IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROSLYN WETHERHORN, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE, Appellee.	)	Supreme Court No. S-11939 Trial Court Case No. 3AN 05-459 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JOHN SUDDUCK, PRESIDING

REPLY BRIEF OF APPELLANT

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Breggin, Peter, MD, Brain Disabling Treatments in Psychiatry: Drugs, Electroshock, and the Role of the FDA. *Springer Publishing Company*, 1997 4
Coleman & Shellow, Ineffective Assistance Of Counsel: A Call For A Stricter Test In Civil Commitments, 27 J. Legal. Prof. 37 (2003) ..... passim
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Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role And Significance Of Counsel In Right To Refuse Treatment Cases," 42 San Diego Law Review 735, 746-7 (2005) 15, 17, 18
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III. CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, ORDINANCES AND REGULATIONS PRINCIPALLY RELIED UPON

U.S. CONST. amend. XIV §1

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

AK CONST. ART. 1, § 7

Section 7 Due Process.

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

AK CONST. ART. 1, § 14

Section 14 Searches and Seizures.

The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AS 47.30.725 Commitment proceeding rights; notification.

(b) Unless a respondent is released or voluntarily admitted for treatment within 72 hours of arrival at the facility or, if the respondent is evaluated by evaluation personnel, within 72 hours from the beginning of the respondent's meeting with evaluation personnel, the respondent is entitled to a court hearing to be set for not later than the end of that 72-hour period to determine whether there is cause for detention after the 72 hours have expired for up to an additional 30 days on the grounds that the respondent is mentally ill, and as a result presents a likelihood of serious harm to the respondent or

others, or is gravely disabled. The facility or evaluation personnel shall give notice to the court of the releases and voluntary admissions under AS 47.30.700 - 47.30.815.

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

* * *

(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 47.30.839 Court-ordered administration of medication.

(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.

AS 47.30.915 Definitions.

In AS 47.30.660 - 47.30.915

* * *

(7) "gravely disabled" means a condition in which a person as a result of mental illness

(A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or

(B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently;

IN 12-7-2-96 Gravely disabled

Sec. 96. "Gravely disabled", for purposes of IC 12-26, means a condition in which an individual, as a result of mental illness, is in danger of coming to harm because the individual:

(1) is unable to provide for that individual's food, clothing, shelter, or other essential human needs; or

(2) has a substantial impairment or an obvious deterioration of that individual's judgment, reasoning, or behavior that results in the individual's inability to function independently.

VT. ST. T. 18 § 7101(17)(B)(ii)

(17) "A person in need of treatment" means a person who is suffering from mental illness and, as a result of that mental illness, his capacity to exercise self-control, judgment or discretion in the conduct of his affairs and social relations is so lessened that he poses a danger of harm to himself or others;

(A) A danger of harm to others may be shown by establishing that:

(i) he has inflicted or attempted to inflict bodily harm on another; or

(ii) by his threats or actions he has placed others in reasonable fear of physical harm to themselves; or

(iii) by his actions or inactions he has presented a danger to persons in his care.

(B) A danger of harm to himself may be shown by establishing that:

(i) he has threatened or attempted suicide or serious bodily harm; or

(ii) he has behaved in such a manner as to indicate that he is unable, without supervision and the assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, so that it is probable that death, substantial physical bodily injury, serious mental deterioration or serious physical debilitation or disease will ensue unless adequate treatment is afforded;

WSA §51.20(1)(a)(2)(e)

(1) **Petition for examination**. (a) Except as provided in pars. (ab), (am), (ar) and (av), every written petition for examination shall allege that all of the following apply to the subject individual to be examined:

* * *

e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2. e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual is appropriate for protective placement under s. 55.06. Food, shelter, or other care that is provided to an individual who is substantially incapable of obtaining food, shelter, or other care for himself or herself by any person other than a treatment facility does not constitute reasonable provision for the individual's care or treatment in the community under this subd. 2. e. The individual's status as a minor does not

automatically establish a substantial probability of suffering severe mental, emotional, or physical harm under this subd. 2. e.

Alaska Rule of Civil Procedure 26(a)

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) Initial Disclosures. Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

IV. ARGUMENT

A. The B Prong of Alaska's Gravely Disabled Statute, AS 47.30.915(7)(B), is Unconstitutional.

The State largely agrees with Ms. Wetherhorn's due process analysis, but cites to *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979), for the proposition only "some danger" is required.[1] However, in *O'Connor v. Donaldson*, 422 U.S. 563, 576, 95 S.Ct. 2486, 2495 (1975), the US Supreme Court held it is only when someone is not "capable of surviving" is it constitutionally permissible to involuntarily commit a person who does not meet the danger to self or others standard.[2] The B Prong's "substantial deterioration of previous ability to function independently" criterion does not meet this standard.[3]

API asserts at n. 28 that "imminence" of serious bodily harm or death is not a requirement, citing to *In re: Harris*, 654 P.2d 109 (Wash. 1982); *In re: LaBelle*, 728 P.2d 138 (Wash. 1986) and *In re: Dennis H.* 647 N.W.2d 851 (N.D. 2002). API mis-analyzes these cases. *LaBelle*, 728 P.2d at 144, reiterated that *Harris* requires

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[1] At p. 16, in order to assert AS 47.30.915(7)(B) ("B Prong") is constitutional, the State says "the legislature has carefully crafted its standard to require a serious showing of harm or danger." This is not true. The B Prong does not require any degree of harm or danger--just deterioration in previous ability to function independently. It is a relative, not absolute test. Only if, as Ms. Wetherhorn asserts, this Court reads into the B Prong a requisite degree of harm or danger can it be constitutional.

[2] This has been reiterated as recently as 1996 in *Cooper v. Oklahoma*, 517 U.S. 348, 368, 116 S.Ct. 1373, 1383 (1996).

[3] At n. 54, the State suggests this Court reading an incompetence requirement into the B Prong would cure any unconstitutionality. However, incompetence relates to the right to decline medication, it does not in any way allow for involuntary commitment without meeting the serious harm (i.e., inability to survive) requirement.

substantial harm evidenced by "recent, overt acts" with respect to the "harm to self or others" standard and required "recent, tangible evidence" under the gravely disabled standard.

Even the troubling *In Re Dennis H* case, 647 N.W.2d 851, 863 (Wis. 2002), found the deterioration must result in the "loss of the 'ability to function independently in the community' or in the loss of 'cognitive or volitional control,'" not just deterioration from a higher level of functioning. Moreover, the Wisconsin Court stated the requirement of "recent acts or omissions" was significant in its finding of constitutionality. 647 N.W.2d at 385-6. Thus, both courts require immediacy even if it is not termed imminent.[4]

API also relies on the completely circular argument put forth by the Treatment Advocacy Center, the most vigorous, well-funded, proponent of psychiatric incarceration and forced drugging in the country,[5] that a psychiatric defendant's denial of mental illness proves mental illness. The hijacking by those on the psychiatric fringe of

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[4] As stated in Ms. Wetherhorn's Opening Brief, *Suzuki v. Yuen*, 617 F.2d 173, 178 (CA9 1980) and cases cited therein do require "imminence."

[5] *See*, front page story in the February 1, 2006 *Wall Street Journal*, "A Doctor's Fight: More Forced Care For the Mentally Ill:"

> Mr. Stanley says he has donated nearly $300 million -- including about $35 million in 2005 -- to Dr. Torrey's efforts. . . . In 1998, Dr. Torrey and the Stanleys decided to target state laws that they believed had gone too far in guaranteeing rights for the mentally unstable. They founded the Treatment Advocacy Center in Arlington, Va. Mr. Stanley and his wife, Vada, support it with about $600,000 a year. In many states, the center and its allies try to put a face on a proposed law and link it to a grieving family.

the legitimate medical condition of anosognasia,[6] which is caused by brain injury, such as Dr. Torrey of the Treatment Advocacy Center[7] to diagnose any involuntary "patient" who disagrees with their diagnosis as proving the diagnosis, demonstrates the need for the courts to ferret out the invalid theories used to justify involuntary commitment.[8] This psychiatric diagnosis of anosognasia is reminiscent of the mid-nineteenth century psychiatric diagnosis of draepotomania, which was the mental ilness that "induces the negro to run away from service, [and] is as much a disease of the mind as any other species of mental alienation, and much more curable, as a general rule."[9]

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[6] Included as Appendix A for the Court's convenience is the Wikepedia entry on Anosognosia, which notes the psychiatric usage of the term is controversial even among psychiatrists.

[7] API Brief at footnote 39. The website cited by the State is that of the Treatment Advocacy Center, referred to by the *Wall Street Journal*, *supra*, note 5.

[8] At n. 38, the State attempts to further justify involuntary medication on the grounds that failure to medicate results in "irreversible brain damage." This is "junk science" the State is attempting to interject into this proceeding on appeal after failing to offer sufficient grounds for the involuntary medication at the trial court level. *See*, Untreated Initial Psychosis: Relation to Cognitive Deficits and Brain Morphology in First-Episode Schizophrenia, *American Journal of Psychiatry* 2003; 160:142-148; Is There an Association Between Duration of Untreated Psychosis and 24-Month Clinical Outcome in a First-Admission Series? *American Journal of Psychiatry* 157:1, January 2000, 157:60–66; Lack of Association Between Duration of Untreated Illness and Severity of Cognitive and Structural Brain Deficits at the First Episode of Schizophrenia, *American Journal of Psychiatry*, 2000; 157:1824–1828); and Duration of untreated psychosis and the long-term, course of schizophrenia, *European Psychiatry* 2000 ; 19 : 264-7.

[9] *The Georgia Blister and Critic*, v. 1, #7 (Sept. 1854), p. 156. The cure was amputating the toes of the slave suffering from the mental illness of desiring freedom. *Human Behavior Magazine* 1974 (September):64. Counsel recognizes this comparison seems histrionic, but the hijacking of the traumatic brain injury condition of anosognosia to justify anyone's denial of having a mental illness as proof of mental illness is analogous to the draepotomania diagnosis to justify slavery.

The State, at page 13, also attempts to justify the B Prong on the basis that it is a benevolent purpose. However, as the California Supreme Court has said:

> This argument is spurious. History is haunted by the accusing cries of those locked away "for their own good." It would be small solace to a person wrongly judged mentally incompetent that his road to commitment was paved with good intentions.

Estate of Roulet v. Roulet, 590 P.2d 1, 9 (Cal. 1979).[10]

API's attempts to analogize Alaska's scheme to other states at §I.E., is also faulty. Neither Oregon, Vermont, Montana, Indiana, Wisconsin, nor Arizona support the State's position. The Oregon courts have unequivocally held it is not permissible to

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[10] There is an assumption involuntary commitment and medication will be helpful to the recipient of such forced "treatment," but for many this is not true. The statements of many recipients of such forced "treatment" that the drugs do not help them and cause them great harm is virtually automatically rejected as the ravings of lunatics when the truth is all the standard "medical" psychiatric treatments are of limited, at best, efficacy, especially in the long-run, and brain disabling in nature. Breggin, Peter, MD, Brain Disabling Treatments in Psychiatry: Drugs, Electroshock, and the Role of the FDA. *Springer Publishing Company*, 1997; and Jackson, Grace, MD, Rethinking Psychiatric Drugs: A Guide to Informed Consent, *Author House*, 2005. These drugs also dramatically increase mortality rates. Joukamaa, et al, Schizophrenia, neuroleptic medication and mortality, *British Journal of Psychiatry*, (2006), 188, 122-127. (each increment of neuroleptic increases mortality by 2.5 times) In Anatomy of an Epidemic: Psychiatric Drugs and the Astonishing Rise of Mental Illness in America, by Robert Whitaker, *Ethical Human Psychology and Psychiatry*, Volume 7, Number I: 23-35 Spring 2005, a copy of which is included as Appendix B for the Court's convenience, the six-fold rise in the rate of disability because of mental illness, much of it attributable to psychiatric drugs, is documented. In *Myers v. API*, Alaska Supreme Court Case No. S-11939, currently pending before this Court, after expert testimony, the trial court found there is a viable debate whether these drugs should be the standard of care and whether they ultimately help or harm patients. Without questioning motives, the assumption of benevolent results from court authorized incarceration and forced drugging is simply not true in many cases. The courts are supposed to ensure involuntary commitment and medication only occur when truly legally justified and this requires respondents' rights to
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involuntarily commit someone on the "basic needs" grounds unless it is life threatening. *State v. Nguyen*, 43 P.3d 1218, 1221 (Or.App. 2002). This was reiterated in *State v. Beil*, 102 P.3d 757, 761 (Or.App. 2004)(30 pound weight loss not "life-threatening.").

Vermont offers no support for the State's position because under VT. ST. T. 18 § 7101(17)(B)(ii), commitment is not authorized for failure to meet "basic needs" unless "it is probable that death, substantial physical bodily injury, serious mental deterioration or serious physical debilitation or disease will ensue." Neither does Montana allow commitment as suggested by the State. *In the Matter of R.T.*, 665 P.2d 789, 791 (Mont. 1983) ("cannot function sufficiently to supply basic survival needs").

Indiana's statute, IN St. 12-7-2-96(2), requires a person be so disabled that it "results in the individual's inability to function independently." This is an absolute standard, rather than the relative one under the "B Prong." Ms. Wetherhorn respectfully suggests *Golub v. Giles*, 814 N.E.2d 1034 (Ind. App. 2004), cited by the State, is devoid of any helpful analysis. While citing *Addington*, the *Golub* Court merely said Golub's behavior was far beyond idiosyncratic and did not mention *Donaldson* or *Cooper* ("incapable of 'surviving safely in freedom.'").

(Continued footnote)----------
be scrupulously honored. Without such protection, the courts become an instrument of oppression.

In footnote 54, the State asserts Wisconsin allows involuntary commitment on the basis of incapacity to make treatment decisions, however, Wisconsin's statute, WSA §51.20(1)(a)(2)(e), cited by the State, clearly requires:

> a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and . . . that will result in the loss of the individual's ability to function independently in the community

(emphasis added). *Dennis H*, 647 N.W.2d at 863, cited by the State requires that mental illness will result in the loss of the ability to function independently in the community or in the loss of cognitive or volitional control. This is an absolute, not relative standard.

At n. 54, the State also asserts *In the Matter of Maricopa County*, 840 P.2d 1042, 1049 (Ariz. App. 1992), upheld the constitutionality of commitment under a "persistently or acutely disabled" standard. However, there the court read into the statute the requirement of "substantial probability of severe harm" to render it constitutional. 840 P.2d at 1048. At n. 54, the State also cites *LaBelle*, yet there, in order to find the "broadened scope" of Washington's gravely disabled standard constitutional, the Court read into the statute that "such care must be shown to be essential to an individual's health or safety."

Thus, the states cited by the State do not support its position that the prospect of deterioration in ability to function independently is a sufficient degree of harm justifying confinement because of mental illness. The various states have different formulations, but all of them require a very convincing showing of both (1) serious harm consistent with the inability to survive and (2) immediacy. The former has unequivocally been required by the United States Supreme Court and the latter has been almost universally

recognized as being constitutionally required by both state and federal courts. *See, e.g.*, *Harris*, 654 P.2d at113; [11]; *Suzuki* 617 F.2d at 178; and *Commitment of N.N.*, 679 A.2d 1174,1183 (N.J. 1996).

V. THE ERRORS BELOW MANDATE REVERSAL

The State admits numerous errors were made, but asserts, citing to *Bethel v. Peters*, 97 P.3d 822, 830 (Alaska 2004), they should nevertheless be ignored because, under the "plain error" rule, counsel failed to raise them and even acknowledged errors won't be reversed unless this Court "need not speculate" the error altered the result. However, *Bethel* is a case where the appellant was attempting to overturn a jury verdict based upon a jury instruction to which no objection was made. This is the context in which this Court has adopted the "need not speculate" standard. In other contexts, including more recently than *Bethel*, this Court has held more broadly, "Plain error exists where an obvious mistake has been made which creates a high likelihood that injustice has resulted." *Martinez v. Cape Fox Corporation*, 113 P.3d 1226, 1229 (Alaska 2005).

In Illinois, failure to comply with statutory requirements appearing on the face of the record mandates reversal under "a doctrine analogous to plain error:" *In Re: Rovelstad*, 667 N.E.2d 720, 726 (Ill. App. 1996). There is no Alaska law on this issue, but Ms. Wetherhorn respectfully suggests the analysis this court set forth in *Sosa v. State*, 4 P.3d. 951, 955 (Alaska 2000) is roughly analogous. There, this Court held "we

[11] In footnote 10, the State mischaracterizes *Harris*. What *Harris* actually held was that because someone already in custody could not be found to be in imminent danger while in custody it would be absurd to require that.

consider claims of plain error regardless of whether the parties argued them in the trial court" and reversed as plain error a conviction for evidence tampering based on refusal to consent to a blood draw when the statute involved did not imply consent for a blood draw. *Sosa* is roughly analogous because this court found plain error where the facts and law simply did not authorize the conviction.

That the propriety of implied consent to blood draws is of constitutional dimension[12] is also analogous to the instant case in that there are constitutional protections against involuntary commitment and medication which the protections provided in AS 47.30 are designed to observe. Thus, the failure to follow the statutory (or constitutional) strictures are, Ms. Wetherhorn suggests, plain error *per se*.

The Illinois courts have expressly acknowledged this:

> Because of the important liberty interests involved, we will consider this issue on the merits under the plain error exception to the general waiver rule. . . .
>
> In mental health cases, strict compliance with statutory provisions is compelling, as liberty interests are involved. The Code's procedural safeguards are not mere technicalities, but essential tools to safeguard liberty interests of mental health patients. Thus, procedural safeguards are construed strictly in favor of the respondent. The failure to comply with procedural rules requires the reversal of court orders authorizing involuntary treatment.

In re Cynthia S, 759 N.E.2d 1020, 1023-4 (Ill. App. 2001), citations omitted.

Similarly, in *In re Richard C*, 769 N.E.2d 1071, 1075 (Ill. App. 2002), an involuntary medication order was reversed for plain error where the State "failed to

prove by clear and convincing evidence that respondent lacked the capacity to make a reasoned decision about the proposed treatment."

Ms. Wetherhorn respectfully suggests plain error exists in involuntary commitment and medication cases when (a) statutory provisions are not complied with, (b) constitutional due process protections are violated, or (c) there is insufficient competent evidence supporting an involuntary commitment or medication order.

Whether or not the Court decides to adopt such a standard, the proceedings below constitute plain error under even the strictest standard enunciated when jury instructions are not objected to, i.e., the "no need to speculate on whether the error altered the result" standard because there was simply insufficient competent evidence to support the orders[13] and the petitions are manifestly insufficient.

A. Failure to Comply With AS 47.30.839(d).

The State readily admits the AS 47.30.839(d) requirement of a Visitor's Report to assist the court in investigating capacity was violated, but offers the excuse the "mistake appears to be an inevitable and regrettable consequence of the timing of events." However, this is no excuse. While the involuntary commitment hearings are supposed to be held within 72 hours,[14] there is no such requirement for the involuntary medication

(Continued footnote)----------

[12] *See*, e.g., *Layland v. State*, 535 P.2d 1043 (Alaska 1975), *overruled* in *Anchorage v. Geber*, 592 P.2d 1187 (Alaska 1979).

[13] Indeed, technically, there was no competent evidence inasmuch as the sole witness was neither sworn in, nor qualified as an expert witness in this case.

[14] AS 47.30.725(b).

proceeding.[15] It is for the convenience of API, the Probate Master and the attorneys that involuntary medication proceedings are also rushed through on the same schedule. In fact, the timing excuse offered by the State would virtually always exist because of the extremely short time frame in which these proceedings take place.[16]

B. Failure to Comply with AS 47.30.730(a)(6)

The State, at pp. 20-1, also admits the petition for commitment failed to comply with the requirement in AS 47.30.730(a)(6) that the State's witnesses be listed, but says that should not matter because it "created no--let alone 'a high'--likelihood of injustice."[17] There clearly was an injustice; Ms. Wetherhorn was incarcerated pursuant to a deficient petition. The State, at n. 58, attempts to rebut Ms. Wetherhorn's overwhelming presentation of authority that strict compliance with statutory

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[15] In fact the State, at p. 20, concedes the involuntary medication proceeding should have been continued because of the lack of the Visitor's report.

[16] In *In re Watts*, 620 N.E.2d 640 (Ill. App. 1993), an involuntary commitment was reversed for failure to comply with the requirement to file a similar report and in *Steele v. Hamilton County Community Mental Health Board*, 736 N.E.2d 10, 22 (OH 2000), the court found such an independent evaluation a due process requirement.

[17] The State, at page 39 also suggests that because "it could come as no surprise that a psychiatrist from API would testify," dispensing with the statutory requirement is of no moment. However, this statement merely serves to emphasize the lack of seriousness with which these proceedings are taken because it assumes no pre-hearing investigation or preparation would occur to attempt to defend against such testimony. It also serves to emphasize that AS 47.30.730(a)(7)'s requirement to list the "facts and specific behavior" (discussed next) requires more than hearsay testimony from the treating psychiatrist. In fact, the New Hampshire Supreme Court has recently re-iterated that testimony solely from a psychiatrist is never enough to justify commitment:

> [A] psychiatrist's finding of a dangerous mental condition does not automatically operate to trigger commitment; without evidence of dangerous conduct, even the most persuasive psychiatrist's report is insufficient to justify commitment.

----------(footnote continued)

requirements is required by citing to *Detention of A.S.*, (982 P.2d 1156, 1156 (Wash. 1999) and *Gilford v. People* 2 P.3d 120, 125-6 (CO 2000). However, the allowed deviation in *AS* was the "unique" situation of the doctor not signing the petition because he was ill where the petition stated an affidavit by the doctor would be filed and even there it drew a stinging dissent and was approved on only a 5 to 4 vote. In *Gilford*, the Colorado Supreme noted

> Deviations from the statutory process governing civil commitment proceedings, however minor, are subject to exacting appellate review, for even the slightest departure from these codified procedures can raise profound constitutional concerns.

2 P.3d at 124, citations omitted.[18]

C. Failure to Comply With AS 47.30.730(a)(7)

The State all but admits it failed to comply with the AS 47.30.730(a)(7) requirement to list the "facts and specific behavior" supporting the allegation the respondent is "mentally ill and as a result is likely to cause harm to self or others or is gravely disabled." The State, at 21-2, says "in this concise entry, much information is conveyed" which "suggests the very sort of deterioration" covered by the B Prong of the gravely disabled statute. However, "conveying much information" which "suggests" the statute's criteria are being met is insufficient. The statute requires "facts and specific behavior." The State asserts this noncompliance is acceptable because it gave notice a

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In the Matter of B.T., ___ A.2d ___ (NH 2006), 2006 WL 459251.
[18] The Colorado court engages in a determination of whether the provision is an "essential statutory provision," the extent to which the deviation implicates due process,
----------(footnote continued)

hearing was going to occur. However, that is not the point here. Because these proceedings are almost always concluded in a matter of days, often the same day the petition is filed,[19] the allegations in the petition must be specific and detailed enough to allow a meaningful opportunity to respond. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004).

The State cites to *GPH v. Giles*, 578 N.E.2d 729 (Ind. App. 1991) for the proposition that notice a hearing will take place is sufficient to satisfy due process, but in *Richard E*, 785 N.Y.S.2d 580 (NY App. Div. 2004) the court approved refusal to allow an on the eve of the hearing examination because "counsel would not have had time to develop any strategy to respond to information revealed in an interview the day before the hearing." The State, at p. 23-4, also cites to the United States District Court decision *French v. Blackburn*, 428 F.Supp. 1351, 1357 (M.D.N.C. 1977), *aff'd.* 443 U.S. 901 (1979)(Mem. Dec.) for the proposition the constitution does not require a list of witnesses nor the substance of their proposed testimony, yet *French*, itself holds it is "constitutionally mandated that the notice be given sufficiently in advance of the proceedings to provide a reasonable opportunity to prepare." *Id.* Whether the 1977 District Court *French* decision is good law is questionable, but even if so, the question has to be considered in light of how the North Carolina procedures give psychiatric

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the gravity of the deviation and the extent of prejudice. Colorado appears alone in condoning such an approach.

[19] Here, the initial hearing was set for April 8, 2005, the day the notice of the hearing was issued (Exc. 8-9) and Ms. Wetherhorn was served with notice only one hour before
----------(footnote continued)

defendants sufficient "notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions" as required by the United States Supreme Court in *Hamdi*. This Court should hold the State must provide sufficient information to inform the Respondent of the case against him or her. This is analogous to the mandatory Civil Rule 26(a) disclosures.[20]

Ms. Wetherhorn suggests the failure of the Petition to set forth any, let alone sufficient, facts and specific behavior demonstrating, *inter alia*, that she was a danger to herself or others or gravely disabled, did not provide a "a fair opportunity to rebut the Government's factual assertions" in light of the time frame involved and is thus violative of due process. However, regardless of whether the lack of specificity is a due process violation, it is certainly a violation of AS 47.30.730(a)(7).

D. <u>Failure to Swear and Qualify the State's Only Witness</u>.

Admitting the State's only witness was not sworn nor qualified as an expert witness <u>in this case</u>, it relies on its plain error analysis that only if it is clear it would have changed the result should this Court correct the error. This position of the State asks this Court to tolerate proceedings devoid of even these most basic elements of our

(Continued footnote)----------
the scheduled hearing (Exc. 11). The constitutionality of this short notice is not conceded, but is not an issue in this case because the hearing was continued.

[20] At p. 30 The State misapprehends Ms. Wetherhorn's point about depositions. Psychiatric respondents have the right to take depositions. The point Ms. Wetherhorn made is effective counsel will take depositions when necessary to properly prepare. Clearly, the potentially illusory ability to conduct "informal interviews" does not provide "proper procedures" required under *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002); the right to compel testimony *via* subpoena, both in depositions and at the hearing is required.

system of justice because counsel appointed to supposedly represent psychiatric respondents abdicate their responsibility so completely the proceedings have become a farce. Clearly, it is the Public Defender Agency's complete failure to put the State to even this modicum level of testing that has created this situation. This is addressed in the following section, but the complete abdication of responsibility by appointed counsel should not leave a psychiatric respondent without the right to overturn such a manifestly defective proceeding on appeal.[21]

VI. RESPONDENT'S REPRESENTATION WAS INADEQUATE

The State suggests this Court should reject the approach of the Montana Supreme Court in *In re: K.G.F.*, 29 P.3d 485 (Mont. 2001) and adopt the criminal standard contained *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and *Risher v. State*, 523 P.2d 421 (Alaska 1974).[22] The problem with adopting this approach was cogently described in *In re: K.G.F.*, 29 P.3d 485, 492 (Mont. 2001):

> Even a cursory review of legal commentary reveals the flawed reasoning of applying the foregoing *Strickland* standard to involuntary civil commitment proceedings. Namely, "reasonable professional assistance" cannot be presumed in a proceeding that routinely accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial

[21] The State did not cite this Court's opinion in *Marron v. Stromstad*, 123 P.3d 992 (2005), issued after the Opening Brief was filed, concerning the requirements for qualifying expert witnesses. Since there was no qualification process at all in this case before allowing the expert testimony there is no way to analyze whether it was proper to admit it under *Marron*.

[22] The State, at p. 32, suggests challenging the level of representation on direct appeal should not be allowed, citing to *Barry v. State*, 675 P.2d 1292 (Alaska App. 1984), which is a criminal case where ineffective assistance of counsel claims are normally pursued in post conviction relief proceeding. The State cited no cases in support of the notion direct appeal should be unavailable.

confrontation. See generally Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law & Hum. Behav. 39, 53-54 (1992) (identifying Strickland standard as "sterile and perfunctory" where "reasonably effective assistance" is objectively measured by the "prevailing professional norms").

A number of commentators have discussed *K.G.F.*, in addition to Professor Michael Perlin who was cited in the Opening Brief.[23] For example, Professor Grant Morris reacts to Perlin as follows:

> Lawyers who represent mentally disabled clients in civil commitment cases and in right to refuse treatment cases, Michael tells us, are guilty of several crimes. They are inadequate. They are inept. They are ineffective. They are invisible. They are incompetent. And worst of all, they are indifferent. Is Michael right in his accusations? You bet he is!

Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego Law Review, 757, 758 (2005).

Similarly, Phyllis Coleman, J.D., Ronald A. Shellow, M.D. have pointed out:

> Using *Strickland* [the criminal standard] as the test of ineffective assistance in civil commitments is a serious mistake. The first prong, which imposes a strong presumption that the attorney acted properly, may be appropriate in the criminal context where: (1) decisions can be attributed to trial tactics; (2) everyone agrees the lawyer's job is to provide a zealous defense; and (3) the record at the time of the claim may not contain sufficient information to conduct a fair evaluation. In contrast, however, such a presumption does not fit commitment proceedings that accept a minimal standard for legal representation . . .. The second Strickland requirement--that the client must prove he was harmed--is also problematic as it is contrary to the general rule that to obtain a valid order for involuntary hospitalization there must be strict compliance with commitment statutes.

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[23] Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role And Significance Of Counsel In Right To Refuse Treatment Cases," 42 San Diego Law Review 735, 746-7 (2005).

Coleman & Shellow, Ineffective Assistance Of Counsel: A Call For A Stricter Test In Civil Commitments, 27 J. Legal. Prof. 37, 60 (2003).

The facts in this case starkly demonstrate the inadequacies described by Perlin, Morris, and Coleman & Shellow. In fact, counsel's performance below no doubt satisfies the "mockery and farce" standard which this court abandoned in *Risher*.[24]

If this court adopts the standard advocated by the State where a psychiatric respondent must prove it is highly likely the result would have been different in the face of demonstrably inadequate performance by counsel and where the inability to demonstrate the prejudice is because counsel has not made the record, the constitutional requirement that no one can be involuntarily committed without "clear and convincing" evidence has been turned on its head.

In this case, the failure of the State's sole witness to be sworn makes a mockery and farce of the proceeding as does the failure of the State's sole witness to be qualified as an expert witness in this case. While both should have clearly been objected to/insisted upon by counsel, the former goes more towards the cavalier attitude of the Probate Master in upholding the dignity of the hearing as a true legal proceeding. However, the reliance on testimony in someone else's case (expert qualification) truly made the proceeding a mockery and farce. The failure of counsel to conduct any meaningful investigation, subject the State's case to any real testing, through cross-

[24] "Unless counsel's conduct is 'so incompetent as to deprive his client of a trial in any real sense-render the trial a mockery and a farce . . .' this court will not reverse." *Sullivan v. State*, 509 P.2d 832, 835-6 (Alaska 1973).

examination or otherwise, to challenge the patently insufficient petition and evidence, or even make any argument, truly deprived Ms. Wetherhorn of a trial in any real sense.[25]

As discussed above, the Montana Supreme Court, Professors Perlin and Morris, and Coleman & Shellow all recognize that a major problem needing to be addressed with respect to the systemic failure of counsel to adequately represent psychiatric defendants in involuntary commitment and medication proceedings is the confusion lawyers (and some courts) have over the proper role of the attorney. Instead of playing their proper role as an advocate in an adversarial proceeding, they usurp the role of the judge and essentially acquiesce to involuntary commitment and medication against the wishes of their clients by failing to interpose any meaningful defense.

> Unfortunately, in doing so, a lawyer commits several critical errors. . . . he "shirk[s] his professional duty to be a zealous advocate." . . . [and] usurps the court's prerogative . . . .

Coleman & Shellow, *supra* at 56 (footnotes omitted).

Violation of the duty of vigorous advocacy is *per se* ineffective assistance of counsel:[26] For example, the United States Supreme Court has held:

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[25] It can not be seriously disputed that being involuntarily committed and forcibly drugged based on testimony in someone else's case is a mockery of proper judicial proceedings and makes a farce of the trial. However, this Court merely ruling witnesses have to be sworn in every case and expert witnesses have to be qualified in every case will not correct the problem of the attitude that psychiatric respondents are not entitled to legitimate proceedings where appointed counsel vigorously defend their rights. In order to solve that problem, something along the lines of the remedies suggested by Ms. Wetherhorn must be adopted.

[26] This Court has recognized where counsel with a conflict of interest is appointed reversal is mandated without further inquiry. *Risher*, *supra* at n.19.

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

and

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

US v. Cronic, 466 U.S. 648, 646-7, 659, 104 S.Ct. 2039, 2045-6, 2047 (1984)(footnotes and citations omitted). Similarly,

> [A]n attorney who adopts and acts upon a belief that his client should be convicted "fail[s] to function in any meaningful sense as the Government's adversary." . . . Whether the attorney is influenced by loyalties to other defendants, third parties, or the government, "if [he] entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights."

Osborn v. Shillinger, 861 F.2d 612, 625 (CA 10 1988), citation omitted. *See, also, Fisher v. Gibson*, 282 F.3d 1283 (CA10, 2002).

The key difference between involuntary commitment and medication cases and criminal defense cases is while it is a valid assumption counsel in criminal cases understand and attempt to fulfill their obligation to subject the state's case to meaningful adversarial testing, that assumption is not valid in the involuntary commitment and medication context. Since the *Strickland/Risher* test rests upon this assumption, as recognized by the Montana Supreme Court, Professors Perlin and Morris and Coleman & Shellow, it is inappropriate to use it in these cases where the assumption is not valid.

While Ms. Wetherhorn believes it is ludicrous for the State to assert the deficiencies in counsel's performance here were legitimate tactical decisions,[27] it demonstrates the error in making the assumption that counsel in these types of cases are even trying to perform their proper role.

Similarly, just as it is not valid to assume counsel is performing their proper role, it is not valid to assume the courts hearing these case are deciding these cases based on compliance with the law.[28] Thus, the second prong of the *Strickland/Risher* test is also inappropriate in these cases.

To address this situation, Coleman & Shellow suggest the following formulation:

> (1) did the attorney act as a reasonably prudent lawyer with experience in this area would have under the circumstances; and (2) did the attorney's actions ensure strict compliance with statutory requirements in obtaining the confinement order.[29]

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[27] For example, the argument made at p. 37 that there was no serious cross examination "may have been the result of a strategic decision to minimize the risk of eliciting more potentially damaging testimony" seems ludicrous in the context of the totality of the situation, including counsel failing to put on any evidence, failing to challenge any aspect of the case and failing to make any argument as to why the petitions should not be granted. It also seems ludicrous in light of the public defender agency virtually never prevailing on any of these cases. The State's suggestion at p. 35, that the failure of any psychiatric respondents to have pursued ineffective assistance of counsel claims is outrageous in light of the inability of any such respondents to pursue such a claim until the Law Project for Psychiatric Rights came on the scene.

[28] *See*, Opening Brief, p; 34-5.

[29] 27 J. Legal Prof. at 60.

To address the situation, Coleman & Shellow, urge the states mandate specialized training for private and appointed counsel who practice in this area.[30] Ms. Wetherhorn urges this Court to adopt such a mandate.[31]

VII. THERE WAS INSUFFICIENT EVIDENCE TO GRANT THE PETITIONS

The State asserts at pp 42-47 that there was sufficient evidence to support the petitions. Ms. Wetherhorn will rely on her Opening Brief with respect to this, except to draw this court's attention to the new case of *B.T., supra.*, which discusses the requirement of sufficient evidence.

VIII. CONCLUSION

The fundamental question in this case is whether psychiatric respondents are entitled to legitimate legal proceedings before they are locked up and forcibly injected with mind-numbing drugs based on alleged mental illness. This Court should hold they are.

RESPECTFULLY SUBMITTED this 28th day of March, 2006.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

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

[30] 27 J. Legal Prof. at 37, 62.

[31] With the Internet and distance learning opportunities it is not hard to fulfill such a mandate even in Alaska. For example, New York Law School has online courses on Mental Disability Law, including one titled "Lawyering Skills in the Representation of Persons with Mental Disabilities," the syllabus for which is attached hereto as Appendix C for the convenience of the Court.