IN THE SUPREME COURT FOR THE STATE OF ALASKA

W.S.B,	)	
	)	
Appellant,	)	
	)	Supreme Court No. **S-12677**
v.	)	
	)	
ALASKA PSYCHIATRIC INSTITUTE,	)	
	)	
Appellee.	)	Trial Court Case No. 3AN-07-247 PR
	)	

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE PETER A. MICHALSKI, JUDGE

BRIEF OF APPELLEE

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ALASKA STATUTES:

AS 47.30.700. Initiation of involuntary commitment procedures

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

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

AS 47.30.735. 30-day commitment

(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.

(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 - 47.30.915, the respondent has the right

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that

the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;

(2) to view and copy all petitions and reports in the court file of the respondent's case;

(3) to have the hearing open or closed to the public as the respondent elects;

(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;

(5) to have an interpreter if the respondent does not understand English;

(6) to present evidence on the respondent's behalf;

(7) to cross-examine witnesses who testify against the respondent;

(8) to remain silent;

(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

AS 47.30.915. Definitions

In AS 47.30.660 - 47.30.915

(1) "commissioner" means the commissioner of health and social services;

(2) "court" means a superior court of the state;

(3) "department" means the Department of Health and Social Services;

(4) "designated treatment facility" or "treatment facility" means a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670--47.30.915 but does not include correctional institutions;

(5) "evaluation facility" means a health care facility that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660--47.30.915, or a medical facility licensed under AS 47.32 or operated by the federal government;

(6) "evaluation personnel" means mental health professionals designated by the department to conduct evaluations as prescribed in AS 47.30.660 - 47.30.915 who conduct evaluations in places in which no staffed evaluation facility exists;

(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;

(8) "inpatient treatment" means care and treatment rendered inside or on the premises of a treatment facility, or a part or unit of a treatment facility, for a continual period of 24 hours or longer;

(9) "least restrictive alternative" means mental health treatment facilities and conditions of treatment that are

(A) no more harsh, hazardous, or intrusive than necessary to achieve the treatment objectives of the patient; and

(B) involve no restrictions on physical movement nor supervised residence or inpatient care except as reasonably necessary for the administration of treatment or the protection of the patient or others from physical injury;

(10) "likely to cause serious harm" means a person who

(A) poses a substantial risk of bodily harm to that person's self, as manifested by recent behavior causing, attempting, or threatening that harm;

(B) poses a substantial risk of harm to others as manifested by recent behavior causing, attempting, or threatening harm, and is likely in the near future to cause physical injury, physical abuse, or substantial property damage to another person; or

(C) manifests a current intent to carry out plans of serious harm to that person's self or another;

(11) "mental health professional" means a psychiatrist or physician who is licensed by the State Medical Board to practice in this state or is employed by the federal government; a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners; a psychological associate trained in clinical psychology and licensed by the Board of Psychologist and Psychological Associate Examiners; a registered nurse with a master's degree in psychiatric nursing, licensed by the State Board of Nursing; a marital and family therapist licensed by the Board of Marital and Family Therapy; a professional counselor licensed by the Board of Professional Counselors; a clinical social worker licensed by the Board of Social Work Examiners; and a person who

(A) has a master's degree in the field of mental health;

(B) has at least 12 months of post-masters working experience in the field of mental illness; and

(C) is working under the supervision of a type of licensee listed in this paragraph;

(12) "mental illness" means an organic, mental, or emotional impairment that has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand; mental retardation, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness;

(13) "peace officer" includes a state police officer, municipal or other local police officer, state, municipal, or other local health officer, public health nurse, United States marshal or deputy United States marshal, or a person authorized by the court;

(14) "persons with mental disorders" has the meaning given in AS 47.30.610;

(15) "professional person in charge" means the senior mental health professional at a facility or that person's designee; in the absence of a mental health professional it means the chief of staff or a physician designated by the chief of staff;

(16) "provider of outpatient care" means a mental health professional or hospital, clinic, institution, center, or other health care facility designated by the department to accept for treatment patients who are ordered to undergo involuntary outpatient treatment by the

court or who are released early from inpatient commitments on condition that they undergo outpatient treatment;

(17) "screening investigation" means the investigation and review of facts that have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

(18) "state" means a state of the United States, the District of Columbia, the territories and possessions of the United States, and the Commonwealth of Puerto Rico, and, with the approval of the United States Congress, Canada.

COURT RULES:

Alaska Rule of Civil Procedure 53. Masters.

(a) **Appointment and Compensation.** The presiding judge of the superior court for each judicial district with the approval of the chief justice of the Supreme Court may appoint one or more standing masters for such district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor and an examiner, and a magistrate or a deputy magistrate. The compensation, if any, to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court, as the court may direct. The master shall not retain the master's report as security for compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to

put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Evidence Rule 103(b) for a court sitting without a jury.

(c) **Proceedings.**

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished for a contempt and be subjected to the consequences, penalties and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(d) **Report.**

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for an action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 77. The court may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(6) *Report of Magistrate or Deputy Magistrate.* Where a magistrate or a deputy magistrate has been appointed a standing or special master for any purpose, the master's report shall include such findings of fact, transcript of evidence or proceedings and recommendations as may have been requested by the superior court in its order of reference.

Alaska Rule of Probate Procedure 2. Appointment and Authority of Masters.

(a) **Appointment.** The presiding judge may appoint a standing master to conduct any or all of the probate proceedings listed in subparagraph (b)(2). Appointment of standing masters must be reviewed annually. A standing master in probate shall serve as a registrar. The presiding judge may appoint a special master to conduct a proceeding which is specified in the order of reference and is listed in subparagraph (b)(2).

(b) **Authority, Order of Reference.**

1. An order of reference specifying the extent of the master's authority and the type of appointment must be entered in every case assigned to a master. The order of reference must be served on all parties.

2. The following proceedings may be referred to a master:

A. all decedent estate hearings:

B. guardianship and conservatorship hearings under Title 13;

C. mental commitment, alcohol or substance abuse commitment, and medication consent hearings under Title 47;

D. hearings on trusts;

E. hearings on emancipations;

F. authorization of emergency life-saving procedures pursuant to AS 13.26.140(f); and

G. hearings in proceedings to bypass parental consent to an abortion under AS 18.16.030 and Probate Rule 20.

3. A master's report is not binding until approved by a superior court judge pursuant to Civil Rule 53(d) and paragraph (f) of this rule, except:

A. a master may enter orders without further approval of the superior court pursuant to Civil Rule 53(b) and (c), and paragraph (d) of this rule;

B. a master's order of removal of a personal representative and appointment of a successor personal representative is effective pending superior court review;

C. a master's order of commitment to a treatment facility is effective pending superior court review;

D. a master's determination of a patient's capacity to give informed consent to medication under AS 47.30.839 is effective pending superior court review; and

E. a master's authorization of emergency life-saving procedures pursuant to AS 13.26.140(f) is effective pending superior court review.

(c) **Objection to Reference to a Master.** In addition to the peremptory challenge of a master provided for in Civil Rule 42(c), a party may object to the assignment of a master for good cause. The procedural requirements of Civil Rule 42(c) apply to the objection.

(d) **Standing Master's Authority to Enter Orders.** A standing master is authorized to take the following actions without further approval by a superior court judge:

1. any actions authorized to be taken by a master as a registrar;

2. appoint counsel and guardians ad litem;

3. order home studies, visitor's reports, and psychological, psychiatric, and medical evaluations;

4. set hearings and order continuances of the master's hearings;

5. issue orders on motions requesting expedited review pursuant to Civil Rule 77(g);

6. accept and approve stipulations;

7. review and approve uncontested orders on annual review; and

8. order mediation and other forms of alternative dispute resolution under Probate Rule 4.5.

(e) **Master's Report, Recommendations.** A master may issue a written report or oral findings on the record concerning an order or recommendation which must be approved by a superior court judge.

(f) **Objections to Master's Report, Recommendations.**

1. *Objections, Reply, Oral Argument.* Objections to a master's report or recommendation must be filed within 10 days of the date of notice of the report as provided by Civil Rule 58.1(c), unless the court otherwise provides. A reply to the objections must be filed within three days of service of the objections. The superior court may permit oral argument, order additional briefing or the taking of further evidence, or grant a hearing de novo.

2. *Request for Stay, Immediate Review.* A party may request that a superior court judge stay a master's order issued under paragraph (b)(3)(B) -- (D) pending review of the order.

PARTIES

W.S.B. ("Wilson")[1] is the appellant.

The Alaska Psychiatric Institute ("API") is the appellee.

ISSUES PRESENTED

1) There was clear and convincing evidence presented at the 30-day commitment hearing that, as a result of his mental illness, which manifested itself through paranoia, delusions, poor judgment, and verbally aggressive behavior, Wilson could not live safely outside of a controlled environment – particularly since he was refusing to cooperate with his public guardian, who previously helped him obtain services and daily necessities. As such, did the superior court err in concluding that Wilson was gravely disabled?

2) Does the mere fact that the Probate Master submitted his findings and recommendations to the superior court without a transcript of the 30-day commitment hearing automatically invalidate the superior court's subsequent commitment order where the superior court had access to the complete record at the time of its review?

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves a petition for a 30-day commitment, which was granted by the superior court resulting in Wilson being committed to API in order to receive

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[1] Given the confidential nature of mental-health commitment proceedings, API relies on a pseudonym for appellant. This pseudonym is not used in the appellant's brief.

appropriate and necessary mental health treatment. [Exc. 4-5, 7-8, 21-22] A hearing on the petition was heard before a Probate Master, who subsequently sent a report to the superior court containing his findings of fact, conclusions of law, and recommendations. [Exc. 7-8] After considering the master's recommendations, Wilson's objections, API's response, and the official record, the superior court overruled the objections and adopted the master's recommendations, granting the petition. [Exc. 21-22] Wilson appeals the 30-day commitment order. Because the superior court did not err in granting the petition, this Court should affirm.

II. FACTS AND PROCEEDINGS

On February 22, 2007, Wilson's pubic guardian, Steven Young, filed a Petition for Initiation of Involuntary Commitment, requesting that the superior court initiate a screening investigation of Wilson pursuant to AS 47.30.700. [Exc. 1-2] In the petition, Mr. Young alleged that Wilson was gravely disabled because he "is highly psychotic and unable to focus on or meet his basic needs. He has refused even to allow someone else to provide him with groceries because [he is] worth billions[.]" [Exc. 1] Mr. Young further alleged that Wilson "has become threatening and hostile and is at risk of assaulting others or of drawing assault upon himself due to his highly aggressive presentation." [Exc. 1] That same day, the superior court issued an *ex parte* order under which either the state troopers or local police were to take Wilson to API, where he would be evaluated by a mental health professional. [Exc. 3] Wilson was taken to API later that day and provided with a notice regarding his rights during the evaluation period. [Exc. 25, 27]

The following morning, after evaluating Wilson, API psychiatrist William Worrall, M.D., filed a Petition for 30-Day Commitment and a Petition for Court Approval of Administration of Psychotropic Medication. [Exc. 4-6] In the former, Dr. Worrall alleged that Wilson is mentally ill and, as a result, is gravely disabled. [Exc. 4] More specifically, he alleged that Wilson was "[p]sychotic, delusional, paranoid, [and] agitated," and that Wilson would not cooperate with his public guardian "to arrange for groceries (to help him stay healthy) to be delivered," that Wilson had lost four pounds in the past three months, and that he "insists his guardian should give him money to do his own shopping, but he agitates people in public and creates disturbances." [Exc. 4] Dr. Worrall also noted that Wilson had not been taking medication for his mental illness despite that fact that "when on medication he was calm and had better judgment." [Exc. 4] Because of Wilson's assaultive behavior, it took several attempts before API staff successfully could serve him with copies of these petitions. [Exc. 26]

A hearing on the 30-day commitment petition was held before Master Brown on February 27, 2007. [Exc. 7] At the conclusion of the hearing, the master issued an oral order, granting the petition. [Tr. 69-72 (2/27/07)] He later reduced his findings, conclusions, and recommendations to writing. [Exc. 7-8] In that written order, the master concluded there was clear and convincing evidence that Wilson was mentally ill and, as a result, was gravely disabled. [Exc. 7] The master further concluded that API was an appropriate treatment facility and that no less restrictive facility adequately would protect Wilson and the public. [Exc. 7] The master then set forth the facts on which he relied:

> The evidence is clear and convincing that [Wilson] has the mental illness of Affective Disorder, Bi-Polar Type. His thought processes involve paranoid ideas, delusions of wealth and grandeur, and irrational thinking. He cannot perceive and understand reality. While he has sufficient funds for housing and basic necessities, his inability to focus on what is necessary and be able to interact with others without disturbing or frightening them impairs his ability to actually provide for himself. He is unable to shop in an appropriate manner for his own food and does not have the ability to make correct nutritional choices. The impairment of his ability to reason and understand causes a substantial deterioration to function independently and he is unable to survive in freedom. He is gravely disabled and there is no less restrictive placement than API.

[Exc. 8] As such, the master recommended that Wilson be committed to API for a period not to exceed 30 days. [Exc. 8] The master also recommended granting the petition for court-ordered administration of medication. [Exc. 9-11]

On March 2, 2007, Superior Court Judge Jack Smith signed both the commitment order and the order for administration of medication, adopting the findings and conclusions of the master. [Exc. 8, 11] These orders were distributed to the parties on March 15, 2007. [Exc. 8, 11]

Before the superior court orders were distributed, Wilson's Public Defender filed an objection to the master's findings in relation to the 30-day commitment petition.[2] [Exc. 12-17] API responded on March 12, 2007, arguing that the master's report should

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[2] Under Probate Rule 2(f), objections to a master's report or recommendation must be filed within 10 days of the date of distribution. It is unclear what day the written recommendation was distributed. However, the master issued oral findings on February 27. Thus, the objections to the 30-day commitment order were timely filed.

be adopted in its entirety. [Exc. 18-20] The objections were not immediately ruled upon. [Exc. 21]

On March 14, 2007, Wilson left API to participate in outpatient treatment through Anchorage Community Mental Health Services ("ACMHS"). [Exc. 28] Under his conditions of early release, Wilson agreed to take his prescribed medication, which included "daily oral medications and bi-weekly Consta shots to be monitored through ACMHS," and to continue to reside at the apartment arranged for by his public guardian. [R. 416] Wilson was notified that "[f]ailure to comply with any of the above conditions, with resultant determination by the Anchorage Community Mental Health Services staff of the need to return to in-patient care at the Alaska Psychiatric Institute, will result in a revocation of the outpatient commitment and a return to API for completion of the period of commitment in the more restrictive in-patient setting." [Exc. 28-29]

Five days later, on March 19, 2007, ACMHS determined that Wilson could no longer be treated on an outpatient basis because he was likely to cause harm to himself or others or was gravely disabled. [Exc. 30] As a result, it notified Wilson that he needed to return to API for treatment. [Exc. 30-31] Wilson did not comply. [Exc. 32] As a result, the superior court ordered a peace officer to take Wilson into custody and transport him to API. [Exc. 33]

On March 21, 2007, after Wilson's return to API, Dr. Worrall filed a Petition for 90-Day Commitment and a Petition for Court Approval of Administration of Psychotropic Medication. [Exc. 34-36, 39] In the 90-day commitment petition, Dr. Worrall asserted that Wilson remained gravely disabled, as alleged in the 30-day

commitment petition, that he continued to be gravely disabled, and that his mental condition likely could be improved by inpatient treatment. [Exc. 34-35] Dr. Worrall also alleged that Wilson "has received appropriate and adequate care and treatment during his . . . 30-day commitment but stopped his medication on early release and his condition worsened," that Wilson "[b]ecame much more labile and angry" while on early release, and that, upon his return to API, Wilson presented as having "[v]ery poor judgment, paranoid & delusional[.]" [Exc. 34-35] A hearing on the petitions was scheduled for March 22, 2007, and a court visitor was appointed to provide a recommendation to the superior court on the medication petition. [Exc. 37, 40]

On March 22, 2007, the Law Project for Psychiatric Rights entered an appearance on Wilson's behalf and requested a jury trial for the 90-day commitment petition. [Exc. 41-42] Because the court-appointed Public Defender, who had represented Wilson at the prior hearings, had not filed a motion to withdraw or a consent to withdraw, the master declined to recognize Wilson's new counsel.[3] [Exc. 43-44] However, the master did grant the request for a jury trial. [Exc. 45] Several days later, the Public Defender filed a motion to withdraw as counsel, which the superior court granted. [Exc. 46-47]

Because Judge Smith was not available for the trial, the matter was re-assigned to Superior Court Judge Peter Michalski. [Exc. 21] After reviewing the file on

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[3] Wilson petitioned this Court for review of the master's order on March 27, 2007. *See W.B. v. Alaska Psychiatric Institute*, S-12646. [R. 270] This Court declined to consider the petition.

March 23, Judge Michalski realized that Wilson's objections to the 30-day commitment order still needed to be ruled on. [Exc. 21] As such, the judge reviewed the record, considered the parties' arguments, overruled the objections, and authorized the 30-day commitment. [Exc. 21-22; Tr. 8 (3/28/07)] This order was distributed on March 27. [Exc. 22]

On April 1, 2007, Wilson filed a motion for reconsideration. [Exc. 23-24] He asserted that the master's failure to submit a transcript of the commitment hearing along with his recommendations, as required by Civil Rule 53(d)(1), constituted plain error. [Exc. 23-24] As such, he argued that the commitment order was invalid. [Exc. 23-24] The superior court denied this motion the following day. [Tr. 5-6 (4/2/07)]

On April 2-4, 2007, a jury trial was held on the 90-day commitment petition. [R. 60-124] The jury unanimously found that API proved by clear and convincing evidence that Wilson was mentally ill; that he was "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;" and that if not treated, Wilson will "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 [his] previous ability to function independently, such that he is unable to survive safely in freedom." [Exc. 48-49] Because the jury split on whether API proved by a preponderance of the evidence that Wilson's "mental condition would be improved by the course of treatment" sought, the 90-day commitment petition was denied. [Exc.

49-50] The superior court then directed that Wilson be released from API that day. [R. 82] As such, neither the commitment order nor administration of medication order are in effect in this case.

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.

The Court reviews the interpretation and application of the civil rules *de novo*, adopting "the rule of law most consistent with precedent, reason, and policy." *Crumpler v. State, Dept. of Revenue*, 117 P.3d 730, 732 (Alaska 2005); *Wetherhorn v. Alaska Psychiatric Institute*, --- P.3d --- , 2007 WL 2745204 *2 (Alaska 2007) ("*Wetherhorn II*").

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT WILSON WAS GRAVELY DISABLED.[4]

Under AS 47.30.735(c), the superior court may commit a person to a mental-health treatment facility for not more than 30 days if there is clear and convincing evidence that the person is mentally ill and, as a result of that illness, is likely to cause harm to himself or to others or is "gravely disabled." Alaska Statute 47.30.915(7) defines "gravely disabled" as follows:

> "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 considering subsection (B), this Court recently held that it "must be construed so that the 'distress' that justifies commitment refers to a level of incapacity that prevents the person in question from being able to live safely outside of a controlled environment." *Wetherhorn I*, 156 P.3d at 378. It also described the "gravely disabled" element as

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[4] API agrees that this particular case meets the exception to the mootness doctrine and is appropriate for appellate review, particularly in light of Wilson's lengthy history with API and the likelihood that future commitment proceedings may be initiated against him based on his mental illness, which results in him being gravely disabled.

involving "a more passive condition, whereby the respondent is so unable to function that he or she cannot exist safely outside an institutional framework due to an inability to respond to the essential demands of daily life." *Id.* at 376 (citing *In re LaBelle*, 728 P.2d 138, 144 (Wash. 1986)).

After hearing testimony at the 30-day commitment proceedings, the master concluded that Wilson was gravely disabled based on the following findings of fact:

> His thought processes involve paranoid ideas, delusions of wealth and grandeur, and irrational thinking. He cannot perceive and understand reality. While he has sufficient funds for housing and basic necessities, his inability to focus on what is necessary and be able to interact with others without disturbing or frightening them impairs his ability to actually provide for himself. He is unable to shop in an appropriate manner for his own food and does not have the ability to make correct nutritional choices. The impairment of his ability to reason and understand causes a substantial deterioration to function independently and he is unable to survive in freedom.

[Exc. 8] After considering Wilson's objections and API's response, the superior court adopted the findings and recommendation of the master.[5] There was more than ample evidence to support the superior court's order, and this Court should affirm.

Steven Young has known Wilson since 1997 and has worked as Wilson's public guardian for the past several years. [Tr. 8 (2/27/07)] At the 30-day commitment hearing, Mr. Young testified about his relationship with Wilson, his efforts to help

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[5] While the master's factual findings are binding on the superior court unless clearly erroneous, the "exercise of judicial discretion upon those facts is vested in the superior court." Thus, the superior court is free to adopt or disregard the conclusions of law and ultimate recommendation. *Headlough v. Headlough*, 639 P.2d 1010, 1012 (Alaska 1982).

Wilson meet his daily needs, and recent difficulties in ensuring that such needs are met. In terms of services, Mr. Young explained that every seven to ten days, he would take Wilson to the grocery store and they would pick out what Wilson wanted: "That's the way [Wilson] gets groceries purchased." [Tr. 11 (2/27/07)] Alternatively, Mr. Young would pay someone to transport Wilson to the grocery store and help him with his shopping. [Tr. 18-19 (2/27/07)] Mr. Young explained that he typically purchases food for Wilson that is ready to eat or microwavable, opting for food that requires little preparation because food preparation is difficult for Wilson. [Tr. 22-24 (2/27/07)] Mr. Young also provides Wilson with $50 a week for personal items, such as cigarettes. [Tr. 18 (2/27/07)]

Mr. Young also testified that, through the guardianship appointment, the Office of Public Advocacy ("OPA") historically has provided Wilson with more services than other clients, based on the difficulties Wilson has in working with service providers:

> Our office provides some unconventional assistance to [Wilson] because of his uniqueness. He doesn't really accept, nor do agencies readily provide out patient mental health services to him.

[Tr. 9, 11-13 (2/27/07)] According to Mr. Young, in the past, Wilson was able to behave in a more appropriate manner, controlling his anger and outbursts. Mr. Young opined that this was a result of Wilson's compliance with outpatient mental health treatment through API and his agreement to regularly take medication. [Tr. 13-14 (2/27/07)] When treatment compliant, according to Mr. Young, Wilson "wouldn't get upset, but . . .

would actually apologize when he got upset. He had a sense of humor. He – he wasn't yelling and screaming, and [being] hostile[.]" [Tr. 14 (2/27/07)]

However, as Mr. Young testified, since Wilson's most recent release from API in January 2007, he had not been compliant with his mental health treatment and, as a result, Wilson's psychosis had gotten worse. [Tr. 8 (2/27/07)] Mr. Young also described Wilson as doing "poorly" and described some of the difficulties he was having trying to work with Wilson as his guardian:

> [W]hen he was released [from API] on the 2nd of January, ah, Mr. Gottstein obtained some outpatient assistance through a new agency called Choices, which he evaporated after a week. And, so, although he was not compliant with his medication, and was deteriorating, we were still in a position of trying to make sure that he had a place to live, and regular food purchasing was going on, and that sort of thing. Which we did up until the time that we felt it was dangerous to go into the grocery store[.]
>
> . . .
>
> So we were trying to come up with a plan to provide needed groceries to [Wilson], and he was completely unable to focus on the issue. [H]is belief that he's worth a lot of money . . . and that was his focus, over, you know, his recognized needs.
>
> On top of that, he was beginning to make threats against, um – he would make them against our office[. T]he threats could include the entire building[.]

[Tr. 8-10 (2/27/07)] According to Mr. Young, as a result of Wilson's behavior, he was asked to stay way from OPA:

> . . . I'm going to go back to the 5th of February. That's the day when we had to ask [Wilson] to stay away from the Office of Public Advocacy because he was unable to maintain any appropriate level of behavior coming into our office. And he was unable to follow that request. He came in

repeatedly after that[.]

[Tr. 8 (2/27/07)]

Although Wilson had an apartment at the time of the hearing, according to Mr. Young, Wilson had been evicted from another apartment several months before based on his agitated condition. [Tr. 15, 17 (2/27/07)] Wilson also had been asked to leave stores when trying to purchase cigarettes. [Tr. 19-20 (2/27/07)] Recently, there had been problems purchasing groceries, even though Mr. Young was present to assist:

> Q: [W]hen you go grocery shopping, he's able to pick out what he would like to eat?
>
> A: Not really. He's able to hold onto the back of the cart, and somebody has to hold onto the front so that he doesn't run into things.
>
> . . . [I]f somebody comes between [him] and an item that he's looking for on the shelves, or in a case, or whatever, it's usually necessary to position yourself in front of him so that the doesn't begin verbally accosting the person who is standing between him and something that he's looking for.

[Tr. 20-21, 25 (2/27/07)] Mr. Young continued:

> He would not be capable, in my opinion, . . . of getting through the grocery [store].
>
> . . .
>
> [Wilson] could not, in my opinion, shop independently. He's not capable.

[Tr. 21, 24 (2/27/07)]

Mr. Young testified that he filed the petition for a 30-day commitment because, in his opinion, Wilson was no longer able to look after even his basic needs. [Tr. 10 (2/27/07)] Mr. Young was also concerned that Wilson could no longer track

conversations: "[J]ust prior to me filing the petition, I – I asked him if this is something that he would prefer to do. He wasn't even able to give me [a] response to the question. His response was completely unrelated to the question." [Tr. 22 (2/27/07)] This testimony, taken as a whole, demonstrated that Wilson's conduct, which was a result of his mental illness and lack of mental health treatment, was having a direct impact on Wilson's daily maintenance and on the public guardian's ability to provide for Wilson or to even safely interact with him.

William Worrall, M.D., Wilson's treating psychiatrist and an expert in psychiatry, also testified at the hearing. [Tr. 26-27 (2/27/07)] Dr. Worrall testified that Wilson, whom he has known "off and on for 20 years," suffers from Schizo-Affective disorder, bi-polar type, which manifests itself through "paranoia, delusions, irrational thinking, poor judgment, quick emotional reactions, [and] assaultive behavior." [Tr. 27, 28 (2/27/07)] According to Dr. Worrall, when Wilson arrived at API for the current admission, he was "primarily very emotional and getting very, very upset, and loud, and scaring people with things that he would say, very disruptive, a delusional, paranoid." [Tr. 28 (2/27/07)] He also lacked any insight into his mental illness, believing instead that "everything that's happening to him is because everyone around him is conspiring to ruin his life." [Tr. 36-37 (2/27/07)]

When asked if Wilson's mental illness caused him to be unable to live safely in the community, Dr. Worrall declined to answer, noting that this was a question for the court to resolve. [Tr. 28 (2/27/07)] However, he did testify about how Wilson's mental illness affects him:

> I can tell you that he has severe impairment of judgment because of his delusions and his paranoia thinking processes. He doesn't do what any rational person would do when presented with a set of options to take steps towards something that's in his interests.
>
> Whether or not he's gonna freeze to death, or starve to death, something like that, I really don't have reason to think that that is gonna happen.
>
> He did – he lost three and a half pounds since he left the hospital January 3[, 2007]. That's not very much weight loss. He's a little thin to start with, but he's certainly not in any medical jeopardy because of the three pound weight loss.
>
> He hasn't been to an emergency room with an assault, because of his relative behavior. But under the existing statute, I felt comfortable filing for grave disability, because he is certainly suffering. He has very impaired thinking processes that cause him to process, but because of his mental illness. And that's the basis for filing the petition, of whether or not he's safe or not, I think is the question here.

[Tr. 28-29 (2/27/07)] When asked about Wilson's failure to act as a rational person would, Dr. Worrall explained that he tried to work with Wilson on not being disruptive in the court proceedings in order to demonstrate an ability to control himself and "encouraged him to try to come up with a plan for how he's gonna have food and provide for his food, and negotiate some plan with his guardian, who he needs to work with at this point in time, for his food." [Tr. 30 (2/27/07)] Dr. Worrall did not believe these efforts had proven successful. [Tr. 30 (2/27/07)]

In terms of Wilson's aggressive behavior, Dr. Worrall testified that Wilson "was in a state of mind where he was screaming so loudly that it was upsetting other patients who were becoming unstable," resulting in an emergency situation that warranted emergency injections of psychotropic medications on two occasions. [Tr. 30,

60 (2/27/07)] After receiving the medication, Wilson became a little more stable and more re-directable. [Tr. 30-31 (2/27/07)] This was consistent with Wilson's use of psychotropic medication during his prior commitment period ending in January 2007, which resulted in a "remarkable improvement" in Wilson's behavior:

> [H]e was the calmest I've ever seen him. You could sit in a room with him and talk about difficult things, and he didn't get upset, he didn't get loud, he didn't try to take over the conversation. He was remarkably improved in his self regulation of his emotional condition. He was still delusional and paranoid, but he wasn't upset by those delusions and driven by the paranoia.

[Tr. 31 (2/27/07)] Although the medication had been beneficial and improved Wilson's judgment, Dr. Worrall noted that Wilson had stopped taking it as soon as he left API. [Tr. 31, 34-35 (2/27/07)] Dr. Worrall opined that as a result, Wilson did not reach "a point that he had such insight that he wanted to continue medication, and he rapidly deteriorated." [Tr. 32 (2/27/07)]

Dr. Worrall testified that, in the past, Wilson had been cooperative with his public guardian and been willing to work with Mr. Young and API on discharge plans. [Tr. 34-35 (2/27/07)] According to Dr. Worrall, even when Wilson would not listen to API staff, he would listen to Mr. Young. [Tr. 35 (2/27/07)] As a result of his treatment compliance and willingness to work with Mr. Young, Wilson could live safely in the community and service providers were willing to assist him. [Tr. 42-43 (2/27/07)] However, by the time of the current commitment petition, this had changed: "[Y]ou couldn't get more uncoorperative, the way he is with his guardian now. And that's a complication that really is unrelated to medication." [Tr. 35 (2/27/07)] In addition, since

Wilson was no longer cooperating with Mr. Young, this was creating problems with service providers who were no longer willing to work with Wilson. [Tr. 42-43 (2/27/07)]

In testifying about Wilson's current mental state, Dr. Worrall noted that Wilson was experiencing grand delusions under which he believed that the White House and President Bush would ensure that he gets food:

> He's got all kinds of conspiracies, delusions, and it all gets fed into by his – by his new – and he actually told me right before the hearing that President Bush was gonna make sure he gets food. That the White House would get him his food. And that the White House – that President Bush gave him a jet airplane, too.

[Tr. 35 (2/27/07)] As a result of such delusional thinking, Dr. Worrall did not believe Wilson was able to participate in making a realistic plan for himself outside of API. [Tr. 36 (2/27/07)]

When asked if Wilson previously had been able to function in the community, Dr. Worrall testified to the following:

> When he was out this time not taking medication? Well, he was escorted from a couple of properties by the police for being disruptive, but he wasn't arrested. He wasn't beaten up and taken to an emergency room.
>
> . . . But I don't think I would say that he was able to function in the community. I would say that he survived.

[Tr. 50 (2/27/07)] Asked whether Wilson could survive if discharged from API at that time, Dr. Worrall stated:

> Well, yeah, I have some concerns, but I don't have a conclusive opinion that he won't survive.
>
> . . .

> No, I don't have any reason to think he can't survive for a few weeks. Even if he did nothing for the next few weeks, he's gonna survive for at least two weeks. As long as he has housing, a warm place to go to, he's [not] gonna freeze to death. We haven't had to admit him with hypothermia, or such impaired judgment, that he sleeps outdoors in winter. He doesn't drink a lot of alcohol. He hasn't passed out in a snow bank. . . . But there's a chance that he is gonna get himself severely assaulted. I think the chance is low because of his disruptive behavior. I think there's a better chance that he'll get arrested because of his disruptive behavior in public. Frightening – concern he's gonna frighten people. He could be pretty scary, but it's really all talk. He's really not the kind of guy that goes around hitting people. But I don't have a firm opinion that he won't survive outside of API if it was a reasonable period of time, weeks or months or more. But under the existing . . . statute that applies to the petition I filed, I think he's gravely disable.

[Tr. 54-55 (2/27/07)] Dr. Worrall also expressed some concern that Wilson's condition would continue to deteriorate without appropriate mental health care:

> A: He's gonna get worse, and worse, and worse every year. . . . And he may reach the point when he does become a danger to himself and others on a constant basis now, instead of being verbally upset, and so forth, he may be so much worse off, and he's tried to hurt people because he thinks they're gonna hurt him. Certainly his level of functioning is going to go down over time if he's not treated. And he suffers. I mean, if you spend enough time with him, you can see that he really believes what he's talking about, and really, really suffers from his delusions.
>
> I mean, he came up to me the other day and with all the stress, because – he told that 300 people a day are eaten alive in this country . . .
>
> [Wilson]: It's true.
>
> A: . . . what are we gonna do about it?

[Tr. 57-58 (2/27/07)] Thus, Dr. Worrall's testimony also demonstrated that Wilson was suffering from a mental illness that resulted in being gravely disabled and that although he was "surviving" on his own (*i.e.*, would not die in the next two weeks), he was not functioning or able to live safely in the community.

At the conclusion of this testimony, the master found that Wilson suffered from a mental illness and that both "Dr. Worrall's and Mr. Young's testimony is clear and convincing that [Wilson] has been suffering from paranoid delusions, irrational thinking. He's had severe emotional reactions. Dr. Worrall testified that [Wilson] has severe impaired judgment. That he does irrational things." [Tr. 69 (2/27/07)] The master continued:

> [H]e is unable to perceive or understand reality that he is – Dr. Worrall testified – used the term, [Wilson] is gravely disabled. And that's backed up very clearly . . . by Mr. Young's testimony as to the extraordinary lengths that the guardian has tried to accommodate [Wilson], but, nonetheless, [Wilson] still is jeopardizing his own well being.
>
> Mr. Young testified that [Wilson] is unable to do his own shopping for food. That the guardian has had to go to the store with him. Even at the store there are – what I would refer to as extraordinary measures to avoid other shoppers from – from being accosted either verbally by [Wilson], which would cause additional problems. That Mr. Young also testified how [Wilson] has been threatening at Mr. Young's office. . . . Mr. Young's testimony is convincing . . . that he is unable to maintain himself . . . with the strict assistance of the – of his guardian. While [Wilson] may have financial resources to pay for an apartment and for food allowance, he still does not have the independent ability to manage himself and his affairs, and it's to the point where it (indiscernible) he would be unable to obtain his own necessary food and other necessities, and would – his well being would be diminished.

[Tr. 69-71 (2/27/07)] Considering these facts in light of *Wetherhorn I*, the master continued:

> . . . I don't have any doubt that that standard is met, because, as Mr. Young's and Dr. Worrall's testimony shows that [Wilson] has severe delusions, paranoia, and is prone to cause problems with others. [W]hile he may have an apartment and funds, I do not believe he can survive safely for long outside the hospital setting, which is highly structured environment. So, while he may be eating well and doing his (indiscernible) in the hospital, that's because it's a highly structured environment, which he needs. And to me it's clear that he really is severely gravely disabled because there would be a severe and a substantial deterioration of his ability to function independently, which is the statutory standard, if he was out on his own.

[Tr. 71 (2/27/07)] As such, he recommended that the 30-day petition be granted. [Tr. 71-72 (2/27/07)] As set forth above, the master reduced his findings and recommendation to writing; upon reviewing this matter, the superior court adopted the master's report. [Exc. 7-8, 21-22] Given the totality of the evidence, the superior court's order was not erroneous and should be affirmed.

Rather than looking at all of this evidence, however, Wilson focuses only on limited portions, impermissibly making inferences in his own behalf, and argues that there was no testimony indicating he could not live safely in the community. [At. Br. at 12-15] He then asserts that he was committed, not because he was unable to live safely in the community, but because he is more tolerable when required to take medication. [At. Br. at 14] As demonstrated by the testimony set forth above, this argument is without merit.

The combined testimony of Dr. Worrall and Mr. Young demonstrated, among other things, that the only way Wilson could meet his daily needs or live safely was either in the highly structured setting that API offered or through the extraordinary efforts of Mr. Young. It also demonstrated that because Wilson was now refusing to cooperate with Mr. Young, such efforts could no longer be made on Wilson's behalf, placing him at substantial risk. While Dr. Worrall opined that Wilson could "survive" for a short period of time without Mr. Young's assistance, he also stated that this did not mean that Wilson was actually functioning in society, merely that he would not immediately starve or freeze to death. In addition, both individuals testified that Wilson would not be able to engage in basic functions on his own, such as going to a grocery store and purchasing necessities, and expressed great concern that Wilson's conduct would result in his arrest or assault by another.[6] This hardly constitutes "being able to live safely outside of a controlled environment." *Wetherhorn I*, 156 P.3d at 378. Instead, it is demonstrative of someone who "is so unable to function that he or she cannot exist safely outside an institutional framework due to an inability to respond to the essential demands of daily life." *Id.* at 376.

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[6] After his most recent discharge from API, Wilson was arrested for allegedly disruptive behavior. Based on Wilson's conduct at his arraignment, the United States Magistrate Judge ordered Wilson remanded to API for a psychiatric evaluation to determine his mental competency. This order was entered September 20, 2007. [Attachment A, documents from *U.S. v. [Wilson]*, 3:07-MJ-00192-JDR] This Court may take judicial notice of such proceedings. *Drake v. Wickwire*, 795 P.2d 195, 197 (Alaska 1990); *see also Christopher v. Aguigui*, 841 A.2d 310, 312 n.2 (D.C. 2003).

API does not dispute that being civilly committed is a curtailment of an individual's liberty. However, the evidence presented at the 30-day commitment hearing clearly demonstrated that, at the time of the hearing, Wilson's mental illness caused him to be gravely disabled in the way envisioned by this Court in the recent *Wetherhorn I* decision. As such, commitment for purposes of receiving mental health treatment was warranted.

In addition, API agrees with Wilson that simply being "hard to tolerate" is an inappropriate justification for a commitment. [At. Br. at 15] But that was not the case here. While the testimony demonstrated that Wilson could be difficult to tolerate at times, even to the extent that he was often asked to leave public locations, such as grocery stores and OPA's offices, this is a direct result of his mental illness. In other words, the fact that he can be difficult to tolerate or can be perceived as a threat by others is just one example of how his illness manifests itself and results in Wilson being unable to function and survive safely in freedom. Unfortunately, such difficulty has resulted in Wilson being unable to purchase necessities, such as groceries, without the assistance of others. Thus, his ability to survive on his own is measured, to some extent, by his willingness to interact with other people and accept the help that they can provide.

The superior court did not grant the 30-day commitment petition because it found Wilson to be "physically unattractive or socially eccentric." [At. Br. at 14, quoting *Wetherhorn I*, 156 P.3d at 378] Instead, it granted the petition based on the clear and convincing evidence that Wilson was gravely disabled as defined by AS 47.30.915(7) and as interpreted by this Court. As such, this Court should affirm that order.

II. THE MASTER'S FAILURE TO SUBMIT A TRANSCRIPT ALONG WITH HIS RECOMMENDATION TO THE SUPERIOR COURT IS HARMLESS ERROR.

After hearing testimony at the 30-day commitment proceedings, the master concluded that Wilson was gravely disabled and recommended that Wilson be committed to API for a period not to exceed 30 days. [Exc. 8] He then forwarded his recommendation and findings to the superior court. [Exc. 8] Pursuant to Civil Rule 53(d)(1), the master should have provided the superior court with a transcript of the proceedings:

> The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

It does not appear that a transcript of the February 27, 2007 hearing was provided to either Judge Smith or Judge Michalski. [Tr. 7-8 (3/28/07)]

At a pretrial conference for the jury trial on the 90-day commitment petition, Wilson raised the issue of a lack of transcript:

> [Wilson]: Your Honor, under civil rule – I assumed there was no transcript prepared for that.
>
> The Court: For what?
>
> [Wilson]: For – that was submitted within the master's recommendation, which is required under, I believe, Civil Rule 53.d.1. And I really need a transcript[.]

[Tr. 6-7 (3/28/07)] The superior court explained that it did not have a transcript but had reviewed the file (including the log notes) in making its rulings, which was its traditional practice:

> . . . I had no hearing at which there was a transcript made of what I did. I reviewed the file. That's what I looked at.
>
> . . .
>
> [T]here were objections that were filed, and the state responded. And it was from – it's usually from the kind of the focus that's created by that process of the two sides discussing what the issue is and the court then makes its determination on objections, per se. I can't speak to, you know, what Judge Smith relied on, because theoretically he could listen – I'm not saying he did. Theoretically he could have listened to the disk, I suppose. That's a theoretical suggestion.
>
> And maybe what we end up having to do, given the length of time available and the capacity of the system to produce transcripts, I don't know.

[Tr. 7-8, 10, & 12 (3/28/07)] At the conclusion of the hearing, the superior court considered whether the lack of a transcript invalidated the 30-day commitment order, concluding that it did not:

> [D]oes the lack of a transcript make the [master's] recommendation invalid? I think my preliminary – I think it's a better practice, but my preliminary ruling would be that it doesn't make it invalid as an order.

[Tr. 22 (3/28/07)]

Several days later, based upon Wilson's motion for reconsideration, the superior court again addressed this issue, concluding that a lack of a transcript did not warrant vacating the 30-day commitment order:

> [The Court] denies [the motion] on the same grounds that it previously expressed with respect to the master's report. . . . I don't think that it's plain error in the same way that the lack of having a visitor's report is, the visitor's report being fundamental to knowing anything about the circumstances for the person making the decision to be brought to the superior court. Whereas, in this case there is at least log notes and the – whatever is contained in the decisions which provide a basis for the Court when it makes the evaluation. So while I agree with the [rule] as well, that it should be provided, I don't find it to be plain error to not to have done so.

[Tr. 6 (4/2/07)]

In arguing that the 30-day commitment order should be vacated, Wilson asserts that the superior court could not adequately "discharge its duty" in ruling on the petition in the absence of a transcript. [At. Br. at 8-10] However, as discussed above, the superior court did not err in concluding that Wilson was gravely disabled, demonstrating that it could (and did) carry out its responsibilities. *See supra*, pp. 9-22. Moreover, Wilson's argument that the order should be vacated based on the lack of a transcript improperly elevates form over substance. *In re A.S.*, 982 P.2d 1156, 1163 (Wash. 1999) (quoting *In re Labelle*, 728 P.2d at 145).

While having a transcript available may make review of the testimony easier, the lack of a transcript should not make the superior court's order per se invalid. Like other court proceedings, mental-health commitment hearings are all recorded, enabling the superior court to hear the evidence presented, if desired. The superior court

also has access to the complete record, including log notes and any documentary evidence, and the guidance of the parties' objections and legal arguments to help focus its review of the master's recommendations. Thus, the superior court does not make its decision in an evidentiary vacuum simply because a transcript is not provided.

As a further protection, the probate rules permit the superior court to take additional evidence or conduct a *de novo* hearing. *See* Ak. Prob. R. 2(f)(1). If Wilson believed the superior court could not properly "discharge its duty" based on the information available to it, he should have requested that it engage in further proceedings under Probate Rule 2(f). He did not take advantage of either option, choosing instead to argue that the evidence presented was insufficient to support the conclusion that he was gravely disabled. Wilson's decision not to ask the superior court to conduct a *de novo* hearing, where it could judge the credibility of witnesses, weigh the evidence, and make its own findings of facts, should not be rewarded now by vacating the relevant order on a mere technicality.

As the superior court recognized, while it might be better if transcripts were always provided along with a master's recommendation, the lack of such a transcript is insufficient on its own to result in a per se invalidation of a superior court order. Given that the lack of a transcript did not result in an erroneous decision and the probate rules provide other procedural safeguards, which Wilson declined to pursue, the Court should

decline to invalidate the 30-day commitment order on this technical violation of Civil Rule 53(d).[7]

CONCLUSION

For the foregoing reasons, this Court should affirm the superior court's order granting the petition for 30-day commitment.

DATED at Anchorage, Alaska, this 22nd day of October, 2007.

TALIS J. COLBERG
ATTORNEY GENERAL

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[7] To the extent transcripts for mental health proceedings are not provided routinely to the superior court, it is unclear whether this is a result of the expedited nature of such proceedings or of budgetary concerns. If this Court concludes that strict compliance with Civil Rule 53(d)(1) is required, the Alaska Court System would need to resolve how to deal with such concerns, rather than API, as the failure to provide transcripts appears to be an internal administrative matter over which API has no control.