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2 **IN THE SUPREME COURT FOR THE STATE OF ALASKA**

3 W.S.B.,)
4 Appellant,)
5 vs.) Supreme Court Case No. S-13116
6 ALASKA PSYCHIATRIC INSTITUTE,)
7 Appellee.)
8 Trial Court Case No. 3AN-08-493 PR

9 **MOTION FOR RECONSIDERATION OF ORDER ON**
10 **EMERGENCY MOTION FOR STAY PENDING APPEAL**

11 Pursuant to Appellate Rule 503(h), the State of Alaska, Department of
12 Health and Social Services, Division of Behavioral Health, Alaska Psychiatric Institute ,
13 through the Office of the Attorney General, makes the following motion for
14 reconsideration of the single justice order dated May 23, 2008, granting Mr. Bigley's
15 Updated Emergency Motion for Stay Pending Appeal, which stayed the superior court's
16 grant of a medication petition pending a decision by this Court on Mr. Bigley's appeal.
17 API contends that reconsideration is warranted because the Court overlooked, misapplied,
18 or failed to consider a principle directly controlling, a material fact, and/or a proposition of
19 law.

20 **A. Probable Success on the Merits Should be the Required Showing,**
21 **Given API's Interests Concerning Mr. Bigley and Other Individuals**

22 While the Court's May 23, 2008, order recognized that API has an
23 important interest in fulfilling its duty to patients and satisfying its charter obligations to
24 the public, the Court gave minimal analysis to how those interests are protected when a
25 stay is granted pending appeal. Instead, the Court concluded that API's interest in
26 protecting Mr. Bigley did not dramatically outweigh Mr. Bigley's desire to make treatment
decisions for himself. This not only overlooked the superior court's conclusion that
Mr. Bigley was not competent to make informed decisions concerning the administration

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2 of psychotropic medication and lacked the “capacity to participate in treatment decisions
3 by means of a rational thought process”—conclusions supported by substantial evidence,
4 as set forth in the superior court’s order—it effectively precludes API from administering
5 medication for Mr. Bigley during this, or any future, commitment periods. [Superior
6 Court Order, p. 1-2]

7 Significantly, the Court recognized that this matter presented a substantial
8 possibility of technical mootness, as the underlying thirty-day commitment order will
9 expire well before a decision is issued in this appeal. Despite recognizing the mootness
10 issue, the Court declined to require a showing of probable success on the merits before
11 granting the motion to stay. Without such a showing, Mr. Bigley’s strategy of seeking an
12 emergency stay places API in the position of being unable to provide treatment to him
13 while an (involuntary) patient at API, despite the fact that the superior court concluded that
14 the proposed course of treatment, which included the administration of antipsychotic
15 medication, was in Mr. Bigley’s best interests based on his mental condition, even when
16 taking into account the potential risk of side effects and the intrusion into Mr. Bigley’s
17 constitutional right to individual choice in his mental health treatment. [Superior Court
18 Order, p. 3-5]

19 If API cannot provide treatment to committed patients because they will
20 strategically seek a “stay” of a medication order, and such stays could be granted on a
21 lesser showing of a non-frivolous argument on appeal, the entire statutory scheme for
22 court-approval of psychotropic medication will be substantially undetermined. Anytime a
23 committed patient is not satisfied with trial court’s approval of psychotropic medication,
24 the patient could effectively prevent API from administering the medication and avoid
25 treatment simply by seeking a stay with this Court and making a *de minimus* showing that
26 he or she possesses some sort of colorable argument on appeal. If reconsideration of the
May 23 order setting a new, lower standard for granting stay is not permitted, patients
could escape jurisdiction of the statutory approval scheme simply by contending that their
interest in avoiding treatment or medication is significant without requiring them to
demonstrate a likelihood of success on the merits.

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2 Here, the trial court properly weighed Mr. Bigley's claimed interest in not
3 receiving medication against the "need" for treatment, finding that the proposed treatment
4 was in Mr. Bigley's best interest. [Superior Court Order, p. 3-5] Given the likelihood that
5 patients seeking to avoid the administration of medication will simply seek a stay pending
6 appeal of the court-approval process by a "balance of the hardships" showing, API urges
reconsideration and adoption of the "probable success on the merits" standard.

7 Under the evidence presented, Mr. Bigley would be unable to demonstrate
8 probable success on his appeal and a stay order should not be granted when doing so
9 would undermine the court-approval process and the constitutional inquiries required in
10 connection with that process. Here, the superior court determined, consistent with
11 substantial evidence, that the administration of medication to Mr. Bigley is within the
12 standard of care for psychiatry in Alaska, is appropriate for Mr. Bigley, and no less
13 restrictive alternative treatment is available. [Superior Court Order, p. 1-5] The superior
14 court recognized the high risk to Mr. Bigley associated with the "no treatment" alternative
15 and supported the authorization of medication, in part upon evidence of Mr. Bigley's own
history while on medication. [Superior Court Order, p. 3-5]

16 If a stay is available to an involuntarily-committed mental health patient
17 who does not want to take medication without a showing of probable success on the
18 merits, the result will be that API is required to maintain committed patients, including
19 Mr. Bigley, in its facility without providing the care that their mental-health care
20 providers deem is not only appropriate and beneficial to the patients' mental condition,
21 but that meets the relevant standard of care in Alaska. Further, the statutory scheme for
22 court-approval of medication when the patient lacks capacity to provide informed
23 consent would be rendered meaningless if such a "back-door" is opened to avoid
treatment.

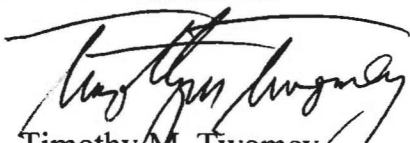
24 The trial court fully explained why treatment with the proposed
25 medication was in Mr. Bigley's best interest. The treatment authorized is within the
26 standard of care and, without treatment, Mr. Bigley cannot function in society, in part,
because he is now unable to obtain shelter or necessary mental health services outside of

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API as a result of his aggressive and angry behavior. [Superior Court Order, p. 3] The superior court supported the use of the medication so that Mr. Bigley may regain his ability to function outside of an institutional setting, not for the purpose of making Mr. Bigley a more compliant or less disruptive patient while at API. Indeed, it fully explained that the risks of no treatment were very high and concluded that Mr. Bigley will continue to be unable to function in the community without the only treatment available, the administration of medication. Under the circumstances, API requests that the Court reconsider the May 23, 2008, order and deny Mr. Bigley's Emergency Motion for Stay so that necessary and appropriate mental health treatment may be provided to Mr. Bigley without further delay.

DATED: 5/28/08

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