



PsychRights

LAW PROJECT FOR

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Memorandum

TO: Justice for Persons with Disabilities Workgroup
FROM: James B. Gottstein
DATE: June 14, 2004
SUBJECT: Disability Justice: A Psychiatric Survivor Lawyer's Perspective

I. Background and Scope

I met with Judge Rhoades and Steve Williams of the Mental Health Court and Barbara Brink, Nancy Groszek, Elizabeth Brennan and Jane Martinez of the Public Defenders Office in support of preparing this memorandum.¹ However, this memorandum is not presented as a joint position, although in some cases I state what I think are others' views.

The Description of the Disability Justice Focus Area includes:

Trust beneficiaries who have committed no crime are incarcerated nearly three thousand times each year because no appropriate alternative is available to provide for their safety. Thousands more are arrested, prosecuted and incarcerated for minor "nuisance" or "status" offenses that result from their mental disability rather than criminal intent.

The first sentence apparently refers to what is known as "Title 47 Holds," which do not involve criminal charges. Virtually all of these in the major cities are for alcohol or other substance abuse. As I understand it, in rural areas, however, these also include people being held for transport to an evaluation facility pursuant to a "Police Officers Application" also known as "POA," under AS 47.30.705 and "ex parte" applications by "any adult" under AS 47.30.700. These are all civil proceedings and are included in this project apparently because they involve the Department of Corrections. If, however, these civil proceedings are involved in the Disability Justice project, it is unclear why similar problems in other civil contexts, such as civil commitment and forced psychiatric drugging should not also be included. However, for the purposes of this memo, it will only be noted that there are serious justice issues in the civil context as well and this memo will otherwise be limited to the understood confines of the project.

The focus of the project currently is how to deal with beneficiaries who end up in jail or prison. It is suggested here, however, that the real solution is upstream to preventing inappropriate incarcerations. A big part of that, of course, is a mental health program that helps people from coming to the attention of the criminal justice system. This has already been recognized by this

¹ Jim Gorton of Gorton and Associates has the contract to represent consumers for Municipality of Anchorage cases and should also be consulted.

group, but is really beyond the scope of this project. Another big part is how the current system enables inappropriate -- even illegal -- incarcerations and it is suggested here that this should be a part of this project. By allowing inappropriate and even illegal incarcerations, the system enables the wholesale criminalization of people diagnosed or diagnosable with mental illness and the re-institutionalization of beneficiaries into our jails and prisons.

II. Unaddressed Areas of Disability Justice

A. Necessity for Alternatives to Psychiatric Drugging.

The evidence seems overwhelming, as documented in *Mad in America: Bad Science, Bad Medicine and the Enduring Mistreatment of the Mentally Ill*, that the mental illness system's virtually universal reliance on psychotropic drugs is at least **doubling the number of people who become "seriously and persistently mentally ill."** At least partly, and maybe even substantially, because there are no alternatives to this counterproductive system, the criminal justice system largely requires people to be "medication compliant" to receive the benefit of any diversion or similar program. Aspects of this will be addressed separately, but the point here is that alternatives should be available.

In discussing this issue with Judge Rhoades, I think she agrees that such alternatives should be available, but her hands are currently tied because they don't exist. My view is the Trust has a fiduciary responsibility to its beneficiaries to address this inappropriate drugging issue, and not just in the context of the Disability Justice Initiative.

B. Representation

The issue of representation is probably the one with the widest divergence of views between myself, Judge Rhoades and the Public Defenders Office. Judge Rhoades indicates that the level of representation is "pretty good," and actually better than non-beneficiaries because special attention and funding is devoted to it. As I understand her perspective, beneficiaries are not really entitled to better representation than other indigents. The Public Defenders Office believes they provide very good representation, although they recognize their clients spend more time in jail, especially pre-trial than non-Public Defender defendants.

My view is that beneficiaries should get a level of representation that gives them fair treatment by the courts and I don't think we are there. One of the reasons is that beneficiaries' accurate recitations of events are discounted because of their beneficiary status.

Ultimately, it is suggested here that any project titled, "Disability Justice" is not addressing its title without paying attention to the issue of representation.

C. Discriminatory Incarcerations

The description of this focus area states:

Thousands [of beneficiaries] are arrested, prosecuted and incarcerated for minor "nuisance" or "status" offenses that result from their mental disability rather than criminal intent.

In Judge Rhoades' March 2001 testimony to US Senate Appropriations Committee, she stated:

"Mercy arrests" are often well intended. However, the practice of criminalizing people because they are mentally or cognitively disordered is expensive and inhumane.

At some point, it seems to me this becomes not just expensive and inhumane, but illegal discrimination in my view. People who should not be arrested or charged should not be arrested or charged. "Mercy arrests," should not result in criminal charges. A system that takes people who should not be arrested or charged and giving them the choice of complying with treatment recommendations (drugs) or go back to regular criminal court is not a fair system. A fair system would drop the charges. Judge Rhoades will recognize the Young Lee case and I would suggest that was a classic situation where the charges should have just been dropped. My suggestion is that there be a mechanism whereby bogus criminal cases are dismissed regardless of whether it is felt the defendant should be in "treatment."

People can lose their Permanent Fund Dividend, housing and welfare if they are convicted of crimes so they should not have these on their records if they are unwarranted. "Mercy arrests," thus have far reaching consequences that are not very merciful. We certainly don't want people escalating into more serious situations, but it is also not appropriate to saddle people with the criminal label inappropriately. The Crisis Intervention Team (CIT) trainings and the Psych ER are examples of programs designed to prevent the unwarranted involvement with the criminal justice system. Do we really know how these are working?

D. Discriminatory Bail and Probation Conditions and Sentencing

Trust Beneficiaries spend a much greater time in jail than other people. One of the reasons is discriminatory bail conditions. Bail amounts and conditions are set based upon (i) ensuring appearance at trial, and (ii) protection of the public. Stigma rears its ugly head here with many judges having an unwarranted view of danger. Judges should be educated on this and I would be willing to participate in this.

One of the reasons that Trust Beneficiaries spend so much time in jail or prison is that they often accumulate a large number of "priors" and even if they are relatively bogus (i.e., for minor offenses or offenses no one else gets charged with) this ends up meaning they get much longer sentences. It seems to me that at some point this disparate treatment can become illegal discrimination.

E. Forced Drugging

The Department of Corrections' forced psychiatric drugging procedures appear to be illegal and should be changed. *See*, <http://psychrights.org/States/Alaska/CaseThree/SummaryJudgment/SJreconstMem.pdf>.

Even though programs such as Mental Health Court, JAS and the new CCAP program are presented as "choices" and therefore voluntary, at a certain point it seems to me the "you have to take the drugs to stay in the program" approach becomes a way to evade constitutional protections against forced psychiatric drugging.

F. Civil Problems Arising Out of Criminal Justice System Involvement

Judge Rhoades made the excellent point that in many cases, the civil legal problems consequences of criminal charges outweigh the direct problems. These include such things as becoming ineligible for many programs, such as housing and SSDI and/or having to get them reinstated.

G. Alcohol Holds

The statement of the problem includes the 3,000+ "alcohol holds" that end up in Corrections' lap and that has been identified as one of the problems to work on. However, in investigating this issue a little bit, it is unclear how much this might be a beneficiary concern as opposed to a Corrections concern. I have been informed that the "sleep off center" in Anchorage is nothing more than a cold, concrete floor. I don't know why this would be an improvement. My suggestion is to survey the people being taken in for these holds to determine their views.

III. Preliminary Recommendations

I haven't really been able to think about these things enough, so these are just preliminary recommendations. I certainly welcome other people's thoughts about what to do about these identified problems.

A. Alternatives to Psychiatric Drugs

I didn't mention for each of the issues above how having alternatives to psychiatric drugs that have been shown to work in helping people diagnosed with serious mental illness recover available is a huge part of the solution, but clearly it is. I don't see how anything can be more important than reducing by half the number of people diagnosed with serious and persistent mental illness. This is an issue that is not only implicated in all of the problems identified above, but throughout the mental health system. It also directly cuts across all four Trust Focus Areas. It is frankly offensive to me to provide alternatives to psychiatric drugs for those involved with the criminal justice system while failing to do so for those who don't get into criminal trouble. Thus, the creation of alternatives to psychiatric drugs should include Trust Beneficiaries who do not have criminal justice involvement.

My recommendation is to retain the services of Dr. Loren Mosher, the former Chief of Schizophrenia Research at the National Institute of Mental Health and Dr. Grace Jackson to help us come up with a specific program for Alaska's unique situation(s). A \$50,000 budget to come up with such a proposal ought to be sufficient. The \$50,000 would be for Drs. Mosher and Jackson and the rest of the expenses to develop the proposal.² Because of how far in advance budgeting is done, it is my suggestion that \$1.5 million be allocated for the FY 06-07 budget to implement the program. It should be emphasized, however, that this should not be just for people with criminal involvement. It needs to be done correctly, though, and not screwed up like the Independent Case Management and Flexible Support Services funding.

There also needs to be an alternative(s) to drugging/forced drugging in Corrections.

² Dr. Aron Wolf as a local consultant comes to mind too and we really need Native participation as well.

B. Bail, Charging, Sentencing.

I am not sure what to recommend for people getting inappropriate bail, charging and sentencing decisions. One obvious recommendation, however, is to educate those making such decisions. I would like to participate in such education because I don't think some of the perspectives presented here are normally put forth in disability justice education efforts.

It also seems to me that an analysis in Anchorage of what is really happening with people as a result of the CIT trainings and the Psych ER, etc., is also in order. If they are really working we could look at expanding them to other places and if not, we should want to act on that as well.

Nelson mentioned the recommendation of one of the groups that mental illness should be a mitigating factor in sentencing.

Again, I think an analysis of disparate treatment is in order.

C. Representation

I know my view is not universally or even perhaps widely shared, but it is not an acceptable response to me that any shortcomings of the public defender system should be visited on Trust Beneficiaries because they are not entitled to anything more than non-Trust Beneficiaries. I have to think there are some ways to shore up people's representation so that they don't suffer so much unfair treatment.

D. Civil Matters

Since Judge Rhoades brought it up, it seems worthwhile looking at whether it makes sense to provide additional civil representation to people. The short-lived Consumers Counsel project, in spite of its organizational challenges, had a fabulous record helping people in civil matters. For whatever reasons, the Disability Law Center does not seem to be filling this need. It doesn't seem this is strictly a criminal justice issue, though, but perhaps it might be referred to the Beneficiary Group Initiatives Focus Area Working Group.