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

REPLY BRIEF OF APPELLANT

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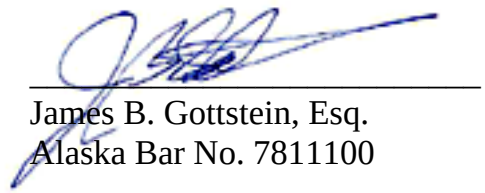

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CONSTITUTIONAL PROVISIONS

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, § 7

Section 7 Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. . . .

STATUTES

AS 47.30.655 Purpose of major revision.

The purpose of the 1981 major revision of Alaska civil commitment statutes (AS 47.30.660 and 47.30.670 - 47.30.915) is to more adequately protect the legal rights of persons suffering from mental illness. The legislature has attempted to balance the individual's constitutional right to physical liberty and the state's interest in protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves by providing due process safeguards at all stages of commitment proceedings. In addition, the following principles of modern mental health care have guided this revision:

(1) that persons be given every reasonable opportunity to accept voluntary treatment before involvement with the judicial system;

(2) that persons be treated in the least restrictive alternative environment consistent with their treatment needs;

(3) that treatment occur as promptly as possible and as close to the individual's home as possible;

(4) that a system of mental health community facilities and supports be available;

(5) that patients be informed of their rights and be informed of and allowed to participate in their treatment program as much as possible;

(6) that persons who are mentally ill but not dangerous to others be committed only if there is a reasonable expectation of improving their mental condition.

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.

ARGUMENT

I. The Less Intrusive Alternative Issue is Not Moot

At page 8 of its brief, API states that even if Appellant prevails in this appeal, "no legitimate remedy can be provided by this Court. As such this Court should dismiss the appeal as moot." Appellant disagrees with API that any relief this Court might order would not be legitimate. This Court may decide not to grant the relief requested, but the request is not moot. Appellant has asked this Court to reverse the Superior Court's finding that there is no less intrusive alternative available and order API to provide the specific less intrusive alternative he requested below. It is difficult to fathom how this request can be moot.

II. The Best Interests Finding is Not Moot

API also asserts the best interests finding is moot, citing to *Peter A v. Alaska Dep't. of Health and Social Services*, 146 P.3d 991, 994 (Alaska 2006). However, in *Peter A*, the reason why the appeal was moot was the contested order was vacated when the proceeding was dismissed.[1] In *Peter A*, citing to *City of Valdez v. Gavora*, 692 P.2d 959, 960 (Alaska 1984), this Court noted that under its precedent, in order for a matter to be moot, the underlying judgment must be vacated. In footnote 25, this Court said:

> We express no opinion about whether *Gavora's* seemingly broad assertion that a holding of mootness requires vacating the judgment below should be narrowed in light of the Supreme Court's discussion in *U.S. Bancorp*.[2]

Thus, under current precedent, the best interests finding is not moot because it still exists.

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[1] 146 P. 3d at 996. ("equity requires vacatur of the adjudication order").

As this Court noted in *Gavora*, the United States Supreme Court in *US Bancorp* backed away from the requirement that the underlying judgment has to be vacated in all cases of mootness. However the United States Supreme Court in *US Bancorp* did not back away from the requirement very far. First, in *US Bancorp*, mootness arose because the parties settled. In those circumstances, the United States Supreme Court held *vacatur* was not warranted because the settling party voluntarily relinquished the right to correct a wrongly issued judgment.[3] However, the United States Supreme Court reiterated that in other circumstances *vacatur* was required:

> [T]he judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.[4]

Both *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007), and the just issued *Wayne B. v. Alaska Psychiatric Institute*, __ P.3d __, 2008 WL 3982089, Opinion No. 6300 (Alaska August 29, 2008), are consistent with this analysis because both of them vacated the underlying judgment.[5]

In *Wetherhorn*, the specific issue of vacating the 30-day commitment was raised in Ms. Wetherhorn's Petition for Rehearing, this Court granted rehearing and changed its

(Continued footnote)----------
[2] *United States Bancorp Mortgage Co., v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386 (US 1994).
[3] 513 US at 25, 115 S.Ct. at 392.
[4] 513 US at 25, 115 S.Ct. at 391, citations omitted.

initial affirmance to vacation. Ms. Wetherhorn's Petition for Rehearing pointed out that failure to vacate meant the Court had agreed the just enunciated standard for involuntary commitment had been met. Since this was precisely the issue this Court had found moot this Court granted re-hearing and vacated the 30-day commitment.

This Court's discussion in *Peter A* otherwise confirms Appellant's analysis here:

> [I]n *Graham v. State*, we held that the revocation of the plaintiff's driver's license was not moot even though the ninety-day period of revocation had ended. . . . Finally, in *Martin v. Dieringer* we held that a petition to remove a personal representative from an estate was not mooted by the fact that the estate had closed and the defendant was no longer the personal representative.

146 P.3d at 995, citations omitted.

To illustrate, it is respectfully suggested should, for example, this Court vacate the best interests finding here because Appellant was denied due process, then whether the Superior Court correctly found the forced drugging in Appellant's best interest does become moot.[6]

III. The Superior Court Failed to Follow *Myers* and there was Insufficient Evidence to Support the Best Interests Determination

API's argument with respect to the Superior Court's best interests finding is rife with disingenuous mischaracterizations (at best). At page 12, API states Appellant's

(Continued footnote)----------
[5] In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006), this Court invoked the public interest exception to the mootness doctrine in deciding the issue and also vacated the trial court's judgment.
[6] It should be noted, however, that even then the less intrusive alternative issue would not be moot.

witnesses "generally criticized the use of psychotropic medication," where what was actually presented was a comprehensive and unrebutted scientific analysis of the drugs.

At page 12, API states, "Dr. Jackson admitted that in clinical practice she herself has prescribed the medicine at issue here." What Dr. Jackson actually testified to was that she wouldn't abruptly withdraw someone from Risperdal because of the adverse effects,[7] but absent an emergency or some other specific reason within the context of treatment, "there is no reason to start it over again for the sake of doing a withdrawal".[8]

At page 13, API also states Dr. Jackson didn't know whether Appellant had experienced Tardive Dyskinesia. What Dr. Jackson actually testified was:

> Q Are you able to quantify the risk of tardive dyskinesia in Mr. Bigley's case at this point?
>
> A Oh, I would -- quite realistically, I would say that he should have tardive dyskinesia. It is astounding to me that he doesn't already have it.[9]

As Appellant pointed out at page 13 of his opening brief, it turned out that Dr. Jackson knew better than API's witnesses, both of whom erroneously testified Appellant didn't have Tardive Dyskinesia,[10] because, as Dr. Jackson expected, Appellant does indeed suffer from Tardive Dyskinesia.[11]

API's statement at page 14 of its brief that Appellant's expert's views as to the risks of medication was contradicted by the testimony of Dr. Khari is incorrect, API cites to 24

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[7] Tr. 157 (May 14, 2008).
[8] Tr. 163 (May 14, 2008).
[9] Tr. 162 (May 14, 2008).
[10] Tr. 39 (May 12, 2008), and Tr. 51 (May 12, 2008).
[11] Exc. 68.

pages of transcript that does not contradict Appellant's experts' testimony on the risks of the medication, and, as set forth at page 20 of Appellant's brief, Dr. Khari was not allowed to testify as to those risks because she was not qualified as an expert to do so.[12] Dr. Khari was allowed to testify as to her training and observations of lack of side effects suffered by Appellant which, as noted above, at least as to Tardive Dyskinesia, was uninformed and incorrect.[13] Dr. Jackson was right that Appellant "should have Tardive Dyskinesia," and her testimony that there is a "high likelihood [Appellant] is just going die in the next five years" if he is placed back on neuroleptics[14] is both unrebutted and highly credible. The Superior Court ignored this unrebutted testimony that API's proposed treatment was likely to kill Appellant within five years.

At page 14 API states the court examined the risks of side effects, but cited to testimony by Dr. Khari, not any examination by the Superior Court.

Otherwise, API does not even attempt to rebut the bulk of Appellant's argument that the Superior Court (a) failed to follow this Court's mandate in *Myers*, and (b) failed to acknowledge the unrebutted evidence before it.

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[12] Tr. 49 (May 12, 2008).

[13] As noted in Appellant's Opening Brief at page 19, Dr. Khari had been gone for the two weeks before the hearing and hadn't even successfully met with Appellant. Her first (and unsuccessful) meeting with Appellant was the morning of the hearing. Tr. 41 (May 12, 2008).

[14] Dr. Jackson specifically testified there is a high likelihood Appellant is just going to die within the next five years if he is placed on risperidone, but it is clear from the entirety of her testimony that this would be true of any of the neuroleptics.

IV. Appellant is Entitled to A Less Intrusive Alternative

A. Appellant's Proposed Less Intrusive Alternative Is Likely to Improve His Mental Health

API also mischaracterizes the evidence with respect to *Myers* less intrusive alternative requirement. The most important is API's assertion the proposed less intrusive alternative won't improve Appellant's mental health, and therefore providing it would be a violation of AS 47.30.665(6). There was extensive, unrebutted evidence on this issue.

For example, after laying out the scientific evidence,[15] one of Robert Whitaker's conclusions was, "Long-term recovery rates are much higher for unmedicated patients than for those who are maintained on antipsychotic drugs"[16] Dr. Jackson testified Mr. Whitaker's testimony is a "very accurate and very clear presentation of the information as I understand it myself,"[17] and provided her own written report describing at some length non-dug approaches that have been shown to be far more beneficial than the drugs.[18]

Dr. Bassman's testimony is in accord,[19] including, "when it is clear that medications are not effective it is necessary and only humane to offer other options for the individual to choose."[20] Sarah Porter, an expert from New Zealand in alternative treatments,[21] also testified at some length about how non-drug approaches can be far

[15] Exc. 145-147.
[16] Exc. 152
[17] Tr. 112 (May 14, 2008).
[18] Exc. 200-204.
[19] Exc. 135-139.
[20] Exc. 136.
[21] Exc. 174.

more beneficial than drugs, especially when the person refuses to take them.[22] Finally, Paul Cornils, who had extensive experience with Appellant in the community,[23] testified as to a specific less intrusive alternative program that would be very beneficial to Appellant.[24] This is the program requested by Appellant.

In sum, it is not, as API suggests, that there was no evidence the less intrusive alternative would likely improve Appellant's mental health, but that API refuses to acknowledge the overwhelming scientific evidence that this is so. Maybe in an another case API can present evidence that the types of less intrusive alternatives to which Appellant's witnesses testified don't work, but it did not do so in this case.

B. API's Invocation of the State's *Parens Patriae* Power Gives Rise to Appellant's Right to a Less Intrusive Alternative

Substantively, API argues *Goodlataw v. Dep't. of Health and Social Services*, 698 P.2d 1190 (Alaska 1985), involving the State's post release obligations to someone who had been convicted of a crime, allows API to evade any obligation to provide a less intrusive alternative by discharging Appellant from the hospital. However, as this Court recognized in *Myers*, people who are confined by the criminal justice system have substantially fewer rights than those who have been civilly committed:

> [P]risoners' rights differ markedly from the rights of civilly committed mental patients. The prisoners involved in most of those cases had greatly

[22] Exc. 170-176.
[23] Exc. 129-130. In contrast, API's witnesses had no experience working with Appellant in the community.
[24] Exc. 130-133.

> diminished liberty interests because they had been convicted and incarcerated for criminal offenses, not because they were mentally ill.[25]

Moreover, this Court's decision in *Goodlataw* also relied on the clear statutory provision that prisoners' right to alcohol treatment ends upon release .[26] In contrast Alaska's involuntary commitment statutes specifically provide that treatment in the least restrictive alternative environment, including in the community, is one of the rights of someone who has been committed:

> The purpose of the 1981 major revision of Alaska civil commitment statutes (AS 47.30.660 and 47.30.670 - 47.30.915) is to more adequately protect the legal rights of persons suffering from mental illness. . . . In addition, the following principles of modern mental health care have guided this revision: . . .
>
> (2) that persons be treated in the least restrictive alternative environment consistent with their treatment needs; . . .
>
> (4) that a system of mental health community facilities and supports be available.[27]

Here, API invoked the State's *parens patriae* power. One of the underpinnings of this Court's decision in *Myers* is that invoking the *parens patriae* power to deprive someone of their fundamental constitutional right to refuse psychotropic medication, causes the less intrusive alternative requirement to arise.[28] API's argument that as an acute care hospital it is not in its mission to provide the requested less intrusive alternative fails to recognize that it is invoking the State's *parens patriae* power and

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[25] 156 P.3d, n56.
[26] 698 P.2d at 1194 ("AS 33.30.020 does not require that the Department of Health and Social Services provide alcoholism rehabilitation to persons released from incarceration.")
[27] AS 47.30.655.

having done so it has caused the State's constitutional obligations to arise. An order from this Court requiring API to provide the less intrusive alternative, is an order requiring the State to provide it.[29] The State should not be allowed to evade the less intrusive alternative requirement by limiting the mission of the specific agency invoking the *parens patriae* power.

V. To The Extent Appellant Has Not Established His Right to Relief, He Was Denied Due Process

In arguing Appellant was not denied his due process rights, at page 20 of its brief, API refers to counsel for Appellant having filed a limited entry of appearance well before the forced drugging hearing, but fails to address:

(a) the Probate Master refused to allow the limited entry of appearance at the time,[30] and

(b) he was not notified when it did become operative,[31]

resulting in the inability to prepare before the hearing.

API does not address, thereby apparently conceding, that Appellant was not given notice of the alleged factual basis under *Myers*, justifying the forced drugging petition. This, itself, is a fatal due process flaw.[32]

(Continued footnote)----------
[28] 138 P.3d at 247-249.
[29] Footnote 1 of API's brief states, "Alaska Psychiatric Institute is a state agency existing within the Division of Behavioral Health of the Alaska Department of Health and Social Services."
[30] Exc. 117
[31] Tr. 11 (May 12, 2008).

At page 21 of its brief, API cites to *Department of Natural Resources v. Greenpeace*, 96 P.3d 1056, 1063 (Alaska 2004), suggesting it holds that in order to find a due process violation, this Court must find the procedures utilized "shocking to the universal sense of justice." However, the full general statement made by this Court was:

> [Due Process] expresses a basic concept of justice such as "our traditional conception of fair play and substantial justice", the "protection of the individual from arbitrary action", "fundamental principles of liberty and justice", whether there has been a "(denial of) fundamental fairness, shocking to the universal sense of justice", "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct."[33]

Greenpeace strongly supports Appellant's claim he was denied due process. For example, citing to *Doe v. State*, 487 P.2d 47, 56 (Alaska 1971), this Court noted that in that case one day's notice and then two weekend days were insufficient notice.[34] In *Greenpeace*, this Court also noted that under the United States Supreme Court case of *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967):

> The United States Supreme Court has said that to comply with due process requirements, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded."

In *Greenpeace*, the failure of DNR to give Greenpeace access to previously requested relevant documents contributed to a denial of due process.[35] The same thing

(Continued footnote)----------
[32] *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 2648-49 (2004) (notice of factual basis required).
[33] *Id*.
[34] 96 P.3d at 1064.
[35] *Id*. at 1067.

happened here. Counsel for Appellant asked for a copy of Appellant's chart on April 29, 2008,[36] but wasn't given access to even part of it until after the hearing had commenced on May 12, 2008.[37] In *Greenpeace*, the due process violation was cured by a four week opportunity to present further evidence.[38] Here, the one day to prepare a defense case did not cure the denial of due process.[39] And, of course, that the Superior Court allowed one day for Appellant to prepare presentation of his defense evidence did not cure the due process defect of Appellant not having had sufficient time to prepare for cross-examination of API's direct case.

In *Greenpeace* this Court also held there must be a special need for very prompt action justifying short notice.[40] In *Wetherhorn*, though, this Court specifically rejected API's contention that forced drugging petitions should be expedited under AS 47.30.839 (in the absence of an emergency, there is no reason why protections should be neglected in the interests of speed).[41]

API also cites to *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976) for the proposition that Appellant received all the process he was due, but the *Mathews v. Eldridge* factors weigh heavily in favor of the strongest due process

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[36] Exc. 12.
[37] Tr. 8-9, 11-12, (May 12, 2008).
[38] 96 P.3d at 1068.
[39] This Court may take judicial notice that counsel for Appellant (poorly) argued the *Wayne B.* case that day, May 13, 2008. Counsel for Appellant also advised the Superior Court he had an oral argument the one day it allowed for preparation of the defense case. Tr. 96 (May 12, 2008).
[40] 96 P.3d at 1065.
[41] 156 P.3d at 381.

protection. The interest being protected from deprivation is a fundamental liberty interest this Court has equated with the intrusiveness of Electroshock and Lobotomy.[42] The danger of an erroneous deprivation is very high if forced drugging defendants are not allowed sufficient time to prepare. The value of allowing sufficient time is extremely high. Appellant respectfully suggests, the burden on the government to provide such basic due process protection is slight as compared to the liberty interest involved.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court:

1. **Reverse** the Superior Court's findings that the treatment proposed by API is in Appellant's best interests,
2. **Reverse** the Superior Court's finding there is no less intrusive alternative, and
3. **Remand** to the Superior Court with directions to (a) order API provide the less intrusive alternative proposed by Appellant, and (b) retain jurisdiction to consider possible alterations.

[42] *Myers*, 138 P.3d at 242; *Wetherhorn*, 156 P.3d at 382.