ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO *ex rel.* JOHN J. ROHRER, Petitioner/Relator,	)	
-vs-	)	Case No. 14-0268
THE HONORABLE LEONARD. HOLZAPFEL, Judge of the Court of Common Pleas of Ross County, Ohio, et al., Respondents.	)	ORIGINAL ACTION IN *HABEAS CORPUS*, PROHIBITION, AND MANDAMUS

MEMORANDUM OPPOSING RESPONDENT ABH'S MOTION FOR JUDGMENT ON THE PLEADINGS

David L. Kastner (#0078355)
Attorney for Petitioner/Relator
3434 North Drive
Beavercreek, Ohio 45432
dlkastner@sbcglobal.net
937-431-1327
937-477-8394

Jeffrey C. Marks (#0080026)
Matthew S. Schmidt (#0074650)
Attorneys for Relator
72 N. Paint Street
Chillicothe, Ohio 45601
740-702-3115
740-702-3106 (fax)
jeffreymarks@horizonview.net

Roger F. Carroll
Ashley E. Rodabaugh
Health and Human Services Section
Ohio Attorney General
30 East Broad Street 26th Floor
Columbus, Ohio 43215
(614)466-8600
(614)466-6090 (fax)
Roger.Carroll@ohioattorneygeneral.gov
Ashley.Rodabaugh@ohioattorneygeneral.gov

FILED
APR 09 2014
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR PETITIONER/RELATOR, JOHN J. ROHRER

I. ABH IS NOT ENTITLED TO JUDGMENT ON THE PLEADINGS BECAUSE ITS MOTION EITHER DISPUTES OR IGNORES ALL OR MOST OF THE MATERIAL FACTUAL ALLEGATIONS OF THE AMENDED COMPLAINT THAT DEMONSTRATE THAT THE ORIGINAL PURPORTED COMMITTMENT WAS VOID

Respondent ABH correctly recites the law that all material allegations of the amended complaint and petition and all reasonable inferences drawn from them are to be construed in favor of John. It then disputes the allegations of the Amended Complaint which demonstrate that the original purported commitment hearing, the forced drugging proceeding and the most recent purported commitment hearing, ***all*** were conducted without admitting any evidence, and with little more than token lip service paid to due process of law. Specifically, at page 12, ABH concludes that the trial court "had jurisdiction to issue the order of commitment". It also makes a blanket assertion that John "is not entitled to immediate release from confinement", thereby denying the statements in the Amended Complaint that Sec. 2945.40(B) does indeed require John's immediate release. There is no claimed factual or legal justification for such disputes.

Even setting aside all the non-specific denials of the Answer, the Motion itself ignores or side–steps all the significant issues of the Amended Complaint, creating and then knocking down straw arguments. ABH's Memorandum ignores the irrefutable evidence contained in the 3 transcripts and never addresses the enormous due process problems that they disclose. Those transcripts in fact show not only that the initial commitment was conducted without evidence [1/25/10Ts. filed herein with Aff. on 2/24/14], but that the other two proceedings were likewise conducted the same way - without evidence. [Ts. of 3/4/11 proceedings & of 9/10/12

proceedings, Ev./Petitioner/Relator, Items II & V]. Without falsely stating so directly, the ABH Memorandum implies that the alleged off-the-record "report" from a "Dr. Eshbaugh", was admitted into evidence. It was not, as a simple reading of paragraphs 13-19 of the Amended Complaint and the 1/25/10 transcript reveals. Instead, the following statutory and due process violations occurred:

1. Failure to inform John that (a) he had the right to contest the commitment procedures against him, (b) that the consequence of the commitment phase of the three-in-one proceeding was involuntary commitment to a mental hospital for up to 8 years, (c) that in order to take away his liberty during that proceeding the state was required under Ohio Rev. Code Sec. 2945.40(F) to prove by clear and convincing evidence that John was "mentally ill and subject to hospitalization by court order", (d) that he had the right to require the state to provide him with a constitutionally adequate hearing under Ohio Rev. Code Sec. 2945.40(A) within ten (10) days of the NGRI finding and to be discharged under Sec. 2945.40(B) upon the state's failure to do so, (e) that he had the right to cross-examine witnesses against him, were the state to produce any, which it did not, (f) that he had the right to read and have a copy of whatever unknown off-the-record, non-evidentiary report from Dr. Eshbaugh was being referred to by the prior judge but not read in to the record, and (g) that he had the right to not have any such report admitted into evidence against him under Ohio Rev. Code Sec. 5122.13 to establish that he was a "mentally ill person subject to hospitalization by court order".

2. That no evidence whatsoever was admitted in support of a finding of mental illness requiring hospitalization.

3. Neither John nor his public defender waived any of the aforementioned rights.

4. That the nature of the proceedings, in combination with two other proceedings, affirmatively misled John, as they would have any reasonable person, as to the nature, purpose, and consequence of the 1/25/10 proceeding, i.e. to take away his liberty

5. The nature of the combination hearing of 1/25/10 was also affirmatively misleading in that the conduct of the trial judge and the context gave the false impressions that (a) the hearing rights under Sec. 2945.40(C) were a repetition of the trial rights discussed minutes earlier during the same hearing, (b) that secret out-of-court "reports" could lawfully be considered against him, and (c) that involuntary commitment was an automatic and routine consequence of the NGRI plea, ***which it is not***.

Clearly ABH knows about the transcripts, since, aside from the fact they are all of record below and herein, the Memoranda is able to recite, as one of its "Relevant Facts" the names of the various public defenders who physically appeared at the 1/25/10, the 3/4/11, and the 9/10/12 proceedings. It overlooks the fact that during the original purported commitment proceeding, John's public defender was stated to be

> "standing for attorney Daniel Silcott who is on vacation."
> [1/25/10 Ts., p. 1, attached to Aff. filed herein of 2/24/14]

ABH overlooks the complete absences of both evidence, and of a specific waiver by John or the public defender of any constitutional rights. [Amended Complaint parags. 10-20, Ts. 1/25/10, pp. 6-7]. It is the transcripts themselves which reveal a complete absence of any evidence to establish that John was a "mentally ill person subject to hospitalization by court order".

The ABH Memorandum claims among its "relevant facts" that John himself stipulated to the various "reports" talked about during the three hearings. The transcripts themselves show something different, as stated in the Amended Complaint.

ABH invariably fails to mention that all three transcripts show that not one of such claimed "reports" was ever marked, read into the record, or admitted into evidence, and that there was no other evidence. Somehow the ABH Memorandum never mentions that the transcripts reveal a complete absence of evidence that anyone ever allowed John to actually read any of these "reports". Or that anyone explained the definition and legal effect, if any, of the use of the word "stipulation" by the public defender, prosecutor, or judge. The transcripts uniformly show that even the term "stipulation" remained unexplained. Certainly the brief use of the term by the two attorneys with zero explanation, may not properly be imputed to the client as a waiver of the federally protected constitutional right of confrontation. *Brookhart v. Janis*, 384 U.S. 1 (1966). There is a presumption against the waiver of constitutional rights, see, *e. g., Glasser* v. *United States,* 315 U.S. 60,70 (1942) For a waiver to be effective it must be clearly established that there was

> "an intentional relinquishment or abandonment of a known right or privilege." [*Johnson* v. *Zerbst,* 304 U.D. 458 (1938)].

Fundamental rights cannot be waived unless the defendant personally participates in the waiver. *See, e.g., United States* v. *Olano*, 507 U.S. 725 (1993); *Taylor* v. *Illinois*, 484 U.S. 400 (1988).

Nothing in the transcript of the hearing of 1/25/10 remotely suggests that John was informed of the purpose or consequence of this part of the proceeding, i.e. that it could result in his being locked up as a result. Nothing in the transcript remotely suggests that he was informed

of his right to first require the State to prove him "mentally ill and subject to hospitalization by Court order" and only according to specific definitions set out in Ohio Rev. Code Sec. 5122.01(A) and (B). Despite the fact that ***seconds earlier, John had been found to be quite competent enough to knowingly and intelligently waive his rights to jury trial, and again, to change his plea to NGRI,*** the committing court, without admitting any evidence and without John or his attorney having specifically waived any rights, purported to find John so mentally ill that he had to be confined. Over the course of those few seconds, no Sec. 2945.40(A) hearing ever took place. Indeed, no express or implied waiver of any rights occurred in this case during any of the hearings because no evidence was presented and no waiver occurred. The ABH Motion never explains any of these defects, which occurred in all the hearings. Nor does it address the consequence of the State's failure to provide a constitutionally or even statutorily adequate initial commitment hearing within 10 days of the NGRI plea:

> **"Failure to conduct the hearing within the ten-day period shall cause the immediate discharge of the respondent".**
> [Ohio Rev. Code Sec. 2945.40(B]

As this Court has stated in another illegal confinement case, *In re Miller,* 63 Ohio St.3d 99 (1992), the failure to strictly follow statutory procedures consistently with due process principles, results in the jurisdiction of the court not having been invoked. In *Miller*, in which a constitutionally deficient affidavit lacking specific factual averments was at least properly filed of record, this Court still concluded that

> "[b]ecause the affidavit was deficient, no probable cause existed to invoke the jurisdiction of the probate court. [citing *In re Boggs* (1990), 50 OhioSt3d 217, 221] Appellant should have been discharged from the hospital . . . the day the invalid affidavit was filed." [*Miller*, at p. 106]

Though still constitutionally and fatally defective, at least the affidavit used to confine Miller

was filed with the court. At least in *Miller* a record was made – unlike in the case below. When this Court in *Miller* examined the affidavit, it found further constitutional rights violations due to the nature of the language used. The affidavit used by the facility seeking to confine *Miller* described him only in conclusory language, stating that he:

> ' has been progressively confused, delusional, and paranoid. His sense of reality is altered, grandious *[sic]* and at times, out of touch with reality.' [*Miller*, at p. 106]

This Court found the use of such terms without incorporating underlying *facts*, further eroded due process. Similarly, in *In re Boggs*, 50 OhioSt3d 217 (1990) this Court opined that even when some specific facts were alleged, such as the failure to take medications,

> "even if we were to assume that the failure to take medications could constitute a basis for involuntary commitment" [*Boggs*, at p. 220]

the state's failure to strictly observe the formalities of the commitment procedure including a requirement that the allegations be specifically substantiated, supported this Court's conclusion in *Boggs* as well, that:

> "the court's jurisdiction was never properly invoked by the facially invalid affidavit." [*Boggs*, at p. 221]

Because none of the off-the-record "reports" allegedly used below, were made part of the record, there is now no way to know whether, *even if they had been admitted into evidence*, whether the contents of those reports displayed the typical psychiatric vagueness found constitutionally deficient in *Miller* and *Boggs*. Or whether the off-the-record alleged "reports" contained privileged information, the inadmissibility of which cannot be cured by an attorney's stipulation. *Miller*, at p. 109. Without any evidence having been admitted against John, he certainly had no remedy by way of appeal or collateral attack other than what John has initiated in this Court.

II. ABH'S MEMORANDUM FALSELY STATES THAT IT DOES NOT ACT QUASI-JUDICIALLY WHILE IT IGNORES THE AMENDED COMPLAINT'S DOCUMENTATION OF JOHN'S EFFORTS SINCE AT LEAST MAY, 2013 TO INVOKE ABH'S ADMINISTRATIVE AUTHORITY TO CORRECT ABH'S PATIENT ABUSE AND NEGLECT WHICH ALSO VIOLATE TORTURE STATUTES AND THE EIGHTH AMENDMENT

John's Amended Complaint herein makes several references to the inhumane acts in which ABH continues to participate, incorporating by reference the allegations of John's December 4, 2013 motions before the trial court, which have been included in evidence before this Court since 2/20/14 [Ev/ Relator Item. VII] These acts, which serve no valid treatment or even penological purpose, have properly been pled as violations of the 8th Amendment, 14th Amendment, Health Freedom Amendment, false imprisonment, OAC Sec. 5122-14-11, Ohio Rev. Code Secs. 2317.54 and 5122.271 informed consent obligations, violations of torture statutes and the Americans with Disabilities Act, among other violations of federal, state, and international law. The grounds and factual details of ABH's many violations of law are set out in lengthy detail in the Amended Complaint and Evidence of Relator and are further summarized herenibelow. The specific details of the damage John is experiencing, include without limitation, ABH's wanton infliction of pain and torture in the form of forced drugging which is causing him symptoms of irreversible tardive dyskinesia, tachycardia, mitral valve prolapse, and high cholesterol. On an acute basis, immediately following the Risperdal Consta injection, unlawfully administered by ABH as an ongoing course of treatment, John suffers symptoms of akathesia, a common neuroleptic side effect linked with violence. Robert Whitaker's affidavit filed herein describes akathesia as "the worst form of torment". [Ev./Pet./Relator Item IV, Ex. A, p. 9]

Besides its drug assaults, including a history of over-drugging without justification as

found by its accrediting agency, and using drugging as retaliation [Ev./Petioner/Relator Item VIII], ABH ignores John's medical needs and refuses to allow him access to his medical doctor, systematically refuses to protect him from violence, refuses to provide a meaningful grievance procedure, episodically interferes with his communication rights, uses chemical sprays into John's unventilated areas of confinement despite his COPD, and retaliates against him for exercising legal rights. None of these acts of gratuitous cruelty, deliberate indifference, and apparent malice were ordered by any judge, including respondent Holzapfel. Although these acts have been repeatedly drawn to the attention of respondent judge, as stated in the Amended Complaint, *they were brought to the attention of ABH first*. The details of the harm done are lengthy and take many documents to tell. The relief requested, however, is simple.

At pp. 6-7 of its Memorandum, ABH complains that it has not exercised judicial or quasi-judicial power. However the allegations and evidence already in the record before this Court [Ev.Petitioner/Relator Item IV, Ex. L2, L3] and referred to in the Amended Complaint demonstrate that ABH's Jane Krason does indeed act and did in this case act in a quasi-judicial capacity. [Ev./Petitioner/Relator, Exs L2, L3] Contrary to what ABH now claims in its Memorandum, the record shows that it designated its own loyal employee, Jane Krason, as the "impartial decision maker" required by OAC Sec. 5122:2-1-02(G)(1)(b). [Ev./Petitioner/Relator, Item IV, Ex. L2, L3] In that capacity she disregarded John's and his family's grievance of May 31, 2013, which sought relief from the cruel treatments described above and in the December 4, 2013 pleadings submitted herein.

Though she could have easily done so and could do so now, ABH's Krason, in her dual capacity as the "impartial decision maker" for patient grievances and as ABH's loyal employee,

continues to refuse to consider allowing ABH to transport John to his medical doctors, which she expressed in a written "quasi-judicial" decision of June 18, 2013 [Ev./Petitioner/Relator, Item IV, Ex. L2], stating "I am denying the grievance". Exhibit L3 of Item IV and other documents of record herein reveal not only the futility of ABH's administrative processes, but the fact that respondent ABH has continued to act in its quasi-judicial capacity to display its deliberate indifference to the mental and physical anguish ABH's drugs caused John and his consequent need to be examined and treated by a legitimate physician who he could trust not to harm him. In particular, the record shows that when confronted during the grievance process with evidence that the March 14, 2011 "Entry" fragment lacked any attached drug schedule, as well as lacked the three (3) findings required by *State v Lantz*, 2011 Ohio 54336 (11th App., 2011)and *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 OhioSt3d 176 (2000), ABH ignored the transparent invalidity. Compounding its bad faith, ABH also continues to ignore the limitations of that "Entry" fragment by creating its own course of abusive and unnecessary forced drugging never even mandated by the illegal "Entry" fragment. It is plain that the Entry fragment never specifically required ABH to administer any particular drug, to use drugs not intended for long-term use, such as RisperdalConsta as a continuing course of treatment, to refuse to attempt informed consent, to disregard medical ethics, or to otherwise act in a gratuitously cruel manner. ABH's Memorandum ignores this, however, as well as the fact that, instead of limiting its actions to the confines of medical ethics, ABH chose instead to exceed the limited, though still unlawful, purported authorization to drug ostensibly granted by the "Entry", by forcing large numbers of dangerous drugs onto a patient well able to give, or refuse informed consent.

Without ever, even to this day, attempting informed consent, ABH continues in its

Motion and Memorandum herein to pass the responsibility for its criminal prescribing of RisperdalConsta to the trial court, referring frequently and inaccurately to the injectable form of the drug as "Court-Mandated [sic] Risperdal Consta" [Amended Complaint, parags. 28,34, 88 Ev./Pet/Relator Item IV Arg. II(I)].

The Second Circuit has defined a serious medical need as "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (quoting *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting)). The Risperdal-induced akathesia that John suffers, as described in the December 4, 2013 pleadings [Ev/Pet./Relator Item VIII, Ex. "A"], can certainly be put in that category. Moreover, the case of *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003) (quoting *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977)) specifically rejects the notion that "only 'extreme pain' or a degenerative condition" meets the legal standard since "the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious deprivations which cause or perpetuate pain." *See also Berry v. City of Muskogee*, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (holding that deliberate indifference requires more than negligence, but less than intentional and malicious infliction of injury); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) (finding that a policy of inadequate staffing of medical personnel may raise question of deliberate indifference); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (stating that serious deficiencies in prison's medical care, including failure to provide the opportunity to make a sick call or to voice medical concerns, meets the standard of deliberate indifference).

As stated in the material submitted first to ABH in 2013, then in the December 4, 2014

pleadings to respondent judge, ABH's unethical and unlawful use of forced drugs, in particular Risperdal Consta, creates a high risk of permanent brain damage, cardiac damage, and the irreversible convulsioning of the muscles of the face and neck, and later, of the torso, which is part of tardive dyskinesia, from which John is increasingly suffering. The risks of permanent brain damage increase by a factor of 4-6% per year. [Ev. of Relator, Items IV Ex. "A", VIII] With higher levels the risks increase accordingly. ABH forces John to submit to the highest levels and has been doing so without interruption since its predecessor hospital began the assaults April 5, 2011, despite the fact that the police power does not justify forced drugging as a "continuing course of treatment"[*Lantz*, at parag. 24]

The Amended Complaint alerted respondents to the 8th Amendment and torture issues. [Parags. 28, 34, 88, Ev./Pet/Relator, Item VIII, Arg. II(F)] As stated in the December 4, 2013 primary motion, the United Nations Torture Convention of 1984 defines torture as follows:

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Although the United States has implemented some 353 reservations, understandings, and declarations [RUD's] before ratifying the Convention, due to concerns pertaining to making criminal liability of state perpetrators in the United States un-prosecutable, United States law does preserve the basic definition of torture from the point of view of the suffering of the victim and currently defines it as follows:

> "(1) torture' means ***an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering*** (other than

> pain or suffering incidental to lawful sanctions) ***upon another person within his custody or physical control***;
> (2) 'severe mental pain or suffering' means the ***prolonged mental harm caused by*** or resulting from—
> (A) the ***intentional infliction or threatened infliction of severe physical pain or suffering***;
> (B) ***the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;*** [18 U.S:C. Sec. 2340]

Clearly the whole point of the forced drugging has always been to alter the mind and profoundly disrupt the senses. This is how neuroleptics such as Risperdal function. [Ev. of Relator, Items IV Ex. "A", VIII] Regardless of how devoted ABH may be to the practice of forced drugging of its patients or how much it may want to believe the marketing campaigns of the drug manufacturers with whom it is allied [Ev./Pet/Relator, Item VIII], forced drugging is still torture and it is still cruel and unusual punishment prohibited under the Eighth Amendment to the federal Constitution. ABH has the unilateral power and clear legal duty to stop the forced drugging.

III. THE ABH MOTION SUGGESTS THAT IF EVEN ONE ASPECT OF DUE PROCESS WAS NOT DENIED, I.E. THE RIGHT TO COUNSEL, THEN JOHN'S OTHER CONSTITUTIONAL RIGHTS MAY BE IGNORED

The ABH Memorandum suggests that the only constitutional right worth considering is the right to counsel – evidently because it was the only one granted in any of the proceedings below. In support of this amazing thesis, ABH's attorney uses relator's citation to *In re Fisher,* 39 Ohio St2d 71, 82-83 (1974). The granting of the right to counsel, however meaningless or positively counter-productive it was in John's case, hardly renders the other constitutional rights he was stripped of, unimportant. Due process still requires that a litigant who faces loss of liberty be informed of the nature of the proceedings against him, without an attorney clothed with apparent authority sabotaging his right to confront his accusers. [The *Fisher* court likened

confining the allegedly mentally ill without due process to "a law which made a criminal offense of such a disease [which] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments", at pp. 82-83] Due process still requires that evidence be admitted - openly -as exhibits, or live testimony, on the record so as to preserve the right of appeal. This cannot occur when one's attorney is helping to keep information concealed and off-the-record. Although *Fisher* vindicated the right to counsel, in hopes that this would reduce other constitutional rights violations, *Fisher* also clearly denounced a wide assortment of other constitutional rights deprivations that the then legislative scheme allowed to be commonly inflicted during confinement proceedings:

> "Ohio's notice and hearing requirements do not mandatorily require personal notice of a hearing to an individual (R. C. 5122.12 and 5122.18), or his presence at a hearing if the court and the examining physicians determine that it is likely to be injurious to him (R. C. 5122.15). Likewise, the Probate Court's unfettered discretion in committing an individual does not provide an adequate record upon appeal for reviewing the grounds for commitment or what burden of proof prompted commitment. Presently, there are no statutory standards for commitment upon which appellate review may be predicated. . . . many petitions for commitment are based upon hearsay evidence and subject to the same abuses in civil commitment hearings which render such evidence inadmissible in any other civil or criminal proceeding. *In re Fisher*, 39 OhioSt2d 71, 79-80 (1974)

What the *Fisher* court may not have anticipated was the speed with which the reforms effected by its decision and subsequent legislation would be undermined by the attitudes of psychiatrists and attorneys who deal with those claimed to be "mentally ill". Indeed, the psychiatric profession explicitly acknowledges that psychiatrists regularly lie to the courts in order to obtain forced treatment orders. E. Fuller Torrey, M.D., probably the most prominent proponent of involuntary psychiatric treatment has stated:

> "It would probably be difficult to find any American psychiatrist

> working with the mentally ill who has not, at a minimum, exaggerated the dangerousness of a mentally ill person's behavior to obtain a judicial order for commitment."
> [Torrey, E. Fuller. 1997. *Out of the Shadows: Confronting America's Mental Illness Crisis*. New York: John Wiley and Sons. 152.]

Dr. Torrey goes on to say that this lying to the courts is a good thing. Dr. Torrey quotes psychiatrist Paul Appelbaum as saying that when 'confronted with psychotic persons who might well benefit from treatment, and who would certainly suffer without it, mental health professionals and judges alike were reluctant to comply with the law,' noting that in "'the dominance of the commonsense model,'" the laws are sometimes "simply disregarded". It is also well known that:

> "Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission."
> [*Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, Michael L. Perlin, Houston Law Review, 28 Hous. L. Rev. 63 (1991)]

The right to counsel is not the only fundamental constitutional right.

IV. ABH'S MOTION DOES NOTHING TO ABSOLVE ITSELF OF ITS CLEAR LEGAL DUTIES TO NOT TREAT JOHN'S MEDICAL NEEDS WITH DELIBERATE INDIFFERENCE, AS IT DOES BY CONTINUING TO (1) UNLAWFULLY FORCE DRUG HIM, AND (2) INTERFERE WITH HIS RIGHT TO MEDICAL CARE AND TREATMENT

The ABH Memorandum claims that John has no right to be free of forced drugging, that ABH owes him no duty, even while it confines him unlawfully, to transport him to his own medical doctors, and that, in any event this should be someone else's problem, not theirs. ABH does not correctly state the law. In particular:

1.ABH HAS NO RIGHT TO CONTINUE TO FORCE DRUG JOHN

Before John filed to vacate forced drugging on December 4, 2014 he had already sought administrative relief throughout much of the Spring and Summer, of 2013 through ABH's sham grievance process discussed earlier. ABH ignored all his humanitarian pleas to be allowed input into decisions about drug dosages, though based on U.N. torture treaties as well as the scientific studies from Harvard, from science investigative reporter Robert Whitaker, and from the National Institute of Mental Health, which he had researched and found to support his view that lower dosages of medications were more effective and safer. As John and his family began to discover ABH's history with its accrediting agency of unjustifiably over-medicating its patients, documentation of which will be provided to this Court, as well as documentation of the ties ABH has with the marketing strategies of the manufacturer of the Risperdal Consta it continues to use against John against his will, they abandoned ABH's sham grievance procedures.

On December 4, 2014, before it was known that the initial commitment order was void, motions were filed in the trial court, asserting the claims John knew about at that time. The portion of his lengthy Motion and Memorandum to stop the forced drugging listed some 11 separate grounds establishing that the "Entry" fragment purporting to authorize it was void, and that the practice itself was unlawful, at least as to him, apart from what might be stated in any court order. The grounds presented in John's Memorandum of 12/4/13 to the trial court [Ev./Relator Item VIII, Table of Contents], already known to and ignored by ABH, are summarized as follows, quoting from that Memorandum:

"A. *THE FORCED DRUGGING PROVISION OF THE ENTRY OF 3/14/11 IS UNENFORCEABLE BECAUSE ITS ENFORCEMENT COMPELS JOHN TO PARTICIPATE IN "HEALTH CARE SERVICES" IN VIOLATION OF SEC. 1.21 OF THE OHIO CONSTITUTION*

B. THE FORCED DRUGGING PROVISION OF THE ENTRY OF 3/17/11 IS INVALID ON ITS FACE DUE TO ITS FAILURE TO MAKE, AND THE IMPOSSIBILITY OF MAKING, THE REQUIRED FINDINGS OF FACT REQUIRED BY STEELE V. HAMILTON CTY. COMMUNITY MENTAL HEALTH BD. 90 OHIOST3d 176 (2000) AND STATE V. LANTZ, 2011 – OHIO – 5436

1. No finding of lack of capacity

2. No finding of the best interests of the patient

3. No finding that no less intrusive treatment will be as effective

   a. The application alleges no facts showing the non-existence of effective alternatives by ignoring documented successes of traditional talk therapies

   b. The application alleges no facts refuting the evidence that mercury chelation and other heavy metal detoxification procedures can be effective for schizophrenia as well as other brain disorders commonly associated with schizophrenia and/or the psychotropics commonly used for it

   c. The application alleges no facts refuting the effectiveness of nutritional therapy known to be a safe, non-violence producing, and highly effective alternative

   d. The application ignores the effectiveness of dietary removal of foods containing substances that exacerbate or cause mental illness and tardive dyskinesia

C. *THE FORCED DRUGGING PROVISION OF THE ENTRY OF 3/14/11 IS INVALID ON ITS FACE FOR DENYING JOHN ONE OF THE CIVIL RIGHTS HE RETAINS DESPITE HOSPITALIZATION UNDER OHIO REV. CODE SEC. 5122.301, AND IN THE ADMITTED ABSENCE OF GROUNDS TO DENY HIM THOSE RIGHTS*

D. *THE RIGHT TO BE FREE OF UNWANTED INVASIVE MEDICAL PROCEDURES; INCLUDING FORCED DRUGGING IS A FUNDAMENTAL RIGHT UNDER THE OHIO CONSTITUTION BASED ON THE RIGHTS TO LIBERTY, RIGHTS OF CONSCIENCE, AND UNENUMERATED NATURAL RIGHTS TO PRIVACY AND BODY AUTONOMY, WHICH MAY NOT BE INFRINGED WHERE, AS HERE,THE STATE FAILS TO SHOW A COMPELLING STATE INTEREST THAT OVERRIDES CONSTITUTIONAL PRINCIPLES AIMED AT PROTECTING INDIVIDUAL CHOICE.*

E. *THE FORCED DRUGGING PROVISION OF THE ENTRY OF 3/14/11 IS INVALID ON ITS FACE AS IT APPEARS BASED ON THE "APPLICATION" OF DR. SOEHNER*

CONTAINING INADMISSIBLE STATEMENTS THAT FAIL TO MEET THE REQUIREMENTS OF OHIO EVIDENCE RULE 102 AS INTERPRETED BY FRYE V. UNITED STATES, 293 F. 1013 (D.C. CIR. 1923) AND DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC. 113 S. CT. 2786 (1993)

F. *THE FORCED DRUGGING PROVISION OF THE ENTRY OF 3/14/11 IS INVALID ON ITS FACE BECAUSE IT VIOLATES THE 8TH AMENDMENT'S CAVEATS AGAIN CRUEL AND UNUSUAL PUNISHMENT,AS WELL AS STATE AND FEDERAL CRIMINAL STATUTES & AN INTERNATIONAL TREATY PROHIBITING TORTURE*

G .*THE FORCED DRUGGING PROVISIONS OF THE ENTRY OF 3/14/11 ARE INVALID BECAUSE THEY DEPRIVE JOHN OF HIS RIGHT TO INFORMED CONSENT TO BEING FORCIBLY INJECTED WITH RISPERDAL IN DOSAGES UNILATERALLY DECIDED BY ABH, OR SOME UNKNOWN ENTITY, ALL IN VIOLATION OF 42 U.S.C. SEC. 12132, THE AMERICANS WITH DISABILITIES ACT*

H. *THE FORCED DRUGGING ORDER OF MARCH, 2011 WAS ENTERED WITHOUT AFFORDING JOHN REASONABLE NOTICE OR A REASONABLE OPPORTUNITY TO BE HEARD IN VIOLATION OF HIS RIGHTS TO SUBSTANTITVE AND PROCEDURAL DUE PROCESS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT*

I. *ABH'S CHIEF CLINICAL OFFICER OR HIS DESIGNEE HAVE FAILED AND REFUSED TO INFORM JOHN AS REQUIRED UNDER OHIO REV. CODE SEC. 2317.54 AND 5122.271 OF THE EXPECTED PHYSICAL AND MEDICAL CONSEQUENCES OF THE DRUGS THEY WISH TO FORCE UPON HIM, THEREBY DEPRIVING JOHN OF THE OPPORTUNITY TO GIVE A FULLY INFORMED, INTELLIGENT, AND KNOWING CONSENT, TO THE USE OF RISPERDAL CONSTA AT THE HIGHEST POSSIBLE LEVELS, OR ANY OF THE OTHER PSYCHOTROPIC MEDICATIONS BEING ADMINISTERED WITHOUT HIS CONSENT.*

J. *THE 3/14/11 FORCED DRUGGING ORDER IS INVALID BECAUSE ABH IS INCAPABLE OF* ***EVER*** *COMPLYING WITH OHIO REV: CODE SECS. 2317.54, 5122.271 OR 5122.27(F)(6) DUE TO THERE BEING NO LEGITIMATE WAY KNOWN TO EVALUATE MUCH LESS TO AVOID,* ***ALL*** *THE KNOWN DRUG INTERACTION RISKS OR CUMULATIVE EFFECTS OF THE NINE(9) DRUGS CURRENTLY BEING FORCED UPON JOHN*

K *GIVEN THAT ABH IS ADMINISTERING NINE DIFFERENT MEDICATIONS; EACH WITH KNOWN SERIOUS AND OFTEN DEADLY SIDE EFFECTS, CONTINUING THE ADMINISTRATION OF SUCH DRUGS IN THE ABSENCE OF ANY STUDY SHOWING SPECIFICALLY WHAT THE DRUG INTERACTIONS, INCLUDING LONG-TERM EFFECTS, ARE LIKELY TO BE, CONSTITUTUTES MEDICAL EXPERIMENTATION WITHOUT COMPLIANCE WITH THE GENEVA CONVENTION'S NUREMBURG CODE.*"

2. DOCTOR ACCESS PAID BY THE PATIENT *IS* STILL A RIGHT

> Constitutional doctrine has absorbed the common law view that
> "[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." *Spicer v. Williamson,* 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

Given that John has never been convicted of any crime, he is at least as entitled to medical care as any prisoner. Unlike prisoners, who are not subjected to forced drugging as part of their punishment, John is in a much more vulnerable position due to being deprived of his liberty to see his doctor to address the damage his confinement and forced drugging, masquerading as "treatment" are doing to his body. Since Ohio Rev. Code Sec. 5122.301 cited earlier provides that he has lost none of his civil rights inconsistent with his confinement, John has same right as any other citizen to have access to his own medical doctor. Once the government has physical possession of one's body, it has the obligation to facilitate medical care [*Todaro v. Ward*, 565 F2d 48 (2nd Cir. 1977], particularly where, as here, the serious need for such care has remained undisputed in the record either of the ABH grievance proceedings of 2013 or in the trial court below. *See also Reynolds v. Swenson*, 313 FSupp. 328 (W.D. Mo. 1970)(no right of prison administrators to interfere with prisoner's prescribed medications), *Tolbert v. Eyman*, 434 F2d 625 (9th Cir. 1970) (no right to interfere with prescribed medication). *Sawyer v. Sigler*, 320 F Supp. 690 (D.C Neb. 1970) aff'd. 445 F2d 818 (8th Cir. 1971)(no right to interfere with prescribed medication).

The right to consult with a medical doctor in order to prepare for a mental confinement hearing is also found in the Revised Code. Ohio Rev. Code Sec. 2945.40(C)(2) ensures that in

any hearing under Sec. 2945.40 or 2945.401, the person accused of being mentally ill according to the Sec. 5122.01(A) and (B) definition, shall have the

> "right to have independent expert evaluation and to have that independent expert evaluation provided at public expense if the person is indigent".

The statute does not restrict the type of expert, and indeed no statute *could* legitimately restrict the type of witness any litigant could call, particularly where the witness is not to be paid by the public. There is no question that a medical doctor is included as an expert under Sec. 2945.401(C)(2) because the person's medical condition is a matter to be considered in a hearing under Ohio Rev. Code Sec. 2945.401(E). The statutory right to this "independent" expert has to mean, in order to be consistent with due process, that so long as John's family is prepared to pay for the expert of John's choosing, John could choose his expert. He would not be forced to submit to an evaluation by an individual on the payroll of any institution which might stand to gain financially from the commitment. John is entitled to have the services of Drs. Pinkham and DeMio among his independent expert witnesses.

The only assistance that would be needed to implement John's rights to his own medical doctors, so long as John is to remain unlawfully confined at ABH, is transportation to the physicians' offices. The purpose of his seeing them is dual – to examine, diagnose and treat, and to evaluate his condition so to be prepared as his expert witnesses for any eventual trial. The memoranda of both respondents deny having any obligation to arrange for John to have transportation to his medical doctors regardless of the reason.

Running throughout the ABH Memorandum is its apparent belief that Ohio citizens have only narrowly defined rights which they may only exercise if they find highly specific authority specifically granting the right. [ABH Mem. Pp. 9-11] In the world of ABH, which is a state

agency, the rights of the individual are purely secondary to those of the government. In the world of ABH, there is no natural law, and the constitution is barely a consideration. Such assumptions, however, violate Sec. 1 Article I, and Sec. 2, Article I, of the Ohio Constitution. E.g. *Pre-term Cleveland v. Voinovich*, 89 OhioApp.3d 684 (1993). The general guarantees of medical treatment provided by statute and constitution, in addition to OAC Secs. 5122-14-11(D)(3)(a), (6)(a), and (11), that also recognize the patient right to their own doctors, do not specify the precise means by which the state institution is going to accommodate that right. From this ABH erroneously concludes that the right does not exist. [ABH Memorandum p. 10]

Since the issue of transportation to the expert John is entitled to under Sec. 2945.40 and Sec. 2945.401 is not specified in those sections, nor is the location of where such consultation or evaluation is to be conducted, we must turn to Sec. 5122.14 to fill in the gaps. (Sec. 2945.401(B) indicates that provisions of Sec. 5122 "shall apply to the extent they are not in conflict with this chapter"). In referring to the physician that a probate court may appoint to examine a committed patient, Ohio Rev. Code Sec. 5122.14: "Pre-hearing medical examination" states that such examinations

> "shall be held at a hospital or other medical facility, at the home of the respondent, or ***at any other suitable place least likely to have a harmful effect on the respondent's health."*** [Emphasis supplied]

The uncontroverted evidence in the record is that the only place that is a "suitable place least likely to have a harmful effect on the respondent's health" for John to be examined, in the case of Dr. Sandra Pinkham, is at her office in Columbus. [Ev./ Pet./Relator, Item IV, Ex. "G", proffer of her subsequent testimony, referred to in parag. 78, Amended complaint]. The proffered testimony of the ABH police officer shows the availability of transportation for, and Dr.

Pinkham's proffered testimony shows the need for, the independent medical examination and treatment. ABH's past practice of transporting John and other patients to outside physicians, and the complete absence of any security or safety issues in such transports of John, is not in dispute.

There is no allegation that respondent ABH requires any court order to stop interfering with either John's right to his own doctors' care, or with his right to be given informed consent and not force drugged. Unlike what ABH's Dr. Sierra has stated, not even the previous trial judge who purported to give permission for forced drugging, ever "mandated" that Risperdal Consta or any other deadly drug be given. [Ev. /Petitioner/Relator, Item III] If John were granted *habeas corpus*, or a writ directing either respondent to release John, he would be able to see his doctors himself and this, and all other issues would be moot.

The ABH Motion, however, takes the general approach that citizens are entitled only to enumerated rights - a typical position for those who believe that citizens exist only to serve the State. Fortunately this is not the position taken by the Ohio Constitution, which very specifically includes a provision for unenumerated, inalienabale, "natural" rights.

Among those natural and inalienable rights is the right to take care of one's body by contracting with one's own physician. Like the right to breathe, eat, work, enter into other contracts, the right to communicate and freely associate, the right of conscience, and the right to privacy– are all natural rights that human beings in a free society should not have to search for precise legal authority to justify exercising them. The federal constitution and some state constitutions enumerate their rights, but Ohio clearly allows for unenumerated rights that go beyond the enumerated ones. Indeed the Ohio Constitution has long recognized such unenumerated natural rights as the right to freely contract, as being sacred. E.g.*Crosby v. Rath*

136 OhioSt 352, 355-356 (1940). In *Preterm Cleveland v. Voinovich*, 89 OhioApp3d 684(10th 1993) the appellate court recognized Sec. 1, Article I of the Ohio Constitution as acknowledging extensive rights to the individual as "natural law", a concept not expressly recognized in the federal constitution). As the *Preterm* court stated, Sec.1, Article I, together with Section 2 Article I

> "make it quite clear that, under the Ohio Constitution's Bill of Rights every person has inalienable rights under natural law which cannot be unduly restricted by government . . ."

and that the Ohio Constitution's natural law provision

> "confers greater rights than are conferred by the United States Constitution, . . . In general this provision guaranteeing the enjoyment of life and liberty confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law." [*Preterm* at p. 692]

The fact that ABH, however unlawfully, has undertaken to act as John's jailer, does nothing to relieve it of its obligation to not interfere with his civil rights, including the right to take care of his own body by contracting for medical services he pays for himself. Even as a confined person, John has the same civil rights as anyone else under Rev. Code Sec. 5122.301, which entitles him, as a hospital patient within the meaning of Ohio Rev. Code Sec. 5122.01, to

> "retain all civil rights not specifically denied in the Revised Code"

or otherwise. This means that John has the same civil rights as others to contract for medical services by a physician of his choice at his own expense. There are no provisions of the Revised Code that specifically deny him or any other citizen these rights, nor are any claimed by the respondents. The conditions of his confinement present a mere logistic problem, created by the

respondents. That logistic problem is in fact no problem at all, as is demonstrated in the proffered testimony contained in John's Motion of 3/4/14 and described in the Amended Complaint.

Even convicted persons, even those who do not maintain their civil rights as has John, because they are held under governmental control, in circumstances where they are dependent upon the government for their basic needs, have a right to adequate medical care at public expense as a component of the protections accorded by the Eighth Amendment:

> "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,'... proscribed by the Eighth amendment," *Farmer v. Brennan*, 511 U.S. 825,832 (1994)

John asks for nothing from ABH or the government except for it to stop interfering with these rights.

Viewed from the standpoint of a correlative duty, neither the government nor anyone else has the right to interfere with another's right to access to his own physician, anymore than they would have the right to interfere with other natural or fundamental constitutional rights. It is axiomatic that those who seek to take away those rights normally have the burden of proving that they are entitled to do so.

Moreover, the right to one's own healthcare one pays for is essential if citizens are not to be forced to accept some other healthcare. The Health Freedom Amendment to the Ohio Constitution (Sec. 1.21) prevents ABH from forcing its brand of healthcare services upon John. This is particularly so since ABH's forced drugging is causing him serious medical problems, including mitral valve prolapse and symptoms of tardive dyskinesia. These and other conditions necessitate that John be able to seek medical help from those who are not creating the medical problems to begin with.

ABH's legal obligations to John also flow from whatever is left of its medical ethics. The AMA Ethics Rules of Conduct, in particular, AMA Rule of Conduct IX urges physicians to

> "support access to medical care for all people",

a principle which is reiterated by Med. Board Opinion 10-01:

> "The physician has an obligation to **cooperate** in the coordination of medically indicated care **with other health care providers**".

AMA Code of Medical Ethics, Opinion No. 8.041, recites the well-recognized patient right to be:

> "***free to obtain second opinions*** on their own initiative, with or without their physician's knowledge. . . .With the patient's consent, the first physician should provide a history of the case and such other information as the second-opinion physician may need." [http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8041.page]

In this case, John is seeking a first opinion, because he has already exercised his Ohio Constitution protected right to discharge ABH psychiatrist Dr. Sierra pursuant to a handwritten letter meeting the formalities of OAC Sec. 4731– 27-01(C) [Ev./Petitioner/Relator, Item IV, Exhibit D2]. There is no court order, not even an "Entry" fragment, purporting to require John to accept this ABH employee as his physician. John must not be deprived of medical care that his family would pay for while ABH continues to collect taxpayer funds for what it claims is "treatment" and which a mountain of evidence described in the December 4, 2013 fillings, shows to be torture and medical malpractice.

V. ABH'S MOTION FAILS TO JUSTIFY ITS REFUSAL TO STOP ITS FALSE IMPRISONMENT OR FORCED DRUGGING ASSAULTS ON JOHN AND IT DEMONSTRATES ITS FURTHER BAD FAITH BY MAKING FALSE AND MISLEADING STATEMENTS ABOUT ITS SHAM GRIEVANCE PROCEDURES

False imprisonment occurs when an entity or person confines another intentionally without lawful privilege and against his consent within a limited area for any appreciable time,

however short. *Bennett v. Ohio Dept. of Rehab. & Corr.*, 60 OhioSt3d 107, 109 (1991). John has pled facts in the within complaint showing that ABH is engaging in false imprisonment of him. To defeat liability for such false imprisonment, ABH would have the burden to prove legal justification for the restraint. *Johnson v. Reddy*, 163 OhioSt 347, 352 (1955). A facially void commitment order does not provide such a legal justification. Once ABH became aware of grounds to question the legality of its confinement of John, it had a duty to inquire further. This occurred no later than February, 2014 when it was served with the original Petition and Complaint herein. The ABH Memorandum, however, indicates that it never took any steps to ascertain the facts of the original commitment. Its Motion and memorandum herein demonstrate that ABH prefers to try ignore the facts and continue its now clearly unlawful actions. Rather than ending the false imprisonment or even trying to mitigate its effects on John, its Memorandum seeks to justify the unjustifiable. Such actions preclude ABH from claiming immunity because it can no longer claim it acted on a "good faith" belief in "information thought by them to be reliable" under Ohio Rev. Code Sec. 5122.34, as a defense for their continuing false imprisonment of John. Indeed

> "R.C. 5122.34 does not apply to immunize mental health professionals from liability in all contexts" *Estates of Morgan v. Fairfield Family Counseling Ctr* 77 OhioSt3d 284, 304 (1977)

Given what it knew during the grievance proceedings of 2013 and what it has learned since from the filings below and in this Court, ABH's failure to inquire prevents it from sustaining its burden to prove it has any such lawful privilege to continue to confine John. *See Barker v. Netcare Corp.* 147 OhioApp3d 1 (10th App. 2001)($200,000 judgment for false imprisonment sustained despite claim of immunity).

ABH likewise enjoys even less immunity against claims of assault due to its forced drugging because it knew of its illegality earlier than it knew of the illegality of it confinement of John. ABH had reason as early as May, 2013, when the grievance procedures began, to know that its practice of force drugging was also unlawful because it was based on a facially defective "Entry" fragment, void on its face and also for all the grounds set out in the December 4, 2013 pleadings, including its failure to make any of the three findings required by *State v. Lantz*, 2011 Ohio 5436 (11th App), due to violating the Health Freedom Amendment, etc. While ABH may not itself have participated in the sham proceedings of March 4, 2011, in order to avail itself of immunity based on "good faith" under Ohio Rev. Code Sec. 5122.34, it had a duty to inquire as to the legality of this supposed order also. It either did not do so, or it did so and decided to continue the illegal forced drugging anyway. The ABH Memorandum does not specify or explain, but the forced drugging does continue, as alleged in the Amended Complaint.

The ABH brief does, however, tacitly admit that the previous state hospital waited until the day of the forced drugging "hearing", March 4, 2011, when it "sought" to have court permission to force drug John. In other words, ABH acknowledges that there was no constitutionally valid pre-hearing notice. As the docket sheet also shows, neither ABH's predecessor hospital, nor the prosecutor ever bothered to ***file*** a motion for forced drugging. Hence ABH's Motion at least corroborates the statements in the Amended Complaint that no notice, adequate or otherwise, was ever given to John about the forced drugging "hearing". The transcript of the March 4, 2011 "hearing" once again reveals even less of an attempt to comply with due process than the travesty that occurred on 1/25/10. On March 4, 2011, there was again no evidence admitted, and no attempt this time even to recite the statutory language about rights,

as none were read at all, and none were waived. All John's rights were taken because the record of those proceedings shows that the decision to force drug had already been made on the basis of yet another secret, off-the-record "report". John was given no opportunity to present his evidence that the 2009 incident involving some violence occurred when he was taking the government psychiatrist's drugs just as prescribed. [Amended Complaint, Dec. 4 pleadings] The only evidence adduced about medication at the March 4, 2011 proceeding was that the 2006 incident the judge characterized as "relatively minor", and certainly non-violent, occurred when John was not on medications. [Ev./Pet/Relator Item II, p. 4]

Without legal justification, which it cannot in good faith show and which its Motion and Memorandum do not even attempt, ABH is committing a common law assault and battery each time it force drugs John.

V. THE ABH MOTION MUST FAIL BECAUSE ITS THEORIES ABOUT THE SUPPOSED EXISTENCE OF ADEQUATE ALTERNATIVE REMEDIES ARE IRRELEVANT TO WHETHER EXTRAORDINARY WRITS MAY BE GRANTED TO RESTORE A PERSON'S LIBERTY WHERE IT HAS BEEN TAKEN BY DEPRIVING HIM OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

Whether a petitioner has no adequate remedy

> "because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult is beside the point." [*Marion v. Ragen*, 332 U.S. 561, 569-570 (1947)]

Habeas corpus lies to challenge the jurisdiction of the court to order continuing confinement (here of a person found NGRI), regardless of the availability of an appeal. *Reid v. Morris* (1990), 70 Ohio App. 3d 807. This Court has granted *habeas corpus* relief to those where the initial commitment proceeding were constitutionally inadequate just in terms of the quality of the

evidence. E. g. *Sheffel v. Sulikowski,* 62 Ohio St. 2d 128 (1980) At least in *Sheffel* the trial court entertained actual evidence it admitted.

The ABH memorandum confuses the lack of capacity of some courts to grant certain forms of relief, with the loss of jurisdictional authority that occurs when courts deprive citizens of life, liberty or property without due process of law, or as a result of other fundamental constitutional rights deprivations, such as 8th Amendment violations. Where a person is involuntarily hospitalized because the State takes away his fundamental procedural protections, *habeas corpus* is proper even though the court issuing the purported detention order can claim general jurisdictional power to do so. *In re Fisher*, 39 Ohio St. 2d 71 (1974). Purported orders that take away a citizen's liberty must be based on more than judicial capacity generally, whether or not the ABH Memorandum suggests otherwise. In *State ex rel Jackson v. Dallman*, 70 Ohio St.3d 261 (1994) the criminal court clearly had general subject matter jurisdiction to address matters pertaining to the criminal action against the defendant in that case, but it determined that the constitutional rights violations that had occurred fully supported *habeas corpus* as a proper remedy.

The ABH memorandum complains that John has not availed himself of all alternative remedies, though none that it mentions would be adequate or even available. One of those alternative remedies could have been through ABH's own grievance procedure, about which the memorandum has made false statements, as indicated hereinabove. When John and his family attempted to resort to ABH's grievance proceedings during 2013, they implored ABH to stop force drugging him and to allow him to be examined by his own doctor. The ABH response was to deny the grievance without dignifying the requests with any specific answers or by having ever

once allowed an audience with its psychiatrist, Dr. Sierra, whose silence is being strictly maintained. [Ev./Pet/Relator Item IV, Ex. L3]

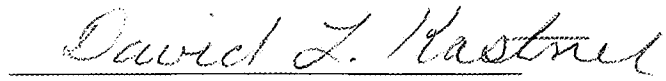
ABH variously suggests that a periodic review hearing before respondent judge would suffice as an adequate alternative remedy but do concede that, as in this case, where "constitutional issue arise which cannot be properly addressed in period hearings" that *habeas corpus* in fact does lie. [ABH memorandum, p. 15] *Roden v. Hubbard*, 65 OhioSt 37 (1981) is clearly inapplicable to the facts of the within case. The only issues that *Roden* had could be dealt with in periodic review hearings. He had no constitutional rights violations to claim.

ABH's position, that John has simply not tried hard enough to obtain rulings from the trial court, is meritless. Just the effort to stop the illegal jailing orders has taken nearly three months without bringing John any closer to having a hearing in that court, and certainly not a hearing that would comport with even a minimum of due process. Efforts to obtain a ruling permitting John access to his physician in hopes of some day having a record sufficient to support a final appealable order, are still floundering. In fact, the docket sheet attached to the ABH Memorandum, and parts of the Amended Complaint make it quite clear than respondent judge has on no fewer than six (6) occasions expressed his intent to deny John the right even to a hearing on the issue of his right to treatment by his own doctor at his own expense. John has attempted at least three times to obtain a hearing on the matter, finally resorting on March 4, 2014, to proffering testimony of witnesses. The chance of ever having a hearing in the trial court on all issues and without fundamental due process violations occurring that would prevent even a record for appeal, is clearly non-existent.

Respondent ABH has failed to demonstrate that it is entitled to any rulings in its favor

based on its Motion for Judgment on the Pleadings.

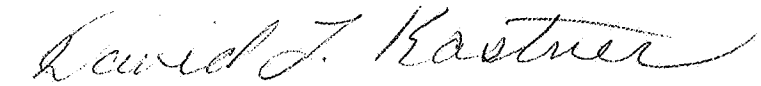
Respectfuly submitted,



David L. Kastner (#0078355)
Attorney for Petitioner/Relator
3434 North Drive
Beavercreek, Ohio 45432
dlkastner@sbcglobal.net
937-431-1327
937-477-8394

CERTIFICATION

This is to certify that on this 9th day of April, 2014, I mailed a true and correct copy of the above and foregoing Memorandum in Opposition to ABH's Motion for Judgment on the Pleadings, to the attorneys for respondent ABH, Roger F. Carroll and Ashley E. Rodabaugh, Health and Human Services Section, Ohio Attorney General, 30 East Broad Street 26th Floor, Columbus, Ohio, and to the attorneys for respondent Holzapfel, Jeffrey C. Marks and Matthew Schmidt, 72 N. Paint Street, Chillicothe, Ohio 45601, all with sufficient postage thereon affixed.



David L Kastner