PsychRights®
Law Project for
Psychiatric Rights, Inc.

March 4, 2005

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Mental Disabilities Board of Visitors
P.O. Box 200804
Helena, MT 59620-0804

Re: Illegal Operations of the Montana Board of Visitors

Dear Members of the Mental Disabilities Board of Visitors:

This letter is to inform you and put you on official notice that the Mental Disabilities Board of Visitors is acting illegally by defying the lawful order of the Montana Supreme Court in the case of *In re Mental Health of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485 (Montana 2000). In *K.G.F.*, the Montana Supreme Court laid down the following as part of its guidelines for representing psychiatric respondents:

> [T]he proper role of the attorney is to "represent the perspective of the respondent and to serve as a vigorous advocate for the respondent's wishes." Further: To the extent that a client is unable or unwilling to express personal wishes, the attorney should advocate the position that best safeguards and advances the client's interest. Additionally: In the courtroom, an attorney should engage in all aspects of advocacy and vigorously argue to the best of his or her ability for the ends desired by the client. (emphasis added, citations omitted)

Mr. Gene Haire, your Executive Director, is officially (and proudly) on record saying that the Mental Disabilities Board of Visitors does not represent Montana State Inmates in the manner required by the Montana Supreme Court in *K.G.F* as set forth above.

By way of background, starting towards the end of 2004, MindFreedom Support Coalition International, with which PsychRights works, began receiving complaints from inmates at the Montana State Hospital about their rights being violated by forced drugging and involuntary commitments. There ended up being eight separate individuals who complained to MindFreedom about this. MindFreedom has a group of people who work on this type of abuse[1] on a grass roots basis and they began to contact various public officials about it, including your Executive Director, Gene Haire.

[1] The abuses are quite common, but what is unusual is for 8 people within a single institution to contact MindFreedom within a short time frame.

On December 11, 2004, I wrote Mr. Haire an e-mail detailing a number of things, including the responsibilities of attorneys representing psychiatric respondents under the *K.G.F.* case. That e-mail is attached as Exhibit 1.

Mr. Haire never responded to my e-mail, but just a couple of days later in an e-mail to someone else, which is attached hereto as Exhibit 2, he wrote:

> From: "Haire, Gene" <ghaire@state.mt.us>
> Date: Mon, 13 Dec 2004 09:46:35 -0700
> To: "Welfare Warriors"
> Subject: RE: forced drugging
> TO: Pat Gowens, Editor, Mother Warriors Voice
>
> With all due respect, I suggest that you get a little more objective information before you fire off ill-advised e-mails at the urging of David Oaks / MindFreedom. It is very easy to throw around such inflammatory phrases as "forced drugging" and such conclusions as "no doubt [the patients who wrote you are] being illegally drugged". You have absolutely no idea what the situations are for any individuals in Montana who may have contacted MindFreedom. You damage your and your organization's credibility by assuming that what David Oaks tells you is true, and by communicating with organizations such as ours - which has been a leader for 30 years in rational advocacy for people with mental illnesses in Montana - in this manner.
>
> Unless you are just interested in ranting and pandering to the self-appointed righteousness of uninformed people like David Oaks, I suggest that you truly investigate specific situations that lead to "involuntary commitment" of people with serious mental illness.
>
> If you are interested an a more rational perspective (in my humble opinion) on this issue - a perspective that is based on actual experiences of people with mental illnesses and their families instead of David Oaks' hyperbole - I recommend that you take a look at the following website http://www.psychlaws.org/.
>
> Sincerely - Gene Haire
>
> Gene Haire
> Executive Director
> Mental Disabilities Board of Visitors
> Governor's Office
> (406) 444-3955

Psychlaws.org is the website of the "Treatment Advocacy Center" (TAC), which was founded and is still run by psychiatrist E. Fuller Torrey who does not believe in the laws giving people the right to decline unwanted psychiatric treatment and advocates that psychiatrists commit perjury to get around these laws. This is reflected officially on the TAC's website where its "Fact Sheet" includes the (untrue) statement, " Civil rights advocates have changed state laws and practices to such an extent that it is now virtually impossible to treat such individuals unless

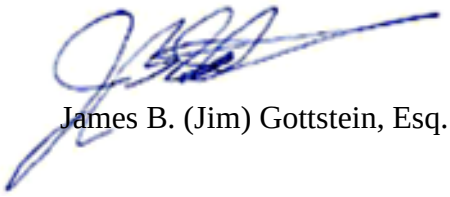
they first commit a violent act." http://www.psychlaws.org/GeneralResources/fact8.htm, accessed February 15, 2005. Another example is an article posted on their website, "Involuntary Hospitalization in the Modern Era: Is "Dangerousness" Ambiguous or Obsolete?" http://psychlaws.org/GeneralResources/article219.htm, accessed on February 15, 2005.

Mr. Haire, has thus officially gone on record as saying the Mental Disability Board of Visitors does not "advocate for the ends desired by the client" as required by law, but instead provides "rational advocacy" as advocated by the Treatment Advocay Center. In other words, the Mental Disability Board of Visitors has a policy of acting illegally under the direction of Mr. Haire.

This also means that you are in violation of 42 U.S.C. §1983, which subjects you to liability for violating the rights of inmates at Montana State Hospital. In *Noble v. Schmitt*, 87 F.3d 157 (6th Cir. 1996), the Sixth Circuit held that employees of the state hospital were not immune from a § 1983 claim if they force medicated someone for improper reasons. You similarly have the responsibility to honor people's rights or be subject to liability under 42 U.S.C. §1983.

Clearly, it should be unacceptable for your agency to be run by someone who refuses to follow the law in running your agency. I hope you will take the appropriate action and terminate the services of Mr. Haire and conform the Mental Disabilities Board of Visitors' practices to the requirements of the law.

Yours truly,



James B. (Jim) Gottstein, Esq.

cc: David Oaks
Governor Brian Schweitzer
Attorney General Mike McGrath
Ed Amberg
Gene Haire

X-Mailer: QUALCOMM Windows Eudora Version 6.2.0.14
Date: Sat, 11 Dec 2004 16:18:40 -0900
To: ghaire@state.mt.us
From: Jim Gottstein <jim@psychrights.org>
Subject: Forced Drugging and the Law
Cc: cfitch@state.mt.us,eamberg@state.mt.us,
"David Oaks - MindFreedom.org" <oaks@mindfreedom.org>,
jim@psychrights.org,"noforce-efn.org" <noforce@efn.org>,
contactdoj@state.mt.us

Dear Mr. Haire,

Mr. Oaks has shared your (below) response with me. I am an attorney, working with the Law Project for Psychiatric Rights (PsychRights). PsychRights' mission is to fight unwarranted forced medication through mounting a serious legal campaign against such abuses.

The first thing to note is that we have not been told the truth about these drugs that are being forced on unwilling victims. It has recently come into public scrutiny about the lies and deception the drug companies have committed with respect to the Selective Serotonin Reuptake Inhibitor (SSRI) antidepressants and how they cause kids to commit suicide. And how the FDA has become complicit in this. The Vioxx debacle demonstrates this is not restricted to psychiatric drugs. What is less well known, but also well established is that the psychiatric drugs typically forced on people, the neuroleptics, including the so-called "atypicals," are neither safe nor effective and in fact not only prevent people from getting better, but exacerbate people's psychiatric symptoms. See, e.g., The case against antipsychotic drugs: a 50-year record of doing more harm than good, by Robert Whitaker, Medical Hypotheses, Volume 62, Issue 1 , 2004, Pages 5-13, which can be accessed on the Internet at http://psychrights.org/Research/Digest/Chronicity/50yearecord.pdf. All of the studies cited in the 50-Year Record paper can be downloaded from http://psychrights.org/Research/Digest/Chronicity/NeuroleptcResearch.htm and additional information retrieved from http://psychrights.org/Research/Digest/NLPs/neuroleptics.htm.

The basic point is that these drugs are unbearable to many people, they don't help most, they can be fatal and are clearly life-shortening. Under these circumstances the state should not be allowed to force anybody to take them. However, as the internationally recognized mental health disability law expert Michael L. Perlin has noted:

> [C]ourts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .
> Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .
> This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met . . .. In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.

The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone? by Michael L. Perlin, Journal of Law and Health, 1993/1994, 8 JLHEALTH 15, 33-34.

This dishonest testimony is explicitly lauded by prominent members of the psychiatric

establishment. E. Fuller Torrey, M.D., perhaps the most prominent proponent of involuntary psychiatric treatment says:

> It would probably be difficult to find any American Psychiatrist working with the mentally ill who has not, at a minimum, exaggerated the dangerousness of a mentally ill person's behavior to obtain a judicial order for commitment.

Torrey, E. Fuller. 1997. Out of the Shadows: Confronting America's Mental Illness Crisis. New York: John Wiley and Sons. 152. Dr. Torrey goes on to say this lying to the courts is a good thing. Dr. Torrey also quotes Psychiatrist Paul Applebaum as saying when "confronted with psychotic persons who might well benefit from treatment, and who would certainly suffer without it, mental health professionals and judges alike were reluctant to comply with the law," noting that in "'the dominance of the commonsense model,' the laws are sometimes simply disregarded."

You say that people's rights are being protected, but it is well-known that:

> Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission.

Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization, Michael L. Perlin, Houston Law Review, 28 Hous. L. Rev. 63 (1991).

Interestingly, it is the Montana Supreme Court, in In the Matter of K.G.F., 29 P.3d 485 (Montana 2001), which has issued perhaps the seminal case on the standards attorneys representing people facing involuntary "treatment" must meet.

1. Appointment of competent counsel. Any attorneys representing a Respondent in an involuntary mental health proceeding should have specialized training in handling involuntary mental health proceedings. The Court also found that the Respondent has a right to counsel of their own choice. "Therefore, it is critical that the district court, upon appointment of counsel, provide the patient-respondent with clear and concise information describing the attorney's name and qualifications in order for the patient to then make an informed decision as to whether to accept appointed counsel, or for good cause shown and based on compelling reasons request the appointment of different counsel, or retain alternative representation."
2. The initial investigation "before and after the required meeting with a patient, under § 53-21-121(3), MCA, counsel should conduct a thorough review of all available records. Such inquiry must necessarily involve the patient's prior medical history and treatment, if and to what extent medication has played a role in the petition for commitment, the patient's relationship to family and friends within the community, and the patient's relationship with all relevant medical professionals involved prior to and during the petition process."…. "counsel should be prepared to discuss with his or her client the available options in light of such investigations, as well as the "practical and legal consequences of those options."…."Prior to or following the initial client interview, counsel should also attempt to interview all persons who have knowledge of the circumstances surrounding the commitment petition, including family members, acquaintances and any other persons identified by the client as having relevant information, and be prepared to call such persons as witnesses." The Court states that the attorney can (and should) request extensions beyond the five day hearing date if necessary.
3. The client interview The Court requires that the attorney meet with the Respondent sufficiently prior to the hearing to be able to present effective representation. The Court

then lists half a dozen topics that the attorney must specifically discuss with the Respondent.

4. The right to remain silent After finding that the right to remain silent applies to a Respondent when being examined by a mental health professional, the Court states "We conclude that it is critical for the patient-respondent, via assistance of counsel, to be allowed to make a voluntary and knowing waiver of his or her right to remain silent prior to the commencement of this examination, see § 53-21-119(1), MCA, or, in the alternative, that counsel must be present during the "examination" similar to a criminal interrogation or a civil deposition. We emphasize again that the right to counsel cannot under any circumstances be waived. See § 53-21-119, MCA. We conclude, therefore, that it would be a patent due process violation for the "examination," as provided for under § 53-21-123, MCA, to be conducted without the assistance of counsel as provided herein."

5. Counsel as an advocate and adversary "The guidelines create the presumption that a client wishes to not be involuntarily committed. The ultimate decision of whether a patient-respondent should be involuntarily committed, therefore, should not be independently made by counsel." "Thus, we conclude that pursuant to the foregoing guidelines, evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment--in the absence of any evidence of a voluntary and knowing consent by the patient-respondent--will establish the presumption that counsel was ineffective." "In the courtroom, an attorney should engage in all aspects of advocacy and vigorously argue to the best of his or her ability for the ends desired by the client."

(summary from the Montana County Attorney's Association website, http://www.treasurestate.com/mcaa/cases/KGF.htm)

Turning now to Montana's forced drugging statute, Montana Code Annotated, 53-21-127(6), provides that a person can be force drugged if the court finds "involuntary medication is necessary to protect the respondent or the public or to facilitate effective treatment." This seems clearly unconstitutional. Just about four years ago, in In the Matter of S.C., 15 P.3d 861 (Montana 2000), the Montana Supreme Court side stepped the issue by saying S.C., did not specifically argue that the commitment statutes are either unconstitutional on their face or as applied to her. Id, 15 P.3d at 863.

While the Montana Supreme Court's failed to acknowledge a "common law" right against forced drugging in *S.C.*, the United States Supreme Court certainly has recognized a federal constitutional right for decades:

> The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.

See, e.g., *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442 (1982), and *Washington v. Harper*, 494 U.S. 210, 221-222, 110 S.Ct. 1028, 1036, 108 L.Ed.2d 178 (1990). The decision is also seriously out of step in holding that a diagnosis of mental illness automatically renders someone incompetent to decline medication. See, e.g., Rogers, 458 N.E.2d 308 (Mass. 1983) and Rivers v. Katz, 495 N.E.2d 337 (NY 1986).

Most recently, and after *S.C.*, the United States Supreme Court issued its decision in *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174 (2003) which was over forcibly medicating someone to make him competent to stand trial. There, after confirming the constitutional right against forced drugging ("In *Harper,* this Court recognized that an individual has a "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of

antipsychotic drugs."), the United States Supreme Court laid down the following constitutional guidelines:

> First, a court must find that *important* governmental interests are at stake.
> Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests.
> Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
> Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

(emphasis is original). While *Sell* is a competence to stand trial case, it is inconceivable a person facing forced drugging in the context of civil commitment has fewer rights.

That these issues have never been seriously pursued by the public defenders in Montana merely serves to confirm that forced drugging victims are not being vigorously represented.

In the final analysis it is merely glib to say, as you do, that people's rights are being protected. They are not. It is highly probable that none of the four people who have contacted us actually meet the legal requirements to be forcibly drugged. What we have is an abuse of power by the state, including what ultimately are sham legal proceedings. My suggestion is that you personally talk to these people and get their stories. Look fairly at the trumped up evidence used to lock them up and then force drug them, keeping in mind that it is supposed to be only in the most serious cases that such massive curtailment of constitutional liberties are allowed.

> On Dec 10, 2004, at 9:54 AM, Haire, Gene wrote:
>
> > Mr. Oaks:
> >
> > Your e-mail message sent to the Governor's office via the Montana State web page has been forwarded to me. The Mental Disabilities Board of Visitors operates a legal services office at Montana State Hospital. Among other things, our Attorney and our Paralegal/Advocate represent patients (an administrative/clinical, not a judicial process) in "involuntary medication" procedures at the hospital. Requirements for the administration of medications to patients against their wishes are defined in Montana statute http://data.opi.state.mt.us/bills/mca/53/21/53-21-127.htm and in Montana
> > State Hospital policy
> > http://www.dphhs.state.mt.us/about_us/divisions/ addictive_mental_disorde
> > rs/montana_state_hospital/vol_ii/18_psychiatric_svcs/ involuntary_medicat
> > ions.pdf.
> >
> > Because of confidentiality requirements, I will not address any specific
> > patient concerns with MindFreedom. The Mental Disabilities Board of Visitors believes that the following statements accurately describe how

"involuntary medications" are handled at the commitment hearing level and at Montana State Hospital:

1) The authorization of the "chief medical officer of a facility or a physician designated by the court to administer appropriate medication involuntarily" [from Montana Code Annotated, 53-21-127(6). 2003.] is a judicial decision made in the context of an involuntary commitment hearing. During these hearings, respondents obviously have representation of counsel as well as other due process protections.

2) The Montana State Hospital policy and procedure for considering treating physicians' requests to administer medications against the wishes of patients are good, err on the side of pursuing other (voluntary) alternatives, and include 14 and 90 day reviews.

3) Montana State Hospital only pursues involuntary medication if the treating physician believes that an individual will continue to meet the
criteria for involuntary commitment
http://data.opi.state.mt.us/bills/mca/53/21/53-21-126.htm unless he/she takes medication, and if all other alternate measures have been attempted and failed.

4) The Mental Disabilities Board of Visitors is involved throughout this process as an advocate for patients.

Gene Haire
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Mental Disabilities Board of Visitors
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(406) 444-3955

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Psych Rights
Law Project for Psychiatric Rights

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of unwarranted forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to brain and body damaging procedures against their will. Extensive information about this is available on our web site, http://psychrights.org/. Please donate

generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.

From: "Haire, Gene" <ghaire@state.mt.us>
Date: Mon, 13 Dec 2004 09:46:35 -0700
To: "Welfare Warriors"
Subject: RE: forced drugging

TO: Pat Gowens, Editor, Mother Warriors Voice

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Sincerely - Gene Haire

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