IN THE SUPREME COURT OF THE STATE OF ALASKA

Mark Andrews, Appellant v. **Jennifer Winkelman, Timothy Ballard, and James Milburn, in their official capacities for the State of Alaska, Department of Corrections,** Appellees	Supreme Court No. S-19453

Trial Court No. 3AN-23-05725CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE DANI CROSBY, JUDGE

REPLY BRIEF OF THE APPELLANT MARK ANDREWS

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Constitutional Provisions

Alaska Constitution Article I § 1. Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Constitution Article I § 7. Due Process

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Constitution Article I § 22. Right of Privacy

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Regulations

22 AAC 05.122: Involuntary administration of psychotropic medication

(a) Except as provided in (b) - (d) of this section, unless treatment or medication has been ordered by a court a prisoner retains the right to informed consent and to refuse psychological or psychiatric treatment including the administration of psychotropic medication.

(b) If facility health care personnel diagnose a prisoner as being in imminent danger of harming himself or herself, or others, as a result of illness, and the prisoner has refused to make an informed consent for treatment, psychotropic medication may be involuntarily administered in accordance with procedures established by the commissioner, if the prisoner

(1) has been evaluated by a physician who has reviewed pertinent

records and information regarding the prisoner and has prescribed the psychotropic medication as part of a therapeutic medical treatment plan;

(2) is apparently capable of, but refuses to give informed consent after being advised of the elements of informed consent;

(3) has had less restrictive alternative forms of treatment such as soft restraints or housing in a restrictive setting applied, without satisfactory therapeutic result;

(4) continues to manifest symptoms that indicate that treatment is necessary to prevent the prisoner from endangering himself or herself, or others; and

(5) has been evaluated by a second physician who concurs in the involuntary administration of psychotropic medication.

(c) Notwithstanding (b) of this section, if, in the opinion of the facility physician, a prisoner presents such an immediate danger to himself or herself, or others, that the informed consent process under (a) of this section, or the informed consent review process under (b) of this section cannot be completed in a timely fashion, the prisoner may be involuntarily administered psychotropic medication. The involuntary administration must be followed by

(1) a medical review as set out in (b) of this section within 72 hours after the emergency administration of medication; and

(2) regular and timely follow-up monitoring by the prescribing physician, incorporating safeguards consistent with prudent standards of medical care.

(d) If, in the opinion of facility health care personnel, a prisoner requires the administration of psychotropic medication as part of the therapeutic medical treatment plan but is not capable of giving informed consent, the following standards apply:

(1) emergency cases must be treated as set out in (c) of this section; and

(2) non-emergency cases must be considered for transfer to a psychiatric facility under 22 AAC 05.253 or referred to the Department of Law for assistance in seeking a court order for treatment.

ARGUMENTS

This case is about Mark Andrews'[1] right to privacy and liberty inside his own mind. "Psychotropic drugs affect the mind, behavior, intellectual functions, perception, moods, and emotions and are known to cause a number of potentially devastating side effects."[2] The Alaska Department of Corrections (DOC) should not be allowed to enter such a private space without court permission and the right to counsel.

I. DOC has shown it cannot maintain a reliable system of internal administrative review for forced medication.

This Court cautioned in *Myers v. Alaska Psychiatric Institute* that an "inherent risk of procedural unfairness [] inevitably arises when a public treatment facility possesses unreviewable power to determine its own patients' best interests."[3] *Myers* addressed the Alaska Psychiatric Institute (API), but the Court in dicta analogized to prisons:

> [E]ven in institutional settings such as prisons, where judicial review of treatment decisions has traditionally not been required, case law strongly suggests that at a minimum, a formal system of independent administrative review may be necessary to guarantee patients' basic due process rights.[4]

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[1] Mr. Andrews prefers to use his real name rather than a pseudonym.

[2] *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 241 (Alaska 2006) (citing *Steele v. Hamilton County Cmty. Mental Health Bd.*, 736 N.E.2d 10, 15 n.3 (Ohio 2000) (internal quotation marks omitted)).

[3] *Id.* at 250.

[4] *Id.*

DOC relies on the above dicta from *Myers* to justify forcibly medicating Mr. Andrews without court oversight. [Ae. Br. 32–33] But DOC has repeatedly failed to maintain the "formal system of independent administrative review" that *Myers* requires at minimum.[5] DOC cites a footnote in *Myers* that distinguishes prisons from psychiatric hospitals. [Ae. Br. 23 n.33] But unlike in *Myers*, the Court now has a record showing DOC repeatedly violating its own policies about forced medication. In practice, DOC's internal forced medication system does not satisfy due process.

A. DOC failed to maintain a formal system of administrative review when it medicated Mr. Andrews for nearly four years with no hearings.

As detailed in the opening brief, DOC has repeatedly violated its involuntary medication policies governing notice, presentation of evidence, and the right to appeal. [At. Br. 33–37] This brief focuses on the most egregious violation: DOC forcibly medicated Mr. Andrews for nearly four years without holding a single hearing.

DOC held its first involuntary medication hearing for Mr. Andrews on October 10, 2018, and DOC's involuntary medication committee authorized forcibly medicating Mr. Andrews. [Exc. 225] Under DOC's policy as written then, and as revised in July 2022, the committee could only authorize forced

[5] *Id.*

medication for up to six months. [Exc. 35, 51] But DOC did not hold another forced medication hearing until August 18, 2022, nearly four years after the previous hearing in 2018. [Exc. 305] DOC continued forcibly medicating Mr. Andrews from November 2018 through January 2020 and from June 2020 through August 2022 without hearings. [Ctr. 17; Exc. 132] DOC concedes it has no record of forced medication hearings during this time. [Ae. Br. 4 n.6]

For some of that time—between April 8, 2019 and August 3, 2020—DOC psychiatrist Dwight Stallman submitted written requests to forcibly medicate Mr. Andrews, which DOC authorized without any 6-month hearings. [Exc. 294-97] Without the required hearings, Mr. Andrews had no notice or opportunity to be heard regarding his ongoing forced medication, and his distrust of DOC staff worsened. [Exc. 132] After August 2020, even the written requests ended; between August 3, 2020 and August 18, 2022, DOC forcibly medicated Mr. Andrews without even written authorization or review.

B. DOC's implication that Mr. Andrews was taking his psychotropic medications voluntarily during this time is incorrect.

DOC concedes this "apparent gap" in authorization for forced medication but adds the caveat that "no injections were needed in this period." [Ae. Br. 44 n.114 and 9 n.14] Any implication that Mr. Andrews was taking these medications voluntarily is contradicted by the record. At a hearing on August 18, 2022, the chairperson of DOC's involuntary medication committee stated

that Mr. Andrews had been forcibly medicated from November 2018 through January 2020, and then from June 2020 through the day of the hearing. [Ctr. 17] At that same hearing, a DOC nurse stated that Mr. Andrews takes these medications only because he is required to.[6]

Injections were sometimes unnecessary because Mr. Andrews grudgingly swallowed the pills to avoid the humiliation of forced injections. After the forced medication hearing on October 10, 2018, DOC employees held Mr. Andrews down and injected psychotropics into his buttocks. [Exc. 129] He endured this at least six times before relenting and taking them orally. [*Id.*] He protested his forced medication through DOC grievance paperwork as early as 2019 and he has been suing to stop his forced medication since February 2020. [Exc. 228–30; R. 1372] DOC knew that Mr. Andrews did not want to take psychotropics, but it continued forcibly medicating him without hearings.

C. DOC restarted forced medication hearings only after Mr. Andrews was appointed counsel in this lawsuit.

In February 2020, Mr. Andrews filed a pro se motion challenging his forced medication on several constitutional grounds. [R. 1372-77] Despite this open litigation, DOC continued forcibly medicating him without 6-month hearings. [Ctr. 17] On June 14, 2022, nearly two and a half years after Mr.

[6] *See* Ctr. 13 ("But medication compliance, he does -- he will take his medications, but because they're involuntary.").

Andrews filed the motion that initiated this case, an attorney from the Public Defender Agency entered an appearance after being appointed by the Superior Court. [R. 1338, 1342] On August 16, 2022, the Superior Court issued an order setting a status and scheduling conference on Mr. Andrews' motion, the first where he would have counsel. [R. 1338] On that same day, DOC gave Mr. Andrews notice that, two days later, he would have his first "6-month" forced medication hearing in nearly four years. [Exc. 222]

In other words, DOC only followed its policy when Mr. Andrews had a court hearing scheduled in front of a judge with a lawyer representing him. *Myers* requires—at minimum—"a formal system of independent administrative review,"[7] but DOC did not maintain such a system without the court oversight of this lawsuit and counsel holding DOC accountable. This experience demonstrates the need for a court hearing and the right to counsel rather than trusting DOC's internal process to protect Mr. Andrews's rights.

D. Failing to hold hearings for nearly four years demonstrates an unacceptably high risk of erroneous deprivation.

DOC argues that its violations of policy were procedural and non-prejudicial, and that DOC staff should still be allowed to authorize forced medication because "agency personnel are presumed to be honest and

[7] *Myers*, 138 P.3d at 250.

impartial until a party shows actual bias or prejudgment."[8] DOC rests this argument on cases that explain what evidence is necessary to prove a particular decisionmaker was biased during a particular hearing.[9]

But the *Mathews v. Eldridge* test addresses the systemic question of what process is necessary to ensure fair outcomes,[10] and *Myers* discussed the unique systemic risk of letting an institution decide for itself whether to forcibly medicate confined patients.[11] DOC's internal process—where the rules are frequently ignored—carries a systemic risk of erroneous deprivation. It is hard to imagine stronger evidence of "prejudg[ing] the issues" than forgoing review hearings for years.[12] Mr. Andrews' mental health fluctuates widely, so forced medication should never have been a foregone conclusion.[13]

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[8] Ae. Br. 36-37, citing *Griswold v. City of Homer*, 556 P.3d 252, 270 (Alaska 2024).

[9] *See* Ae. Br. 36 n.85, citing *Griswold*, 556 P.3d at 270 (holding there was insufficient evidence that the chairperson of Homer's planning commission was biased against plaintiff in a zoning dispute) and *Calvert v. State, Dep't of Labor & Workforce Dev.,* 251 P.3d 990, 1006 (Alaska 2011) (holding there was insufficient evidence that a Department of Labor hearing officer was biased when affirming a reduction in plaintiff's employment benefits).

[10] 424 U.S. 319, 335 (1976).

[11] *Myers*, 138 P.3d at 250–51.

[12] *Griswold*, 556 P.3d at 271.

[13] For example, in January 2024, DOC's Medical Advisory Committee (MAC) found that Mr. Andrews was gravely disabled but not an imminent risk of harm. [Exc. 301] Five months later, DOC's involuntary medication committee found that Mr. Andrews was an imminent risk of harm but not gravely disabled. [Exc. 307] Then, in October 2024, DOC stopped forcibly medicating

Moreover, both the old and new versions of DOC's forced medication policy say that forced medication hearings must address the appropriate type and dosage of psychotropic medication.[14] DOC providers have disagreed on what combination of psychotropic medications to force upon Mr. Andrews as his mental health has fluctuated.[15] DOC's failure to address these questions at 6-month review hearings for nearly four years prejudiced Mr. Andrews, and further vindicates this Court's concerns in *Myers* about an institution forcibly medicating patients without oversight.

Mr. Andrews after realizing his appeal paperwork had been lost [Exc. 308–09], and he remained successfully unmedicated for around one year. For someone whose mental health fluctuates like this, forgoing review hearings for years is prejudicial.

[14] *See* Exc. 35, 48. This Court and the Court of Appeals have likewise required courts to consider the specific medication proposed before ordering forced medication of civil committees and probationers—and have expressly held that a court must conduct the hearing and render the final decision. *See Myers*, 138 P.3d at 252 (during a civil committee's forced medication hearing, the court must consider "information about the proposed medication, its purpose, the method of its administration, [and] the recommended ranges of dosages" (quoting AS 47.30.837(d)(2)(B))); *Love v. State*, 436 P.3d 1058, 1060–61 (Alaska App. 2018) (quoting *Kozevnikoff v. State*, 433 P.3d 546, 548 (Alaska App. 2018)) (probationer facing forced medication is entitled to judicial hearing "to argue for alternatives to any medication at all, or to a particular medication").

[15] For example, at the June 2024 forced medication hearing, the chairperson read Dr. Worrall's report into the record; it recommended changing Mr. Andrews' medications to a combination of Clozapine and another psychotropic. [Ctr. 54–55] Dr. Olivera disagreed with Dr. Worrall and stated that, if Mr. Andrews switched to Clozapine, he would "probably regress to a psychotic state and get progressively worse than what he's doing right now." [Ctr. 56–57] Evidently, the type of psychotropic and dosage can have very different effects on a person's mind.

E. DOC's minor revision of its forced medication policy does not erase years of violating it.

DOC argues that "[a]ny arguments about deficiencies in DOC's process before July 2022 are moot because DOC implemented a new policy that month." [Ae. Br. 44 n.114] But the process remains almost identical—and equally unconstitutional—under the revised policy.

DOC revised its forced medication policy in July 2022. [Exc. 37] As the Superior Court below noted, "[t]he second policy is similar to the first." [Exc. 189] Both versions allow emergency forced medication under certain conditions. [Exc. 29–30, 41–43] Both versions allow six months of forced medication after a hearing before a DOC committee. [Exc. 30–31, 43–44] Both forbid forcibly medicating someone beyond six months without another DOC hearing. [Exc. 35, 51] The standard for forced medication is similar under both versions. [Exc. 28–29, 40, 43] The versions provide the incarcerated patient similar rights: both require notice [Exc. 31, 44–45], both require a DOC staff advisor [Exc. 31, 45–46], and both require DOC to record the hearings. [Exc. 31, 47] Both promise the rights to know what evidence the committee is relying on, to present evidence, and to cross-examine witnesses. [Exc. 32, 46] After the hearing, both promise the right to appeal to DOC's Medical Advisory Committee. [Exc. 33–34, 49–50]

DOC does not discuss any differences between the two versions, let alone

explain why the revisions make DOC more likely to follow the policy. In fact, since July 2022, DOC has continued violating its policy. [At. Br. 9–17] For example, after a forced medication hearing in June 2024, Mr. Andrews submitted an appeal—a right protected by both the old and new versions of the policy. [Exc. 307, 33–34, 49–50] DOC lost his appeal paperwork and failed to respond. [Exc. 308–09] DOC's Chief Mental Health Officer subsequently admitted she found his appeal "in a former employee's email inbox" in October 2024. [*Id.*] In the intervening three and a half months, DOC continued forcibly medicating Mr. Andrews despite having lost his appeal paperwork. [*Id.*]

The revised policy is largely the same as the earlier version. Minor revisions do not "moot" DOC's history of violating both versions of its policy.

II. This Court should not follow the result in *Harper* because the law and relevant facts are different.

Federal law and Alaska law both use the *Mathews v. Eldridge*[16] framework to evaluate violations of procedural due process. DOC argues that the result here should be the same as in *Washington v. Harper*, where the U.S. Supreme Court applied *Mathews* and held that the federal Constitution does not require counsel and a judicial hearing before forcibly medicating a person in prison.[17] But this case compels a different result.

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[16] 424 U.S. 319 (1976).

[17] *See* Ae. Br. 30, citing *Washington v. Harper*, 494 U.S. 210 (1990).

A. Alaska law is more protective of due process than federal law.

In *Parham v. J. R.*, the U.S. Supreme Court applied the *Mathews* framework and held that a parent may commit their child to inpatient psychiatric care without a judicial or administrative hearing.[18] Subsequently, in *Native Village of Kwinhagak v. Department of Health & Social Services,* this Court, applying *Mathews*, concluded that the Alaska Constitution requires a judicial hearing soon after the Office of Children's Services commits a child to inpatient psychiatric care.[19] This Court said, "Because the Alaska Constitution's guarantee of due process is more protective than that of the federal constitution, we are guided by, but not tethered to, the *Parham* decision."[20] This Court is similarly not tethered to the *Harper* decision because Alaska law is more protective of due process.

B. Alaska law is more protective than federal law of a person's privacy and liberty in their own mind.

The first *Mathews* step considers the private interest at stake. Unlike in *Harper*, the private interests at stake here are Mr. Andrews' rights to privacy and liberty in his mind under the Alaska Constitution. As explained in *Myers*, the Alaska Constitution protects these rights more strongly than the federal

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[18] 442 U.S. 584, 607–08 (1979).

[19] 542 P.3d 1099, 1123–24 (Alaska 2024).

[20] *Id.* at 1120.

Constitution.[21] Because the Alaska Constitution gives greater weight to the private interests at stake here than the U.S. Supreme Court gave them in *Harper*, the outcome here should be more protective.

C. Unlike DOC, the prison in *Harper* followed its policiess.

At the second step of *Mathews*, courts consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[22] The record here shows DOC created a high risk of erroneous deprivation by repeatedly violating its policies and failing to hold forced medication hearings for nearly four years. By contrast, the Supreme Court in *Harper* relied on the prison's track record of compliance. The Court examined the Washington prison's forced medication policy and found no examples of the prison violating it.[23]

The prison facility in *Harper* was better designed to follow its mental health policies than Alaska DOC. Mr. Harper was forcibly medicated at a prison facility called "the Special Offender Center (SOC or Center), a 144-bed

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[21] *See Myers*, 138 P.3d at 245 ("We have specifically recognized that Alaska's guarantee of privacy is broader than the federal constitution's . . . . We have similarly declared Alaska's constitutional guarantee of individual liberty to be more protective.").

[22] 424 U.S. at 335.

[23] *Harper*, 494 U.S. at 233 ("In the absence of record evidence to the contrary, we are not willing to presume that members of the staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the Policy.").

correctional institute established by the Washington Department of Corrections to diagnose and treat convicted felons with serious mental disorders."[24] While still a prison, the SOC was designed for people with serious mental illnesses and had its own policy for involuntary medication called Special Offender Center (SOC) Policy 600.30.[25] Alaska DOC has no such facility. As DOC points out, during his time in prison, Mr. Andrews has been housed either with the general prison population, or in segregation where "inmates do not contribute to the facility's functioning or further their own rehabilitation by working or engaging in programming." [Ae. Br. 29] Even under federal law, which is less protective, *Harper* may have come out differently if the plaintiff had been forcibly medicated at a regular prison that repeatedly violated its policies.

III. Due process requires stronger protections for people facing forced medication than for people facing prison discipline.

Alaska law permits DOC to discipline prisoners without providing "the

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[24] *Id.* at 214.

[25] *Id. See also* Joseph D. Bloom, *Treatment Refusal in Arizona's Jail-Based Competency to Stand Trial Restoration Programs*, 47 The Journal of the American Academy of Psychiatry and the Law 233, 237–38 (2019), https://jaapl.org/content/47/2/233.long ("There is controversy about whether the *Harper* procedures can be applied to jails because that decision focused on treatment refusal in a prison psychiatric program in the state of Washington, which was more like a psychiatric program in a hospital than any program likely encountered in a jail.").

full panoply of rights due an accused in a criminal proceeding."[26] DOC analogizes forced psychiatric medication to prison discipline, arguing that Mr. Andrews is not entitled to counsel and a judicial hearing because "the impact on [his] liberty interests is not as great as for someone outside of prison." [Ae. Br. 29, 34–35] But this analogy misses a categorical difference between prison discipline and forced psychiatric medication.

A. Unlike prison discipline, forced medication undermines a person's privacy in their own mind.

By definition, incarceration severely limits a person's physical liberty. Prison limits where a person can go, what activities they can do, and who they can interact with. Prison discipline results in even greater restrictions on physical liberty such as placement in segregation, loss of statutory good time, or loss of access to activities.[27]

That is why incarcerated people have diminished due process rights in disciplinary hearings. An incarcerated person arrives at a disciplinary hearing already not physically free, so their "liberty as a free citizen [is not] threatened by potential curtailment."[28] As this Court recently explained when applying

[26] *McGinnis v. Stevens*, 543 P.2d 1221, 1226 (Alaska 1975).

[27] *See id.* at 1225 n.6.

[28] *Id.* at 1226.

the *Mathews* test[29] to prison discipline, the private interest at stake there is a prisoner's "liberty interest in not being wrongly punished with conditions of confinement more severe than he already endures."[30]

Unlike prison discipline, forced psychiatric medication invades a person's privacy and liberty inside their mind. Incarceration limits physical liberty but does not ordinarily include chemically altering a person's brain. In the context of probation, the Alaska Court of Appeals has held that, even after a person is convicted, the sentencing judge may not order forced psychotropic medication as a probation condition unless the judge holds a hearing "where medically informed expert testimony is presented to the judge, and where the defendant has the opportunity to present their own expert testimony, and to argue for alternatives to any medication at all, or to a particular medication."[31] Being convicted of a crime—even a serious one—does not destroy a person's right to a contested court hearing before the government may enter the privacy and liberty of their mind.

With respect to his mind, Mr. Andrews—and the approximately 21 other incarcerated individuals currently being involuntarily medicated by DOC [R.

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[29] *Mathews*, 424 U.S. at 335.

[30] *Valoaga v. Dep't of Corr.*, 563 P.3d 42, 47 (Alaska 2025).

[31] *Love*, 436 P.3d at 1060–61 (quoting *Kozevnikoff*, 433 P.3d at 548) (cleaned up).

517–18]—are less like prisoners facing disciplinary restrictions and more like civil committees facing forced medication. Like the latter, they should have the right to counsel and a court hearing before being forcibly medicated.

B. The cost of providing court hearings and counsel would be far lower for forced medication than for prison discipline.

The third *Mathews* factor considers the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[32] Every incarcerated person is subject to discipline if they violate DOC's rules, so requiring judicial hearings and appointed counsel in all discipline cases would be quite costly. Instead, due process requires DOC to provide counsel to incarcerated people facing disciplinary proceedings only when a felony is alleged,[33] a much more manageable burden. Currently, Alaska DOC is forcibly medicating 22 people in its custody. [R. 517–18] Providing court hearings and counsel for this small group would be similarly manageable.

IV. Counsel would be helpful and not too burdensome.

Because forced psychiatric medication involves chemically altering a mental health patient's brain without their consent, it can generate distrust between the patient and the provider. DOC argues that providing counsel would hurt incarcerated patients by raising the level of confrontation, harming

[32] *Valoaga*, 563 P.3d at 47 (citing *Mathews*, 424 U.S. at 335).

[33] *McGinnis*, 543 P.2d at 1235.

correctional employees' relationships with incarcerated people, and "adding little benefit to ascertaining whether involuntary medication is necessary." [Ae. Br. 42] DOC is mistaken.

A. Providing counsel to those facing forced medication would increase trust.

Many incarcerated people with serious mental illnesses likely struggle to gather evidence, present it effectively at hearings, and cross-examine lay and expert witnesses. For this population, the right to a hearing is mostly empty without counsel helping to present evidence and arguments.

Providing counsel would increase trust. People facing forced medication would have more respect for the process and outcomes if they had an attorney to speak with confidentially who could give them a voice at the hearing. This has worked well in the civil commitment arena for years. For example, at Ms. Myers' forced medication hearing, she retained two experts who both testified against forced medication.[34] That evidence almost certainly would not have been presented without counsel.

The practical benefits of promoting trust factor into the *Mathews* test. Under the second *Mathews* factor, courts consider "the fiscal and administrative burdens that the additional or substitute procedural

[34] *Myers*, 138 P.3d at 240.

requirement would entail."[35] A breakdown in trust between incarcerated patients and DOC is costly.

DOC counters that Mr. Andrews' "pending lawsuit about involuntary medication worsened his distrust of DOC staff." [Ae. Br. 42] But Mr. Andrews distrusts DOC staff because they forcibly medicated him for nearly four years without any hearings, not because he has an attorney. After he filed this case pro se, DOC continued forcibly medicating him without hearings for years. It should surprise no one that Mr. Andrews has grown to distrust DOC. Counsel would increase trust by ensuring DOC follows the rules.

B. DOC is already required to appoint attorneys for people facing disciplinary hearings where the conduct alleged is a felony.

DOC says it "has no process to identify and assign attorneys to indigent inmates." [Ae. Br. 48] But DOC is already required by law to have such a process. When incarcerated people face prison disciplinary proceedings where the allegations could result in felony prosecution, DOC is required to provide counsel.[36] Similarly, DOC is required to provide counsel at administrative segregation hearings "when the segregation is in connection with an infraction that could be a felony."[37] "This right is codified in DOC policies regarding both

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[35] *Mathews*, 424 U.S. at 335.

[36] *Brandon v. State, Dep't of Corr.*, 73 P.3d 1230, 1234 (Alaska 2003) (citing *McGinnis*, 543 P.2d at 1229, 1236–37.

[37] *Watkinson v. Dep't of Corr.*, 540 P.3d 254, 262 (Alaska 2023).

administrative segregation and disciplinary board hearings."[38] The right is also codified in a DOC regulation that says, "An accused prisoner has a right to counsel in a hearing from which felony prosecution might result or has been initiated."[39]

Either DOC is following these rules, or it is not. If DOC provides attorneys to these incarcerated people, it can use the same process for involuntary medication hearings. If DOC has no such process, it is violating case law, the administrative code, and its own policies, and this should caution further against trusting DOC to follow its forced medication policies.

V. DOC applies its forced medication policy to all prisoners, including those who are pretrial.

DOC argues that due process does not require the rights to counsel and a judicial hearing before forcibly medicating a "convicted inmate." [Ae. Br. 25] Mr. Andrews has been convicted, but DOC's forced medication policy does not distinguish between people who have been convicted and people who are pretrial and presumed innocent.[40]

Due process should not depend on whether a person is charged with a

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[38] *Id.* at 268 (citing DOC Policy 804.01(VII)(C)(1) and DOC Policy 809.04(II)(D)(4)).

[39] 22 AAC 05.440(e).

[40] *See* Exc. 37–51. The record has at least one example of DOC forcibly medicating a person who was incarcerated pretrial. [R. 371–72]

crime. If a person in Anchorage experiences a psychotic episode and begins shouting and running down a busy street, an officer arriving on scene has discretion to either file a petition for civil commitment at Alaska Psychiatric Institute (API), or charge them with disorderly conduct and bring them to Anchorage Correctional Complex (ACC).[41] Under DOC policy, the officer's decision between API and ACC determines whether the person will have the right to counsel and a judicial hearing before forced medication. But any number of non-legal factors could affect this decision, including API's limited capacity.[42] And Alaskan defendants often wait in prison pretrial for years, so the officer's discretion could shape the person's due process rights for a long time.[43] DOC should not be allowed to forcibly medicate people who are presumed innocent without court permission and counsel.

VI. DOC concedes the right to administrative appeal of DOC forced medication decisions.

This Court has never addressed whether an incarcerated person can file

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[41] AS 47.30.700; 11.61.110.

[42] *See* Zachariah Hughes, *Amid a shortage of hospital beds, psychiatric patients put in jails* (Oct. 13, 2018), https://alaskapublic.org/news/2018-10-13/amid-a-shortage-of-hospital-beds-psychiatric-patients-put-in-jails.

[43] *See* Yvonne Krumrey, *Pretrial delays leave everyone in Alaska's court system waiting* (Mar. 6, 2025), https://alaskapublic.org/news/public-safety/2025-03-06/pretrial-delays-leave-everyone-in-alaskas-court-system-waiting.

an administrative appeal asking the Superior Court to review a DOC forced medication decision.[44] DOC appears to rest its position that no judicial hearing is necessary on the premise that an administrative appeal is available to incarcerated people after a DOC forced medication hearing and decision.[45] For all the reasons already explained, this Court should hold that a court hearing and appointed counsel prior to forced medication are necessary under the Alaska Constitution. But, if this Court decides a court hearing is not necessary prior to forced medication, it should clarify that judicial review is available through an administrative appeal to the Superior Court after the decision to medicate has been made.

Respectfully submitted, this 12th day of January 2026.

/s/ Doron Levine
Doron Levine [2101002]

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[44] While no statute provides for an appeal of a DOC administrative decision to the Superior Court, this Court has "held that administrative appeals are proper from certain DOC determinations even when not authorized by statute." *Brandon v. State, Dep't of Corr.*, 938 P.2d 1029, 1031 (Alaska 1997) (citing *Hertz v. Carothers*, 784 P.2d 659, 660 (Alaska 1990)). "[A]n administrative appeal is appropriate where there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review." *Id.* at 1032.

[45] *See* Ae. Br. 34 n.72, 35 n.77, 36 n.83, 38 n.94, 43 n.111, 50. DOC does not concede the right to counsel in such an administrative appeal. [Ae. Br. 43 n.11] But as discussed above, most if not all incarcerated patients with serious mental illnesses would struggle to present their case pro se—whether at a DOC forced medication hearing or in an administrative appeal.