permissible for Missouri to require that it took clear and convincing evidence of Nancy Cruzan's wishes to terminate life support. The majority held it was, while the minority would hold in order to accurately determine her wishes, Nancy couldn't be required to a much higher burden of proof for one decision over the other.

In analyzing the issue of the constitutional right to refuse treatment, the majority specifically discussed the constitutional right to refuse anti-psychotic medication:

> Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." Washington v. Harper, 494 U.S. 210, 221-222, 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990); see also id., at 229, 110 S.Ct., at 1041 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing medical treatment. . . .

(Cruzan, 497 US at 278, emphasis added). The State also relies heavily on Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) which, as acknowledged in the quote from the majority decision in Cruzan, recognized "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment" and "the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty" (Id., 494 U.S. at 221-22 and 229).

The State's argument that a fundamental right is not involved seems untenable, being inconsistent not only with the principle case relied upon by it, but with all other applicable case law, such as that cited herein and in Ms. Myers' Opening Brief.

B. Institutional Psychiatrists' Determinations are Not Exempt from Judicial Scrutiny for Compliance with Constitutional Standards.

At page 34 of its Appellee's Brief, the state asserts the State's determination that medication is in a patient's best interest is not subject to judicial review:

> The statute delegates the decision that psychotropic medication is in a patient’s best interests to the treatment facility; it does not provide for a court to review or second-guess that decision.

Similar statements follow. However, the State may not permissibly exempt this determination from judicial scrutiny. In CSEA v. Beans, 965 P.2d 725, 728 (Alaska 1998), this court ruled that a legislative attempt to limit grounds for judicial review "is, of course ineffective to prevent a litigant from challenging an unconstitutional application of the statute."

C. The Sell Case

Any question about this issue of abdicating protection of constitutional rights against unwanted psychiatric drugs to institutional psychiatrists, as a matter of U.S. constitutional law, was laid to rest in the recent case of Sell v. U.S., __ U.S. __, 71 USLW 4456, 123 S.Ct. 2174 (2003). Tellingly, even though this controlling case was cited and discussed in Ms. Myers' Opening Brief, the State failed to even mention it. In Sell, 123 S.Ct. at 2183, the Court specifically posed the question this way:

> Does forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive him of his "liberty" to reject medical treatment?

and at 214 answered:

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

At 2184-5 the Court held

> First, a court must find that important governmental interests are at stake. . . .
>
> Second, the court must conclude that involuntary medication will significantly further those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. . . .
>
> Third, the court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. . .
>
> Fourth, as we have said, the court must conclude that administration of

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

(Italics in original, underlining added).

There are a number of very important holdings in the Sell case, but most germane to the issue at hand is the United States Supreme Court held "the [trial] court must conclude that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest." Thus, as a matter of federal constitutional law, the assertion that the determination of best interests can be exempt from court consideration has been firmly rejected.

The Supreme Court also held "the court must conclude," the medication will "significantly further" state interests, and to do so it must find the medication "is substantially likely" to achieve those state interests. The Supreme Court also held the "court must conclude" the medication is "unlikely to have side effects that interfere significantly" with the person's rights. Applying these principles to the current case means the trial court must conclude the proposed medication is substantially likely to be efficacious and the side effects are not likely to be significant. Here the Superior Court found there was a "viable debate" over whether it would help or hurt Ms. Myers.

The Supreme Court additionally held "the court must conclude involuntary medication is necessary to further those [state] interests" which includes "the court must find that any alternative, less intrusive treatments are unlikely to achieve substantially

the same results." The State disputes the less restrictive alternative requirement, but without even acknowledging the existence of Sell.

In Sell the state interest was prosecuting serious crime where here it is the Parens Patriae interest in protecting its citizens. Are there any differences in analysis necessitated by this difference? Ms. Myers submits there is, illustrated by Justice Brennan's Opinion in Cruzan, supra. In competency to stand trial cases, what the criminal defendant would decide if he or she was competent to make the medication decision is not an issue. Medical best interests are, as well as the defendant's right to a fair trial. In the Parens Patriae situation here, as Justice Brennan said in Cruzan, supra, accurately determining what the incompetent person would decide is the touchstone of the Parens Patriae justification ("until Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination").[6] 497 US at 315-316.

D. State Constitutional Protections

In its Appellee's Brief, the State correctly points out that much of the Alaska Constitutional analysis is similar under the various provisions of the Alaska Constitution. As set forth in Ms. Myers' Opening Brief, This court has consistently held that whichever fundamental constitutional right is involved, the State must (i) prove a

[6] The State is simply wrong when it states on page 39 of its brief that in Cruzan, supra "the United States Supreme Court has stated the substituted judgment approach is not required by the federal constitution." There the Supreme Court ruled just the opposite. The statement relied upon by the state merely held the state didn't have to accept the "'substituted judgment' of close family members" in making the required substituted judgment determination. Cruzan. 497 U.S. at 285, 286.

compelling state interest, (ii) the State's interest must be achieved, and (iii) no less restrictive alternative is available.

As set forth above and in Appellant's Opening Brief, the Due Process Clause of the United States Constitution does not allow the State to exempt institutional psychiatrists' determinations from judicial review, but it also seems clear the Alaska Constitution prohibits it as well. It has been recognized by this court that certain Alaska constitutional protections, such as the right to privacy, exceed federal protection. Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice, 948 P.2d 963, 968 (Alaska, 1997).

It may very well be that here too Alaska's constitutional protections are greater than the federal protections enunciated above. See, e.g., Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442 (1982). A very instructive case from another jurisdiction is Jarvis v. Levine, 418 N.W.2d 139 (Minnesota 1988). There, in a forced psychiatric medication case, after assuming its "obligation to be 'independently responsible for safeguarding the rights of citizens,'" the court ruled:

> When medical judgments collide with a patient's fundamental rights, as in this case, it is the courts, not the doctors, who possess the necessary expertise.
>
> Indeed, the final decision to accept or reject a proposed medical procedure and its attendant risks is ultimately not a medical decision, but a personal choice.
>
> * * *
>
> There is a right to privacy under the Constitution of Minnesota. The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent. Commitment to an institution does not eliminate this right. When intrusive treatment is proposed, the "professional judgment" of medical personnel insufficiently protects this basic human right.

Id, 418 N.W.2d 139 at 147-149, citation omitted. See, also Conservatorship of Foster, 547 N.W.2d 81 (Minn. 1996); and Large v. Superior Court, In and For Maricopa County, 714 P.2d 399, 408 (Ariz.,1986) ("Due process requires that courts 'make certain' that proper professional judgment was 'in fact' exercised in the denial of a liberty interest"). As noted in Appellant's Opening Brief at 27-8, it is well-known that institutional psychiatrists have many considerations other than patients' best interests when deciding whether to medicate someone.

The State cites Riese v. St. Mary's Hospital, 209 Cal.App.3d 1303 (Cal. Ct. App. 1988), for the proposition the courts are not to decide the medical question of necessity or availability of an alternative, but shortly after Riese was decided, in People v. Delgado, 262 Cal. Rptr. 122, 127 (Cal. Ct. App. 1989), the California Court of Appeals held this was mere dicta and incorrect.[7]

The State asserts Massachusetts has rejected the Parens Patriae doctrine and that since Alaska retains it, Rogers, 458 N.E.2d 308 (Mass. 1983), is inapplicable. Appellee Brief at 39. This mischaracterizes both the Massachusetts Supreme Judicial Court's ruling in Rogers and this court's Parens Patriae analysis. What the Massachusetts Supreme Judicial Court actually did was put constitutional limits on the Parens Patriae doctrine. This Court has also recognized similar limitations for quite some time. In

[7] The State also cites In re Qawi, 90 Cal. App. 4th 1192, 109 Cal. Rptr 523 (Cal. Ct. App 2001) in footnote 68 for this proposition, but this decision has been de-published pending appeal. Nor is it clear how In re Qawi supports the State's position. At 109 Cal. Rptr. 527, the Qawi court notes the respondent asserted a right to judicial review of the need for the medication, but it decided the case on other grounds.

State v. Sears, 553 P.2d 907, 916 (Alaska 1976), this court held that just because the state might properly invoke its Parens Patriae power, doesn't mean it may constitutionally do whatever it believes is in the incompetent person's best interest ("therapeutic goals can no longer be used as an excuse for a lack of procedural safeguards and the deprivation of constitutional rights").

In footnote 6 to this statement, this Court quotes the U.S. Supreme Court's opinion in In re: Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967) that "The Latin phrase proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme." (emphasis added) In this case, the State is suggesting this court should allow invocation of the Parens Patriae doctrine to justify the exclusion of people diagnosed with serious mental illness from the constitutional scheme. Not only has this court rejected the argument in the juvenile context, but as demonstrated by Ms. Myers, courts around the country, including the U.S. Supreme Court, have rejected it with respect to forced psychiatric medication. It is not a question of whether either Alaska or Massachusetts allow the state to exercise Parens Patriae power, but instead the constitutional limits of the exercise of that power. Thus, the State's citation to Rust v. State, 582 P.2d 134, 138-40 (Alaska 1978), In the Matter of C.D.M., 627 P.2d 607 (Alaska 1981); and State v. Hiser, 924 P.2d 1024, 1025-26 (Alaska Ct. App. 1996), for Alaska's recognition of the Parens Patriae power is inapposite.

V. That The State May Be Required to Give Treatment Under the Parens Patriae Doctrine to Someone Who Wants It Does not Mean the State Can Force It on People Who Don't.

From page 23 to 29 of Appellee's Brief, the State argues that because when the State assumes control of a person under its Parens Patriae power it is obligated to provide necessary medical services, this somehow terminates Ms. Myers right to be free from forced medication. This turns the concept on its head. That someone has a right to necessary treatment while under State control is a far cry from forcing it on someone who doesn't want it.

In the Matter of C.D.M., 627 P.2d 607, 612-3 (Alaska 1981) is cited by the State at page 32, n. 61, in support of its contention, but there this Court held:

> The advocates of the proposed operation bear the heavy burden of proving by clear and convincing evidence that sterilization is in the best interests of the incompetent. [FN16]
>
> FN16. The United States Supreme Court has recently held that the due process clause of the Fourteenth Amendment to the United States Constitution requires that the "clear and convincing" standard of proof be applied to civil commitment proceedings. Addington v. Texas, 441 U.S. 418, 433, 99 S.Ct. 1804, 1813, 60 L.Ed.2d 323, 335 (1979). We are convinced that this standard is equally applicable to a petition for sterilization.
>
> Basic notions of procedural due process require that the incompetent be afforded a full judicial hearing at which medical testimony is presented and the incompetent, through a guardian ad litem, is allowed to present proof and cross-examine witnesses.
>
> * * *
>
> To the extent possible, the court must also elicit testimony from the incompetent concerning her understanding and desire for the proposed operation and its consequences. Although the individual's status as an "incapacitated person" prevents her expressed desires from being conclusive, this does not mean that her apparent preferences can be totally ignored.

(Emphasis added). Under the logic of In the Matter of C.D.M, the incompetence standard provided in AS 47.30.839 is constitutionally infirm because the Alaska

Constitution prohibits a patient's preferences from being ignored even if she has been determined to be incompetent.[8]

The State also cites the case of In re M.P., 510 N.E.2d (Ind. 1987), for this idea that having a right to treatment means there is no right to refuse treatment, but as pointed out in Ms. Myers Opening Brief, the court in In re M.P., at 510 N.E.2d 646-7 held a person's constitutional right to be free of forced medication meant the state could only force it upon someone by a showing the medication will be of substantial benefit in treating the condition and not just in controlling behavior.

Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687 (1988), is similarly of no help to the State because all it says is the state can act in a person's best interest. It doesn't say the State is exempt from judicial examination when, as the Superior Court found here, "there is a viable debate in the psychiatric community regarding whether administration of this type of medication might actually cause damage to her or ultimately worsen her condition."

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[8] It is, at a minimum, misleading for the State to assert as it does in a number of places that Ms. Myers doesn't contest the competency determination. The original Points on Appeal in this matter included that the "Superior Court erred by (1) misallocating the burden of proof, by requiring Appellant to prove that she clearly had the capacity to participate in treatment decisions by a rational thought process, when, under applicable law, the Appellant had the burden to prove Appellant incompetent to do so by clear and convincing evidence; (2) finding that the Appellant was incompetent to make the decision to accept or decline medication." However, since a competency determination is so fact and time specific, Ms. Myers dismissed these points on appeal when the then extant petitions for commitment and forced medication were dismissed with prejudice. See, (a) Dismissal with Prejudice attached as Exhibit 5 to the State's Motion to Dismiss Appeal as Moot, and (b) Partial Dismissal, both filed here. Counsel, however, commends to the court, Ms. Myers testimony regarding why she did not want to take the

The State cites other cases in this section, but there is insufficient space to address them all. Nor does it really seem necessary. None of the Alaska cases are on point[9] and the cases from other jurisdictions do not really aid in the disposition of this case.

VI. The Trial Court Must Conclude That the Proposed Medication is Both Objectively in a Patient's Best Interest and the Patient Would Decide to Take the Medication if Competent

Ms. Myers asserts the State needs to prove the invasion of her protected liberty interest in being free of unwanted medication is both (a) objectively in her best interest and (b) what Ms. Myers would choose if she were competent. The justification for forced medication in this case is the Parens Patriae power of the State to do what is in the best interests of someone found to be incompetent to make such a decision. Ms. Myers submits the State must be able to prove that it actually is in her best interest.[10]

As stated in Cruzan, supra, Guardianship of Roe, 415, 421 N.E.2d 40 (Mass. 1981), and Rogers, supra, where incompetence of an adult to make a decision is the basis for the exercise of the Parens Patriae power, the touchstone must be a determination of what that decision would be if the person were competent. The medical profession often believes that a person should subject herself to some very

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medications to see what an incredibly high burden the Superior Court placed on her. [Tr. 114, et. seq.]

[9] State v. Sieminski, 556 P.2d 929 (Alaska 1976), for example is a fishing case.

[10] Even in Sell, supra, which is a competence to stand trial case and Washington v. Harper, supra, which is a police power case involving a prisoner, the U. S. Supreme Court also prohibits involuntary psychiatric medication unless it is medically appropriate, i.e., in the person's best interest.

unpleasant treatment because it is in her "best interest" but we don't force her to undergo such treatment:

> Every competent adult has a right 'to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession.' "
>
> * * *
>
> The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both. . . . "if an incompetent individual refuses antipsychotic drugs, those charged with his protection must seek a judicial determination of substituted judgment."
>
> * * *
>
> A substituted judgment decision is distinct from a decision by doctors as to what is medically in the "best interests" of the patient. "[T]he goal is to determine with as much accuracy as possible the wants and needs of the individual involved."

(Rogers, supra, 458 N.E. 2d. at 314-16, citations omitted).

In Rogers, supra, the court held the substituted judgment determination must include best interest factors of the probability of side effects and the prognosis without and with treatment. Id, at 318-19. Since the best interest determination is subsumed within the "substituted judgment" determination in its formulation, Rogers held the proposed medication must be both in the person's best interest and that it would be the decision made if the person were competent. Ms. Myers respectfully submits this reasoning is persuasive and should be adopted by this court.[11]

VII. Proper Evidentiary Determinations Must Be Made

[11] As set forth in Appellant's Opening Brief, another way to look at it is the Due Process clauses of both the United States and Alaska constitutions require the best interest determination, while the Parens Patriae, justification requires the substituted judgment determination of what the person would decide if competent.

In Section V of the State's Brief, it disputes that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), adopted by this court in State v. Coon, 974 P.2d 386 (Alaska 1999) applies to proffered expert opinion in forced psychiatric medication cases. Most of the State's argument is a rehashing of its position that institutional psychiatrists' decisions to override a person's fundamental liberty interest in avoiding unwanted psychiatric medication is judicially unreviewable, which is addressed above and will not also be rehashed here by Ms. Myers.

However, the State does cite to the decision of this Court in Samaniego v. City of Kodiak, No. S-10378, 2003 WL 22682796 (Alaska 2003) rehearing pending,, issued after Appellant's Opening Brief was filed here, and it seems useful to discuss the implications of that decision on the instant case. In Samaniego, this court held judicial notice could be taken of the admissibility of certain psychiatric and psychological evaluation testimony where, as held in Coon, 974 P.2d at 398, supra, it "is well-known and has been fully considered by the courts." In doing so, this Court noted:

> Samaniego does not contend that Dr. Raffle's methodology or any portion of his testimony was unreliable; she simply asserts that Kodiak should have subjected Raffle's testimony to the four reliability factors outlined in Daubert and mentioned by this court in Coon.
>
> * * *
>
> A bare claim that psychiatric evidence is unreliable does not subject forensic psychiatry to a mini-trial in every case. We have repeatedly recognized the validity of independent psychological and psychiatric exams and forensic psychological and psychiatric exams in civil and criminal contexts.

This is in stark contrast to here where Ms. Myers presented virtually uncontroverted evidence of such unreliability.

In addition, while in Samaniego, the Superior Court took judicial notice that the type of proffered testimony was well-known and has been fully considered by the courts here, while the court recited the same language, it allowed the testimony on the basis that the court did not "conclude that the testimony is unreliable or untrustworthy." This reverses the test and is not proper.

Conclusion

For the foregoing reasons, Ms. Myers requests this court REVERSE the Superior Court, hold AS 47.30.839 facially unconstitutional,[12] and that when the State seeks to obtain a court order authorizing the administration of psychiatric medication against a person's will, the State must prove by clear and convincing evidence, under proper evidentiary standards for expert opinion testimony, i.e., State v. Coon, supra., that:

(a) the person is incompetent to refuse such medication, and
(b) the proposed medication is objectively in the person's long-term best interests, including (i) consideration of probable benefits, (ii) potential side effects, and (iii) the long term prognosis with and without the proposed medication, and
(c) the person would make a decision to accept the medication if he or she were competent, and
(d) there is no less restrictive alternative.

RESPECTFULLY SUBMITTED this ____ day of December, 2003.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC

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

[12] The question arises whether the AS 47.30.839 is facially unconstitutional or only unconstitutional as applied. Since this court rejected the "no set of circumstances" test for facial unconstitutionality in Part III. C., of State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001), and AS 47.30.839 authorizes forced medication without consideration of constitutionally required factors, it seems the statute is unconstitutional on its face.