ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 8, 2007
1:08 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative John Coghill
Representative Bob Lynn
Representative Ralph Samuels
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Nancy Dahlstrom, Vice Chair

COMMITTEE CALENDAR

OVERVIEW(S): BRIEFING ON THE MYERS AND WETHERHORN ALASKA SUPREME COURT DECISIONS

- HEARD

HOUSE BILL NO. 7
"An Act relating to false caller identification."

- MOVED CSHB 7(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 90
"An Act relating to bail."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: HB 7
SHORT TITLE: FALSE CALLER IDENTIFICATION
SPONSOR(S): REPRESENTATIVE(S) LYNN, GARDNER

01/16/07	(H)	PREFILE RELEASED 1/5/07
01/16/07	(H)	READ THE FIRST TIME - REFERRALS
01/16/07	(H)	JUD
01/22/07	(H)	JUD AT 1:00 PM CAPITOL 120
01/22/07	(H)	Scheduled But Not Heard
01/24/07	(H)	JUD AT 1:00 PM CAPITOL 120

01/24/07	(H)	Heard & Held
01/24/07	(H)	MINUTE(JUD)
01/31/07	(H)	JUD AT 1:00 PM CAPITOL 120
01/31/07	(H)	Heard & Held
01/31/07	(H)	MINUTE(JUD)
02/01/07	(H)	JUD AT 1:00 PM CAPITOL 120
02/01/07	(H)	Heard & Held
02/01/07	(H)	MINUTE(JUD)
02/05/07	(H)	JUD AT 1:00 PM CAPITOL 120
02/05/07	(H)	Heard & Held
02/05/07	(H)	MINUTE(JUD)
02/08/07	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JAMES B. GOTTSTEIN, ESQ., President and CEO
Law Project for Psychiatric Rights, Inc.
Anchorage, Alaska
POSITION STATEMENT: Presented the briefing on the Myers and Wetherhorn Alaska Supreme Court decisions.

JANE W. PIERSON, Staff
to Representative Jay Ramras
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Reviewed the changes encompassed in Version M of HB 7.

DIRK MOFFATT, Staff
to Representative Bob Lynn
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 7, responded to a question on behalf of Representative Lynn, joint prime sponsor.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 7.

ACTION NARRATIVE

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:08:38 PM. Representatives Coghill, Lynn,

Holmes, Gruenberg, and Ramras were present at the call to order. Representative Samuels arrived as the meeting was in progress.

OVERVIEW(S): BRIEFING ON THE MYERS AND WETHERHORN ALASKA SUPREME COURT DECISIONS

1:09:04 PM

CHAIR RAMRAS announced that the first order of business would be a briefing on the Myers v. Alaska Psychiatric Institute and Wetherhorn v. Alaska Psychiatric Institute Alaska Supreme Court decisions.

1:09:47 PM

JAMES B. GOTTSTEIN, ESQ., President and CEO, Law Project for Psychiatric Rights, Inc., first opined that Alaska's current mental health system is set up such that it doubles the number of people who never recover after being diagnosed with a serious mental illness. He then went on to say that his organization focuses on unwarranted court ordered psychiatric drugging, which, he relayed, he calls "forced drugging." He noted that although there is no forced electroshock in Alaska, psychiatric drugs have the same effect as a lobotomy - these drugs essentially act as chemical lobotomies.

MR. GOTTSTEIN relayed that the Alaska Supreme Court, in two recent cases, has held that certain portions of Alaska's statutes are unconstitutional. For example, AS 47.30.839 says that if someone is found to be incompetent to make a decision regarding whether he/she should be taking drugs, then the hospital gets to make the choice for that person, and this assumes that whatever the hospital psychiatrist wants is the right thing for the person. He opined that during the course of competency determinations, the Public Defender Agency (PDA) doesn't actually present any real defenses for its clients - it ends up being phony representation - and thus what he termed the involuntary system is operating way outside the bounds of constitutionality.

MR. GOTTSTEIN said that the Alaska Supreme Court, in the Myers case, held that the question of whether it's in someone's best interest to be forcibly drugged is a legal matter that a court must decide by clear and convincing evidence. Constitutionally, he suggested, before the government can deprive someone of the right to choose [not] to take mind altering drugs, it must show both that forced drugging is in the person's best interest and

that there are no less-restrictive alternatives available - with some limitations with regard to reasonableness and expense. Just because the State chooses not to make a less-restrictive alternative available, he opined, does not allow it to forcibly drug someone.

MR. GOTTSTEIN said he is concerned because it appears to him that the Alaska Psychiatric Institute (API) is getting around the Myers holding and thus defying the court's decision. He opined that one of the problems is a lack of viable alternatives, because when the State doesn't have a viable alternative to offer, it will lie to the court, saying it has met conditions when it hasn't, in order to be allowed to forcibly drug someone.

1:18:29 PM

MR. GOTTSTEIN, in response to a question, said that it is not clear what is going on with regard to whether less restrictive alternatives really are available, because although the API has cited a very dramatic drop in the number of proceedings under AS 47.30.839, no less drugging is occurring. For example, two years ago there were 500 such cases, and now there are only 50 such cases, but the same amount of drugging is occurring; this raises the question of what is really going on.

MR. GOTTSTEIN referred to the Wetherhorn case, and noted that under the involuntary commitment statutes, people can be committed if they are either a danger to themselves or others, or are gravely disabled, which is defined in AS 47.30.915(7) as:

> (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;

MR. GOTTSTEIN offered his belief that although he agrees with subparagraph (A), the criteria listed in subparagraph (B) could

apply to anyone. In Wetherhorn, his organization proffered to the court that under the [Constitution], a person can't be locked up for being mentally ill unless it can be demonstrated that the person can't survive safely in freedom - a concept, he noted, similar to that found in AS 47.30.915(7)(A). The Alaska Supreme Court, he opined, agreed with his organization's point, adding his interpretation that this means that the court held AS 47.30.915(7)(B) to be unconstitutional.

MR. GOTTSTEIN said he views the current system - wherein people's rights are being violated as a matter of course - as being broken at the PDA level, and characterized the PDA as phony. At the heart of the problem is a lack of representation, a lack of constitutionally-required alternatives, and the extent to which children in state custody are being drugged, often with unapproved drugs, simply for acting out.

[Following was a brief discussion regarding the prevalence of medicating of children not in state custody simply so that they will behave in the classroom.]

REPRESENTATIVE COGHILL asked Mr. Gottstein to substantiate his accusations against the API and the PDA, asked whether the PDA's problem can be traced to either a resource issue or a competency issue, and asked for more information about kids in state custody being drugged.

1:26:48 PM

MR. GOTTSTEIN relayed that the backup material he provided the committee contains quotes from Professor Michael L. Perlin, who, Mr. Gottstein said, has spoken about the endemic nature of untrue testimony by psychiatrists. Whatever the legal standard is for being able to drug a person against his/her will or for being able to prove a person is incompetent, psychiatrists giving testimony will simply recite certain words in order to meet that legal standard, and those psychiatrists are never challenged by the PDA. In Wetherhorn, he asserted, the PDA didn't do anything on behalf of the client, adding that this is typical. In the 10-20 [commitment] hearings held weekly at the API, almost all the clients are involuntarily committed, and if there is a "forced drugging" petition, they are all forcibly drugged; he characterized these hearings as an assembly line process that does not resemble a true legal proceeding. He posited that the current situation is partly the result of competency and resource issues, but also a result of an attitude

problem: "If my client wasn't crazy, [he'd/she'd] know [that] this is good for [him/her]."

MR. GOTTSTEIN reiterated his belief that the current mental health system is turning people into permanent mental patients - permanent wards of the state.

REPRESENTATIVE COGHILL again said he wants Mr. Gottstein to substantiate his claims against the API [and the PDA].

MR. GOTTSTEIN reiterated his comments regarding Professor Perlin.

REPRESENTATIVE COGHILL recounted a situation wherein a friend of his suffered a head injury, and the authorities, instead of getting him the medical help he needed, had him involuntarily committed and drugged.

MR. GOTTSTEIN, on the issue of children in state custody being drugged, said he has been trying to get the State to research which drugs have been given to those children, but it doesn't appear as the though the State is compiling those kinds of records. According to statistics from other states, approximately 70 percent of the children in state custody are receiving psychiatric drugs.

REPRESENTATIVE COGHILL surmised that Mr. Gottstein's claims against [the State, the API, and the PDA] are merely suspicions.

MR. GOTTSTEIN said that children in state custody who are sent out of state to residential treatment centers are locked up and drugged.

CHAIR RAMRAS relayed that he's heard from the Department of Corrections (DOC) that prisoners try to fake a mental disease or illness in order to have a component of leniency added to their sentence, and that the burden of caring for the mentally ill is being shifted to the DOC.

1:33:30 PM

MR. GOTTSTEIN acknowledged that point, adding that there is no question that the DOC is the largest in-patient psychiatric facility in the state.

REPRESENTATIVE COGHILL asked whether, since the Wetherhorn and Myers decisions, there has been a challenge to the DOC's evaluation process.

MR. GOTTSTEIN indicated that there has been, the Bavilla v. Alaska Department of Corrections case, adding that the DOC has a forced drugging procedure modeled after a U.S. Supreme Court case, Washington v. Harper. In the Bavilla case, he offered, the State admitted that it had violated Washington. Thus it is clear to him, he relayed, that the DOC is not following the guidelines set out by the U.S. Supreme Court. In the Bavilla case, the DOC claimed that the procedure wasn't an adversarial process and so wouldn't allow Ms. Bavilla to be represented or bring forth witnesses. He clarified that he knows that some people find the drugs helpful, and that he believes that those people should have access to those drugs; however, the people who don't want those drugs shouldn't be forced to take them, and certainly not when [the State] has not complied with the statutory and constitutional requirements for doing so.

MR. GOTTSTEIN, in response to a question regarding his claims against the API, said that his is an informed opinion that will be established as fact, and reiterated that comment with regard to his claim - outlined in his backup material - that there has been illegal use of ex parte proceedings. On the latter point, he offered, although ex parte orders have a legitimate use, the judge should look at each individual case. He said this same scrutiny is not given to those cases involving psychiatric commitment, and in some cases - for example, after a person is in custody - the use of ex parte orders is not even necessary and yet they are still being used.

1:39:26 PM

REPRESENTATIVE LYNN offered his belief that part of the problem is that many homeless people who are mentally ill are no longer being kept in institutions.

MR. GOTTSTEIN, in response to a question, said that he works pro bono for the Law Project for Psychiatric Rights, Inc., which is a 501(c)(3) nonprofit corporation that accepts private donations and sometimes gets attorney fee awards from the cases it takes on. In response to further questions, he said he doesn't have any suggested language to replace that which was found to be unconstitutional in the Wetherhorn and Myers cases, though he does believe that the statutes should conform to the holdings in those cases, and that he has gone before the Alaska Mental

Health Board (AMHB) and has found it to be supportive, though he's not had a chance to speak to the AMHB since the Wetherhorn case was decided. In conclusion, he offered his belief that the problems arising in the current mental health system stem from a failure of representation.

HB 7 - FALSE CALLER IDENTIFICATION

1:44:27 PM

CHAIR RAMRAS announced that the final order of business would be HOUSE BILL NO. 7, "An Act relating to false caller identification." [Before the committee was the proposed committee substitute for HB 7, Version LS0057\C, Bannister, 2/2/07, which had been adopted as the work draft and amended on 2/5/07.]

1:45:46 PM

REPRESENTATIVE COGHILL moved to adopt the proposed committee substitute (CS) for HB 7, Version 25-LS0057\M, Bannister, 2/8/07, as the work draft.

REPRESENTATIVE LYNN objected for the purpose of discussion.

1:46:33 PM

JANE W. PIERSON, Staff to Representative Jay Ramras, Alaska State Legislature, reviewed the changes encompassed in Version M. On page 1, lines 4-5, the language, "A person may not insert false information into a caller identification system with the intent to defraud" was deleted and the following language inserted: "A person may not make a call and insert false information into a caller identification system with the intent to defraud". She explained that the aforementioned change should satisfy both the committee's amendment to insert "or transmit" and Legislative Legal and Research Services' recommendation that such language would make the [bill consistent]. She then pointed out that the language on page 1, lines 10-11, was developed by Legislative Legal and Research Services in order to address the committee's [request to have language that would help define the crime]. The language inserted read:

> (c) A person who violates (a) of this section by inserting, whether by making one call or more than one call, false information into

(1) four caller identification systems is guilty of a class B misdemeanor;

(2) five or more caller identification systems is guilty of a class A misdemeanor.

MS. PIERSON highlighted that Version M also includes an additional definition of "call" on page 2, lines 2-3, as follows: "means a call made by telephone, computer, or similar communication device or technology, whether transmitted by wire or wireless means;".

REPRESENTATIVE SAMUELS drew attention to the new language on page 1, line 13, which refers to "four caller identification systems", and questioned whether it should instead use the following language: "less than five".

MS. PIERSON relayed that she just spoke with Anne Carpeneti and was advised that the language should refer to "less than five".

REPRESENTATIVE LYNN removed his objection.

CHAIR RAMRAS announced that Version M was before the committee.

1:49:54 PM

REPRESENTATIVE SAMUELS made a motion to adopt Amendment 1, to delete the word, "four" on page 1, line 13, and replace it with the words, "less than five". There being no objection, Amendment 1 was adopted.

REPRESENTATIVE COGHILL asked whether the language in Version M addresses the due process issue raised in the memorandum from Theresa Bannister, the drafter, dated 2/8/07.

1:50:57 PM

DIRK MOFFATT, Staff to Representative Bob Lynn, Alaska State Legislature, remarked on behalf of Representative Lynn, joint prime sponsor, that there is some disagreement between Legislative Legal and Research Services and the Department of Law on that issue.

1:51:17 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), offered her understanding from Ms. Bannister's memorandum that

Ms. Bannister is concerned that if one inserts information into five caller identification systems, a prosecutor could charge the individual with either a class A misdemeanor or class B misdemeanor. The adoption of Amendment 1, however, should satisfy that concern, Ms. Carpeneti opined. In response to a comment, she pointed out that similar leeway can be found in all criminal statutes.

REPRESENTATIVE GRUENBERG opined that the drafter, with regard to the concern she stated in her memorandum, is wrong.

MS. CARPENETI concurred. In further response to Representative Gruenberg, she said she isn't aware of any case that is on point to support the conclusions of the drafter. However, she recalled that there are decisions addressing a situation in which there are two different statutes of different levels and the act of the defendant could reasonably be charged under either offense. The aforementioned is a constitutional problem and results in the individual being charged under the less serious offense.

REPRESENTATIVE GRUENBERG noted that as a matter of logic, the greater always includes the lesser.

CHAIR RAMRAS concurred.

MS. CARPENETI, in response to a comment, informed the committee that prosecutors have the discretion to charge and resolve cases at a lower level than they might possibly be charged or resolved. The aforementioned would apply with regard to [Version M, as amended].

1:55:40 PM

REPRESENTATIVE SAMUELS moved to report the proposed CS for HB 7, Version 25-LS0057\M, Bannister, 2/8/07, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 7(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:57 p.m.