IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM S. BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S-13116

Trial Court Case No. 3AN 08-493 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE SHARON L. GLEASON, PRESIDING

BRIEF OF APPELLANT

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Filed in the Supreme Court of
the State of Alaska, this _____
day of _____, 2008

Marilyn May, Clerk

By: _____
Deputy Clerk

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CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV §1

Section 1. No State shall. . . deprive any person of life, liberty, or property, without due process of law.

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. . . .

AK CONST. ART. 1, § 22

Section 22 Right of Privacy.

The right of the people to privacy is recognized and shall not be infringed. . . .

STATUTES

AS 47.30.700 Initiation of involuntary commitment procedures.

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a

judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

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

AS 47.30.705 Emergency detention for evaluation.

(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the facility.

(b) In this section, "minor" means an individual who is under 18 years of age.

AS 47.30.730 Procedure for 30-day commitment; petition for commitment.

(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must

(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;

(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;

(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;

(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;

(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;

(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and

(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

AS 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 47.30.839 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, an advance health care directive under AS 13.52, 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.

COURT RULES

Civil Rule 81(d)

(d) Limited Appearance By Counsel. A party in a non-criminal case may appear through an attorney for limited purposes during the course of an action, including, but not limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(1) The attorney files and serves an entry of appearance with the court before or during the initial action or proceeding that expressly states that the appearance is limited, and all parties of record are served with the limited entry of appearance; and

(2) The entry of appearance identifies the limitation by date, time period, or subject matter.

JURISDICTIONAL STATEMENT

Appeal is brought by William S. Bigley, Respondent below in Case No. 3AN 08-493 PR, an AS 47.30.839 forced psychiatric drugging proceeding. Appellant appeals to the Alaska Supreme Court from the Findings and Order Concerning Court-Ordered Administration of Medication, dated May 19, 2008 (Forced Drugging Order). Notice of Appeal was timely filed May 20, 2008. This court has jurisdiction under AS 22.05.010(a)&(b).

PARTIES

The parties to this appeal are Appellant, William S. Bigley, an Alaska resident, and the Alaska Psychiatric Institute, a state agency, Appellee.[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred in concluding the course of treatment proposed by the Alaska Psychiatric Institute (API) is in Appellant's best interest.

2. Whether the Superior Court erred in concluding there is no less intrusive alternative.

3. Whether the Superior Court erred by failing to order API to provide a less intrusive alternative.

4. Whether the Superior Court denied Appellant Due Process.

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[1] There were other participants below, who although not parties, have been included on the service list in this appeal to wit: (1) The Office of Public Advocacy, who is Appellant's guardian, represented by Elizabeth Russo, (2) the Alaska Public Defender Agency who, through Elizabeth Brennan, represented Appellant with respect to the ----------(footnote continued)

STATEMENT OF THE CASE

I. Brief Description of Case

Following commitment for 30 days under AS 47.30.730, in which he was represented by the Alaska Public Defender Agency, a hearing was held on a petition under AS 47.30.839 to force Appellant, William S. (Bill) Bigley, to take the drug Risperdal (risperidone) against his will, in which he was represented by the Law Project for Psychiatric Rights. This hearing was held on a very expedited basis over Appellant's objections in spite of this Court's direction in *Wetherhorn v. Alaska Psychiatric Institute*,[2] that in the absence of an emergency, protections to avoid the erroneous deprivations of the liberty interest in avoiding forced psychiatric drugging should not be neglected in the interests of speed.[3]

Under *Myers v. Alaska Psychiatric Institute*,[4] in non-emergency cases, a court may not permit a treatment facility to administer psychotropic drugs unless, in addition to the statutory requirements, it finds by clear and convincing evidence the forced drugging "is in the patient's best interests and that no less intrusive alternative is available."

In this appeal, based on unrebutted evidence, Appellant asserts the Superior Court improperly found the forced drugging to be in his best interests and failed to order the

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involuntary commitment preceding the forced drugging proceeding on appeal here, and (3) Marieann Vassar, the Court Visitor.

[2] 156 P.3d 371, 381 (Alaska 2007).

[3] In *Wetherhorn*, the Court specifically referenced "statutory protections," but it seems the same must be true with respect to Constitutional protections.

[4] 138 P.3d 238, 254 (Alaska 2006).

provision of an available less intrusive alternative. In addition, he challenges on due process grounds the Superior Court's insistence on holding the forced drugging hearing on an extremely rushed schedule to his prejudice.

II. Course of Proceedings

April 25, 2008. Appellant is brought to API by the Anchorage Police for examination under AS 47.30.705, known as a "POA" or "Police Officer Application."[5]

April 26, 2008. API files a Petition for Initiation of Involuntary Commitment under AS 47.30.700, commonly known as an "*Ex Parte*."[6] Magistrate Johnson signs an *Ex Parte* Order that API take Appellant into custody and deliver him to API for evaluation and be released or a petition for commitment filed within 72 hours of arrival.[7] The Law Project for Psychiatric Rights e-mails API and the Alaska Public Defender Agency that unless and until otherwise notified, it is representing Appellant with respect to forced drugging, including prospective proceedings.[8]

April 28, 2008. Judge Michalski signs an *Ex Parte* Order that API take Appellant into custody and deliver him to API for evaluation and be released or a petition for commitment filed within 72 hours of arrival.[9] API files a Petition for 30-day Commitment under AS 47.30.730 (30-Day Commitment Petition),[10] and forced drugging

[5] Exc. 2.
[6] Exc. 3
[7] Exc. 5
[8] Exc. 6.
[9] Exc. 8.
[10] Exc. 9.

under AS 47.30.839 (Forced Drugging Petition).[11]

April 29, 2008. 8:24 am: Having received no response to its April 26th e-mail, the Law Project for Psychiatric Rights e-mails API's CEO as well as API's counsel, and the Alaska Public Defender Agency that it is representing Appellant with respect to forced drugging.[12] 8:39 am: Counsel for API responds that he has received Appellant's counsel's[13] e-mails regarding representation of Appellant and will communicate to him as appropriate.[14] S. Richmond, Judge/Clerk, issues Notice of 30-Day Commitment Hearing for 8:30 am the following morning and appoints [blank] as counsel for Appellant.[15] Master John Duggan issues Notice of Hearing and Order for Appointment of Court Visitor, appointing the Office of Public Advocacy (OPA) Visitor, and the Public Defender Agency as counsel for Appellant with respect to the Forced Drugging Petition, the hearing for which is also set for 8:30 a.m., the following morning.[16] 4:37 pm: Appellant's counsel is subpoenaed to testify against his client at 8:30 the next morning.[17]

April 30, 2008. The Law Project for Psychiatric Rights files a Limited Entry of Appearance under Civil Rule 81(d) with 93 pages of attachments before the hearing,[18]

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[11] Exc. 11.
[12] Exc. 12.
[13] Appellant is using the term "Appellant's counsel" or "counsel for Appellant" to refer to Mr. Gottstein below to distinguish his representation of Appellant against the Forced Drugging Petition below from the Alaska Public Defender Agency representation of Appellant against the 30-Day Commitment Petition.
[14] Exc. 12.
[15] Exc. 14.
[16] Exc. 16.
[17] Tr. 16 (April 30, 2008). The time the subpoena was served is not in the record.
[18] Exc. 17-110, Tr. 5 (April 30, 2008).

including a Motion for Less Intrusive Alternative filed the month before in 3AN-00247PR.[19] Appellant, through The Law Project for Psychiatric Rights, files a motion to vacate the appointment of the Alaska Public Defender Agency with respect to the Forced Drugging Petition.[20] The hearing on the 30-Day Involuntary Commitment Petition is held before Master McBurney.[21] Master McBurney refuses to allow the Law Project to enter its appearance in the forced drugging proceeding because the Forced Drugging Petition is "not in a posture to be decided."[22] Counsel for Appellant is compelled to testify pursuant to the subpoena over his objections.[23] After the close of evidence and argument, Master McBurney indicates she intends to recommend commitment.[24]

May 2, 2008. Master McBurney signs a recommended Order for 30-Day Commitment,[25] which was not served on counsel,[26] and issues an Order Regarding Representation that since the Master's recommendation was now complete, counsel for Appellant's entry of appearance "will be considered operative as to the medication petition," which was not served on counsel for Appellant.[27]

May 5, 2008. Superior Court Judge Rindner signs the 30-Day Commitment Order

[19] Exc. 18.
[20] Exc. 111.
[21] Tr. 1-110 (April 30, 2008).
[22] Exc. 117, Tr. 13 (April 30, 2008).
[23] Tr. 16-17 (April 30, 2008).
[24] Tr. 105-108 (April 30, 2008).
[25] Exc. 118.
[26] Exc. 119; Tr. 5 (May 12, 2008).
[27] Exc. 117; Tr. 11 (May 12, 2008).

as recommended by Master McBurney, which is not served on counsel for Appellant.[28]

May 7, 2008. API files a Motion to Set Expedited Hearing on Capacity to Give Informed Consent.[29]

Friday, May 9, 2008. 3:34 p.m.: Without having shortened the time to respond to the Motion to Set Expedited Hearing on Capacity,[30] the Superior Court sets the hearing for 10:00 am the next business day, Monday, May 12, 2008.[31]

May 12, 2008. Appellant's counsel orally[32] (1) objects to proceeding with the hearing on such short notice because he is not prepared to go forward at that time,[33] and under *Myers* there is no reason to rush non-emergency forced drugging proceedings,[34] (2) objects to proceeding without notice of the alleged factual basis justifying granting the Forced Drugging Petition,[35] (3) requests time to conduct discovery,[36] (4) requests a pre-trial conference,[37] (5) requests the Superior Court order a settlement conference,[38] and (6) advises the Superior court he intends to file pre-trial motions.[39] The Superior Court orders the trial to proceed with the presentation of API's case and at its conclusion, might

[28] Exc. 119; Tr. 5 (May 12, 2008).
[29] Exc. 125.
[30] Tr. 3-4 (May 12, 2008).
[31] Exc. 126-127.
[32] Appellant's counsel was away when API's Motion to Set Expedited Hearing on Capacity to Give Informed Consent was filed and the order setting the hearing issued, arriving back in town at 1:00 am on the morning of the hearing. Tr. 3 (May 12, 2008).
[33] Tr. 13 (May 12, 2008).
[34] Tr. 14, 15 (May 12, 2008).
[35] Tr. 6 (May 12, 2008).
[36] Tr. 9 (May 12, 2008).
[37] Tr. 9 (May 12, 2008).
[38] Tr. 9 (May 12, 2008).

give Appellant additional time to respond.[40] At the close of API's case, Appellant moves to dismiss the Forced Drugging Petition,[41] and for the Superior Court to order a less intrusive alternative,[42] which the Superior Court takes under advisement,[43] and the trial set to resume two-days later, on May 14, 2008.[44]

May 13, 2008. Appellant files written testimony.[45]

May 14, 2008. The trial continues, with the presentation of Appellant's live case and is set to conclude the following day.[46]

May 15, 2008. The presentation of evidence continues to conclusion,[47] closing arguments made,[48] and Appellant again moves the Superior Court to order API to provide a less intrusive alternative,[49] Appellant prophylactically moves for a stay pending appeal should the Forced Drugging Petition be granted,[50] and the Superior Court takes the matters under advisement.[51]

May 19, 2008; 12:30 pm. The Superior Court grants the Forced Drugging Petition, staying its decision for 48 hours to permit Appellant to seek a stay in this Court.

(Continued footnote)----------
[39] Tr. 9 (May 12, 2008).
[40] Tr. 12 (May 12, 2008).
[41] Tr. 83 (May 12, 2008).
[42] Tr. 86 (May 12, 2008).
[43] Tr. 95 (May 12, 2008).
[44] Tr. 101 (May 12, 2008).
[45] Exc. 128-166.
[46] Tr. 103-194 (May 14, 2008).
[47] Tr. 199-262 (May 15, 2008).
[48] Tr. 263-299 (May 15, 2008).
[49] Tr. 284 (May 15, 2008).
[50] Tr. 274 (May 15, 2008).

May 20, 2008. Appellant moves for a stay pending appeal in this Court.[52]

May 23, 2008. This Court grants the motion for stay pending appeal.[53]

May 28, 2008. API files a motion for full court reconsideration of the stay.[54]

June 25, 2008. API's motion for reconsideration is denied,[55] and by separate order, the parties ordered to address whether this appeal should be expedited.[56]

July 7, 2008. Appellant and OPA, but not API, file responses to the order.[57]

July 14, 2008. This Appeal is expedited.[58]

III. Statement of Facts

A. Appellant's Early Psychiatric History

Prior to 1980, Respondent was successful in the community, had long-term employment in a good job, and was married with two daughters.[59]

In 1980, Respondent's wife divorced him, took his two daughters and saddled him with high child support and house (trailer) payments, resulting in his first

(Continued footnote)----------
[51] Tr. 299 (May 15, 2008).
[52] (Emergency) Motion for Stay Pending Appeal, dated May 20, 2008, updated May 21, 2008.
[53] Order dated May 23, 2008, entered at the direction of an individual justice.
[54] Motion for Reconsideration of Order on Emergency Motion for Stay Pending Appeal, dated May 28, 2008.
[55] Order, dated June 25, 2008, entered by direction of the court.
[56] Order, dated June 25, 2008, entered by direction of an individual justice.
[57] Response Re: Expedited Appeal, dated July 7, 2008; Memo Re: Expedited Appeal, dated July 7, 2008.
[58] Order, dated July 14, 2008, entered at the direction of an individual justice.
[59] Exc. 57-64.

hospitalization at the Alaska Psychiatric Institute (API).[60] When asked at the time what the problem was, Respondent said "he had just gotten divorced and consequently had a nervous breakdown."[61] He was cooperative with staff throughout that first admission.[62]

At discharge, his treating psychiatrist wrote his prognosis was "somewhat guarded depending upon the type of follow-up treatment patient will receive in dealing with his recent divorce."[63]

After being cooperative the first two admissions, Appellant decided the drugs API administered were not helping, at which point API locked him up and administered them despite acknowledging that they weren't working.[64] "The medication seemed not to have noticeable favorable effects throughout the first several hospital weeks, despite the fact that there were a variety of unpleasant Extra Pyramidal Symptoms."[65] The Discharge Summary of this admission also states:

> On 3/26/81, a judicial hearing determined that there would be granted a 30 day extension during which time treatment efforts would continue, following which there would be a further hearing concerning the possibility of judicial commitment. Mr. Bigley was furiously angry that he was deprived of his right to freedom outside the hospital, but despite his persistent anger and occasional verbal threats, he never became physically assaultive, nor did he abuse limited privileges away from the locked unit.

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[60] Exc. 57.
[61] Exc. 57.
[62] Exc. 61.
[63] Exc. 64.
[64] Exc. 65-68.
[65] Exc. 67. Extra Pyramidal Symptoms (EPS), are involuntary movements resulting from the brain damage caused by these drugs. In the early 1980's, the standard of care was that the "therapeutic dose" had been achieved when Extra Pyramidal Symptoms appeared. Dr. Jackson testified about this in the hearing below Tr. 144 (May 14, 2008).

> After the first six hospital weeks he continued to believe that he had some special mission involving Easter Island - drug addicts and alien visitors to the Earth. When these views were gently challenged he became extremely angry, usually walking away from whoever questioned his obviously disordered thoughts.[66]

B. Clinical Results of Almost Three Decades of Forced Drugging

The Visitor's Report of May 25, 2004 in his guardianship case reports, "when hospitalized and on medications, [Respondent's] behaviors don't appear to change much . . . . Hospitalization and psychotropic medication have not helped stabilize him."[67] On March 23, 2007, at discharge from his 68th admission, his treating psychiatrist Dr. Worrall, described Appellant's condition after the maximum benefits from the drugs as "delusional . . no insight and poor judgment, . . . paranoid and guarded." [68]

C. 2007 and Prior 2008 Involuntary Commitment, Forced Drugging, and Misdemeanor Proceedings

3AN 06-1039PR. On January 3, 2007, in an involuntary hospitalization that started on September 1, 2006,[69] Appellant was discharged "Against Medical Advice,"[70] from a 90-Day Commitment,[71] following the Law Project for Psychiatric Rights'

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[66] Exc. 67.
[67] Confidential Judicial Notice Envelope. The Court may take judicial notice of this as well as the other filings in other proceedings cited herein. *Drake v. Wickwire*, 795 P.2d 195, n1 (Alaska 1990).
[68] Exc. 71.
[69] Jud. Not. Apdx. 1. For the convenience of the Court, a Judicial Notice Appendix has been filed containing the documents Appellant refers to herein of which this Court may take judicial notice. Designations to these documents are "Jud. Not. Apdx. __."
[70] Jud. Not. Apdx. 12.
[71] Jud. Not. Apdx. 5.

December 20, 2006 appearance on his behalf[72] and election, among other things, for a jury trial in the event a 180-Day Commitment Petition is filed.[73] In the verified 90-Day commitment petition, Dr. Worrall, staff psychiatrist at API, stated Appellant was "not responding to Risperdal alone,"[74] and in the associated verified forced drugging petition, that Appellant "has refused mood stabilizer medication or second antipsychotic."[75]

3AN 07-274PR. 30-day petitions for commitment and forced drugging were filed on February 23, 2007,[76] Appellant was represented by the Alaska Public Defender Agency, a hearing held before the Probate Master on February 27, 2007, who recommended approval of both petitions, and which were approved by the Superior Court on March 2, 2007.[77] On March 21, 2007, 90-day continuation petitions for involuntary commitment and forced drugging were filed.[78] The Law Project for Psychiatric Rights represented Appellant in those proceedings,[79] and Appellant demanded a jury trial.[80] The Superior Court ruled Appellant had the right to a jury trial only with respect to the involuntary commitment.[81] Dr. Worrall testified he has treated Appellant off and on since 1984, including the last several admissions,[82] "[h]e has a

[72] Jud. Not. Apdx. 9.
[73] Jud. Not. Apdx. 10.
[74] Jud. Not. Apdx. 3.
[75] Jud. Not. Apdx. 4.
[76] Jud. Not. Apdx. 13, 17.
[77] Jud. Not. Apdx. 15-19.
[78] Jud. Not. Apdx. 20, 22.
[79] Jud. Not. Apdx. 23.
[80] Jud. Not. Apdx. 24.
[81] Jud. Not. Apdx. 30.
[82] Jud. Not. Apdx. 35.

universal history all the time of stopping his medications when he gets out of the hospital,[83] the drugs have "no effect on" [Appellant's beliefs] . . the delusions are not going to go away,"[84] and "if it's real cold he knows how to get into jail and get into a warm place."[85] The jury did not find Appellant's mental condition would be improved by the course of treatment, and a verdict entered for Appellant.[86]

3AN 07-598PR. On May 14, 2007, a thirty-day commitment petition was filed against Appellant, and a forced drugging petition on May 15th in which Appellant was represented by the Alaska Public Defender Agency. Both petitions were granted on May 23, 2007.[87] Ninety-day petitions for commitment and forced drugging were filed against Appellant prior to the expiration of the 30 day commitment, and represented by the Alaska Public Defender Agency at a the jury trial held June 26, 2007, the jury found Appellant was not gravely disabled and a verdict entered for Appellant.[88]

3AN 07-1064PR. On August 29, 2007, Appellant was brought to API pursuant to an *Ex Parte* Order that had not been signed by a Superior Court judge,[89] and on August 30, 2007, a 30-day involuntary commitment petition was filed.[90] On August 31, 2007, the Law Project for Psychiatric Rights filed a limited entry of appearance for the

[83] Jud. Not. Apdx. 37.
[84] Jud. Not. Apdx. 40.
[85] Jud. Not. Apdx. 43.
[86] Jud. Not. Apdx. 48, 49.
[87] Jud. Not. Apdx 50-55.
[88] Exc. 81-83.
[89] Jud. Not. Apdx 56.
[90] Jud. Not. Apdx 57.

forced drugging only.[91] The hearing on the involuntary commitment petition was held August 31, 2007, at the conclusion of which Master Brown stated he was recommending the petition be granted.[92] Master Brown issued written recommendations on September 4, 2007, which the Superior Court approved the same day.[93]

On September 4, 2007, represented by The Law Project for Psychiatric Rights, Appellant filed a 32 page Pre-Hearing Brief with a 340 page Appendix[94] and the written testimony of Robert Whitaker and Ronald Bassman showing (1) the drugs were not in Appellant's best interests and (2) there are less intrusive alternatives available.[95]

The direct testimony of Dr. William Worrall, the treating physician at API was taken, as well as the direct and cross-examination of Sarah Porter,[96] a New Zealand expert on less intrusive alternatives.[97] Among other things, including that Appellant has Tardive Dyskinesia,[98] Dr. Worrall testified

> [T]he federal protective services were at their wits end trying to protect Murkowski's office from him. We're looking at a guy who is going to do time in jail if we don't intervene."[99]

The hearing was continued to September 10, 2007, for Dr. Worrall's cross-examination and further presentation of Appellant's live testimony.[100]

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[91] Jud. Not. Apdx 60 (without exhibits).
[92] Jud. Not. Apdx. 73
[93] Jud. Not. Apdx 82-83.
[94] Jud. Not. Apdx 84-116, without appendix.
[95] Exc. 135-139, 140-154, respectively.
[96] Exc. 166-177.
[97] Exc. 174.
[98] Exc. 168.
[99] Jud. Not. Apdx 129.

At the September 10, 2007, hearing, API announced it was going to discharge Appellant rather than go forward with the forced drugging petition.[101] Appellant objected that API had some obligation to Appellant upon discharge and that he would like to see some kind of settlement.[102]

On September 12, 2007, Appellant filed a motion for an order in the form of a permanent mandatory injunction requiring API to provide a less intrusive alternative,[103] supporting it with the additional written testimony of Paul Cornils.[104] The key features of the requested less intrusive alternative were reasonable housing, including API as housing of last resort,[105] and having sufficient staff available to be with Appellant for him to be successful in the community.[106]

On September 14, 2007, well before the expiration of the 30-day commitment that had been granted upon API's sworn testimony that Appellant was unable to survive safely in the community[107] and Dr. Worrall's testimony on September 5, 2007 that he was going do time in jail if API didn't intervene because of his contacts with Senator Murkowski,[108] and before the Superior Court ruled on Appellant's motion for an order requiring API to provide a less intrusive alternative, a key feature of which was to have

(Continued footnote)----------
[100] Exc. 102.
[101] Jud. Not. Apdx. 146.
[102] Jud. Not. Apdx .147.
[103] Jud. Not. Apdx. 149.
[104] Exc. 129.
[105] Exc. 132.
[106] Exc. 133.
[107] Jud. Not. Apdx. 68, 70.

someone available to be with Appellant to enable him to be successful in the community,[109] API discharged Appellant "against medical advice."[110]

***USA v. Bigley*, 3:07-MH-00192-JDR**. On September 19, 2007, Appellant was arrested for yelling and disturbing employees of Senator Murkowski's Anchorage office, repeated telephone calls, and for leaving 55 voice mail messages over a 29 day period.[111] On September 20, 2007, Appellant was sent to API to evaluate his competency to stand trial,[112] and on October 12, 2007, pursuant to a motion by the prosecutor, the charges were dismissed and he was ordered released.[113]

3AN 07-11795CR. On October 21, 2007, Appellant was arrested and charged with trespass and assault-reckless use of force or violence.[114] The charges were dismissed on October 23, 2007.[115]

3AN 07-1311PR. That same day, October 23, 2007, while Appellant's counsel was outside of the state,[116] an *Ex Parte* Petition was filed in which it was reported that despite being drugged against his will while in jail, Appellant was extremely delusional,

(Continued footnote)----------
[108] Jud. Not. Apdx. 129.
[109] Jud. Not. Apdx. 149.
[110] Exc. 1.
[111] Jud. Not. Apdx 160.
[112] Jud. Not. Apdx 162.
[113] Jud. Not. Apdx 164.
[114] Jud. Not. Apdx 167. In light of the unanimous testimony that Appellant is not known to have ever been violent, the allegation of assault should not be assumed true.
[115] Jud. Not. Apdx 167.
[116] Exc. 30.

agitated, angry, hostile to staff, yelling obscenities and occasional threats.[117] Appellant was thereupon taken into custody and delivered to API pursuant to a putative *Ex Parte* Order, which was not executed by the Superior Court.[118] API filed petitions for 30-day involuntary commitment and forced drugging on October 25, 2007,[119] a hearing on both petitions held on November 2, 2007, in which the Alaska Public Defender Agency represented Appellant. Both petitions were granted on November 2, 2007.[120]

Appellant was not discharged during the 30-day commitment, and a continuation 90-day petition for involuntary commitment was filed November 29, 2007, a hearing thereon was held December 20, 2007 in which Appellant was represented by the Alaska Public Defender Agency, and a written order for 90-day commitment was issued January 7, 2008.[121] API, in concert with Appellant's public guardian, arranged extra funding for Appellant to stay at an assisted living facility in Houston, Alaska called the "Big Lake Country Club,"[122] and Appellant discharged from API on January 21, 2008 to the Big Lake Country Club.[123]

3AN-08-247PR. On February 23, 2008, after Appellant quit taking the psychiatric drugs, he left the Country Club, was taken to API by the police, and voluntarily admitted

[117] Jud. Not. Apdx. 170.
[118] Jud. Not. Apdx. 168.
[119] Jud. Not. Apdx. 172-174.
[120] Jud. Not. Apdx. 175-178.
[121] Jud. Not. Apdx. 179.
[122] Jud. Not. Apdx. 182.
[123] Jud. Not. Apdx. 183.

himself.[124] On February 26, 2008, API filed petitions for involuntary commitment and forced drugging because Appellant refused to take psychiatric medications.[125] On March 7, 2008, Appellant's counsel filed a limited entry of appearance to represent Appellant with respect to the forced drugging petition only.[126] The hearing on the 30-day involuntary commitment petition was held March 14, 2008, in which Appellant was represented by the Alaska Public Defender Agency.[127] Superior Court Judge Jack Smith conducted the hearing, found Appellant was not gravely disabled, and denied the petition for 30-day involuntary commitment.[128]

3AN 08-3805CR. On April 10, 2008, Appellant was arrested for violating conditions of release, trespass and assault (pushing),[129] and he was confined in jail until the charges were dismissed on April 15, 2008.[130]

3AN 08-416P/S. On April 17, 2008, API filed petitions for 30-day involuntary commitment and forced drugging.[131] On April 21, 2008, the Law Project for Psychiatric Rights filed a Conditional Limited Entry of Appearance to represent Appellant with respect to forced drugging only.[132] The hearing on the involuntary commitment took

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[124] Jud. Not. Apdx 196.
[125] Jud. Not. Apdx 196.
[126] Jud. Not. Apdx. 187.
[127] Jud. Not. Apdx 188.
[128] Jud. Not. Apdx 202.
[129] Jud. Not. Apdx 205. Based on the testimony in the commitment case that followed, that it was someone else who was doing the pushing and Appellant didn't push back, it seems likely there was no assault by Appellant.
[130] Jud. Not. Apdx 204.
[131] Jud. Not. Apdx 208.
[132] Jud. Not. Apdx 207, without 90 pages of attachments.

place the same day, April 21, 2008 before Master Lack, who recommended Appellant be found not gravely disabled.[133] This recommendation was approved by the Superior Court on April 22, 2008, and both petitions for involuntary commitment and forced drugging dismissed.[134]

D. <u>May, 2008 Hearing Testimony</u>

At the May 12, 2008 hearing below, API called Lawrence Maile, PhD, a licensed psychologist and clinical director[135] and Dr. Kahnaz Khari, API staff psychiatrist.[136] Marieann Vassar, the Visitor, also testified against Appellant.[137]

On May 13, Appellant filed written testimony of Robert Whitaker, Ronald Bassman PhD, Paul Cornils, Loren R. Mosher, MD, and Sarah Porter.[138]

On May 14, 2008, at the continued hearing, Grace E. Jackson, MD, testified telephonically on behalf of Appellant,[139] including the submission of a written report,[140] API declined to cross-examine Ronald Bassman, PhD and Robert Whitaker,[141] and Dr. Hopson, API's Medical Director was called by Appellant.[142]

On May 15, 2008, Dr. Hopson's testimony concluded,[143] and Paul Cornils was

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[133] Jud. Not. Apdx 208.
[134] Jud. Not. Apdx 208.
[135] Tr. 17 (May 12, 2008).
[136] Tr. 41 (May 12, 2008).
[137] Tr. 74 (May 12, 2008)
[138] Exc. 128-177.
[139] Tr. 107 (May 14, 2008)
[140] Exc. 189.
[141] Tr. 168 & 171, respectively (May 14, 2008).
[142] Tr. 172 (May 14, 2008).
[143] Tr. 237 (May 15, 2008).

called for cross-examination on his written testimony.[144]

(1) API's Best Interest Testimony Below

Lawrence Maile, PhD testified on behalf of API with respect to best interests that that while Appellant "has improved" as a result of being drugged, "it has been a declining course overall;"[145] Appellant is pleasant and unthreatening when drugged,[146] and his professional wish for Appellant was that he be drugged against his will so that he would become a "friendly, pleasant guy," "funny" and "easy to be around; [147] Appellant is very clear he doesn't like the side effects, including weight gain and sedation;[148] Appellant doesn't have Tardive Dyskinesia--he has not been diagnosed with it;[149] and he was unaware Dr. Worrall had testified Appellant has Tardive Dyskinesia.[150]

Dr. Khari testified she had been away for two weeks and hadn't successfully met with Appellant;[151] Appellant is still delusional when drugged, but the intensity is at a lot lower level;[152] administering Risperdal to Appellant is within the standard of care;[153] she didn't know how he would respond to the Risperdal, but he has responded well in

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[144] Tr. 238 May 15, 2008).
[145] Tr. 22 (May 12, 2008).
[146] Tr. 24 (May 12, 2008).
[147] Tr. 38 (May 12, 2008).
[148] Tr. 39 (May 12, 2008).
[149] Tr. 39 (May 12, 2008).
[150] Tr. 40 (May 12, 2008). Dr. Worrall's prior testimony that Appellant has Tardive Dyskinesia was filed with the Superior Court the next day. Exc. 168.
[151] Tr. 41 (May 12, 2008).
[152] Tr. 47 (May 12, 2008).
[153] Tr. 53 (May 12, 2008).

the past;[154] she didn't know if Appellant stopped voluntarily taking Risperdal when the hospital insisted on adding Depakote, a mood stabilizer, and Seroquel, as a second antipsychotic;[155] that he was functioning in the community in an assisted living facility;[156] he was more rational, less labile and less tangential and had a higher quality of living standard when drugged;[157] she believed the drugging of Appellant was in his best interest because it would improve his mental state, delusional thought content, rational thought and his affective mood;[158] she had not observed any side effect of major concern to her;[159] Appellant has been given the drugs for a long time and Tardive Dyskenisia has never been observed; [160] she expected Appellant would stop taking the medication when he was discharged,[161] which is why she wanted to give him a long-acting shot,[162] saying "even every day is better than no day to stay stable;"[163] and she seeks forced drugging orders against all of her committed patients who don't agree to take the drugs.[164] The Superior Court sustained an objection to Dr. Khari testifying the newer neuroleptics have a better side effect profile than the older ones; [165] Dr. Khari

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[154] Tr. 54 (May 12, 2008).
[155] Tr. 60 (May 12, 2008).
[156] Tr. 55 (May 12, 2008)
[157] Tr. 55 (May 12, 2008).
[158] Tr. 57 (May 12, 2008).
[159] Tr. 51 (May 12, 2008).
[160] Tr. 51 (May 12, 2008).
[161] Tr. 63 (May 12, 2008).
[162] Tr. 63 (May 12, 2008).
[163] Tr. 63 (May 12, 2008).
[164] Tr. 71 (May 12, 2008).
[165] Tr. 48 (May 12, 2008). "Neuroleptics" are also called "antipsychotics," although they are really "chemical lobotomizers," their main perceived benefit actually being that they
----------(footnote continued)

admitted on cross-examination that the National Institute of Mental Health "CATIE Study" concluded they did not,[166] asserted there were other studies,[167] but could not name any.[168]

Dr. Hopson, API's Medical Director, testified Appellant has a history of not taking the drugs after he is discharged;[169] Appellant is able to carry on a much more appropriate conversation and is much calmer and affable when drugged and that would enable him to function at a higher level in the community;[170] drugging Appellant is the standard of care,[171] but admitting there have been many situations where the standard of care has proven to be very harmful, including psychiatry's frontal lobotomies.[172]

Marieann Vassar, the Court Visitor, testified that Appellant suffered erectile dysfunction and somnolence side effects,[173] and that she had never seen a diagnosis of Tardive Dyskinesia for Appellant.[174]

(2) Appellant's Best Interest Testimony Below

Robert Whitaker, who Appellant presented as an expert on the analysis of

(Continued footnote)----------
"stop annoying behaviors" and "inhibit so much brain activity . . that the symptoms which some people call psychotic or schizophrenic seem to be at bay." Tr. 141 (May 14, 2008).
[166] Tr. 61, 62 (May 12, 2008).
[167] Tr. 61 (May 12, 2008).
[168] Tr. 61 (May 12, 2008).
[169] Tr. 210 (May 15, 2008).
[170] Tr. 230 (May 15, 2008).
[171] Tr. 234 (May 15, 2008).
[172] Tr. 237 (May 15, 2008).
[173] Tr. 80 (May 12, 2008).
[174] Tr. 81 (May 12, 2008).

clinical studies,[175] submitted an extensive analysis of the scientific research regarding the class of drugs commonly forced on people, the neuroleptics, also called antipsychotics,[176] which he summarized as follows:

a) Antipsychotics increase the likelihood that a person will become chronically ill.

b) Long-term recovery rates are much higher for unmedicated patients than for those who are maintained on antipsychotic drugs.

c) Antipsychotics cause a host of debilitating physical, emotional and cognitive side effects, and lead to early death.

d) The new "atypical" antipsychotics are not better than the old ones in terms of their safety and tolerability, and quality of life may even be worse on the new drugs than on the old ones.[177]

Dr. Jackson was qualified as an expert in psychiatry and psychopharmacology.[178] With respect to Mr. Whitaker's written testimony, Dr. Jackson testified, it is a "very accurate and very clear presentation of the information as I understand it myself."[179] Dr. Jackson also had prepared a written report, which was admitted into evidence.[180] Dr. Jackson's testimony, including the written report, describes the ineffectiveness and extreme harm caused by the neuroleptics, including Risperdal (chemical name risperidone), confirming Mr. Whitaker's analysis with greater specificity as to the

[175] Exc. 140, Tr. 169 (May 14, 2008). Since Mr. Whitaker's direct testimony was in writing and he was not cross-examined, no formal qualification as an expert occurred, the Superior Court letting his written testimony speak for itself. Tr. 169-171 (May 14, 2008).
[176] Exc. 140-153.
[177] Exc. 152-153.
[178] Tr. 111 (May 14, 2008), Exc. 178-188.
[179] Tr. 112 (May 14, 2008).
[180] Exc. 189.

effects in the brain and body.[181] Dr. Jackson testified that due to the way the published information is influenced by the pharmaceutical companies, it would be almost impossible for a psychiatrist in clinical practice to find out, and most don't know, the truth about the neuroleptics;[182] the psychiatric drugs forced on Appellant over the decades had inflicted upon Appellant what she called "Chemical Brain Injury;"[183] they cause dementia of which Appellant is an example;[184] the drugs' primary effect is inhibiting so much brain activity that they stop annoying behavior;[185] they are actually chemical lobotomizers;[186] there is a high likelihood Appellant will die in the next five years if he is placed on risperidone;[187] the neuroleptics, including Risperdal, among other serious problems, are associated with cognitive and behavioral decline,[188] increase the risk for strokes and heart attacks, leg clots and pulmonary edema;[189] based on Appellant's long term drugging history he should have Tardive Dyskinesia; [190] Risperdal can cause psychosis when it is administered[191] as well as when it is withdrawn;[192] because of the severe psychiatric side effects from withdrawal, people should be allowed a lengthy time off the drugs to determine how much they can

[181] Tr. 133, *et seq.* (May 14, 2008) & Exc. 189-199.
[182] Tr. 132-133 (May 14, 2008).
[183] Tr. 135 (May 14, 2008).
[184] Tr. 135 (May 14, 2008).
[185] Tr. 141 (May 14, 2008).
[186] Tr. 141 (May 14, 2008).
[187] Tr. 160 (May 14, 2008).
[188] Tr. 136 (May 14, 2008).
[189] Tr. 139 (May 14, 2008).
[190] Tr. 160 (May 14, 2008).
[191] Tr. 144 (May 14, 2008).

improve,[193] and concluding by testifying "it would be very unwise [to administer Risperdal] for a lot of reasons."[194]

Dr. Loren Mosher's testimony from the *Myers* trial in 2003 was submitted under Evidence Rule 804(b)(1).[195] Dr. Mosher, among other things was the former Chief for the Center for Studies of Schizophrenia at the National Institute of Mental Health[196] and was qualified in *Myers* as an expert psychiatrist, especially in schizophrenia.[197] His testimony included that Dr. Jackson "knows more about the mechanisms of action of the various psychotropic agents than anyone who is a clinician, that I'm aware of."[198] It also included that neuroleptics are not the only viable treatment,[199] continuing:

> [they] will reduce the so-called positive symptoms, the symptoms that are expressed outwardly for those kinds of folks. And that way they may seem better, but in the long run, the drugs have so many problems, that in my view, if you have to use them, you should use them in as small a dose for as short a period of time as possible. And if you can supply some other form of social environmental treatment -- family therapy, psychotherapy, and a bunch of other things, then you can probably get along without using them at all, or if at all, for a very brief period of time.[200]

Dr. Mosher's testimony also included that as a therapeutic matter, "Involuntary treatment should be difficult to implement and used only in the direst of

(Continued footnote)----------
[192] Tr. 145 (May 14, 2008).
[193] Tr. 147-148 (May 14, 2008).
[194] Tr. 151 (May 14, 2008).
[195] Exc. 154.
[196] Exc. 155-156.
[197] Exc. 162.
[198] Exc. 164.
[199] Exc. 162.
[200] Exc. 162-163.

circumstances,"[201] because once a psychiatrist resorts to force, "it becomes nearly impossible to change . . . into . . . the traditional role of the physician as a healer advocate for his or her patient."[202]

Paul Cornils, who had extensive experience working with Appellant in the community,[203] testified Appellant would receive medication at API and immediately discontinue it when released; Appellant doesn't like the medication; that, other than the sedative effects, he did not observe any changes in Appellant's behavior on or off the drugs; Appellant's delusions are as strong, his anger and aggression is still present, but he just does not express them as strongly, he is less disturbing most of the time on the drugs and his behavior is more socially acceptable,[204] and because he does not like and will quit taking the medication, API's plan is not beneficial to Appellant and futile.[205]

(3) API's Less Intrusive Alternative Testimony Below

Dr. Khari testified it is very good to have a program in the community that will work with people without drugs who, like Appellant, don't want to take neuroleptics.[206]

Dr. Hopson, API's Medical Director, testified it is when Appellant loses his housing that he deteriorates in the community to the point he is brought to API,[207]

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[201] Exc. 156-154, 163.
[202] Exc. 163.
[203] Exc. 129, Tr. 242 (May 15, 2008).
[204] Tr. 241-242 (May 15, 2008).
[205] Tr. 243 (May 15, 2008).
[206] Tr. 63 (May 12, 2008).
[207] Tr. 182 (May 14, 2008).

Appellant's situation is unique;[208] API wouldn't let Appellant out on a daily pass because "that is not our mission;"[209] even though Appellant would be much happier if he was let out during the day, "that would not at all be in the mission of the hospital;"[210] API wouldn't provide housing (of last resort) proposed by Appellant because "it sets a precedence for us to be providing a different level of care than we're accustomed to doing;"[211] if an intensive case-management program was established, which is "where Mr. Cornils has come into the picture," Appellant might never have to come back to the hospital;[212] API had previously made an exception for Appellant by providing outpatient services, which it normally doesn't provide;[213] that to him "to not treat" means "to not use medication;"[214] and all of API's patients are admitted involuntarily.[215]

(4) Appellant's Less Intrusive Alternative Testimony Below

Dr. Jackson, Dr. Bassman, and Mr. Whitaker testified that based on the scientific evidence they cited, non-drug approaches are far more successful than psychiatric drugs,[216] with Dr. Jackson testifying Appellant's proposed plan for a less intrusive alternative "looked like a very solid and a very reasonable proposal."[217]

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[208] Tr. 182 (May 14, 2008).
[209] Tr. 181 (May 14, 2008).
[210] Exc. 183 (May 14, 2008).
[211] Tr. 215 (May 15, 2008).
[212] Tr. 183 (May 14, 2008).
[213] Tr. 233 (May 15, 2008).
[214] Tr. 190 (May 14, 2008).
[215] Tr. 214 (May 15, 2008).
[216] Exc.189-207, Tr. 107-165, Exc. 135-139; and Exc. 140-153, respectively.
[217] Tr. 150 (May 14, 2008).

Dr. Mosher testified, "without adequate housing, mental health 'treatment' is mostly a waste of time and money,"[218] and "if some other form of social environmental treatment -- family therapy, psychotherapy, and a bunch of other things [are provided], then you can probably get along without using [psychiatric drugs] at all, or if at all, for a very brief period of time."[219]

Sarah Porter, whose testimony in 3AN 07-1064PR was submitted under Evidence Rule 804(b)(1)[220] and was qualified therein as an expert in alternative treatments,[221] testified to the great success of the non-coercive program she established,[222] saying, among other things "there is growing recognition that medication is not a satisfactory answer for a significant proportion of the people who experience mental distress and that for some people it creates more problems than solutions;"[223] and the alternative approach has been successful with people who had been on medication for a long time.[224]

Paul Cornils, testified to his extensive experience working with Appellant in the community;[225] that Appellant could function in the community without psychiatric medication if he was given the appropriate support,[226] which is primarily housing[227] and having someone with him for an extended period of time during the day to help him meet

[218] Exc. 157.
[219] Exc. 163.
[220] Exc. 154.
[221] Exc. 174.
[222] Exc. 170-176.
[223] Exc. 177.
[224] Exc. 170.
[225] Exc. 129, Tr. 240-261 (May 15, 2008).
[226] Tr. 240-261 (May 15, 2008)..

his needs and stay out of trouble;[228] that quite frequently he was called to intercede when Appellant was having conflicts with his public guardian or other individuals who he perceived as wanting him to take those medications and limit his rights;[229] that that makes Appellant very angry, resulting in disturbing behavior and these problems would be mitigated if he was allowed to choose not to take the medications;[230] that because of Appellant's extreme difficulty in retaining housing, including that the Brother Francis homeless shelter is not available to him, he should be allowed to sleep at API when or if he chooses to do so;[231] and if he is brought to API involuntarily, he should be let out on pass for at least four hours a day with escort by staff members who like him, or some other party willing and able to do so.[232]

STANDARD OF REVIEW

This Court reviews the trial court's factual findings for clear error, which is found when this Court is left with a definite and firm conviction on the entire record that a mistake has been committed; the trial court's legal analysis is reviewed *de novo*, and in answering legal questions this Court applies the rule of law that is most persuasive in light of precedent, reason, and policy.[233]

(Continued footnote)----------
[227] Exc. 132, Tr. 240, *et seq*. (May 15, 2008).
[228] Exc. 133, Tr. 240, *et seq*. (May 15, 2008).
[229] Tr. 246 (May 15, 2008).
[230] Tr. 246 (May 15, 2008).
[231] Exc. 132.
[232] Exc. 132.
[233] *Vezey v. Green*, 171 P.3d 1125 (Alaska 2007).

ARGUMENT

I. Summary of Argument.

In *Myers*,[234] this Court held in non-emergency cases, in addition to compliance with all applicable statutory requirements, a court may not permit a treatment facility to administer psychotropic drugs unless it finds by clear and convincing evidence the proposed treatment is in the patient's best interests and no less intrusive alternative is available. Here, the evidence (a) does not support the Superior Court's conclusion the proposed forced drugging is in his best interests, and (b) supports no conclusion other than that a less intrusive alternative is available.

The Superior Court granted API's petition to subject Appellant to psychiatric drugging against his wishes as being in his best interests under *Myers*,[235] despite unrebutted evidence the proposed drugging is ineffective for many, if not most, dramatically reduces recovery rates, are very unpleasant, are very harmful physically, including causing brain damage, and lead to early death or, at times, are outright fatal and the unanimous testimony that 28 years of psychiatrically drugging Appellant during 75 hospitalizations has been unsuccessful. The testimony in favor of the forced drugging was essentially, "but that's what we do," i.e., it is the standard of care. Appellant asserts this is constitutionally insufficient to subject Appellant to the forced drugging.

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[234] 138 P.3d 238, 254 (Alaska 2006).
[235] 138 P.3d 238 (Alaska 2006)

Similarly, saying "it is not API's mission" to provide an identified and entirely feasible less intrusive alternative is a constitutionally insufficient justification for failing to provide it.

To the extent Appellant was unable to make the record to have established the forced drugging is not in his best interests and there is a less intrusive alternative available, the extremely rushed basis the Superior Court ordered for the conduct of the hearing over Appellant's objections denied him due process.

Finally, this appeal is not moot, or an exception to the mootness doctrine should be applied. Appellant's claim to a less intrusive alternative is still very much a present, live controversy in which he is entitled to relief upon prevailing. Whether the best interests issue is technically moot because the commitment period has expired is perhaps less clear. Under *Washington v. Harper*[236] it is not moot under the Due Process Clause of the United States Constitution because Appellant faces the prospect of future forced drugging proceedings, while in *Myers*,[237] citing to *Harper*, this Court invoked the public interest exception to the mootness doctrine.

II. The Evidence Does Not Support the Superior Court's Conclusion the Forced Drugging is In Appellant's Best Interests

In this Court's May 23, 2008 Order granting a stay pending appeal here, full court reconsideration denied June 25, 2008, at 2-3, this Court noted with respect to the merits of this appeal that "findings of fact . . . are reviewed under a clearly erroneous standard,

[236] 494 U.S. 210, 218-219, 110 S.Ct. 1028, 1035, 108 L.Ed.2d. 178 (1990).
[237] 138 P.3d at 245.

and . . . necessary conclusions of law are considered de novo." Appellant respectfully suggests the Superior Court's conclusion that the proposed forced drugging of Appellant is in his best interest is a necessary conclusion of law which this Court reviews *de novo*. Even if not, Appellant suggests the entire record must leave this Court with a definite and firm conviction that a mistake has been committed, i.e., clearly erroneous.

A. The *Myers* Best Interest Factors Mandate Reversal

In *Myers*, this Court required the trial court to make an independent determination of best interests and in doing so, *at a minimum*, to consider the following information which AS 47.30.837(d)(2) directs the treatment facility to give to its patients in order to obtain informed consent:[238]

> (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; and
> (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][239]

This Court then found helpful and sensible the Supreme Court of Minnesota's holding that in order to determine the "necessity and reasonableness" of a treatment, "courts should balance [a] patient's need for treatment against the intrusiveness of the

[238] 138 P.3d at 252.
[239] 138 P.3d n.92.

prescribed treatment," also citing the following "[f]actors that the Minnesota court believed should be considered:"[240]

> (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
> (2) the risks of adverse side effects;
> (3) the experimental nature of the treatment;
> (4) its acceptance by the medical community of the state; and
> (5) the extent of intrusion into the patient's body and the pain connected with the treatment.[241]

The Superior Court did not discuss most of these "*Myers* Factors."

(1) An Explanation Of The Patient's Diagnosis And Prognosis, Or Their Predominant Symptoms, With And Without The Medication;

With Medication

Dr. Jackson testified Appellant will likely die within five years if maintained on a neuroleptic(s), such as Risperdal.[242]

The testimony was unanimous that with the medication Appellant's psychiatric symptoms would continue to be severe, but his behavior would not be as disturbing to other people. In concluding the forced drugging was in Appellant's best interests, the Superior Court's stated that when drugged in the past, Appellant's "behavior has improved to such an extent that he has been able to successfully reside in the community, albeit for short periods of time,"[243] which might be considered a statement about prognosis with the medication. However, there is little or nothing in the record that

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[240] 138 P.3d 252, citing to *Price v. Sheppard*, 239 N.W.2d 905, 239 (Minnesota 1976).
[241] *Id*.
[242] Tr. 160 (May 14, 2008).
[243] Exc. 210.

demonstrates Appellant stays out of the hospital longer as a result of being drugged. As the following table compiled from the facts set forth above regarding Appellant's 2007-2008 confinements, the evidence is that the length of time Appellant remains free is dependent on the amount of community support he gets, rather than being drugged:

Case No	Days Free	Custody Date	Release Date	Days Confined	Comments
06-1039 PR		09/01/06	01/03/07	124	Limited CHOICES services on release
07-247 PR	50	02/22/07	04/04/07	41	Won 90-day jury trial
07-598 PR	40	05/14/07	06/26/07	43	Limited CHOICES services on release
07-1064 PR	64	08/29/07	09/14/07	16	No community services on release
USA v Bigley	5	09/19/07	10/12/07	23	No community services on release
07-1795 CR	0	10/12/07	10/23/07	11	Tranferred to API by court?
07-1311 PR	0	10/23/07	01/21/08	90	Extra Funds for Housing & Services
08-247 PR	33	02/23/08	03/14/08	20	Found Not Gravely Disabled
08-3805 CR	28	04/11/08	04/15/08	4	No community services on release
08-416 PR	2	04/17/08	04/21/08	4	No community services on release
08-593 PR	4	04/25/08			

Without the Medication

Dr. Jackson testified that Appellant had a better prognosis off the medication than on it, and because the withdrawal effects manifest themselves as a worsening of psychiatric symptoms over some length of time, Appellant needs to be given a relatively extended period of time off the drugs.[244] Sarah Porter testified that non-coercive support in the community has proven very successful, even for people who have been drugged against their will for a long time.[245] Robert Whitaker testified chronicity is dramatically increased and recovery rates dramatically decreased for people maintained on neuroleptics.[246] Paul Cornils testified that without medication, but with using the non-

[244] Tr. 144-145 (May 14, 2008).
[245] Exc. 171.
[246] Exc. 143-147.

coercive community support approach about which he testified, Appellant could be successful in the community and there is a reasonable prospect within a year to eighteen months Appellant could get by with far less services and be within the normal Medicaid funding range.[247] The Superior Court ignored this unrebutted testimony.

(2) 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;

Possible Side Effects. The Superior Court did not address the unrebutted testimony establishing the serious and substantial side effects to which Dr. Jackson and Robert Whitaker testified. As Dr. Jackson testified, many of these are not really "possible," but certain.

Possible Benefits. Particularly instructive regarding the possible benefits of the proposed treatment, or more accurately, the lack thereof for many if not most of the people taking these drugs, is Robert Whitaker's and Dr. Jackson's unrebutted testimony that it is counterproductive and the perceived benefit is really only suppressing the behavior that is disturbing people through being a "chemical lobotomizer" in which they "inhibit so much brain activity . . . that the symptoms . . . seem to be at bay."[248] The Superior Court's, finding that the drugging has allowed Appellant to reside in the community, "albeit for a short time,"[249] as a benefit from the drugging seems preposterous in light of 28 years and 75 admissions to API under its forced drugging

[247] Exc. 133.
[248] Tr.141 (May 14, 2008).

regime. Appellant spent the last 100 days of 2006 under commitment, the end of which was when the Law Project for Psychiatric Rights began representing Appellant in resisting forced drugging.[250]

(3) A Review Of The Patient's History, Including Medication History And Previous Side Effects From Medication;

The Superior Court found "this particular medication has not caused severe side effects to Mr. Bigley in the past,"[251] in spite of acknowledging that Appellant has Tardive Dyskinesia, which is such a serious side effect it is specifically identified in AS 47.30.837(d)(2), and ignoring Dr. Maile's testimony about sedation,[252] the Court Visitor's testimony regarding sedation and sexual dysfunction,[253] and Dr. Jackson's testimony the psychotropic drugs forced on Appellant have given Appellant what she calls Chemical Brain Injury[254] and probably caused dementia or dysmentia.[255]

(4) An Explanation Of Interactions With Other Drugs, Including Over-The-Counter Drugs, Street Drugs, And Alcohol

API presented a little testimony regarding interactions with other drugs, including

(Continued footnote)----------
[249] Exc. 210.
[250] Jud. Not. Apdx. 9.
[251] Exc. 211. The Superior Court then stated the risk of that condition is considerable less with risperidone than with "some other medications," citing transcript pages in the *Myers* case. Appellant can find no such statement in the referenced pages and a word search on "Tardive" for the entire transcript also did not reveal any such statement. Assuming that "some other medications" means first generation neuroleptics, such as Haldol, even if such an opinion was expressed in 2003, Dr. Jackson testified a 2006 study showed a very high rate of Tardive Dyskinesia for Risperdal (risperidone). Tr. 158 (May 14, 2008).
[252] Tr. 38-39 (May 12, 2008).
[253] Tr. 80 (May 12, 2008).
[254] *See*, above written testimony of Dr. Jackson and TR. 135 (May 14, 2008).

over-the-counter, street drugs and alcohol,[256] however, Appellant doesn't have a history of using street drugs or alcohol in any problematic way[257] and it is not an issue here.

(5) Information About Alternative Treatments And Their Risks, Side Effects, And Benefits, Including The Risks Of Nontreatment

Drs. Jackson and Bassman, Mr. Whitaker and Ms. Porter all testified extensively that other approaches are far more successful with far less harm than the drugs.[258] API presented no testimony on this required element.

(6) The Extent And Duration Of Changes In Behavior Patterns And Mental Activity Effected By The Treatment

Dr. Khari testified that even when on medication Appellant maintains his delusional thought content.[259] Dr. Maile testified that Appellant's condition has been declining over time,[260] which is under the 28 year forced drugging regime imposed on him by API. As set forth above, Dr. Jackson testified this is likely due to the brain damage inflicted by the drugs, which she calls Chemical Brain Injury.[261] It is unanimous Appellant quits taking the drugs when they are not forced upon him. Mr. Cornils, who, unlike API's witnesses, spent a considerable amount of time working with Appellant in the community,[262] testified forcing Appellant to take the Risperdal is futile,[263] and with

(Continued footnote)----------
[255] Tr. 155 (May 14, 2008).
[256] Tr. 52-53 (May 12, 2008)
[257] Tr. 81 (May 12, 2008).
[258] Exc. 200-204, 135-139, 143-147,& 170-177, respectively.
[259] Tr. 47 (May 12, 2008).
[260] Tr. 22 (May 12, 2008).
[261] *See*, above written testimony of Dr. Jackson and TR. 135 (May 14, 2008).
[262] Tr. 242 May 15, 2008).

respect to Appellant's behavior on and off the drugs:

> Q Did you observe any differences in Mr. Bigley's behavior?
>
> A Beyond the sedative effects, no. His -- his delusions are as strong. His anger and aggression is still present, he just does not express them as strongly. He is less disturbing most of the time. I don't know if that makes sense to you or not. But if you spend a lot of time with him, like I have, he -- I have not noticed much difference except to say that his behavior is more socially acceptable when he's on medication.[264]

As set forth above, the Superior Court found any perceived positive benefit is for only a short time.

(7) The Risks Of Adverse Side Effects;

The risks of adverse side effects was one of the factors set forth by the Minnesota Supreme Court in *Price* this Court cited with approval. This factor parallels the AS 47.30.837(d)(2)(B) factor and is not separately addressed here.

(8) The Experimental Nature Of The Treatment.

Dr. Khari testified the proposed treatment is not experimental[265] and it is not an issue in this case.

(9) Acceptance Of The Proposed Treatment By The Medical Community Of The State.

Both Dr. Khari,[266] and Dr. Hopson[267] testified the proposed treatment conformed to the standard of care in Alaska. The Superior Court found that the proposed treatment

(Continued footnote)----------
[263] Tr. 243 (May 15, 2008).
[264] Tr. 241-242 (May 15, 2008).
[265] Tr. 53 (May 12, 2008).
[266] Tr. 53 (May 12, 2008).
[267] Tr. 234 (May 15, 2008).

is within the standard of care, which Appellant does not dispute. However, it is respectfully suggested that in light of Dr. Jackson's, Dr. Mosher's and Mr. Whitaker's unrebutted testimony regarding how uninformed that acceptance is, and the harm it is causing,[268] this factor should be downgraded if not eliminated. It is not logically relevant to the "independent judicial determination of the patient's best interests" required under *Myers*.[269]

Moreover, while the standard of care is one of the factors cited by the Minnesota Supreme Court in *Price*, it is not one of the AS 47.30.837(d)(2) factors. In this regard, the following analysis by this Court in *Myers* seems useful:

> [T]he issue is not one of medical competence or expertise. As we have already seen, the right at stake here-the right to choose or reject medical treatment-finds its source in the fundamental constitutional guarantees of liberty and privacy. The constitution itself requires courts, not physicians, to protect and enforce these guarantees. Ultimately, then, whether Myers's best interests will be served by allowing the state to make a vital choice that is properly hers presents a constitutional question; and though the answer certainly must be fully informed by medical advice received with appropriate deference, in the final analysis the answer must take the form of a legal judgment that hinges not on medical expertise but on constitutional principles aimed at protecting individual choice.[270]

Whether acceptance of the proposed treatment by the medical community in Alaska is a factor or not, it would still be just one factor of many.

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[268] Tr. 112, et seq. (May 14, 2008) and Exhibits E, F, pp 2-8, & G.
[269] 138 P.3d at 252.
[270] 138 P.3d at 250.

(10) The Extent Of Intrusion Into The Patient's Body And The Pain Connected With The Treatment.

This Court has noted forced drugging has been equated with the intrusiveness of electroshock and lobotomy.[271] Dr. Hopson testified that if API was authorized to administer the Risperdal as it has requested and Appellant refused, he would be held down and injected.[272] Forced psychiatric drugging is so intrusive it is asserted to "violate the universal prohibition against torture."[273] When the former Soviet Union gave this class of drugs to political prisoners, the international community decried it as torture.[274] It is no less so because someone has been diagnosed with mental illness.

B. The Unrebutted Evidence Presented Mandates The Conclusion the Forced Drugging is Not in Appellant's Best Interests

The unanimous testimony is the drug API seeks to force Appellant to endure will, at best, make Appellant more tolerable to other people for a short time. API also asserts it will allow him to live more successfully in the community, but this is belied by its own testimony and that Appellant has been admitted to API 75 times over 28 years under API's forced drugging regime. The unrebutted testimony is that this drug, Risperdal (risperidone), is largely ineffective, reduces recovery rates, is extremely harmful, including causing early death, and that the previous forced drugging of Appellant has

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[271] *Myers*, 138 P.3d at 242; *Wetherhorn* 156 P.3d at 382.
[272] Tr. 185 (May 14, 2008). He also testified that in his experience patients will quite frequently submit when faced with that prospect. *Id*.
[273] T. Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free From Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT'L L. & COM. 405 (2007).
[274] Carl Gershman, *Psychiatric Abuse in the Soviet Union*, 21 Society 54, 57 (July 1984).

caused him to suffer from Chemical Brain Injury of such an extent it has probably caused dysmentia or dementia and continued administration of this drug will likely leave Appellant dead within five years. This, Appellant respectfully suggests, compels the conclusion that the forced drugging is not in his best interests.

III. This Court Should Order the Provision of A Less Intrusive Alternative

A. Appellant Proposed an Available Less Intrusive Alternative

Appellant proposed a less intrusive alternative consisting of the provision of housing and having someone be with him extensively in the community. One piece of this was utilizing API as "housing of last resort."[275] The reason for this is, at this point, Appellant tends to lose his housing regularly, and even the Brother Francis Shelter is unavailable to him. While some people do reasonably well without housing, successfully choosing the streets over being required to take psychiatric drugs, Appellant is not one of them. The testimony was unanimous it is when Appellant loses his housing that problems in the community escalate. Appellant proposed that unless alternative funding for such housing was made available, API be ordered to provide a reasonably nice dwelling for Appellant and that if/when Appellant has lost his housing, API itself, be housing of last resort. The testimony was also unanimous that having someone with Appellant extensively in the community would almost certainly dramatically improve the situation and, with the right approach, potentially dramatically improve Appellant's long-

[275] Tr. 280 (May 15, 2008).

term functioning in the community. There was not any dispute, or at least contrary evidence, about this. API just refuses to provide it.

The Superior Court did not address any of this other than to say that letting Appellant "come and go from API as he chooses"[276] . . . "is inconsistent with API's role as an acute care facility," that "[Appellant] would not avail himself of the option even if it were available,"[277] and, referring to potential community services being provided by CHOICES, Inc., that because Appellant was not following medical advice to take the drugs, Appellant had "presented no viable alternative."[278]

First, utilizing API as housing of last resort,[279] was not the cornerstone of the proposed less intrusive alternative. Providing housing and community support were. Second, API can and should be ordered to provide the less intrusive alternative in the event another provider, such as CHOICES, is not found and funded to do so.

B. API Is Constitutionally Required to Provide An Available Less Intrusive Alternative

API's is constitutionally required to provide an available less intrusive alternative. *Wyatt v. Stickney*,[280] ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt*,[281] (state legislature is not free to provide social service in a

[276] This was not what Appellant proposed.
[277] Exc. 210.
[278] Exc. 211.
[279] Tr. 280 (May 15, 2008)
[280] 344 F.Supp. 387 (M.D.Ala.1972).
[281] 503 F.2d 1305, 1315 (5th Cir. 1974).

way that denies constitutional right). In *Wyatt* the federal courts required the State of Alabama to spend funds in specific ways to correct constitutionally deficient services.

Upon API invoking its awesome power to confine Appellant and seeking to exercise its similarly awesome power to forcibly drug him against his will, Appellant's constitutional right to a less intrusive alternative arises under *Myers*. Under *Wyatt* API may not avoid its obligation to do so by adopting a mission that denies Appellant's constitutional right to a less intrusive alternative.

In *Hootch v. Alaska State-Operated School System*,[282] in considering an equal protection claim regarding the right to state funding of local schools, this Court held that resolution of the complex problems pertaining to the location and quality of secondary education are best determined by the legislative process, but went on to hold, "We shall not, however, hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or United States Constitutions is established." Here, it is respectfully suggested, this Court should not hesitate to order the provision of the available less intrusive alternative to satisfy the constitutional due process right to a less intrusive alternative it required in *Myers*. Otherwise, the right is meaningless.[283]

C. Less Intrusive Alternative Remedy

Because it is fairly likely that over time adjustments in the less intrusive alternative will be necessary and/or desirable, Appellant is requesting that should this

[282] 536 P.2d 793, 808–09 (Alaska 1975).
[283] There are likely limits to the right, such as unreasonable cost, but that is not the situation here.

Court reverse and remand to the Superior Court to order API to provide a less intrusive alternative, this Court also direct the Superior Court to retain jurisdiction to make such modifications as may, from time to time, be necessary and/or desirable. In addition, if this Court remands to the Superior Court to fashion a less intrusive alternative, Appellant requests this Court direct the Superior Court to grant on an interim basis, the less intrusive alternative proposed by Appellant.

IV. The Expedited Hearing Denied Appellant Due Process

As set forth above, the Master refused to allow counsel for Appellant to appear on behalf of Appellant before he was committed,"[284] Appellant's counsel was not notified when the commitment petition was granted,[285] counsel for Appellant was notified at 3:30 on Friday, May 9, 2008, while he was out of state,[286] that the hearing on the Forced drugging Petition would be heard at 10:00 am, the next business day, June 12, 2008,[287] the Superior Court ordered the hearing take place over counsel for Appellant's objection that he had no notice of the factual basis supporting the Forced Drugging Petition, and after being told counsel for Appellant had arrived back in town at 1:00 am that morning and was not prepared to proceed.[288] This denied Appellant due process.

In *Wetherhorn*, this Court held that unlike civil commitment, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse

[284] Exc. 117.
[285] Tr. 5 (May 12, 2008).
[286] Tr. 3 (May 12, 2008).
[287] Exc. 126-127.
[288] Tr. 3, 13, (May 12, 2008).

psychotropic medications remain intact and therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.[289] Appellant suggests the same must be true of the constitutional protection that the trial court must find the forced drugging is in Appellant's best interests and there is no less intrusive alternative.

The Superior Court proceeded on the extremely rushed schedule despite *Wetherhorn's* explicit holding to the contrary because of AS 47.30.839(e)'s requirement that a hearing to determine the respondent's capacity be held within 72 hours after the filing of a forced drugging petition.[290] Appellant explicitly objected to the rushed proceeding as a violation of due process,[291] and argued the statute's 72 hour requirement only applies to the capacity issue, not the best interests and less intrusive alternative determinations required in *Myers*, and pointing out that if the person is found competent, there is no necessity of any further proceedings to determine best interests and whether a less intrusive alternative is available.[292] However, even if AS 47.30.839(e) is judicially expanded to include that the best interest and no less intrusive alternative determinations be heard within 72 hours, the lack of notice and a reasonable opportunity to be heard here violated due process.

Meaningful notice and a meaningful opportunity to be heard, including being informed of the factual basis forming the claim, are the fundamental hallmarks of Due

[289] 156 P.3d 371, 381 (Alaska 2007).
[290] Tr. 14 (May 12, 2008).
[291] Tr. 17 (May 12, 2008).

Process.[293] Here, Appellant protested he didn't even know the drug(s) with which API proposed to forcibly drug him,[294] and then the Superior Court complained the testimony he presented was not more specifically addressed to the drug API finally identified in testimony.[295] With no factual basis on the *Myers* Factors set forth in the Forced Drugging Petition and without being allowed to take the depositions of API's witnesses, Appellant could not ascertain their expected testimony prior to the hearing. This did not allow Appellant the opportunity to bring in rebuttal witnesses and/or documentary evidence.

All of API's witnesses testified they were unaware of events Appellant brought to their attention, such as Appellant stopping his voluntary use of Risperdal when API added Seroquel and Depakote, and the expedited schedule did not allow Appellant time to subpoena Dr. Worrall to testify.[296] Nor was Appellant able to confront Dr. Khari with Dr. Worrall's previous involuntary commitment petition in which he stated Appellant was "not responding to Risperdal alone." This was extremely prejudicial because Dr. Khari, who had virtually no experience with Appellant, and had obviously not read very much of his chart, testified Appellant had responded well to Risperdal in the past[297] and the Forced Drugging Order was predicated on Risperdal being effective for Appellant.

(Continued footnote)----------
[292] Tr. 15 (May 12, 2008).
[293] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004).
[294] Tr. 8, (May 12, 2008).
[295] Tr. 129, 148 (May 14, 2008).
[296] Dr. Worrall left his employment at API in the fall of 2007, so it was going to take more time than Appellant's counsel had available to subpoena him.
[297] Tr. 54 (May 12, 2008).

Even more prejudicial was the lack of time to prepare the less intrusive alternative case. Appellant was surprised by Mr. Cornils' testimony that CHOICES' medical director would not accept a client who was not taking prescribed psychiatric medications,[298] and subsequently learned this impediment could probably have been overcome. Above, Appellant asks this court to take judicial notice that in 3AN 07-1311PR, API arranged for extra-funding to provide extra services and more expensive housing to Appellant following discharge to the "Country Club" (which required Appellant to take the prescribed medication).[299] This is a critical point because it shows API has provided extra support to Appellant, including in the community, when it requires psychiatric drugging. The rushed time frame did not permit Appellant to present the evidence below on this critical fact. In fact all of the material in the Judicial Notice Appendix was not in the record because of the Superior Court's rush to judgment.

The rushed time frame ordered by the Superior Court denied Appellant Due Process. This was exacerbated by the Probate Master's refusal to allow Appellant's counsel to enter his limited appearance until after commitment had been granted, denying him access to Appellant's medical chart until after the hearing started and then only to a portion of it.[300] As argued to the Master, Appellant had the absolute right to counsel of his choice, if available, and Civil Rule 81(d) authorizes the limited appearance.[301]

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[298] Tr. 250 (May 15, 2008).
[299] Exc. 183, Tr. 233 (May 15, 2008).
[300] Tr. 8, 10, 12 (May 12, 2008).
[301] Tr. 5-13 (April 30, 2008).

V. This Appeal is Not Moot or an Exception to the Mootness Doctrine Should be Applied

In this Court's May 23, 2008, Order granting a stay pending appeal,[302] this Court said the possibility of technical mootness is substantial and the parties should anticipate this issue in their briefing. In *Wetherhorn*, this Court held, "A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[303] In *Harper*,[304] the United States Supreme Court held the appeal there was not moot even though the appellant was no longer subject to the forced medication order because he was not unlikely to be faced with a new forced medication effort. In *Myers*, citing to *Harper*, this Court held the forced drugging petition was moot, but applied the public interest exception to the mootness doctrine.[305] Here, there is no question but that Appellant is likely to be faced with future forced drugging efforts if relief is not granted here.

Appellant's claim that he is entitled to an order requiring API to provide a less intrusive alternative to function better in the community is a present, live controversy, which provides him with relief if he prevails. It is not moot.[306]

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[302] Full Court reconsideration denied June 25, 2008.
[303] 156 P.3d at 380.
[304] 494 U.S. at 218-219, 110 S.Ct. at 1035.
[305] 138 P.3d at 245.
[306] However, even if this Court considers it technically moot, it meets the public interest exception to the mootness doctrine. Most telling in this regard is Appellant has presented essentially the same claim for a less intrusive alternative four times and it has evaded review thus far. The issue was also initially raised in Appeal No S-13015 in this Court, but dropped in favor of pursuing it here because, "the less intrusive alternative issue
----------(footnote continued)

Whether the best interests finding is moot under Alaska law presents a closer question, but whether it is or is not, this Court should consider it under the public interest exception to the mootness doctrine. In *Wetherhorn*, this Court set forth the following factors in determining whether the public interest exception to the mootness doctrine applies:

> (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[307]

The disputed issues here are capable of repetition and the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented. In fact, they have been repeatedly circumvented with Appellant being subjected to forced drugging orders by the Superior Court when the Law Project for Psychiatric Rights was not in a position to represent Appellant. Appellant respectfully suggests, if this Court determines the best interest issue is technically moot, the issue is so important to the public interest as to justify overriding the mootness doctrine.[308]

(Continued footnote)----------
arises in a less complicated, more straightforward way" here. Brief of Appellant, S-13116, n.5.

[307] At 380-81

[308] Although this Court may determine the issue is moot for Alaska constitutional purposes, it would appear it is not for United States constitution purposes under the United States Supreme Court decision in *Harper*.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court:

Reverse the Superior Court's findings that

(1) the treatment proposed by API is in Appellant's best interests, and

(2) there is no less intrusive alternative,

and

Remand this case to the Superior Court, directing it to order API provide the less intrusive alternative proposed by Appellant; the Superior Court to retain jurisdiction to consider possible alterations.

RESPECTFULLY SUBMITTED the 7th day of August, 2008.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

By: _____

James B. Gottstein, Esq.
Alaska Bar No. 7811100