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

4 In the Matter of the Necessity )  
for the Hospitalization of: )  
5 )  
6 WILLIAM BIGLEY, )  
Respondent. )  
7 )


Case No. 3AN-08-1252 PR

8 **MOTION IN LIMINE REGARDING RESPONDENT'S PROPOSED**  
9 **WITNESSES BOB WHITAKER, GRACE JACKSON, MD AND RONALD**  
10 **BASSMAN, PhD AND USE OF TERM "FORCED DRUGGING"**

11 The State of Alaska, Alaska Psychiatric Institute ("API"), by and through  
12 the Office of the Attorney General, and pursuant to Evidence Rules 402, 703, and 802,  
13 hereby moves in limine to exclude the testimony of Respondent William S. Bigley  
14 ("Bigley")'s proposed witnesses Bob Whitaker, Grace Jackson, MD, and Ronald  
15 Bassman, PhD ("the proposed witnesses"). Further, any reference to "forced drugging"  
16 by Bigley's counsel should be stricken as inflammatory and unduly prejudicial under  
17 Alaska Rule of Evidence 403. This motion is supported by the memorandum filed  
herewith.

18 DATED: November 4, 2008

19 TALIS J. COLBERG  
20 ATTORNEY GENERAL

21 By:   
22 Erin A. Pohland  
23 Assistant Attorney General  
24 Alaska Bar No. NA14009

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9 **MEMORANDUM IN SUPPORT OF MOTION IN LIMINE**  
10 **REGARDING RESPONDENT'S PROPOSED WITNESSES BOB WHITAKER,**  
11 **GRACE JACKSON, MD AND RONALD BASSMAN, PHD AND**  
12 **USE OF TERM "FORCED DRUGGING"**

13 **I. THE PROPOSED TESTIMONY IS INADMISSIBLE AS IRRELEVANT**

14 Under Alaska Rule of Evidence 402, irrelevant evidence is inadmissible.  
15 Here, the ultimate issue is Bigley's capacity to give or withhold informed consent to  
16 medication.<sup>1</sup> Bigley's capacity is determined using the following standard:

- 17 (1) Did Bigley refuse medication?  
18 (2) Is Bigley capable of informed consent?  
19 (3) If not, are medications in Bigley's best interest?  
20 (4) Are there less intrusive alternatives available to protect the  
21 individual?<sup>2</sup>

22 Given this standard for determining capacity, opinions helpful to the court  
23 are those based on knowledge of the standard of care in the State of Alaska, knowledge  
24 of Bigley's mental health status, and therapeutic alternatives available to Bigley in the  
25 State.

26 The proposed witnesses listed by Bigley as available for cross-  
examination are not residents of the State.<sup>3</sup> The testimony for these out-of-state experts

<sup>1</sup> AS 47.30.839(e).

<sup>2</sup> *Myers v. Alaska Psychiatric Institute*, 138 P.2d 238 (Alaska 2006).

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2 is presumably not about the standard of case (care?) for the State or for API; API has  
3 not yet been provided with the "written testimony" upon which Bigley expects API to  
4 cross-examine the proposed witnesses. To API's knowledge, none of the proposed  
5 witnesses have treated or examined Bigley. It is unclear how these witnesses, not  
6 residents or practitioners in the State, none of whom have treated Bigley, can provide  
7 relevant information as to Bigley's capacity to consent. Generalized analysis of clinical  
8 trials, psychopharmacology, and less intrusive alternatives is not relevant to the hearing;  
9 the sole purpose of the hearing is to determine *Bigley's* ability to consent to medication.  
10 Because none of these proposed witnesses can provide testimony as to *Bigley's* ability  
11 to consent, whether medication would be in *Bigley's* best interest, or less intrusive  
12 alternatives for *Bigley*, their testimony is irrelevant. Having never evaluated or treated  
13 Bigley, the proposed witnesses are unable to provide testimony as to what is in Bigley's  
14 best interest, or what a least restrictive alternative in Anchorage, Alaska is for Bigley.  
15 The only testimony they can offer is theoretical in nature, and therefore irrelevant. As  
16 such, under Alaska Rule of Evidence 402, the testimony of Bob Whitaker, Grace  
17 Jackson, MD, and Ronald Bassman, PhD should be excluded.

## 16 II. THE PROPOSED WITNESSES DO NOT HAVE A PROPER BASIS FOR 17 EXPERT TESTIMONY

18 Similarly, the proposed witnesses do not have specialized knowledge that  
19 will assist the court in determining Bigley's capacity to consent to medication. Under  
20 Alaska Rule of Evidence 703, the facts or data upon which an expert bases an opinion  
21 must be those perceived or made known to the expert at or before the hearing. Bigley's  
22 proposed witnesses are scheduled to testify via "written testimony." It is unknown what  
23 the basis of this testimony would be, given that none of the proposed experts have  
24 treated or examined Bigley, practiced in the State, or are familiar with the standard of  
25 care for the State. As described above, without such knowledge, the proposed witnesses  
26 cannot testify as to Bigley's capacity to consent to medication, which is the *sole issue* of

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3 See Respondent's Preliminary Witness List, attached as Exhibit 1.

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2 this hearing. API requests a determination by the court as to whether the requirements  
3 of Rule 703 have been met prior to any testimony by these proposed witnesses. API  
4 further requests that the testimony of the proposed witnesses be excluded as improper  
5 expert witness testimony.

### 6 **III. THE PROPOSED TESTIMONY IS INADMISSIBLE AS HEARSAY**

7 Under Alaska Rule of Evidence 802, hearsay not within a specified  
8 exception is inadmissible. Here, it is presumed that the written testimony by the  
9 proposed witnesses – which has not been provided to API – is being offered in evidence  
10 to prove the truth of the matter asserted; that is, whether Bigley lacks capacity to  
11 consent, whether medication is in his best interest, and whether there are less restrictive  
12 alternatives to medication. If the written testimony by the proposed witnesses is not  
13 being offered to prove these issues, then it is irrelevant to the hearing and should be  
14 excluded on that basis. The court-ordered medication hearing is not intended to be a  
15 fishing expedition for Bigley to explore the various theories on psychiatric medications;  
16 instead, its sole purpose is to determine Bigley's capacity to consent to medication, as  
17 described above.<sup>4</sup> If the testimony is being offered to prove these issues, then it is  
18 hearsay and should be excluded.

19 As hearsay, this testimony does not fall within any of the recognized  
20 hearsay exceptions under the Alaska Rules of Evidence. Each court-ordered medication  
21 petition is unique, depending on Bigley's capacity at the time of the petition, and so API  
22 has not had a similar opportunity and motive to develop testimony from these experts.  
23 No other potential hearsay exception is applicable to the written testimony by the  
24 proposed witnesses.

25 Bigley has offered these proposed witnesses for cross-examination, but  
26 proposes to offer their direct testimony via writings. As noted above, this written  
testimony has not been provided to API. If the proposed witnesses can be made  
available telephonically for cross-examination, the direct testimony should be conducted

<sup>4</sup> AS 47.30.839(e).

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2 telephonically as well. No reason or explanation has been given as to why the proposed  
3 witnesses cannot provide direct testimony telephonically. If the court finds that the  
4 testimony is in fact relevant and comports with Alaska Rule of Evidence 703, the  
5 proposed testimony should be given telephonically rather than via written testimony. If  
6 not, then the testimony should be stricken as violative of Alaska Rule of Evidence 802.

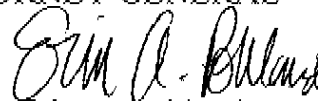
7 **IV. ALL REFERENCES TO "FORCED DRUGGING" SHOULD BE**  
8 **FORBIDDEN AS UNDULY PREJUDICIAL**

9 In previous proceedings and in depositions conducted prior to this  
10 hearing, counsel for Respondent has repeatedly referred to the court-ordered  
11 administration of psychotropic medications as "forced drugging." This language is  
12 prejudicial, and is used with an inflammatory intent. The relevant statute uses the  
13 specific term "court-ordered administration of medication."<sup>5</sup> Under Alaska Rule of  
14 Evidence 403, evidence may be excluded if its probative value is outweighed by the  
15 danger of unfair prejudice or confusion of the issues. Given that the use of the term  
16 "forced drugging" has no probative value, counsel for Respondent should be instructed  
17 to use the proper term as provided under the statute, "court-ordered administration of  
18 medication," in order to avoid undue prejudice to API. Any and all uses of the term  
19 "forced drugging" should be stricken from the record to similarly prevent prejudice.

20 DATED: November 4, 2008

21 TALIS J. COLBERG  
22 ATTORNEY GENERAL

23 By:



Erin A. Pohland

Assistant Attorney General  
Alaska Bar No. NA14009

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26 <sup>5</sup> AS 47.30.839.

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**AFFIDAVIT**

STATE OF ALASKA )  
THIRD JUDICIAL DISTRICT ) ss.

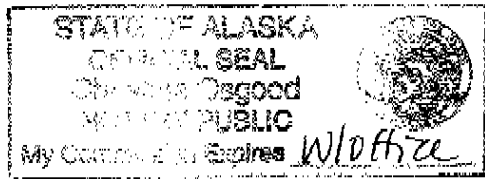
Erin A. Pohland, being first duly sworn upon oath, deposes and says:

- I am the assistant attorney general assigned to the above-captioned matter.
- The facts stated in the Motion in Limine Regarding Respondent's Proposed Witnesses Bob Whitaker, Grace Jackson, MD, and Ronald Bassman, PhD and Use of Term "Forced Drugging" are true and correct to the best of my knowledge.

Further your affiant saith naught.

*Erin A. Pohland*

SUBSCRIBED AND SWORN to before me on this 4<sup>th</sup> day of November, 2008.



*Christina Osgood*  
Notary Public in and for Alaska  
My commission expires with office

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