District Court, Boulder County, Colorado Court Address: 1776 6th Avenue Boulder, CO 80306	
THE PEOPLE OF THE STATE OF COLORADO v. **AHMAD AL ALIWI ALISSA** Defendant.	DATE FILED: February 16, 2023 12:08 PM σ COURT USE ONLY σ
Megan Ring, Colorado State Public Defender Daniel King #26129 Chief Trial Deputy State Public Defender Kathryn Herold #40075 Supervising Deputy State Public Defender Samuel Dunn #46901 Senior Deputy State Public Defender Boulder Regional Public Defenders 2555 55TH Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. **21CR497** Division 13

OBEJECTION TO P-012, AND REQUEST FOR AN ORDER PROHIBITING THE PROSECUTION AND/OR CMHIP FROM COMPELLING MR. ALISSA TO UNDER A FORENSIC NEUROPSYCHOLIGICAL EVALUATION, VIDEO-RECORDED OR OTHERWISE
[P-012]

Mr. Alissa, through counsel and pursuant to his rights to due process, against self-incrimination, and the effective assistance of counsel, as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18, 23, and 25 of the Colorado Constitution, moves this Court to deny P-012 and issue an order prohibiting the prosecution and/or CMHIP from compelling Mr. Alissa to undergo a forensic neuropsychological evaluation, video-recorded or otherwise.

In support, Mr. Alissa states the following:

I. There is no basis in the relevant competency statutes to compel Mr. Alissa to undergo the prosecution's requested evaluation, and the court lacks the authority to grant the prosecution's request.

1. Mr. Alissa is severely mentally ill, and this Court found him incompetent based on two independent evaluators' opinions. The prosecution, believing the first evaluation incorrect and methodologically flawed, requested and received a second competency evaluation by an evaluator that they chose and approved, Dr. Westmoreland. That evaluator concluded in her 52 page report that Mr. Alissa was incompetent as well.

2. Furthermore, Dr. Joshua Hatfield, a licensed psychologist retained by the defense, also completed a competency evaluation of Mr. Alissa and found him to be incompetent to proceed. Notably, Dr. Hatfield met Mr. Alissa not once or twice, but 7 times over a course of months.

3. This means four psychologists have conducted competency evaluations of Mr. Alissa and found him to be incompetent to proceed. No mental health professionals have opined differently. Furthermore, all four doctors have diagnosed Mr. Alissa with schizophrenia, a severe and permanent psychotic illness.

4. Mr. Alissa remains incompetent and severely mentally ill. Throughout the course of his stay at CMHIP, no mental health professionals have expressed an opinion that he is competent.

5. On January 26, 2023, the prosecution filed a "Motion for Court Order Regarding Additional Information Related to Defendant's Competency, or in the Alternative, People's Motion for Restoration Hearing (P-012)," ("Motion").

6. The Motion's title is misleading. While the prosecution's Motion does seek a court order regarding "additional information," the prosecution requests much more than information; rather, it seeks unprecedented direct access to Mr. Alissa to *create* information through its hand selected agents.

7. Indeed, the pertinent issue in the Motion is an unsupported and unprecedented request—that this Court order Mr. Alissa to "undergo a full forensic neuropsychological evaluation by a board-certified clinical neuropsychologist" chosen by the prosecution and to "audio and video" record "all aspects" of the "evaluation" for the prosecution's subsequent use. *See* Motion, p6.

8. The government states in their pleading that they "have concerns regarding CMHIP's evaluations of Defendant and the findings in the reports provided by CMHIP" but they cannot or will not articulate what those concerns are so their "concerns" can be evaluated. Absent an articulation of valid concerns, the defense can only assume the government simply wants to avoid the legal, statutory framework provided for competency evaluations and is asking this Court to allow it unprecedented, extra-legal access to Mr. Alissa.

9. The prosecution's request is not supported by any caselaw. *See generally*, Motion. Further, its attempts to utilize inapplicable competency statutes—statutes that pertain to information used by competency evaluators in making competency determinations—fails.

10. The prosecution seemingly argues that section 16-8.5-104(1) provides this Court with the authority to order Mr. Alissa to submit to a compelled evaluation performed by a prosecution-friendly expert during his restoration therapy.

11. However, section 16-8.5-104(1) gives this Court no such authority:

> [W]hen the court . . . orders that the defendant undergo restoration treatment, any claim by the defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:
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> ****
>
> Information and documents *relating to the competency evaluation* that are created by, obtained by, reviewed by, or relied on by *an evaluator performing a court-ordered evaluation*[.]
>
> ****
>
> Nothing in this section limits the court's ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator or to either party to the case.

(Emphasis added).

12. Contrary to the prosecution's view, the statute clearly refers to "information" that has already been created by CMHIP doctors and cannot be logically read to confer this Court with the authority to (1) order Mr. Alissa to submit to a compelled evaluation performed by a prosecution-friendly expert during restoration therapy; and, then (2) provide the prosecution with this information. *See People In Int. of B.B.A.M.*, 2019 CO 103, ¶ 3 (reversing the district court's order for a second competency evaluation because there was no basis to compel the accused to undergo a second evaluation in the relevant competency statutes); *see also People v. Kilgore*, 2020 CO 6, ¶ 26 (reversing the district court's discovery order because there was no basis for the order in the relevant discovery rule).

13. Additionally, section 16-8.5-104 appears to affirmatively foreclose the prosecution's argument that the Court may order additional evaluations at the prosecution's request after a second evaluation. The statute contemplates access to "[r]eports of evaluations, *including second evaluations*," but it does not refer to other, subsequent evaluations requested by the prosecution. § 16-8.5-104(1)(a), C.R.S. (emphasis added). *See Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) ("Under the rule of interpretation *expressio unius exclusio alterius,* the inclusion of certain items implies the exclusion of others."). Further, the statutory scheme elsewhere only allows for subsequent defense-requested evaluations, and no statute permits the prosecution to hand-select the evaluator. *See* § 16-8.5-106, C.R.S.; D-021 (Opposition to the Court Allowing the Prosecution to Choose the Evaluator for the Second Competency Evaluation), ¶¶ 6-18.[1]

14. The prosecution's alternative argument is just as flawed. The prosecution claims it is entitled to an immediate hearing concurrent with Mr. Alissa's restoration therapy "where the

[1] Mr. Alissa incorporates all arguments and authorities from D-021 in this Motion.

Court may receive sworn testimony" from Drs. Torres, Reis and Pounds "along with other [unidentified] experts in the field," citing section 16-8.5-113(1). Motion, pp5-6.

15. However, the prosecution's reliance on section 16-8.5-113(1) for support is misplaced. Section 16-8.5-113(1) states that the "court may order a *restoration hearing* at any time on its own motion, on motion of the prosecuting attorney, or on motion of the defendant." (Emphasis added).

16. A "restoration hearing" is a hearing to determine whether the incompetent accused has been restored to competency. § 16-8.5-113(6), C.R.S. ("At the [restoration] hearing, the court **shall** determine **whether the defendant is restored to competency**.")(emphasis added).

17. There is no constitutional or statutory support for conducting a restoration hearing when the accused **is in restoration therapy**, and doctors believe there is a substantial probability that the accused will be restored to competency within the reasonably foreseeable future.

18. A restoration hearing is not a hearing where the prosecution can question Drs. Torres, Reis and Pounds "along with other [unidentified] experts in the field" concerning why they are not restoring Mr. Alissa to competency consistent with the prosecution's preferred timeline. *See* Motion, pp5-6; § 16-8.5-113, C.R.S.; *see also People In Int. of B.B.A.M.*, 2019 CO 103, *Kilgore*, ¶ 26.

19. Finally, the prosecution's unsupported and unprecedented requests seeking to compel Mr. Alissa to submit to an extra-legal neuropsychological evaluation and then to provide the results—including any video-recorded interrogation—to the prosecution violates his state and federal constitutional rights to due process, against self-incrimination, and the effective assistance of counsel. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 25; *see also Culombe v. Connecticut*, 367 U.S. 568, 581 (1961)(The privilege against self-incrimination arises from a "cardinal" rule, "basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that . . . a prisoner is not 'to be made the deluded instrument of his own conviction.'")(citation omitted); *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)(The Fifth Amendment to the United States Constitution guarantees the right to counsel during a custodial interrogation.); *Effland v. People*, 240 P.3d 868, 877 (Colo. 2010)(The State may not exploit a defendant's mental condition to extract a confession.).

II. Conducting a Neuropsychological Battery will not provide any information relevant to competency and will not inform any decision before the Court.

20. In its motion, the prosecution states, "It is a standard, nationalized practice to conduct a forensic neuropsychological assessment of defendants under the circumstances of this case." This is incorrect. While neuropsychological assessments are common in cases involving questions of SANITY in the context of an evaluation for insanity, they are rarely used in the context and circumstances of a competency evaluation unless the defendant was developmentally or intellectually impaired, had low IQ or some brain injury.

21. A neuropsychological battery is designed to provide a snapshot of the person's current cognitive abilities. It is an assessment of intellectual functions, NOT psychiatric symptoms of a thought disorder like schizophrenia, and not an assessment of issues of competency. So the instruments (tests) that would be administered would assess for IQ, learning, memory, processing speed, perception, and executive functions.

22. Notably, there are instruments which can be administered which are designed to test for competency.

23. Mr. Alissa has been diagnosed with and has profound symptoms of a psychotic disorder, not a cognitive or developmental disorder or injury.

23. A neuropsychological examination won't provide information about Mr. Alissa's schizophrenia which is a psychotic thought disorder. It won't confirm what the diagnosis is, what symptoms he is experiencing, what his delusional beliefs are, or what hallucinations or other psychotic symptoms he is experiencing, including negative psychotic symptoms.

24. Likewise, a neuropsychological battery will not provide relevant information about competency, meaning whether Mr. Alissa has a factual and rational understanding of the proceedings, and can assist his attorneys in his defense as required by *Godinez v. Moran*, 509 U.S. 389, 396 (1993).

III. Mr. Alissa is very unlikely to be able to complete a Neuropsychological evaluation due to the profound effects of his severe mental illness.

25. There are two types of psychotic symptoms, positive and negative. Although positive symptoms like hallucinations and disorganized thought and speech are more easily recognized to the layperson, often the more prominent symptoms in schizophrenia are negative:

a) *Diminished emotional expression* includes reductions of expression of emotions in the face, eye contact, intonation of speech (prosody) and movements of the hand, head and face that normally give an emotional emphasis to speech.
b) *Avolition* is a decrease in motivated, self-initiated, purposeful activities. The person may sit for long periods of time and show little interest in participating in work or social activities.
c) *Alogia* is manifested by diminished speech output
d) *Anhedonia* is the decreased ability to experience pleasure from positive stimuli or a degradation in the recollection of pleasure previously experienced.
e) *Asociality* refers to the apparent lack of interest in social interaction and may be associated with avolition but it can also be a manifestation of limited opportunities for social interactions.

Diagnostic and Statistical Manual of Mental Disorders (DSM-5)at pp 88.

26. Flattened affect, logia, avolition, anhedonia etc. These symptoms profoundly limit the persons ability to interact with the world and others in, limiting or even preventing them from being able to act and speak, etc. At their worst, these symptoms result in catatonia where the person may not be able to move or speak at all.

> *Catatonic Behavior* is a marked decrease in reactivity to the environment. J This ranges from resistance to instructions (*negatism); to maintain in a rigid, inappropriate or bizarre posture*; to a complete lack of verbal and motor responses (*mutism* and *stupor*). It can also include purposeless and excessive motor activity without obvious cause (*catatonic excitement*). Other features are repeated stereotyped movements, staring, grimacing, mutism, and the echoing of speech.
> *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)at pp 88.*

27. In their reports, all 4 of the psychologists who evaluated Mr. Alissa noted the prominence of his negative symptoms and talked about the profound effects these had on his ability to interact in a meaningful way. Dr. Westmoreland, the prosecution's hand-picked expert who was the last psychologist to see Mr. Alissa in the county jail prior to being sent to the hospital was of the opinion that he was approaching catatonia.

28. Negative psychotic symptoms are very resistant to medication. The prominence of very strong negative symptoms in Mr. Alissa was the reason that Dr. Hatfield opined that his prognosis was not good.

29. Mr. Alissa still suffers profoundly from these symptoms and they limit his ability to interact. He speaks in repetitive non-responsive answers and cannot tolerate contact with others for more than a very brief period of time.

30. A neuropsychological battery of tests takes 7-8 hours of attentive effort on testing. The patient has to focus and perform tasks and put forth optimal cognitive effort in order for the testing results to be valid. Mr. Alissa cannot engage in a conversation that lasts more than a few minutes and there is no way he will be able to get through a neuropsychological examination and obtain valid results because he remains so profoundly sick.

31. Thus, Mr. Alissa, through counsel and pursuant to his rights to due process, against self-incrimination, and the effective assistance of counsel, as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18, 23, and 25 of the Colorado Constitution, moves this Court to deny P-012 and issue an order prohibiting the prosecution and/or CMHIP from compelling Mr. Alissa to undergo a forensic neuropsychological evaluation, video-recorded or otherwise.

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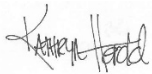

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Certificate of Service

I hereby certify that on 2/16/23, 2023, I served the foregoing document through Colorado E filing to all opposing counsel of record.
s/skoslosky

Dated: February 16, 2023