IN THE SUPREME COURT OF THE STATE OF ALASKA

W.S.B.,

Appellant,

v.

ALASKA PSYCHIATRIC INSTITUTE,

Appellee.

Trial Court Case No. 3AN-08-493 PR



Supreme Court No. S-13116

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

# BRIEF OF APPELLEE

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## AUTHORITIES PRINCIPALLY RELIED UPON

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.

## PARTIES

William S. Bigley is the appellant. The Alaska Psychiatric Institute[1] ("API") is the appellee.

## JURISDICTION

This is an appeal from an order of the superior court, the Honorable Sharon L. Gleason, dated May 19, 2008. This Court has authority to consider this appeal pursuant to AS 22.05.010 and Appellate Rule 202(a).

## ISSUES PRESENTED

Should this Appeal be dismissed as moot, given the absence of a current case or controversy as between API and Mr. Bigley?

Was the court approval of administration of psychotropic medication based on clear and convincing evidence that appellant was not competent to provide informed consent and that the proposed course of treatment was in appellant's best interest?

Given the trial court's consideration of appellant's less intrusive alternative evidence, was it error to approve the administration of medication and not grant injunctive relief?

Was Due Process afforded in connection with the hearing on API's petition for court approval of administration of psychotropic medication?

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[1] Alaska Psychiatric Institute is a state agency existing within the Division of Behavioral Health of the Alaska Department of Health and Social Services.

## STANDARD OF REVIEW

The Court will review factual findings for clear error, reversing only if its "review of the record leaves [it] with a definite and firm conviction that a mistake has been made." *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 375 (Alaska 2007) ("*Wetherhorn I*"). The Court ordinarily will not overturn factual findings based on conflicting evidence but will look for evidence in the record to support such findings and conclusions. *Brynna B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 88 P.3d 527, 529 (Alaska 2004); *R.G. v. State, Dep't of Health & Soc. Servs, Div. of Family & Youth Servs.*, 43 P.3d 145, 149 (Alaska 2002). The Court will not reweigh evidence when the record provides clear support for the trial court's ruling. *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 214 (Alaska 2000). Whether the factual findings satisfy the requirements of the relevant statute is a question of law to which the Court applies its independent judgment. *Wetherhorn I*, 156 P.3d at 375.

## STATEMENT OF THE CASE

### I. FACTS

Although William Bigley denies that he has any mental health issues, he has struggled for almost 30 years with mental illness and has been hospitalized at API on over 75 occasions. [Tr. 18-20] His long-standing diagnosis is schizophrenia, paranoid type. [Tr. 18-19] As a result of the schizophrenia, Mr. Bigley suffers routinely from symptoms including delusions. He holds a number of beliefs that appear

not to be true and which are inconsistent with reality. [Tr. 20-21] These delusions drive most of Mr. Bigley's day-to-day decisions. As an example, Mr. Bigley doesn't eat and drink sufficiently or regularly because of his belief that his food is being poisoned. [Tr. 20-21] As a result, there are often concerns raised about Mr. Bigley's physical health and inability to maintain a healthy weight. In addition to concerns about the impact on his physical health, API was concerned that Mr. Bigley's delusions would impact his rational decision-making with respect to his mental health treatment, including the decision of whether or not to take psychotropic medication. [ Tr. 21] Mr. Bigley has not been able to participate in a rational discussion about proposed medication, including discussing possible side effects and benefits and his prior history of having taken such medications. [Tr. 22-23] Mr. Bigley has repeatedly declared that he doesn't want medication. He believes the medicine to be poison and that it will kill him. [Tr. 21] His objections are inconsistent with prior treatment experience with medication as, over the years, his mental health improved, at least periodically, as a result of treatment with medication. Without it, his condition has declined. [Tr. 21-22] Mr. Bigley is very different when compliant with medications from when he is not. [Tr. 24] For example, without medication, Mr. Bigley tends not to take care of himself. He doesn't eat, drink, or seek appropriate medical care. [Tr. 24] While taking appropriate medication, Mr. Bigley is more stable and better able to meet his daily needs. [Tr. 21-26; 47; 55-57]

## II. PROCEEDINGS

On April 25, 2008, a police officer applied to have Mr. Bigley examined by a mental health professional following Mr. Bigley's involvement in a disturbance at First National Bank in Anchorage. [Exc. 3-5] The examination was conducted at API, and it was determined that Mr. Bigley was mentally ill; the mental health professional also believed that Mr. Bigley was a danger to himself or others and that he was gravely disabled. [Exc. 9] Because there was reason to believe that Mr. Bigley was incapable of giving informed consent for psychotropic medication, on April 28, 2008, a petition for court-ordered administration of medication was filed along with the involuntary commitment petition. [Exc. 8-11] The court first held a hearing on the commitment petition on April 30, 2008. [Exc. 118] The public defenders office was appointed to represent Mr. Bigley in connection with the commitment petition. Notice of the hearing was provided and Mr. Bigley's private attorney, Mr. Gottstein, filed a limited entry of appearance as to the petition for court-ordered administration of medication, which he characterized as "forced drugging". [Exc. 16-17] Attached to the limited entry of appearance were approximately 93 pages of attachments. [Tr. 3-4; Exc. 17-116] Based on the limited entry of appearance, it was determined that the public defenders office would represent Mr. Bigley with respect to the commitment petition and that Mr. Gottstein would represent Mr. Bigley at the subsequent hearing on the medication petition, if such a hearing was still necessary. [Exc. 117] Master Lucinda McBurney heard evidence, made findings of fact and recommended granting the commitment

petition on May 2, 2008. [Exc. 118-124] Three days later, on May 5, Judge Mark Rindner adopted the findings of fact and that ordered Mr. Bigley be committed to API for mental health treatment for a period not to exceed 30 days. [Exc. 119]

On May 7, 2008, API asked the trial court to schedule a hearing on the pending petition for approval of court-ordered administration of medication, as no hearing date had been set. [Exc. 125] All parties, including Mr. Bigley's counsel for both the commitment petition and the petition for court approval of medication, were informed on May 9, 2008, that a hearing would occur on May 12, 2008. [Exc. 126-127] Judge Gleason presided over the hearing on May 12, 2008 and again on May 14 and May 15, 2008. [Exc. 208]

On the first day of the hearing, May 12, 2008, counsel for Mr. Bigley denied that he had knowledge of Mr. Bigley's commitment and suggested that the petition for approval of court-ordered administration of medication was premature. [Tr. 3-5] He then asserted that the medication petition was defective as it did not describe in detail why the proposed medication was in Mr. Bigley's best interest. [Tr. 6-8] Mr. Gottstein then suggested that a pre-trial conference or settlement conference be held for the purpose of creating a plan that would allow for an alternative to Mr. Bigley taking the proposed psychotropic medication. [Tr. 8-10] After considering these issues, the court decided to proceed with the hearing, permitting API to begin presenting evidence. But the courted explained that additional time would be made available for Mr. Bigley, though his attorney, to respond to such evidence, if necessary. [Tr. 12-14]

API presented testimony and evidence on May 12, 2008, including the testimony of Lawrence Male, Ph.D., director of API's forensic evaluation unit and clinical director; Kahnaz Khari, M.D., staff psychiatrist at API and the court received a report form the Court Visitor on the issue of competency. [ Tr. 18-83] Near the conclusion of the proceedings on May 12, the court asked Mr. Bigley's counsel about the evidence he intended to present in response to API's evidence. [Tr. 93-94] Mr. Gottstein estimated that it would take approximately and hour and a half to present his evidence. [Tr. 94] Based on this representation, the court set aside time on May 14, 2008, for Mr. Bigley's presentation of evidence. [Tr. 98-101]

At the time allotted, Mr. Bigley presented his evidence, indicating that he planned on calling three witnesses: Grace Jackson, M.D., retained expert; Duane Hopson, M.D., Medical Director of API and Camry Altaffer (who was subsequently not called) [Tr. 104] Because Mr. Bigley had not presented all of his evidence in the time scheduled, the court indicated that the hearing would be continued on the following day, May 15, 2008. [Tr. 193-194] Mr. Gottstein agreed that an additional two hours would be sufficient to conclude the hearing. [Tr. 193-194] After the submission of additional evidence, the hearing concluded on May 15, 2008, and Judge Gleason took the matter under consideration. [Tr. 300]

Judge Gleason issued her Findings and Order granting the petition for approval of administration of medicine on May 19, 2008. [Exc. 208-212] The trial court's medication order was stayed pending appeal to this Court. [Exc. 212; Supreme

Court Order of May 23, 2008] After the medication order was stayed, Mr. Bigley's period of commitment expired and he was released without receiving the medication at issue.

## SUMMARY OF ARGUMENT

If this matter is appropriate for review based on an exception to mootness, then substantial clear and convincing evidence supported the conclusion that the administration of medication to Mr. Bigley was within the standard of care for psychiatry in Alaska, was appropriate for Mr. Bigley, in his best interests, and no less intrusive alternative therapeutic treatment was available. As the record demonstrates, there was appropriate due process afforded and Appellant has no right to injunctive relief forcing API to create an "alternative" to medication in the form of housing and companionship in the community.

## ARGUMENT

### 1. Because There Is No Present Case Or Controversy Concerning Mr. Bigley's Mental Health Treatment At API, Dismissal Of This Appeal Is Warranted

This Court repeatedly has held that a case "is moot if it has lost its character as a present, live controversy." *Peter A. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 146 P.3d 991, 994 (Alaska 2006). "If the party bringing the action would not be entitled to any relief even if it prevails, there is no 'case or controversy'" for the Court to decide. *Id.*; *Gilbert M.*, 139 P.3d at 588-89; *Fairbanks Firefighters Ass'n Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167

(Alaska 2002) ("[u]nder ordinary circumstances, we will refrain from deciding questions where events have rendered the legal issue moot."). In such cases, dismissal is warranted.

Because Mr. Bigley is not a currently committed as a patient at API nor is there an order concerning medication in effect, the impact of the trial court's determination to approve medication is moot, as Mr. Bigley was discharged as a patient of API. If API prevails in this appeal and the order permitting medication is confirmed, API will not be in a position to administer the approved medication to Mr. Bigley, as future medication approval would require an examination of Mr. Bigley's capacity at that time.[2] Further, if Mr. Bigley prevails in this appeal, no legitimate remedy can be provided by this Court. As such, this Court should dismiss the appeal as moot.

Mr. Bigley was involuntarily committed as a patient at API based on a finding that he was gravely disabled as a result of his mental illness. [Exc. 118-124] The commitment was based on Mr. Bigley's then recent behavior in the community, which gave rise to his detention and evaluation for mental health treatment. [Exc. 123-124] The period of commitment at API was limited to no more than 30 days pursuant to AS 47.30.735. [Exc. 118] Mr. Bigley did not appeal the commitment order, so the validity of his commitment based on grave disability is not at issue.

Because API reasonably believed that Mr. Bigley lacked the capacity to provide or withhold informed consent for treatment for his schizophrenia, it petitioned

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2 AS 47.30.839(b).

the court for permission to administer psychotropic medication pursuant to AS 47.30.839. After a multi-day contested hearing, the trial court found that Mr. Bigley lacked capacity to provide or withhold informed consent, that the administration of medication to Mr. Bigley would be in his best interest, and that no less intrusive alternative was available to treat Mr. Bigley's mental illness. [Exc. 208-212]

Before API could implement this order and administer medication to Mr. Bigley, he sought a stay (which was granted) and filed this appeal. [Exc. 212; Supreme Court Order of May 23, 2008] As a result, the period of commitment subsequently expired and Mr. Bigley was released, having not received the course of treatment, which was to include medication, that his treating physician recommended and which the trial court had approved, Thus API was unable to provide treatment to Mr. Bigley while an (involuntary) patient, despite the fact that the trial court properly concluded that the proposed course of treatment, which included the administration of antipsychotic medication, was in Mr. Bigley's best interests based on his mental condition, even taking into account the potential risk of side effects and the intrusion into Mr. Bigley's constitutional right to individual choice in his mental health treatment. [Exc. 210-212]

On appeal, Mr. Bigley must show either that concrete relief would be available to him if this Court were to reverse the underlying order or that the issues presented fall into one of the exceptions to the mootness doctrine. *Peter A.*, 146 P.3d at

994.[3] With respect to the availability of relief, it appears that Mr. Bigley seeks some sort of injunction against API, but such relief cannot remedy this case's mootness.

It has been recognized that a moot case involving involuntary medication may invoke the public interest exception to the mootness doctrine, but such an exception should not be applied here. There are three factors to consider in determining if the public interest exception 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." *Fairbanks Firefighters Ass'n Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (quoting *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995). Determination of whether to review a moot question is left to the discretion of the Court. *Id.*

It has been generally recognized that an appeal may be rendered moot when a person who had been committed for purposes of receiving mental health treatment has been released or when the term of commitment has expired. *In re P.S.*, 702 A.2d 98, 167 Vt. 63 (VT 1997); *In re Doe*, 2003 WL 1264129 (Haw. 2003). Such should be the result here. The specific facts giving rise to commitment and involuntary medication petitions are not capable of repetition. Any future commitment proceeding would be based on facts existing at the time the petition for commitment is presented.

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[3] *Peter A v. State, Department of Health and Social Services, Office of Children's*

API has no present ability to exercise control over Mr. Bigley, regardless of the outcome of this appeal. Any future petitions for involuntary commitment or for administration of medication would be based on the unique facts existing at that time. Such facts, as well as the existence and nature of treatment available options, is speculative at this juncture, regardless of Mr. Bigley's attempt to generalize this case as one involving a "API's forced drugging regime." [Appellant's Brief, pages 8-18, 39] In *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007), considering evidentiary challenges similar to those found here,[4] this court declined to find an exception to the mootness doctrine, noting that factual questions are not capable of repetition. *Id.* at 380-81. Here, as in *Wetherhorn* this Court need not address the sufficiency of the evidence presented as any future commitment and medication petitions would be based on new and different facts. While this Court in *Myers v. Alaska Psychiatric Institute*, found an exception to the mootness doctrine because there were important issues raised that have a high likelihood of recurring, the exception does not apply here. Mr. Bigley's request for "[a]n order requiring API to provide a less

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*Services*, 146 P.3d 991 (2006).

[4] Appellants Brief, pages 8-18; 39.

intrusive alternative to function better in the community"[5] does not present an issue appropriate for legal remedy, but rather would be best addressed by legislative action.[6]

**2. The Trial Court's Determination That It Was In Mr. Bigley's Best Interests To Grant The Medication Petition Was Supported By Sufficient Evidence**

The trial court conducted hearings over three days to inquire into Mr. Bigley's capacity to give or withhold informed consent and to determine whether administration of psychotropic medication is in Mr. Bigley's best interest considered in light of any available les intrusive treatments. [Exc. 208]

Appellant does not challenge the conclusion that he lacks capacity, but does contend in this Appeal that the medication authorized by the trial court is not in his best interest, relying on statements submitted by persons who generally criticized the use of psychotropic medication but who were not in a position to provide treatment to Mr. Bigley arguing that *not taking medication* is an appropriate alternative and offering criticism of the pharmaceutical industry . [Appellant's Brief, pages 22-24; 26] But even Mr. Bigley's physician expert on the "harm" caused by antipsychotic medication, Dr. Jackson, admitted that in clinical practice she herself has prescribed the medicine at issue here. [Tr. 156-157] She further acknowledged that her views do not represent the

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5 Appellant's Brief, page 47.

6 API is a statutory entity not funded to provide the scope of community support services sought by Mr. Bigley. While such community services may be beneficial to some patients or to society, API suggests that this is a matter of legislative priority and public policy best addressed by the legislative process. As currently established and funded, API is an acute care facility with limited resources. The allocation of state funds for the purpose of mental health treatment is a matter for the legislature and inappropriate to address here.

mainstream of psychiatry and that the standard of care in this country is to employ the medicines she advocates against. [Tr.152-156] Further, Dr. Jackson has never practiced medicine in Alaska, has not met Mr. Bigley and has not reviewed his complete medical record and didn't know whether he had experienced tardive dyskinesia as a side effect of medication. [Tr. 151-160]

The evidence considered by the court below demonstrated that the physicians in Alaska providing mental health treatment to Mr. Bigley rejected the views of his alleged experts and were acting in compliance with commonly accepted medical practices related to use of antipsychotic medications for the treatment of schizophrenia As such, the trial court did not err in concluding that the administration of medication was in. Mr. Bigley's best interests, a conclusion that this Court should affirm. Mr. Bigley's suggested alternative, CHOICES, was shown to not be a realistic alternative, as their medical director would not accept a client who was not following treatment advice to take medication. [Exc. 211; Tr. 249-251]

The issue on appeal is whether the trial court erred in relying more heavily on testimony and evidence provided by API than on that provided by Mr. Bigley. This Court has routinely recognized that "it is not [the Court's] appellate function to reweigh evidence which was adduced before the trial court or to substitute [its] judgment for that of the trial court." *Martens v. Metzger*, 591 P.2d 541, 543-44 (Alaska 1979). As such, deference will be given to the trial court's findings, which will only be disturbed by this Court if it is "left with a definite and firm conviction on the entire record that a mistake

has been made, even though there may be evidence to support the finding." *Id.*; *see also In re Adoption of A.F.M.*, 15 P.3d 258,262 (Alaska 2001) (recognizing that "[i]t is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence."). Here, there was more than sufficient evidence to support the trial court's findings, which should be given deference by this Court. Ignoring this testimony, Mr. Bigley asserts there was "unrebutted" testimony that proposed medication would cause harm, rather than prove beneficial. [Appellant's Brief, page 34] But this argument is based only on Mr. Bigley Appellant's experts' view as to the risks of medication, which was contradicted by the testimony of Mr. Bigley's treating psychiatrist at API, Dr. Khari. [Tr. 41-65] It is clear that the trial court considered all of this evidence. In entering its order, the trial court explicitly acknowledged the risks of the medication, as well as the benefits, and made its assessment of what was in Mr. Bigley's best interests after considering all of is the evidence, not just that presented by Mr. Bigley. Such consideration and weighing of evidence was entirely appropriate and falls within the discretion of the trial court.

While the court did not agree with Appellant's perspective, the court did examine the risks of side effects and the anticipated measures to guard against adverse side effects associated with the proposed medication. [Tr. 48-52] The trial court heard evidence, both in favor and against the "no-drugs" alternative proposed by Mr. Bigley.

In the end, the court concluded that the proposed administration of antipsychotic medication was in Mr. Bigley's best interests, based on his mental health

condition, even when taking into account the potential risk of side effects and the intrusion into Mr. Bigley's constitutional right to individual choice in his mental health treatment. [Exc. 210-212] In addition, the trial court properly weighed Mr. Bigley's claimed interest in not receiving medication against the "need" for treatment, finding that the proposed treatment was in Mr. Bigley's best interest. As set forth above, the trial court's findings were supported by more than sufficient evidence and should be affirmed. Testimony presented by API was that the proposed medication would be therapeutic, that it met the standard of care and that on medication there would be an expectation of improvement of Mr. Bigley's condition, including his thought process. [Tr. 53-54] Dr. Khari testified that the standard of care required the administration of the proposed medicine in Mr. Bigley's case. [Tr. 53] The superior court recognized the high risk to Mr. Bigley associated with the "no treatment with medicine" alternative and supported the authorization of medication, in part upon evidence of Mr. Bigley's own history while on medication. [Exc. 210-212; Tr. 55-57]

### 3. The Trial Court Properly Declined To Create A Less Restrictive Alternative And API Has No Present Obligation To Provide Social Services Of Questionable Efficacy

Appellant's argument that a less restrictive alternative treatment existed and must be provided was and remains illusory. No error is shown by Appellant by arguing that the trial court should have denied the petition for court approval of medication based on a hypothetical alternative where API would be utilized as housing of last resort and Mr. Bigley would be provided community services. Appellant's "alternative" consisted of

the provision of housing and having someone be with Mr. Bigley extensively in the community.[7] Indeed, it appears that Appellant seeks an order requiring API to fashion a less restrictive alternative out of thin air consistent with his belief that medication is unnecessary, despite the undisputed lack of general acceptance in the psychiatric community of Appellant's experts' views and contrary to the mission of API. Further, the "alternative" suggested by Appellant is not mental health ***treatment,*** as simply keeping Mr. Bigley out of trouble in the community will do nothing to improve his mental status or thought organization or his delusional thought content.

API staff psychiatrist, Dr Khari testified that the standard of care for psychiatry would require administration of medicine. [Tr. 53] She testified that the medicine is not experimental. [Tr. 53] She expected that Mr. Bigley would experience some improvement on the medication based on his prior experiences with medication. [Tr. 54] She expected that the intensity of Mr. Bigley's delusional thought content would be at a lower level on medication and expected him to have some improvement in his rational thought and have better control and be in touch with reality more and to be able to have some level of sensible discussion. [Tr. 47] She described the major possible side effects of the medication and how she planned to monitor for side effects. [Tr. 50-52]

Indeed, the testimony of Appellant's witness Paul Cornils of CHOICES, offered for the purpose of showing an alternative to drugs was available was no alternative at all. On cross-examination it was acknowledged that CHOICES would not accept

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[7] Appellant's Brief, page 40.

Mr. Bigley as a client knowing that he was non-compliant with his health care provider's medication recommendations. [Tr. 250-251]

Appellant now suggests that he would do better in the community if API were required to provide him with housing and a person who would intervene between Mr. Bigley and the public with the goal of helping Mr. Bigley stay out of trouble and function.[8] No evidence was presented that Mr. Bigley's mental health would be improved by any alternate treatment program. Indeed, Appellant seems to be requesting some sort of order requiring API or others to provide him with suitable housing, implying that Mr. Bigley loses his housing and gets himself into trouble in order to obtain housing in jail or API.[9] API's medical director, Dr. Hopson testified that in Mr. Bigley's case, simply providing him with psychosocial rehabilitation would not be effective and would likely agitate him. [Tr. at 176-179] Further if API were required to house patients rather than devote their resources to treatment, API would be prevented from fulfilling its mission. [Tr. 180-184]

Appellant is not entitled to the relief requested, as this issue was not properly raised in the proceedings below and Appellant can not establish his right to any so-called "alternative" when he is neither committed to the custody of API or when a petition for court approval of medication is not pending.[10] Further, the suggested "alternative" would in itself be contrary to the standard of care for psychiatry in Alaska and would not be

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8 Appellant's Brief, page 40.

9 *Id.*

therapeutic. Dr. Khari, staff psychiatrist at API, testified that there was a risk to Mr. Bigley if he did not receive the proposed medication in that he would continue to deteriorate. [Tr. 56-57] She expected that Mr. Bigley's mental state would improve, that there would be improvement of delusional thought content, his rational thinking and organization and his affective mood as a result of receiving the proposed medication. [Tr. 57]

Appellant desires an order requiring API to provide some sort of social services. API's mission is not to provide community services to individual patients so that they may maintain in the community. Rather, API is an acute care inpatient hospital providing mental health treatment to the residents of Alaska who are at risk and cannot obtain mental health treatment elsewhere in their community or who present a danger to society or to themselves. [Tr. 213-215] The only medical providers willing to treat Appellant's mental illness indicated that administration of medicine is the only treatment available. Ordering API to forego the administration of medicine, against the recommendations of the API physicians, and to provide a supportive community environment instead will not improve Mr. Bigley's mental illness, and testimony from API's medical director was that such an arrangement would not be in Mr. Bigley's best interest. [Tr. 215-216]

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[10] *Goodlataw v. State, Dept. of Health and Social Services*, 698 P.2d 1190 (Alaska 1985).

While Appellant argues that there has been a "forced drugging regime" imposed on Mr. Bigley, the inverse is true. It could just as easily be concluded that the very same mental health history cited shows that Mr. Bigley's non-compliance with voluntary medication has delayed any improvement in his condition. His mental health has not improved. His behavior appears to be deteriorating. It is time for Mr. Bigley to receive treatment by medication, notwithstanding his view that he doesn't want medication. The alternative of no medication and simply providing a supportive environment to accommodate Mr. Bigley's socially unacceptable behavior is not therapeutic and will do nothing to improve Mr. Bigley's illness.

Evidence was presented that API is an acute-care psychiatric hospital and that it would be inconsistent to require API to simply provide housing to Mr. Bigley, as API is not a home for the mentally ill. [TR. 213-215] One of the purposes of civil commitment of a non-dangerous individual is that the commitment has "a reasonable expectation of improving [the patient's] mental condition." AS 47.30.655(6). Housing someone at API without providing treatment is not consistent with AS 47.30.655(6) as evidence was presented that Mr. Bigley will not improve without treatment. Appellant's own history confirms this.

The trial court explained that without treatment, Mr. Bigley cannot function in society, in part, because he is now unable to obtain shelter or *necessary mental health services* outside of API as a result of his aggressive and angry behavior. [Exc. 210] The superior court supported the use of the medication so that Mr. Bigley

may regain his ability to function outside of an institutional setting, not for the purpose of making Mr. Bigley a more compliant or less disruptive patient while at API. Indeed, it fully explained that the risks of no treatment were very high and concluded that Mr. Bigley will continue to be unable to function in the community without the only treatment available, the administration of medication.

**4. The Trial Court Afforded Mr. Bigley Due Process In Connection With The Petition For Court Approval Of Medication.**

Appellant's claim that the underlying proceeding violated due process and that he did not receive notice and an adequate opportunity to respond is not supported by the record. There was no "extremely rushed schedule" as claimed by Appellant.[11] As set forth above in "Proceedings," the court allocated sufficient time to conduct the subject hearing over the course of multiple days: May 12, 2008, May 14, 2008, and May 15, 2008. Appellant's counsel was questioned as to how much time would be necessary and the court accommodated. [Tr. 12-14; 93-94] Appellant's claim of inadequate notice is similarly inconsistent with the facts. Appellant's counsel was fully aware of the petition for court approval of medication by April 30, 2008, the date of the commitment hearing, as he asserted himself into that proceeding by filing his "limited" entry of appearance and submission of materials in support of his effort to represent Mr. Bigley with respect to what he calls "forced drugging" on April 29, 2008. [Exc. 17-116] Further, Mr. Bigley was represented for the commitment proceeding by the Public Defender Agency before Mr. Gottstein's involvement, and notice of the hearing was

provided to them on April 29, 2008. [Exc. 16] Any claim that there was lack of notice or a rush to judgment is specious. Besides having received notice by April 29, 2008, the actual hearing on the medication petition did not commence until May 12, 2008. Appellant and counsel had adequate time to respond. There was no surprise or lack of reasonable opportunity to be heard as claimed.[12]

This Court has stated that "the crux of due process is opportunity to be heard and the right to adequately represent one's interests.[13] Here Appellant received his opportunity and was heard and represented by counsel at a multi-day hearing where the burden of proof applied was the "clear and convincing" evidence standard. [Exc. 208-212] Due process was afforded. Due process expresses a basic concept of justice, such as whether there has been a denial of fundamental fairness "shocking to the universal sense of justice."[14] The seminal federal due process decision *Mathews v. Eldredge*[15] recognizes that the function of legal process is to minimize the risk of erroneous decisions and counsels that consideration of a procedural due process claim requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

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11 Appellant's Brief, page 44.

12 Appellant's Brief, page 44.

13 *D.M. v. State, Div. of Family and Youth Serv's,* 995 P.2d 205, 213-214 (Alaska 2000).

14 *See State, Dept. of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1063 (Alaska 2004).

15 *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[16]

With respect to civil commitment of mentally ill individuals for treatment, the U. S. Supreme Court adopted the "clear and convincing" standard of proof recognizing the balance between an individual's right to liberty and the state's right and obligation to provide treatment:[17]

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror-or indeed even a trained judge-who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See ibid. Such "freedom" for a mentally ill person would be purchased at a high price.

Here, Appellant was provided notice, representation by counsel, a hearing conducted under the rules of evidence by a judge with a right of appellate review, and there was no "rush to judgment" as the court afforded Appellant with sufficient opportunity to be heard.

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16 *Id.*

17 *Addington v. Texas*, 441 U.S. 418, 430 (1979).

## CONCLUSION

Substantial clear and convincing evidence supported the conclusion that the administration of medication to Mr. Bigley was within the standard of care for psychiatry in Alaska, was appropriate for Mr. Bigley, in his best interests, and no less restrictive alternative therapeutic treatment was available. For the foregoing reasons, this Court should either dismiss this Appeal as moot or affirm the superior court's order granting the petition for approval of the administration of psychotropic medication.

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