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| DISTRICT COURT, BOULDER COUNTY, COLORADO<br>1777 Sixth Street<br>Boulder, CO 80302   | DATE FILED: September 22, 2023 8:54 AM |
| <b>PEOPLE OF THE STATE OF COLORADO</b><br><br>v.<br><br><b>AHMAD AL ALIWI ALISSA</b><br>Defendant  | <b>COURT USE ONLY</b>                  |
| Michael T. Dougherty, District Attorney<br>Adam Kendall, Chief Trial Deputy District Attorney<br>1777 Sixth Street<br>Boulder, CO 80302<br><br>Phone Number: (303)441-3700<br>FAX Number: (303)441-4703<br>E-mail: akendall@bouldercounty.org<br>Atty. Reg. #38905 | Case No.<br>21CR497<br><br>Div:13      |
| <b>People’s Response to [Defendant’s] Continued Objection to Dr. Scott Bender Testifying Remote (D-025)</b>  |  |

On September 20, 2023, Ahmad Al Aliwi Alissa (the “Defendant”) filed his Continued Objection to Dr. Scott Bender Testifying Remote (D-025) (the “Objection”), taking issue with Dr. Scott Bender testifying remotely at the September 27-28, 2023 hearing. The Objection is *nearly identical* to Defendant’s Objection to Any Witness Testifying Remotely at the May 23<sup>rd</sup>, 2023 Hearing (D-022). The Court previously denied D-022 on May 4, 2023, finding that Dr. Bender could properly testify remotely. Yet, Defendant is recycling his old argument. Once again, outside of citing the United States and Colorado Constitutions and Defendant’s general “right to confront and cross-examine the witnesses against him,” Defendant provides no authority in support of his Objection. *See* Objection, ¶ 5.

Contrary to Defendant’s claim, the restoration hearing is the type of hearing where remote testimony is proper. The People prefer to have Dr. Bender testify in person, but he is committed to work in Georgia during the hearing, this work cannot be rescheduled, and he is unable to travel to Colorado. Because of this conflict, Dr. Bender will testify at the hearing via live, remote

videoconferencing. When the hearing was set, on the record, the People explained that Dr. Bender would have to testify virtually. In support of this Response, the People further state as follows:

### **Authority and Argument**

There is no rule within the Colorado Rules of Criminal Procedure that expressly prohibits video testimony at any hearing, except for a trial, in a criminal case. But, even with trials, there is some leeway regarding the requirement for in-person testimony. Colo. R. Crim. P. 26 states “[i]n all trials the testimony of witnesses shall be taken orally in open court, *unless otherwise provided by law.*” (emphasis added). Another rule, Colo. R. Crim. P. 43, does not address remote witness testimony or video appearance by the People, but it does authorize a defendant and his attorney to appear by video. In fact, a defendant and counsel may appear by video “for any proceeding that does not involve a jury.” Colo. R. Crim. P. 43(e)(2).

While the People are unable to find case law addressing remote testimony by witnesses via video at a restoration hearing, relevant case law evidences that, even at trial, allowing witnesses to testify by video is proper in certain circumstances and not violative of the Confrontation Clause. *See People v. Hebert*, 411 P.3d 201, 204 (Colo. App. 2016) (holding that while “[t]he Sixth Amendment provides all criminal defendants with the right to confront witnesses who testify against them at trial” admitting a video recorded deposition of a victim at trial did not violate the defendant’s confrontation rights because the process was necessary to protect the victim’s health and the procedure ensured the testimony was reliable); *see also People v. Phillips*, 315 P.3d 136, 150-53 (Colo. App. 2012) (holding that a trial court does not violate defendant's federal Confrontation Clause or Colorado State “face to face” Confrontation Clause rights by allowing a child witness to testify via closed-circuit television at trial); C.R.S. § 16-10-402 (authorizing testimony at trial via the use of closed-circuit television in some circumstances).

In weighing whether to allow remote testimony at the restoration hearing—a pre-trial hearing—a useful comparison for the Court to consider is a defendant’s confrontation rights associated with a preliminary hearing. “An accused has a statutory right to a preliminary hearing before a judge to determine whether probable cause exists to permit trial of the charged offense. The prosecution bears the burden of proving probable cause, and the defendant has the right to cross-examine the prosecution’s witnesses and introduce evidence.” *Harris v. District Court of City and County of Denver*, 843 P.2d 1316, 1319 (Colo. 1993) (citations omitted). At a preliminary hearing “a defendant has no constitutional right to an unrestricted confrontation of all witnesses.” *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986) (citing *Rex v. Sullivan*, 575 P.2d 408 (1978)) (emphasis added). Notably, a “preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery.” *Id.* (citations omitted). “However, once a witness has been called by the prosecution at a preliminary hearing, a defendant has a right to conduct reasonable cross-examination of the witness on the issue of probable cause.” *Harris*, 843 P.2d at 1319.

Another point of comparison is the confrontation rights associated with a make-my-day hearing. In *People v. Hernandez*, the Colorado Supreme Court examined an order issued by a trial court allowing the prosecution to present witnesses at a make-my-day hearing, to be held during the COVID pandemic, live via a videoconferencing platform. 2021 CO 45, ¶ 1. The *Hernandez* court determined that a make-my-day hearing was analogous to a preliminary hearing. *Id.* at ¶ 23. The court held that the live videoconferencing platform utilized for the hearing would allow the trial court to assess the credibility of witnesses as the witnesses would be under oath, subject to live cross-examination, and all parties could observe the witnesses’ demeanor. *Id.* at ¶ 26. Ultimately, the court ruled that there was no need to decide if confrontation rights extended to a

make-my-day hearing as testimony “live over a videoconference platform” did not violate the defendant’s right to confrontation under the circumstances of the case.<sup>1</sup> *Id.* at ¶¶ 24, 27.

A restoration hearing is similar to a preliminary hearing and a make-my-day hearing “because it is ‘designed to shield parties from the rigors of trial when the evidence shows the presence or absence of certain circumstances’” *Id.* at ¶ 23 (quoting *People v. Wood*, 255 P.3d 1136, 1140 (Colo. 2011)). A restoration hearing is not a final judgment; it is a hearing to determine if statutory conditions have been met and, if so, this would allow the case to proceed to trial. *See id.*

In the instant matter, Dr. Bender, a renowned expert and board-certified forensic neuropsychologist, is a necessary witness for the People to meet the burden of proof at the hearing—to prove by a preponderance of the evidence that Defendant is competent. Dr. Bender will testify as to his review of the records provided to the parties by the Colorado Mental Health Institute at Pueblo (“CMHIP”) related to Defendant’s competency, and the work done by CMHIP to restore Defendant to competency, focusing his testimony primarily on 2023. He will discuss efforts that have and should have been made to restore Defendant to competency and can opine as to the efficacy and expectations associated with the most recent efforts by CMHIP to restore Defendant to competency. Dr. Bender is not available to testify in person on September 27-28, 2023. However, as the *Hernandez* court held, live, videoconference testimony will allow for detailed examination of Dr. Bender and for the Court to properly assess his testimony. Understanding there is no categorical bar on testimony via video even at trial, live, videoconference testimony from Dr. Bender at the September 27-28, 2023 restoration hearing is permissible and necessary under the circumstances of this case.

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<sup>1</sup> The Colorado Court of Appeals has gone even further than the *Hernandez* court, holding that confrontation rights do not extend to pretrial hearings, period. *People v. Felder*, 129 P.3d 1072, 1073-74 (Colo. App. 2005).

WHEREFORE, for all of the above stated reasons, the People request that this Court again deny the Objection and allow Dr. Bender to testify remotely, live through a videoconference platform at the September 27-28, 2023 restoration hearing.

Respectfully submitted,

MICHAEL T. DOUGHERTY  
DISTRICT ATTORNEY

By:  
s/Adam D. Kendall  
Adam D. Kendall  
September 22, 2023

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CERTIFICATE OF SERVICE  
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I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system on September 22, 2023, and addressed as follows:

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