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

In The Matter of the Necessity for the Hospitalization of William Bigley,

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO STAY POLICE POWER FORCED DRUGGING ORDER

Respondent has moved to stay this Court's December 3, 2008, Order Granting Motion for Clarification of Order (Police Power Forced Drugging Order).

Standard for Granting Stay Pending Appeal

The Alaska Supreme Court's Order granting the stay in S-13116, sets forth the standard for deciding whether a stay pending appeal should be granted:

> It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, the movant "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" *State, Div. of Elections v. Metcalfe*, 110 P.3d 976,978 (Alaska 2005). On the other hand, if the movant's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a "clear showing of probable success on the merits."

Respondent meets both tests here.

A. This Court Lacked Subject Matter Jurisdiction to Issue the Police Power Forced Drugging Order.

As a threshold matter, however, this Court did not have subject matter jurisdiction to issue the Police Power Forced Drugging Order since Respondent had already filed an appeal to the November 25, 2008 order. Appellate Rule 203, provides:

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> The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the appellate courts, except as otherwise provided in these rules.

In *Noey v. Bledsoe*,[1] the Supreme Court held an appeal in another case didn't deprive the Superior Court of jurisdiction in the case at question, but otherwise affirmed Appellate Rule 203 grants exclusive jurisdiction over the matter on appeal to the appellate court unless some exception applies. Here, there is no such exception and this Court's dramatic addition to its decision after it had been appealed is exactly what Appellate Rule 203 prohibits.

B. Respondent Can Show Probable Success on the Merits

Substantive Due Process Requirements

In *Myers v. Alaska Psychiatric Institute*, the Supreme Court held the right to be free from the unwanted administration of psychotropic medications is a fundamental constitutional right[2] and:

> When a law places substantial burdens on the exercise of a fundamental right, we require the state to articulate a compelling state interest and to demonstrate the absence of a less restrictive means to advance that interest.[3]

The compelling interest in *Myers* was the *parens patriae* doctrine involving "the inherent power and authority of the state to protect "the person and property" of an individual who

[1] 978 P.3d 1264, 1275 (Alaska 1999).
[2] 138 P.3d 238, 248 (Alaska 2006)
[3] 138 P.3d at 245-246, internal quotes and citations omitted.

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"lacks legal age or capacity,"[4] while the compelling state interest invoked under the police power is "imminent threat of harm."[5]

Alaska's Statutory Implementation of the Police Power Justification

AS 47.30.838 is Alaska's statutory implementation of the police power justification for forced psychiatric drugging. AS 47.30.838(a)(1) permits such forced drugging only if

> 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.

It then goes on to require the behavior or condition of the patient giving rise to a crisis to be documented in the patient's medical records, which also 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."

Under AS 47.30.838(c) API can unilaterally invoke the police power justification for only three crisis periods without superior court approval under AS 47.30.839(a)(1).

Respondent Was Denied Due Process

The order granting expedited consideration of the motion to "clarify," states:

> The Court has ruled on this and the underlying substantive motion without further input from William Bigley and James Gottstein because the issues were fully addressed at the recent hearing and should have been more clearly articulated by the Court in its decision.

This is not truthful as the transcripts from the October 28, 2008 and November 3, 2008 hearings demonstrate.

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[4] *Myers* 138 P.3d at 249.
[5] *Myers*, 138 P.3d at 248.

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Believing that if it granted the forced drugging petition based on the *parens patriae* justification under AS 47.30.839(2) (*Parens Patriae* Count) it would eliminate the need for considering the Police Power Count, this Court ruled it would not hear any evidence on the Police Power Count until after it ruled on the Parens Patriae Count and if there was then a need to consider the Police Power Count, further evidence would be taken from both sides, after allowing Respondent some discovery.[6]

The issue was first raised by Respondent at the October 28, 2008, status conference:

> MR. GOTTSTEIN . . . Your Honor, in the past, API has administered medication pursuant to 838 without the legal predicate . . . existing. And I'd be very surprised if the actual legal requirement for that medication exists. And so that's one of the things that I really need to be able to discover, is what actually --what actually happened. So,. . . it really puts me in a difficult position because. . . they come in and say all these things and then many times it turns out not to be true, and so I really have to have an opportunity to be able to explore that.[7]

It was then discussed at some length during the November 3, 2008, status conference, including:

> THE COURT: So let's assume, just for purposes of walking it through, that I grant the 839 petition because he's incapable of giving informed consent and I meet all the other Meyer/Weatherhorn criteria. Doesn't that moot out the 838 -- the 839(a)(1) petition?
>
> MS. DERRY: Yes, Your Honor.[8]
>
> * * *
>
> THE COURT: Doesn't it make sense for the State to proceed under 839(a)(2) in the first instance and present only the information it thinks is necessary

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[6] Exhibits A & B, culminating at Exhibit B, p 6, Tr. 19-20 (November 3, 2008).
[7] Exhibit A, p. 6; Tr. 18 (October 28, 2008).
[8] Exhibit B, p. 6, Tr. 14 (November 3, 2008).

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there? If I grant that petition, then any need for 839(a)(1) authorization is moot?

MS. DERRY: Yes. I believe that, Your Honor.

THE COURT: And then if, on the other hand, I deny your 839(a)(2) request, then the State can, if it wants, present whatever additional information is necessary to seek 839(a)(1) authority.[9]

* * *

THE COURT: . . . So do you see any problem, Mr. Gottstein, if we -- if the State goes under 839(a)(2) first, under whatever it thinks is a smaller subset of evidence, you respond to that, I'm going to make a ruling, if I grant it, doesn't that moot out the (a)(1) request?

MR. GOTTSTEIN: I think that, Your Honor, this is where the Supreme Court stay really comes into effect, because the Alaska Supreme Court issued a stay on essentially the same evidence that I presented to you, Your Honor, and then you indicated --

THE COURT: Forget the stay. Just forget that there's a stay for purposes of this discussion, and then we'll go back to what the stay brings. If there was no stay in place, doesn't the granting of the 839(a)(2) petition, if that's what I do, moot out the (a)(1)?

MR. GOTTSTEIN: Yes, Your Honor.[10]

Respondent then pointed out, however, that because of the stay, API was going to run out of its limited authorization to utilize the police power justification for forced drugging under AS 47.30.838 without obtaining court approval under AS 47.30.839(a)(1).[11] Assuming this Court would follow through on its statements that a later hearing would be held on the Police Power Count before forced drugging would be

[9] Exhibit B, p. 5, Tr. 15 (November 3, 2008).
[10] Exhibit B, p. 5, Tr. 17 (November 3, 2008).
[11] Exhibit B, pp 5-6, Tr. 17-18 (November 3, 2008).

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authorized under AS 47.30.839(a)(1), Respondent thought limiting the hearing to the *Parens Patriae* Count benefitted him,[12] and this Court said:

> THE COURT: Okay. We're both in agreement. . . . [T]he State will present what it thinks is necessary under 839(a)(2).

Respondent then raised the question of how much time he would have to prepare for a hearing on the Police Power Count "if we end up going to that?"[13] This Court responded:

> THE COURT: . . . I'm going to issue an order in the first instance on the 839(a)(2) petition, and if I grant that, then everything else is moot. If I don't grant it, then I'm going to grant the State an opportunity right then to supplement its evidentiary basis for the second type of authorization. And then, Mr. Gottstein, you can tell me when the time comes why you think you might not have been prepared. If you're not, you're not. I'll deal with that assertion when it's given to me and when I've had a chance to see the evidence that both sides present.[14]

The problem was, just as Respondent had advised this Court, everything else was not going to be moot when this Court issued the *Parens Patriae* Forced Drugging Order.

Then, as set forth above, this Court granted API's motion to "clarify," but which was really a back door granting of the Police Power Count without allowing Respondent to be heard on the matter. It is hard to imagine a more clear denial of due process. As the United States Supreme Court has recently held, a meaningful opportunity to be heard is one of the fundamental hallmarks of Due Process.[15] Respondent has demonstrated probable success on the merits because of this due process violation.

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[12] Exhibit B, p. 6, Tr. 18 (November 3, 2008).
[13] Exhibit B, p. 6, Tr. 19, (November 3, 2008).
[14] Exhibit B, p 6, Tr. 19-20 (November 3, 2008).
[15] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).

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The Factual and Legal Predicates for the Police Power Forced Drugging Order Are Extremely Unlikely to Be Present

Respondent was not able to conduct much discovery with respect to the true facts surrounding API's police power drugging of him, but there is already enough to demonstrate the factual and legal predicates justifying granting the Police Power Count are highly unlikely to exist. First, following a prior emergency motion to this Court to stop the improper purported police power forced drugging of Respondent in Supreme Court Case No. S-12851, Dr. Worrall advised Respondent's counsel that there was no API policy on implementing the police power justification as embodied in AS 47.30.838, or otherwise, he had received no training on the topic, and he had had no idea of the requirements before Respondent pointed them out in connection with S-12851.[16] Respondent's counsel understands from the same source that the Attorney General's office then started working on a policy.

During the deposition of Ron Adler, API's CEO, over counsel for API's objection, Respondent asked Mr. Adler about this and he promised to provide the new policy,[17] but API has failed to do so. Mr. Adler also testified that there was now training, that he couldn't identify who did the training, but he would subsequently provide that information "through our attorneys,"[18] which he has failed to do.

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[16] Dr. Worrall asked that his e-mail so advising Respondent's counsel be kept private, but he would so testify if subpoenaed. It may be necessary to make that e-mail public at some later date if Dr. Worrall testifies contrary to it, but Respondent is respecting his request at this time and it is not attached it hereto.

[17] Exhibit C, page 4, Transcript page 12.

[18] Exhibit C, page 3, Transcript pages 8-9.

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A deposition was also taken of Dr. Khari, and over, API's objection, Respondent also questioned her about police power justification forced drugging procedures at API.[19] This transcript demonstrates API's practice of administering police power forced drugging does not comply with AS 47.30.838, nor does it comply with constitutional requirements.[20]

Thus, Respondent has also demonstrated probable success on the substantive merits as well due process grounds.

C. Respondent Faces the Danger of Irreparable Harm

The unrebutted written testimony of Dr. Jackson and Robert Whitaker demonstrates Respondent faces the danger of irreparable harm if the police power forced drugging of Respondent is not stayed pending appeal.

D. Conclusion

For the foregoing reasons, Respondent's Motion to stay the Police Power Forced Drugging Order should be **GRANTED**.

DATED: December 6th, 2008.

Law Project for Psychiatric Rights

By: _____
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[19] Exhibit D, pages 5-7, Transcript pages 15-25.

[20] Respondent sought the names of the nurses who decide whether the conditions for administering police power forced drugging exist and Dr. Khari said she would get Respondent a list of names the next day if not by fax that afternoon (Exhibit __, page 7, Transcript page 23), which she failed to do.