SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Michael Cleary, et al., Plaintiff v. **Robert Smith, et al.,** Defendant	No. 3AN-81-05274CI

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MOTION TO SEVER MARK ANDREWS'S CLAIM FROM *CLEARY V. SMITH* AND ACCEPT HIS PROPOSED AMENDED COMPLAINT

Mr. Mark Andrews, through undersigned counsel, moves to sever his pending matter from the above captioned matter, *Cleary v. Smith*, No. 3AN-81-05274CI. Mr. Andrews also seeks leave of court to file the attached Proposed Amended Complaint instead of an Amended Motion to Enforce. As is detailed in his Proposed Amended Complaint, Mr. Andrews has a stand-alone claim under the Alaska Constitution wholly separate from *Cleary*, and the remedy he seeks is not contemplated by the Consent Decree in *Cleary*. This severance will benefit the Court by

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keeping Mr. Andrews's claim separate from the voluminous filings in *Cleary* and mitigating any confusion of the issues that might arise from proceeding purely under a Motion to Enforce the Consent Decree.

While Mr. Andrews had originally put forth his substantive arguments under *Cleary* as a Motion to Enforce the *Cleary* Consent Decree, his counsel has fashioned the attached as an Amended Complaint, not an Amended Motion to Enforce, as Mr. Andrews is no longer seeking a *Cleary* remedy and instead raising a standalone procedural due process claim.

Therefore, Mr. Andrews respectfully requests that this Court: (1) sever this matter from *Cleary v. Smith* and assign him an individual case number; and (2) accept the attached Amended Complaint as his prevailing pleading document in the severed matter.

Dated: March 15, 2023

Respectfully submitted,

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Pro Hac Vice Motion Pending

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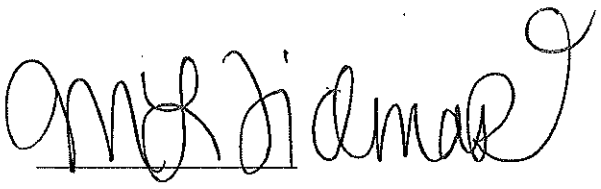
CERTIFICATE OF SERVICE

On March 15, 2023, a true and correct copy of this Motion to Sever and all attachments, including the Proposed Amended Complaint, was delivered via mail to:

Anna L. Marquez
State of Alaska Department of Law
1031 W. 4th Ave, Suite 200
Anchorage, AK 99501
Anna.marquez@alaska.gov



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SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Michael Cleary, et al., Plaintiff v. **Robert Smith, et al.,** Defendant	No. 3AN-81-05274CI

[PROPOSED] ORDER GRANTING MOTION TO SEVER MARK ANDREWS'S CLAIM FROM *CLEARY V. SMITH* AND ACCEPT HIS PROPOSED AMENDED COMPLAINT

IT IS HEREBY ORDERED that Mark Andrews's claim will be severed from the above captioned matter, *Cleary v. Smith*, and Mr. Andrews may proceed under a separately-captioned matter matching the parties set forth in his Proposed Amended Complaint. It is further ordered that his Proposed Amended Complaint is accepted as his prevailing pleading document in the severed matter and is now his Amended Complaint.

DATED at Anchorage, this __ day of _____, 2023.

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The Honorable
Thomas A. Matthews
Superior Court Judge

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SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Mark Andrews,

Plaintiff

v.

Jennifer Winkelman, *in her official capacity*,

Robert Lawrence, *in his official capacity*,

and

James Milburn, *in his official capacity*,

Defendants

No. 3AN-23-_____

PLAINTIFF'S PROPOSED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

1. All Alaskans have a right to not be deprived of their liberty without due process of law. Alaska Const. Art. I § 7. This right applies whether or not an individual is incarcerated.

2. One of these most basic liberties is the freedom from being forced to take mind-altering psychotropic medication against one's will.

3. For Mr. Andrews, this basic liberty has been stripped from him repeatedly, without due process of law, over the course of at least five years. Department of Corrections staff have held him down, handcuffed him, and forcibly injected him with antipsychotic medication. Mr. Andrews only takes antipsychotic medication orally under the threat of another injection.

4. For four years, Department of Corrections forcibly medicated Mr. Andrews with psychotropic medication without even a hearing. When the Department finally did afford Mr. Andrews an internal hearing about his continued forced medication order in August 2022 and subsequent internal appeal, the procedures were so woefully inadequate to protect his due process rights as to render them unconstitutional. Mr. Andrews continues to be forcibly medicated

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today, bringing the total of his involuntary psychotropic medication without adequate due process to five years.

5. The only way to ensure that Mr. Andrews's procedural due process rights are not further violated by Department of Corrections is for this Court to order a judicial hearing before a neutral adjudicator where he may be heard, may present evidence, may have counsel present, and may review evidence that will be presented against him ahead of the hearing with his counsel.

JURISDICTION AND VENUE

6. This is a complaint for declaratory and injunctive relief brought pursuant to AS 22.10.020(a) and (g). This Court has original jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015(a)(1) and AS 22.10.020(a).

7. Venue is proper in this district pursuant to AS 22.10.030 and Alaska Rule of Civil Procedure 3(c).

PARTIES

8. Plaintiff Mark Andrews is an incarcerated person housed at Spring Creek Correctional Center in Seward, Alaska. He has been in

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Department of Corrections' custody since 2001. Department of Corrections medical staff has been forcibly administering him psychotropic medication since approximately 2013.

9. Defendant Jennifer Winkelman is the Commissioner-Designee of the Alaska Department of Corrections. She is sued in her official capacity. As Commissioner-Designee, she oversees all prisons in Alaska, including Spring Creek Correctional Center. She is the highest ranking official within the Department of Corrections and oversees the adoption, implementation, and application of the Department's Policies and Procedures.

10. Defendant Robert Lawrence is the Chief Medical Officer for Alaska Department of Corrections. He is sued in his official capacity. Dr. Lawrence oversees medical staff, policies, and practices for all prisons in Alaska, including Spring Creek Correctional Center.

11. Defendant James Milburn is the Superintendent of Spring Creek Correctional Center. He is sued in his official capacity. He oversees all staff at Spring Creek, including medical staff. He is the legal custodian of all incarcerated persons at Spring Creek.

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FACTUAL ALLEGATIONS

I. Forced Psychotropic Medication in Prisons

12. Psychiatric medication is used to treat mental illness. One category of psychiatric medication is known as "psychotropic," meaning it is a substance that affects how the brain works and causes changes in mood, awareness, thoughts, feelings, or behavior.

13. Patients incarcerated in prisons can be prescribed psychotropic medications to treat their mental illnesses. Some patients take these medications voluntarily, while others do not. Generally, an incarcerated patient has the right to refuse medical care. *See, e.g.*, *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) ("the right to make decisions about medical treatments for oneself . . . is a fundamental liberty and privacy right in Alaska").

14. There are exceptions to the general rule that an incarcerated person can refuse medical treatment. One such exception is the forced administration of psychotropic medication. Under Alaska law, forced psychotropic medication should be a last resort and only done in narrow circumstances, such as when an incarcerated patient

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presents an imminent harm to themselves or others. *See* 22 AAC 05.045.

15. Because Alaska law makes involuntary psychotropic medication the exception and not the rule, DOC has instated policies governing when it will forcibly medicate an incarcerated patient. These policies are discussed in detail in Section II.

16. While there are many psychotropic medications on the market, the central medications at issue in this case are: citalopram, aripiprazole, olanzapine, and ziprasidone. This may not be an exhaustive list of all the psychotropic medications at issue and more may be discovered during disclosure and discovery procedures.

17. In addition to affecting the user's brain function, mood, thoughts, and emotions, each of these medications carry the risk of side effects. Citalopram's possible side effects include, but are not limited to: stomach pain; memory problems; nausea, diarrhea and other digestive problems; and excessive tiredness. Aripiprazole's possible side effects include, but are not limited to: discomfort or pain in the stomach; extreme tiredness; and increased anxiety. Olanzapine's possible side effects include, but are not limited to: memory problems; chest

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tightness; change in personality; stomach discomfort or pain; and loss of interest or pleasure. Ziprasidone's possible side effects include, but are not limited to: irregular heartbeat or pulse; chest pain; and body aches or pain.

II. Alaska Department of Corrections' Forced Medication Procedures

18. From July 9, 1995 to July 21, 2022, Department of Corrections ("DOC") used the same Involuntary Medication Policy ("IMP 1").[1] Under IMP 1, DOC could only issue a forced medication order for psychiatric medication for an incarcerated patient if they "suffer[] from a mental disorder, and as a result of that disorder, constitute[] a serious harm to self or others, property destruction, or [are] gravely disabled."

19. IMP 1 required that a Mental Health Review Committee ("MHRC"), comprised of two DOC staff members licensed as mental health professionals appointed by the Health Care Administrator,

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[1] *See* Exhibit A, Alaska Department of Corrections, Policies & Procedures 807.16, "*Involuntary Treatment*" (Jul. 19, 1995).

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conduct a tape-recorded pre-medication "due process hearing"[2] to review the involuntary medication order.

20. IMP 1 provided that a DOC staff member known as the "assisting staff member" would assist the incarcerated patient in the hearing; that the assisting staff member and patient must receive written notice of the hearing at least 24 hours in advance; and that the patient can attend the hearing unless their attendance "poses a substantial risk of serious physical or emotional harm to self or poses a threat to the safety of others."

21. Under IMP 1, during the hearing, the patient had the right to present all relevant evidence and confront the evidence presented against them, although they need not be given the evidence against them to review before the hearing.

22. The MHRC was then required to issue a written decision that included the evidence presented and the rationale for the decision. If the patient wanted to appeal the decision, they had to do so in

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[2] This is the language used in DOC's Involuntary Medication Policy (IMP 1). Mr. Andrews's position is that the hearing procedures laid out in this policy do not comport with due process.

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writing within 48 hours. Then, IMP 1 required that the Medical Advisory Committee ("MAC") issue a written appeals decision within five working days.

23. IMP 1 further required (1) the prescribing psychiatrist to review the administration of psychotropic medication within seven days; (2) the prescribing psychiatrist to interview the patient every 30 days while the patient is receiving involuntary psychotropic medication; and (3) the MHRC to conduct periodic review hearings to judge the need for continued involuntary medications every six months.

24. In psychiatric "emergency" situations, IMP 1 allowed involuntary psychotropic medication to be administered for up to 72 hours without a pre-medication hearing. Forced medication was prohibited beyond 72 hours, unless DOC first held a "due process hearing" where IMP 1 required that the incarcerated patient be allowed to attend the hearing absent an exigent risk to safety, to present relevant evidence and testimony, and to cross-examine witnesses testifying in support of forced medication.

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25. On July 22, 2022, DOC issued new Policies and Procedures regarding involuntary medication ("IMP 2").[3] While many of the procedures remained the same as the prior policy, there were a few differences, including but not limited to: (1) the MHRC is now called the Involuntary Medication Committee ("IMC") and has three members instead of two; (2) emergency involuntary medication orders can be renewed without a hearing for up to three consecutive periods of 72 hours; and (3) the prescribing psychiatrist is no longer required to interview the patient every 30 days while the patient is being medicated against their will.

III. Mr. Andrews's Forced Medication

26. Plaintiff Mark Andrews has been incarcerated by DOC since 2001. He is serving a 99-year sentence. He has been housed at Spring Creek Correctional Center since his 2003 sentencing.

27. Mr. Andrews has suffered from mental health issues while incarcerated. DOC has diagnosed him with schizoaffective disorder. It

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[3] *See* Exhibit B, Alaska Department of Corrections, Policies & Procedures 807.16, "*Involuntary Treatment*" (Jul. 22, 2022).

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is unclear when DOC first gave him this diagnosis, because when undersigned counsel requested and received Mr. Andrews's medical records from DOC, counsel only received records dating back to 2017.

28. From 2001 to approximately 2008, he engaged in self-harm behaviors, namely cutting himself.

29. When Mr. Andrews was first taken into DOC custody in 2001 at the Fairbanks Correctional Center in Fairbanks, Alaska, DOC prescribed him psychotropic medication. On information and belief, more information on Mr. Andrews's initial medication by DOC will be available through discovery, as counsel only received medical records dating back to 2017 through its medical records request to DOC.

30. Mr. Andrews has been on some form of psychotropic medication for the last 22 years, including, but not limited to, citalopram, aripiprazole, olanzapine, and ziprasidone.

31. Beginning in 2018, Mr. Andrews felt he did not need antipsychotic medication anymore, which he had been taking voluntarily. By that time, it had been approximately five years since his last episode of self-cutting and seven years since any serious altercation with another incarcerated person. As "danger to self" and

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"danger to others" had been two of DOC's primary reasons for prescribing Mr. Andrews's psychotropic medication, he informed DOC medical staff that he did not want to take the antipsychotic medication anymore.

32. In October 2018, the MHRC informed Mr. Andrews that if he refused the antipsychotic medication, he would be forced to take it anyway. Although the DOC policy required that the Committee conduct a "due process hearing" for Mr. Andrews before rendering its decision on whether to forcibly medicate him,[4] DOC did not conduct any such hearing before forced medication began, at least to which Mr. Andrews was privy. Mr. Andrews was never offered a hearing or informed that he had a right to a hearing before he could be forcibly medicated.

33. From 2018 until August 2022, DOC continued to psychiatrically medicate Mr. Andrews against his will. The MHRC never conducted even one hearing about Mr. Andrews's ongoing forced medication order for psychotropic medications. Mr. Andrews did not

[4] *See* Exhibit A.

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have any opportunity to present his case on why he should not be subjected to forced mind-altering medication.

34. Instead, the MHRC issued periodic "reviews" of the forced medication orders: two- to three- sentence conclusory statements that renewed the order. For example, on August 3, 2020, the Committee supported its six-month renewal of involuntary psychotropic medication with only the following: "Offender indicates will stop medication if not involuntary. Offender's [*illegible*]. Decrease in [*illegible*] symptoms and improve functioning in [*illegible*]."

35. On August 18, 2022, the IMC (previously known as the MHRC) conducted its first internal administrative hearing regarding Mr. Andrews's forced medication order. This hearing occurred after this Court issued its Order Lifting Stay (*Cleary v. Smith*, Motion No. 313) finding that Mr. Andrews had properly alleged a violation of the Cleary Final Settlement Agreement and due process and appointed him counsel.

36. Although Mr. Andrews had retained undersigned counsel on this matter and had an assigned public defender appointed by this

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Court on this matter, none of his attorneys were notified of this hearing.

37. Mr. Andrews was notified of the hearing two days before it began. He was not allowed to review any of the evidence that would be presented in favor of the forced medication order ahead of time so that he might have prepared to rebut it. He was provided an "advisor," a DOC staff member, purported to assist him before and at the hearing.

38. Mr. Andrews was given the opportunity to speak during the hearing. Mr. Andrews informed the IMC that he did not feel comfortable speaking without his attorneys present. Instead of notifying Mr. Andrews's attorneys and rescheduling the hearing, the IMC treated this statement as his full testimony.

39. The IMC heard testimony from Dr. Stallman, a DOC physician, in which Dr. Stallman recommended that Mr. Andrews continue to be forcibly medicated. Mr. Andrews does not recall the details of Dr. Stallman's testimony, and DOC did not include minutes or a summary of the hearing in the medical records provided in response to counsel's medical records request.

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40. After this testimony, and without any substantive testimony or evidence from Mr. Andrews, the IMC renewed the involuntary medication order, citing "imminent risk of harm to others." However, Mr. Andrews has not had a write-up for any aggressive behavior since approximately 2018, and his last serious altercation with any other incarcerated person was in 2011.

41. After the IMC's decision, DOC staff gave Mr. Andrews an appeals form to fill out and three days to complete it. Neither undersigned counsel nor Mr. Andrews's public defender were notified of the appeals process or the corresponding form by DOC. When DOC staff came by to pick up the form on August 22, Mr. Andrews requested to turn in the form later that day, after he had a chance to have a scheduled confidential attorney call with his attorney. The DOC staff member demanded that he turn it in at that moment. Not wanting to waive his appeal, Mr. Andrews did so, even though he had not yet had a chance to consult with counsel.

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42. Mr. Andrews received the appeal decision back two weeks later, denying his appeal.[5] The Committee did not fully complete their own form, forgetting to check the boxes indicating their appeal decision and whether they had found the hearing procedures had been followed at the original hearing or not. The Committee's substantive justification for denying his appeal was only four sentences. The Committee stated that one of its reasons for denying Mr. Andrews's appeal is that he "has been given multiple opportunities to take his medication voluntarily." The Committee also claimed that Mr. Andrews presents a danger when not being forced to take psychotropics, because at one point he allegedly became aggressive and violent when he was not on antipsychotic medication. The Committee failed to provide any further details on this, including the alleged date of occurrence. The most recent the incident the Committee could have been referring to occurred in 2018, the last time Mr. Andrews was not under a constant forced medication order.

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[5] *See* Exhibit C, Alaska Department of Corrections, MAC Appeals Decision re Mark Andrews (Sept. 12, 2022).

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43. When Mr. Andrews refuses to take psychotropic medication, DOC staff physically restrain him, force him into handcuffs, and forcibly inject it into his muscle. For example, he has been forcibly injected with Zyprexa (olanzapine) alone at least six times.

44. Mr. Andrews has also been subjected to "emergency" involuntary medication orders without any hearing. During an "emergency" order in October 2018, Mr. Andrews was repeatedly held down by DOC staff and injected with ziprasidone, sometimes multiple times a day. This was administered in addition to the Zyprexa (olanzapine) Mr. Andrews was already taking.

45. Mr. Andrews has submitted numerous grievances and Requests for Information ("RFIs" or "cop-outs") to DOC staff and administrators over the last decade challenging the necessity of his forced medication orders.

46. Mr. Andrews has chronic stomach and intestinal pain that he believes is attributable to long-term psychotropic use. The pain and stomach upset are so bad that sometimes he cannot get out of bed. Mr. Andrews also has high blood pressure which causes him chest pain and

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forces him to rest for long periods during the day; chest pain, irregular heartbeat, and fast heartbeat are side effects of at least olanzapine and ziprasidone. The constant chronic pain has severely impacted his day-to-day functioning, including his memory and recall abilities.

COUNT I
VIOLATION OF PROCEDURAL DUE PROCESS

47. Paragraphs 1 through 46 are realleged and incorporated as if stated herein.

48. The Alaska Constitution protects the procedural due process rights of Alaskans so that no one is deprived of their liberty without due process. Alaska Const. Art. I § 7.

49. The Alaska Constitution is more protective of individual rights than the U.S. Constitution and is not bound by federal standards. *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."). This includes due process rights. *See, e.g., Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985).

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50. To determine whether a procedural due process violation has occurred, the court balances (1) the private liberty interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens of additional or substitute safeguards. *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002) (adopting tripartite test of *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

51. The private interest at stake here is severe and cuts in Plaintiff's favor. *See Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 182 (Alaska 2009) ("the private interest here [against forced medication] is very strong, given the highly intrusive and potentially harmful effects of involuntary administration of psychotropic drugs"). Psychotropic drugs "'affect the mind, behavior, intellectual functions, perception, moods, and emotions of an individual and are known to cause a number of potentially devastating side effects, some of which are permanent and not treatable." *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 241-42 (Alaska 2006) (internal quotations

omitted). One's freedom to one's own mind, emotions, and thoughts is a paramount liberty interest.

52. Mr. Andrews has been held down, handcuffed, and forcibly injected with psychotropics against his will, repeatedly, over the past five years, without receiving the due process required by both DOC's own policy and the Constitution of the State of Alaska.

53. The risk of erroneous deprivation here also falls in Plaintiff's favor, and additional safeguards would help guard against that wrongful deprivation.

54. The hearing that DOC finally *did* provide to Mr. Andrews pursuant to its new policy violates due process, because the only hearing Mr. Andrews received was internal, was conducted by DOC staff and not a neutral arbiter, was closed to his attorneys, provided little notice to Mr. Andrews and none to his counsel, and provided no opportunity for Mr. Andrews to review any of the evidence levied against his bodily liberty ahead of time. When Mr. Andrews made it clear that he did not feel comfortable speaking on his own behalf without consulting with his attorneys, the IMC treated that as Mr. Andrews not wanting to speak on his own behalf at all.

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55. Mr. Andrews's "appeal" was an internal form with three days to complete it. When he made it clear for a second time that he wished to consult with counsel before making statements on his own behalf, DOC responded by demanding the form immediately, lest he waive his appeal. The appeal was reviewed internally, not by a neutral arbiter, and the appeal decision itself does not produce a detailed enough record for any meaningful judicial review. The appeal decision contained only four substantive sentences and made an allegation of violence against Mr. Andrews, without details or a date, but could only have been from at least five years ago, when Mr. Andrews was last given the opportunity to not be forcibly medicated. Without these details, it would be impossible for a court to review the Committee's "finding" that supported the appeal denial. The Committee also rested its decision on the fact that Mr. Andrews has not taken his medication voluntarily in the past, but ostensibly all individuals before the Committee are opposing a forced medication order because they want the right to refuse medication. Moreover, it is unclear what mechanism Mr. Andrews would even have for a direct judicial review of the Committee's appeal decision.

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56. Additionally, DOC's new policy on its face is constitutionally insufficient to protect Mr. Andrew's due process rights, as the procedures it provides are woefully inadequate. DOC contends that persons like Mr. Andrews are so mentally ill that they must be on psychotropic medication against their will. Alaska law recognizes that forced medication implicates the constitutionally protected right to liberty and bodily autonomy. Nevertheless, DOC requires persons facing forced medication to be represented by a non-attorney DOC staff member instead of their own attorney. This restriction deprives the person of a fair hearing and increases the risk that the person will be inappropriately medicated, and a substitute safeguard of attorney representation would reduce the risk of erroneous deprivation. Requiring a hearing in front of a judge instead of DOC staff would also reduce this risk, as judges are used to issuing cogent, impartial written decisions involving constitutional rights, due process, and involuntary psychotropic medication in the civil context. Judges would also require real evidence and fair procedures before approving involuntary medication orders and renewals, instead of rubberstamping DOC staff recommendations and issuing four-sentence decisions that are

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insufficient to understand the basis of the decision and enable appellate review.

57. Finally, the government's interest here also falls in Mr. Andrews's favor. The government has an interest in avoiding unnecessary forcible medication, because involuntary medication implicates a person's fundamental rights to bodily autonomy and liberty, and because these medications can cause serious side effects, especially when taken long-term. As DOC is responsible for the healthcare of all the people in its custody, reducing the creation of new medical issues from the side effects of overmedicating would reduce DOC's financial and administrative burdens. While there will be additional costs of providing incarcerated individuals who DOC seeks to involuntarily medicate with psychotropic medications with a judicial hearing, they would not be a great enough burden to offset the weighty liberty interest here, especially because the infrastructure for these hearings already exists in the civil context.

PRAYER FOR RELIEF

Accordingly, based on the foregoing, Plaintiff requests that this Court do the following:

ACLU OF ALASKA FOUNDATION
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1. Issue a declaratory judgment that Defendants' continued forced medication of Mr. Andrews without additional process is contrary to law;

2. Issue a declaratory judgment that Defendants' July 22, 2022 involuntary medication policy does not adequately protect due process and is therefore unconstitutional;

3. Order that, before administering any psychiatric medication against his will, Mr. Andrews be provided a judicial hearing before a neutral adjudicator where he may be heard, may present evidence, may have counsel present, and may review evidence that will be presented against him, to ensure that he is not medicated without due process;

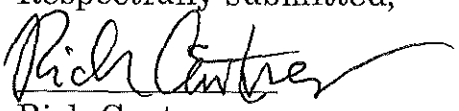
4. Declare that Plaintiffs are the prevailing parties and are constitutional public interest litigants under AS 09.60.010(c);

5. Award Plaintiffs' costs and full reasonable attorneys' fees incurred in obtaining the relief sought in this proceeding; and

6. Award such other relief as this Court may deem just and equitable.

Dated: March 15, 2023

Respectfully submitted,



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**Pro Hac Vice Motion Pending*

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CERTIFICATE OF SERVICE

On March 15, 2023, a true and correct copy of this Proposed Amended Complaint and all attachments was delivered via mail to:

Anna L. Marquez
State of Alaska Department of Law
1031 W. 4th Ave, Suite 200
Anchorage, AK 99501
Anna.marquez@alaska.gov

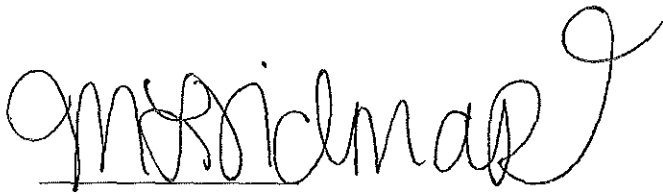

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EXHIBIT
A

Policy

A. Except as otherwise directed or approved by a court, psychotropic medication may be administered involuntarily only in compliance with the provisions of this policy.

Procedures

A. Definitions

1. Gravely Disabled. A condition in which the prisoner, as a result of a mental disorder: (1) is in danger of serious physical harm resulting from his or her failure to provide for essential human needs of health or safety, or (2) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

2. Likelihood of Serious Harm. Evidence of substantial risk of physical harm to self or others, or to the property of others.

3. Medical Advisory Committee (MAC). A Commissioner-appointed panel that makes Department decisions regarding non-emergency hospitalizations, some specialty referrals, complex clinical cases, special studies or treatments, and reviews prisoner health care grievance appeals (see policy #807.01, Health Care Organization and Administration). MAC includes health care staff and selected collaborating and consulting physicians.

4. Mental Disorder. Any organic, mental, or emotional impairment according to the DSM-IV that has a substantial adverse effect on an prisoner's cognitive or volitional functioning.

5. Psychiatric Emergency. A situation in which the prisoner poses an imminent threat of serious physical harm to self or others due to a mental disorder.

6. Psychiatric Order. A medical order issued by a licensed psychiatrist providing psychiatric services for the Alaska Department of Corrections.

B. Order for Involuntary Administration of Psychotropic Medication

1. Except as provided in section D below (psychiatric emergency), if involuntary administration of psychotropic medication appears necessary, the prisoner must be referred to and evaluated by a psychiatrist. A psychiatric order for involuntary administration of psychotropic medication may only be given if it is demonstrated that the prisoner suffers from a mental disorder, and as a result of the disorder, constitutes a likelihood of serious harm to self or others, property destruction or is gravely disabled.

2. A psychiatric order for involuntary administration of psychotropic medication and the clinical evidence and diagnosis to support that order must be fully documented in the prisoner's medical file. Documentation will include the patient's history of (in)voluntary medication compliance, prognosis, history of side effects, and treatment plan (including prescription).

3. A mental health professional shall meet with the prisoner to discuss the reasons that the medication was ordered and to address any concerns the prisoner may have about complying with the psychiatric order for the medication. A full discussion of the medication side effects, risks, benefits, and alternatives shall also be provided and documented at this time.

C. Right to Refuse Psychotropic Medication

1. In the absence of a psychiatric emergency or a court order directing or approving the administration of psychotropic medication, a prisoner has the right to refuse to comply with a psychiatric order for psychotropic medication unless the involuntary administration of that medication has been reviewed and approved by a Mental Health Review Committee at the conclusion of a due process hearing where it is determined that:

   a. the prisoner suffers from a mental disorder;

   b. the medication is in the best interest of the prisoner for medical reasons; and

   c. the prisoner is gravely disabled or poses a likelihood of serious harm to self, others, or the property of others.

D. Psychiatric Emergencies

1. Notwithstanding section B above, if, in the opinion of a licensed health professional with prescriptive authority, a prisoner is suffering from a mental disorder, and as a result of that disorder, presents an imminent likelihood of serious harm to self or others, a psychiatric emergency exists. In such cases, the prisoner may be administered psychotropic medication over his or her objections for a limited time, if medically appropriate. Justification for emergency involuntary psychotropic medication must be documented in the prisoner's medical file.

   a. The prescribing health care professional shall notify the Department's Mental Health Clinician Supervisor as soon as practicable after involuntary psychotropic medications are initiated.

   b. When medication is prescribed in a psychiatric emergency, consultation with a licensed psychiatrist must be obtained within 24 hours. The consultation and any recommendations from the consulting psychiatrist must be documented in the prisoner's medical file.

(1) If the psychiatrist does not concur in the administration of psychotropic medication, it may no longer be administered.

(2) If the psychiatrist concurs in the continued administration of psychotropic medication, such medication may be continued for up to 72 hours, excluding weekends and holidays.

(a) Health care staff shall initially offer all involuntary medication in its oral form, paying particular attention to insure the patient's compliance. This may include a complete mouth check.

(b) If the patient refuses the oral medication, appropriate security staff should be notified for assistance in administering intramuscular medication.

(c) Health care staff shall monitor and document the patient's condition at least every four hours on day and swing shifts. Night shift staff shall check the patient at least once while the patient is awake.

c. Any involuntary administration of psychotropic medication beyond the time periods described in Section D(1)(b) above requires the approval of the Mental Health Review Committee following a due process hearing.

E. Mental Health Review Committee

1. Except for the involuntary administration of psychotropic medication during a psychiatric emergency, involuntary administration of psychotropic medication may occur only at the Cook Inlet Pre-Trial Facility's Mike Module Unit in the case of male prisoners, and the Hiland Mountain Correctional Center in the case of female prisoners.

2. A Mental Health Review Committee shall be established within the Department in order to conduct due process hearings to review psychiatric orders for involuntary administration of psychotropic medication.

a. The committee shall be comprised of two members appointed by the Health Care Administrator.

(1) Both members shall be licensed Mental Health Professionals.

(2) At least one member shall be a psychiatrist.

(3) One member of the committee shall serve as the Chairperson as designated by the Health Care Administrator.

b. Neither of the members of the committee may have been involved in the prisoner's current treatment or the prescribing of the psychotropic medication under review, but clinicians are not disqualified from sitting on the committee if they have treated or diagnosed the prisoner in the past.

F. Right to a Hearing

1. Upon completion of the order for involuntary administration of psychotropic medication, the prescribing psychiatrist shall, by use of the attached form (807.16A), request the scheduling of a due process hearing to occur within 72 hours.

2. The Mental Health Review Committee shall conduct a tape recorded due process hearing to review the psychiatric order for involuntary administration of psychotropic medication.

G. Prehearing Activities

1. A member of the institutional staff independent of the prisoner's treatment team shall be assigned by the institutional Superintendent to assist the prisoner in the due process procedure. The staff assistant must be able to understand and interpret the prisoner's rights and hearing proceedings, act in the prisoner's best interest, and have some understanding of the psychiatric diagnosis and the issues that a case may present.

    a. The role of the assisting staff member is to facilitate the understanding and participation in the hearing by the prisoner.

    b. The assisting staff member must have completed a training program approved by the Attorney General's Office and the Mental Health Clinician Supervisor of the Department regarding the relevant legal and medical issues.

2. The prisoner and the assisting staff member shall be provided written notice (form 807.16B), of the time and place of the hearing at least 24 hours prior to the hearing.

    a. The notification must also include the:

        (1) diagnosis; and

        (2) reasons that the psychiatrist and other mental health services staff believe the medication is necessary.

3. At least four hours prior to the hearing, the prisoner and the assisting staff member may request in writing to the Chairperson of the Committee that certain witnesses be present at the hearing or that specific questions be asked of certain witnesses outside of the hearing or telephonically during the hearing if they are unable to personally appear.

    a. The request shall be made using page 2 of form 807.16B.

4. Prior to the hearing, the Mental Health Review Committee shall conduct any investigation and/or examination as it deems necessary regarding the administration of psychotropic medication to the prisoner.

a. Any information obtained during an investigation must be presented at the hearing in order to be considered by the Committee in reaching its' decision and to give the prisoner an opportunity to respond.

5. Absent a psychiatric emergency requiring that a prisoner be involuntarily medicated, the prisoner has **the right to refuse** involuntary medication or psychiatric care 24 hours preceding the due process hearing, and until the hearing adjourns. If a psychiatric emergency requires that the prisoner be medicated, the Chairperson of the Mental Health Review Committee shall make findings at the hearing whether the administration of medication caused the prisoner any difficulties with cognition and communication which prevented the prisoner from actively participating in the hearing.

H. Due Process Hearing

1. The prisoner must be provided the opportunity to be present at the hearing unless the prisoner's attendance poses a substantial risk of serious physical or emotional harm to self or poses a threat to the safety of others.

   a. The assisting staff member shall appear at the hearing on the prisoner's behalf whether the prisoner is present or not.

2. At the hearing, the Mental Health staff are obligated to disclose to the prisoner the evidence relied upon for the proposed involuntary treatment.

3. The prisoner and the assisting staff member may present relevant evidence, including statements, testimony of witnesses, and written documents and may cross examine witnesses who testify at the hearing in support of involuntary medication.

   a. The presentation of evidence or questioning of witnesses by the prisoner or the assisting staff member may be limited or disallowed only when the Chairperson of the Committee finds the evidence or questions to be irrelevant, repetitious, or a threat to the safety of those involved in the proceedings or the security of the facility.

      (1) Any denial of a request to make statements, present witnesses or documents, or cross examine witnesses must be explained orally at the hearing and in the hearing summary (form 807.16C).

      (2) Upon a showing of good cause, written statements of witnesses, or telephonic testimony may be permitted by the Chairperson in lieu of live testimony.

4. Any information obtained outside of the hearing must be made available at the hearing so that the prisoner has the opportunity to respond to or comment upon it.

5. Although the documentation in the medical file of the prisoner must be reviewed by the committee, the committee may also require that the psychiatrist responsible for the psychiatric order under review appear in person at the hearing.

I. Decision of the Committee

1. The Committee shall consider all relevant information and material which has been presented at the hearing in deciding whether to approve or modify the psychiatric order for involuntary administration of the psychotropic medication. Any decision to approve involuntary administration of psychotropic medication must be unanimous.

2. A written decision must be prepared by the Chairperson of the Committee and provided to the prisoner, (form 807.16C).

   a. The written decision must be signed by both members of the Committee.

   b. The written decision must contain a summary of the hearing, including the following:

      (1) the evidence presented; and

      (2) the rationale for approving, modifying, or disapproving the involuntary administration of the psychotropic medication.

3. The original of the written decision shall be placed in the prisoner's institutional file, and copies distributed to the following:

   a. the prisoner;

   b. the prisoner's medical file;

   c. the prisoner's mental health file;

   d. the Health Care Administrator;

   e. the Mental Health Clinician Supervisor; and

   f. the Committee Chairperson.

J. Appeal Process

1. If the Committee approves the involuntary administration of the psychotropic medication, the prisoner shall be advised of the right to appeal the decision to the Medical Advisory Committee for the Department by filing a written notice of appeal within 48 hours of the prisoner's receipt of the Committee's written decision (form 807.16D).

a. If the prisoner decides to appeal the decision to approve the involuntary administration of the psychotropic medication, the assisting staff member shall promptly forward or assist the prisoner in preparing and forwarding the prisoner's written appeal, within the 48 hour time limit. The prisoner may request to listen to the tape recording of the due process hearing to assist in the appeal.

b. If the prisoner appeals a decision to approve the involuntary administration of the psychotropic medication, the Medical Advisory Committee shall review the decision of the Mental Health Review Committee.

(1) The Medical Advisory Committee shall, within five *working days*, either:

(a) approve the continued involuntary administration of the psychotropic medication as ordered by the prescribing psychiatrist or as modified by the Mental Health Review Committee; or

(b) order it to cease.

(2) The decision of the Medical Advisory Committee shall be in writing.

2. Department of Corrections' nursing staff shall enforce the administration of the medication as ordered by the psychiatrist and approved by the Mental Health Review Committee while awaiting the decision of the Medical Advisory Committee on the appeal.

3. The original of the written appeal decision shall be placed in the prisoner's institutional file, and copies shall be distributed to the following:

a. the prisoner;

b. the prisoner's medical file;

c. the prisoner's mental health file;

d. the Mental Health Clinician Supervisor; and

e. the Chairperson of the Mental Health Review Committee.

K. Monitoring and Periodic Review

1. Once initiated, the involuntary administration of psychotropic medication must be reviewed by the prescribing psychiatrist within seven calendar days.

a. If the order for medication is renewed, it must continue to be reviewed at least every 14 calendar days by the prescribing psychiatrist.

b. Full documentation supporting the decision to continue to administer the medication must be provided in the medical and mental health file by the psychiatrist.

2. The prisoner must be interviewed by the prescribing psychiatrist at least once every 30 days while the prisoner is receiving involuntary psychotropic medication.

   a. Full documentation (including side effects) supporting the continuation or discontinuation of involuntary medication must be provided by the psychiatrist in the medical file.

   b. When the prisoner becomes compliant with his medications, his willingness to voluntarily take the medication is to be fully documented in the medical file.

   c. The involuntary medication treatment may be discontinued when the psychiatrist feels the patient has insight into his mental illness and is at a point in his treatment where he is able to continue taking his medications on a voluntary basis or is no longer in need of medications.

3. The Mental Health Review Committee shall conduct a hearing and review the need for continued involuntary medications every six months if the involuntary administration of the medication continues or occurs on a regular basis during that time; and shall review the treating psychiatrist's choice of both the type and dosage of medication to be administered. The Committee may recommend suitable changes in the type and dosage if deemed medically appropriate. If the treating psychiatrist, in his or her professional judgment, does not accept the Committee's recommended changes, the Committee may disapprove the continued involuntary administration of medication subject to the psychiatrist's right to seek review by the Medical Advisory Committee. Unless a review hearing occurs before the Mental Health Review Committee, a prisoner may not be involuntarily administered psychotropic medication after a six-month period has expired.

ORIGINAL

Date: May 9, 1995

Margaret M. Pugh, Commissioner
Department of Corrections

Authority:
Washington v. Harper, 494 U.S. 210 (1990)
Cleary Final Order, 3AN-81-5274 CIV (Sept. 1990)
22 AAC 05.122
22 AAC 05.253

Forms Applicable:
807.16A
807.16B
807.16C
807.16D

EXHIBIT
B

STATE OF ALASKA DEPARTMENT OF CORRECTIONS POLICIES & PROCEDURES	SECTION: Health and Rehabilitation Services		PAGE: Page 1 of 15
	CHAPTER: 807	NUMBER: 807.16	P&P TYPE: Public
	TITLE: Involuntary Treatment		
	APPROVED BY: Jennifer Winkelman, Acting Commissioner		DATE: 7/22/22

ATTACHMENTS / FORMS:

- **A. Emergency Psychotropic Medication Log**
- **B. Involuntary Medication Hearing Request**
- **C. Third-Party Psychiatric Involuntary Medications Evaluation**
- **D. Involuntary Medication Hearing Notice**
- **E. Involuntary Medication Hearing Minutes**
- **F. Involuntary Medication Hearing Summary**
- **G. Notice to Appeal Involuntary Medication Status**
- **H. MAC Appeal Decision**
- **I. Notification of Psychotropic Medication Refusal**

AUTHORITY / REFERENCES:

22 AAC 05.045 22 AAC 05.120
22 AAC 05.122 22 AAC 05.253
AS11.81.430 AS 47.30.839
AS 47.30.837 AS 47.30.838
NCCHC MH-1-02
Washington v. Harper, 494 U.S. 210 (1990)
Cleary Final Order, 3AN 81-5274 CIV (Sept. 1990)
Loftner vs State of Colorado

POLICY:

I. It is the policy of the Department of Corrections (DOC) to have procedures in place that provide guidance and direction to staff who are responsible for assessing, administering, and monitoring the use involuntary psychotropic medications.

II. It is the policy of the Department to only use involuntary psychotropic medications with prisoners to prevent imminent harm to self and others and for those prisoners presenting as gravely disabled.

A. Behavioral health services, including involuntary psychotropic medications, shall be provided to prisoners using the least restrictive methods practical and consistent with accepted standards.

B. Informed consent for treatment (DOC Policy 807.08, Informed Consent) shall be obtained whenever practical.

C. Staff shall make every effort to decrease the use of involuntary medications by:

1. Respecting the dignity and ensuring the safety and well-being of all prisoners.

2. Making a good faith attempt to obtain consent before proceeding with proposed treatment for those prisoners capable of giving informed consent.

3. Having the prisoner participate as much as possible in the decision-making process regarding their mental health treatment, including medications.

4. Ensuring current ethical practices are utilized in situations requiring the administration of involuntary psychotropic medications.

5. Making good faith efforts to reduce the level of risk through the least restrictive alternatives possible while providing for the safety of the prisoner and others.

6. Limiting the use of involuntary medications to situations that require emergent mental health care, in which there is an imminent danger to self or others that cannot be otherwise safely avoided or when the prisoner meets criteria for grave disability.

7. Acknowledging that the prisoner has the right to refuse medication.

D. A clinically approved protocol as outlined in this policy shall be utilized for emergency situations when a prisoner is dangerous to self or to others due to a mental illness and when emergency psychotropic medication shall be used to prevent harm, based on a psychiatric provider's order.

E. Medications shall not to be used as a means of coercion or punishment; for the convenience of staff; or when less restrictive alternatives to manage behaviors are available and appropriate. Medications shall not be administered solely for the purpose of cooperation during prisoner movement.

III. If involuntary medications cannot be administered on site, the prisoner shall be immediately transferred to a facility capable of administering medications and providing the appropriate level of mental health services to meet the needs of the prisoner.

APPLICATION:

This policy and procedure shall apply to all Department employees and prisoners.

DEFINITIONS:

As used in this policy, the following definitions shall apply:

Chief Mental Health Officer (CMHO):
Position responsible for the oversight of behavioral health services to include mental health, substance abuse and sex offender treatment services.

Emergency Mental Health Care:
Care for acute mental health symptom(s) that cannot be deferred until the next scheduled mental health clinic or routine appointment.

Emergency Psychotropic Medication:
An order for medications not to exceed 72 hours that is given without the prisoner's consent and for the specific purpose of preventing immediate harm to self or others. Emergency medications are distinguishable from involuntary psychotropic medications by not requiring a hearing and expiring after 72 hours.

Grave Disability:
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.

Imminent Risk of Harm:
Based on clinical judgment, there is a risk that the prisoner shall harm self and/or others without immediate intervention.

Independent Third-Party Psychiatrist:
A physician licensed to practice medicine in the jurisdiction in which services are provided and who has successfully completed a residency in psychiatry and who is contracted to provide an independent, unbiased evaluation of a prisoner's need for involuntary psychotropic medication.

Informed Consent:
Informed consent is an agreement by a prisoner to a treatment, examination, or procedure after the prisoner receives facts about the nature, consequences, risks of the proposed treatment, examination or procedure and the alternatives to it. For invasive procedures, if there is some risk to the prisoner, informed consent is documented on a form containing the prisoner's signature. The right to refuse treatment is inherent in this concept.

Involuntary Medication Committee:
A three-person committee comprised of a chair who is a licensed mental health professional, a non-treating psychiatrist and non-treating mental health clinician or psychiatric Advanced Practice Registered Nurse who convene to determine whether medication may be involuntarily administered to a prisoner.

Involuntary Medication Hearing:
A hearing to determine whether medication may be administered to a prisoner where a licensed psychiatric provider believes that the prisoner is in imminent risk of harming self or others without immediate intervention and that imminent risk is a result of mental illness; is gravely disabled and due to the failure to care for self, risk of harm is imminent; has refused to make an informed consent for treatment; and less restrictive alternatives for treatment have been used without satisfactory therapeutic result.

Less Restrictive Alternatives:
Treatment and placement options that have been identified to be the least restrictive or least intrusive. This shall include, but is not limited to, non-physical and physical methods used to deescalate a prisoner.

Medical Advisory Committee (MAC):
The MAC is a Health and Rehabilitation Services (HARS) Division Director appointed panel comprised of health care personnel to include at a minimum, the HARS Director, HARS Deputy Director, Chief Medical Officer, Chief Nursing Officer, Chief Mental Health Officer, Health Practitioner II(s), Medical Social Worker, Quality Assurance and Utilization Review Nurse and selected collaborating and consulting physicians, psychiatrists, or nurses. The MAC shall authorize all non-emergency hospitalizations and surgeries, some specialty referrals, complex cases, special studies or treatments; review Departmental decisions that deny a prisoner treatment recommended by a consulting physician; investigate and respond to prisoner health care grievance appeals (DOC P&P 808.03, Prisoner Grievances); respond to prisoner's appeals to the use of involuntary medication; and review and approve health care policies and procedures, clinical guidelines, medical operating procedures and protocols.

Non-Treating :
A mental health clinician or psychiatric Advanced Practice Registered Nurse who has not provided any service to the prisoner beyond routine coverage for another provider within the last month.

Psychiatric Provider:
A physician licensed to practice medicine in the jurisdiction in which services are provided and who has completed a fully qualified residency in psychiatry or an Advanced Practice Registered Nurse (APRN) with specialized training in the provision of psychiatric care.

Psychotropic Medication:
Medications used to treat mental illness.

PRN:
Abbreviation meaning "when necessary" (from the Latin "**pro re nata**", for an occasion that has arisen, as circumstances require, as needed).

Serious Mental Illness (SMI):
A substantial disorder of thought, mood, perception orientation or memory, any of which grossly impairs judgment, behavior, capacity to recognize reality, or impairs an individual's ability to function on a daily basis.

PROCEDURES:

I. Emergency Treatment
Where a prisoner lacks the capacity to consent to emergency treatment, health care staff shall provide medical treatment that is intended to preserve life or limb. Emergency treatment under this section includes, but is not limited to wound care, administration of antibiotics, drawing of blood and protective splinting.

II. Emergency Psychotropic Medications

A. A licensed psychiatric provider may order emergency psychotropic medications for up to seventy-two (72) hours, excluding weekends and holidays, without an involuntary medication hearing if the provider determines the prisoner:

1. Is in imminent risk of harming self or others without immediate intervention and that imminent risk is as a result of mental illness,

2. The prisoner has refused to make informed consent for treatment, and

3. Less restrictive alternatives for treatment have been used without satisfactory therapeutic result.

B. The ordering psychiatric provider shall use Emergency Psychotropic Medication Order (Attachment A) and provide the following information:

1. The prisoner's diagnosis;

2. The imminent risk of harm posed;

3. The reason for ordering the emergency psychotropic medication;

4. Less restrictive alternatives considered or attempted;

5. A treatment plan goal for less restrictive alternatives as soon as practical; and

6. Specify when, where and how the psychotropic medication is to be administered, including any medically necessary lab work and blood-draws that may be required.