Boulder District Court, Boulder County, State of Colorado 1777 Sixth Street Boulder, Colorado 80302	DATE FILED August 22, 2024 3:27 PM
People of the State of Colorado, v. **AHMAD AL ALIWI ALISSA,** Defendant.	**▲ COURT USE ONLY ▲**
Attorneys for the People: Michael Dougherty, Esq., Adam Kendall, Esq., and Ken Kupfner, Esq. *Attorneys for Defendant:* Samuel Dunn, Esq., and Kathryn Herold, Esq.	Case Number: **2021CR497** Division **13** Courtroom **G**
ORDER RE: AUGUST 15 MOTIONS HEARING	

This matter came before the Court for a motions hearing. Michael Dougherty, Esq., and Ken Kupfner, Esq., appear on behalf of the People. Kathryn Herold, Esq. and Sam Dunn, Esq. appear on behalf of Defendant, Ahmad Alissa, who also appears. The proceedings were recorded on the FTR and by court reporter Kim Reifein.

BACKGROUND

Defendant is charged with ten counts of Murder in the First Degree (F1), forty-seven counts of Attempted Murder in the First Degree (F2), one count of Assault in the First Degree (F3), six counts of Possession of a Large-Capacity Magazine During the Commission of a Felony (F6), and forty-seven counts of Crime of Violence with a Semiautomatic Assault Weapon as a Sentence Enhancer. This case was set for a motions hearing on August 6, 2024, but the matter was continued until August 15, 2024. This case is set to begin jury selection the week of August 26, 2024, with the remainder of the four-week jury trial beginning the week of September 2, 2024.

SWORN WITNESSES

1. Commander Joshua Bonafede, Boulder County Sheriff's Office.
2. Former Officer Brad Frederking, Boulder Police Department.
3. Sergeant Connor Pontiakos, Boulder County Sheriff's Office.

ADMITTED EXHIBITS

People's Exhibits: 1, 2, and 3.

APPLICABLE LAW

Custodial Interrogation

Prior to any custodial interrogation of a suspect by a police officer, the suspect is constitutionally entitled to be advised of certain rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). If a suspect's statements are made while the suspect is not in custody, or if the statements are not made in response to interrogation (i.e., if the statements are "spontaneous"), no *Miranda* warnings are required. *Id.*

The test for determining whether questioning is "custodial" is an objective one: the trial court is to determine whether, in view of all the circumstances surrounding the encounter at the time of the questioning, a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way. *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984). This test is not whether a reasonable person would believe he was free to leave, but rather "whether such a person would believe he was in police custody of the degree associated with a formal arrest." *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001).

Colorado courts have identified nine factors as relevant to determining whether a reasonable person would have believed he was in custody: the time, place, and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer; the officer's tone of voice and general demeanor; the length and mode of the interrogation; whether any limitation of movement or other form of restraint was placed on the suspect during the interrogation; the officer's response to any questions asked by the suspect; whether any directions were given to the suspect during the interrogation; and the suspect's verbal and nonverbal responses to such directions. *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

The standard for determining whether questioning constitutes interrogation is an objective one. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *People v. Trujillo*, 784 P.2d 788, 790 (Colo. 1990). Under *Miranda*, interrogation consists not only of express questioning, but also of its functional equivalent, i.e., "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Lewis v. Florida*, 486 U.S. 1036 (1988) (quoting *Innis*, 446 U.S. at 301). This inquiry "focuses primarily upon the perceptions of the suspect . . . rather than the intent of the police." *Innis*, 446 U.S. at 301.

Police conduct generally constitutes the functional equivalent of interrogation if the defendant is "subjected to compelling influences, psychological ploys, or direct questioning." See *Arizona v. Mauro*, 481 U.S. 520 (1987); *People v. Rivas*, 13 P.3d 315, 319 (Colo. 2000) ("Practices identified as the functional equivalents of interrogation generally employ compelling influences or psychological ploys in tandem with police custody to obtain confessions."). Further, "[t]he words or actions of the officer must also be such that he should know they will be perceived by the suspect as provocative rather than merely informative or permissive." *Rivas*, 13 P.3d at 320. "In determining whether a person has been

subjected to custodial interrogation, courts must consider the totality of the circumstances surrounding the encounter." *Id.* at 319 (citing *People v. Gonzales*, 987 P.2d 239, 241 (Colo. 1999)).

Miranda, however, establishes that "confessions remain a proper element in law enforcement and that volunteered statements of any kind are not barred by the Fifth Amendment." *Id.* at 319 (citing *Miranda*, 384 U.S. at 478). Accordingly, the pivotal issue is "whether the defendant was compelled by the police to make a statement, not whether he was allowed to talk to the police without the benefit of warnings and counsel." *Id.*

Public Safety Exception to Miranda Requirements

Even where custodial interrogation factors are met, courts have long recognized a public safety exception to the *Miranda* requirements, which does not require a *Miranda* warning when, under the totality of the circumstances, the officer's questioning relates to an objectively reasonable need to protect the public or police from immediate danger. *Perez v. People*, 479 P.3d 430, 435 (Colo. 2021).

"…the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." *New York v. Quarles*, 467 U.S. 649, 657-658 (1984).

Additionally, the Supreme Court maintains a belief that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659. Where a defendant is questioned about issues of public safety prior to being read the *Miranda* warning and is then given the warning prior to questioning unrelated to public safety, this demonstrates a clear example of officers properly using their questioning discretion. *Id.* Where a defendant is armed, questions about other potentially armed defendants will fall under the public safety exception. See *People v. Wakefield*, 428 P.3d 639, 651 (Colo. App. 2018). Questions meant to determine whether there could be other armed suspects or injured victims in the vicinity also fall within the public safety exception. *Id.* Where a defendant is questioned about issues of public safety prior to being read the *Miranda* warning and is then read *Miranda* warning prior to questioning unrelated to public safety is a clear example of officers properly using their questioning discretion. *See Quarles* 467 U.S. at 658-659.

Right to Counsel

Additionally, under *Miranda*, if a suspect unambiguously and unequivocally invokes his right to counsel during an interrogation, the police must scrupulously honor that request. *Miranda*, 384 U.S. at 478; *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In order to invoke that right, a suspect must "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances *would* understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 458 (1994) (emphasis added). When determining whether a defendant unambiguously

invoked his right to counsel, a court must consider "the totality of the circumstances," examining factors such as what was said, the questioner's and the suspect's demeanor and tone, the suspect's behavior, and the suspect's personal characteristics (such as age) and background. *People v. Kutlak*, 364 P.3d 199, 206 (Colo. 2016). When a suspect unambiguously invokes his right to counsel, interrogation must cease. Smith v. Illinois, 469 U.S. 91, 92 (1984).

Waiver

A suspect can waive his *Miranda* rights. A *Miranda* waiver must be made knowingly, voluntarily, and intelligently. *Miranda*, 384 U.S. 436. A waiver is voluntary if is a product of "a free and deliberate choice rather than intimidation, coercion, or deception." *People v. Mejia-Mendoza*, 965 P.2d 777, 780 (Colo. 1998) (quoting *People v. Hopkins*, 774 P.2d 849, 851 (Colo.1989)). The prosecution must prove by a preponderance of the evidence that the *Miranda* waiver was made knowingly, voluntarily, and intelligently based on the totality of the circumstances. *People v. Platt*, 81 P.3d 1060 (Colo. 2004).

In analyzing the totality of the circumstances, factors to consider include, but are not limited to: the time interval between the initial *Miranda* advisement and any subsequent interrogation; whether the defendant or the interrogating officer initiated the interview; whether and to what extent the interrogating officer reminded the defendant of his rights prior to the interrogation by asking him if he recalled his rights, understood them, or wanted an attorney; the clarity and form of the defendant's acknowledgement and waiver, if any; and the background and experience of the defendant in connection with the criminal justice system. *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

Voluntariness

To be admissible under any circumstances, a defendant's statements must be voluntary. *Jackson v. Denno*, 378 U.S. 368 (1964). Voluntary statements are statements that are not "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *People v. Freeman*, 668 P.2d 1371, 1378 (Colo. 1983). In making a finding regarding voluntariness, the trial court must consider the totality of the circumstances and determine whether the defendant's will was overborne by coercive police conduct. *People v. Stephenson*, 56 P.3d 1112, 1120 (Colo. App. 2001). The prosecution bears the burden of proving, by a preponderance of the evidence, that a Defendant's statement is voluntary. *People v. May*, 859 P.2d 879 (Colo.1993).

"Critical to any finding of involuntariness is the existence of coercive governmental conduct, either physical or mental, that plays a significant role in inducing a confession or an inculpatory statement." *People v. Valdez*, 969 P.2d 208, 211 (Colo. 1998). A statement may be involuntary even if a defendant was not in custody when the statement was made, even if the statement was not inculpatory, and even if the statement was preceded by a valid *Miranda* warning. *People v. Humphrey*, 132 P.3d 352, 360 (Colo. 2006). The mere fact that police conduct is angry and confrontational, or that a defendant was under the influence of drugs and alcohol at the time of questioning does not necessarily render a statement involuntary. *Valdez*, 969 P.2d at 212; *People v. Cardenas*, 25 P.3d 1258, 1264 (Colo. App. 2000). "However, the deliberate exploitation of a person's weaknesses by psychological intimidation can, under certain circumstances, constitute coercion rendering a statement involuntary." *Valdez*, 969 P.2d at 211.

Colorado courts have considered various factors in assessing voluntariness, including the following:

> whether the defendant was in custody or was free to leave and was aware of his or her situation; whether *Miranda* warnings were given prior to any interrogation and whether the defendant understood and waived his or her *Miranda* rights; whether the challenged statement was made during the course of an interrogation or instead was volunteered; whether any overt or implied threat or promise was directed to the defendant; the method and style employed by the interrogator in questioning defendant and the length and place of the interrogation; and the defendant's mental and physical condition immediately prior to and during the interrogation, as well as the defendant's educational background, employment status, and prior experience with law enforcement and the criminal justice system.

People v. Roybal, 55 P.3d 144, 147 (Colo. App. 2001); *People v. Gennings*, 808 P.2d 839 (Colo. 1991).

In *People v. Clayton*, 207 P.3d 831, 836 (Colo. 2009), the Colorado Supreme Court addressed a situation where officers declined a suspect's request to call his mother prior to waiving his *Miranda* rights. In that case, the Court found that a suspect does not have a constitutional right to call family members and denying such a request does not weigh against voluntariness. *Id.*

MATTERS AT THE HEARING

The Court reviewed the evidence, the case file, and applicable law, and considered the testimony and arguments of counsel. The findings and rulings made on the record are incorporated herein, and the Court now issues the following findings and orders.

1. Defendant's Motion to Suppress Statements – King Soopers (D-58):

In their July 8, 2024, *Motion to Suppress Statements*, Defendant asserted that during his apprehension at King Soopers, he was immediately placed in handcuffs and under arrest. While being handcuffed, police officers asked Defendant multiple questions, including, "Where are your clothes? Why did you take your clothes off? Did you shoot people? Are you the shooter?" Defendant responded to these questions before being handed off to another police officer and being led outside. Defendant is asked additional questions, such as, "Is anyone else in there that is going to get hurt? Are you here by yourself? What did you bring with you when you came?" Defendant also requests to speak to his mother, but a police officer responds to this request by saying, "I'm not going to let you call your mom until you answer my question, is there anyone else inside that is going to shoot at us?" Defendant is subsequently placed in the back of an ambulance and transported to the hospital.

Defendant argued that immediately upon his encounter with police at King Soopers, Defendant was in custody and subject to interrogation by police officers in violation of his *Miranda* rights.

Defendant additionally argued his statements were not voluntary, asserting that he was told that he could only speak to his mother if he answered the police officers' questions and that this "create[d] an atmosphere of unconstitutional coercion." Therefore, Defendant argued that his statements must be suppressed.

The People argued in their July 26, 2024, *Response to Defendant's Motion to Suppress Statements* that though they do not contest that Defendant was in custody for the purposes of *Miranda*, Defendant's questioning upon his apprehension falls underneath the public safety exception to law enforcement's *Miranda* requirements. The People argued "the officers' questions were reasonably prompted by a concern for public safety and the need for such answers substantially outweigh Defendant's privilege against self-incrimination." Additionally, the People argued Defendant was not coerced into speaking with law enforcement, that police conduct did not play a significant role in inducing Defendant's statements, that Defendant's will was not overborne, and therefore, Defendant's statements were voluntary and should not be suppressed.

Com. Bonafede testified at the hearing that he was the commander of the Boulder County SWAT team and K9 Units. On the day of the incident, he was alerted about the active shooter event at King Soopers by phone and responded to the scene. When he arrived, there was already a "sea of cops" present. Com. Bonafede learned that there was not a team of officers inside at the time because a previous team had attempted to enter and been forced to retreat after they were fired upon. In order to get authorization to gain entry, they had to retrieve and assemble a shield that was rated for protection against rifle fire. Upon entry, Com. Bonafede noticed multiple casualties, including Officer Talley. At this time, there were multiple potential angles they had to cover and law enforcement was unsure if there were multiple shooters. However, they made contact with Defendant near the pharmacy section of the store when they saw him come out from behind a display case or counter, wearing only his underwear and with his hands up in the air and bleeding from a wound in his leg. The officers commanded Defendant to continue approaching them with his hands raised, eventually walking backwards towards the rifle shield, where Defendant was instructed to kneel down to be handcuffed. Com. Bonafede testified that it was a safety issue to approach Defendant out in the open at this time because law enforcement still believed that there may be more than one shooter at the location. After Defendant was handcuffed, Com. Bonafede asked Defendant a series of questions, such as why he wasn't wearing clothes and whether Defendant was the shooter or where his gun was located.

Brad Frederking testified at the hearing that he used to be an officer with the Boulder Police Department and was on-duty with a trainee at the time of the shooting. They arrived at the King Soopers to see numerous patrol vehicles clogging the driveway that turns off of Table Mesa, so he instructed his trainee to hop the curb and park by the entrance. While they worked their way to the entrance of the store through the parking lot, they heard a volley of firearm rounds and breaking glass. The shots sounded like they were coming from the other side of the wall that they were standing against, but the other officers outside the door couldn't tell where they were being fired from inside the store. Officers attempted to

enter the store with an armored vehicle and then made announcements to tell the suspect to surrender. Eventually, officers managed to make it into the entryway of the store and dragged Ofc. Talley's body out to where Frederking was stationed, who then helped carry him out the doors to be placed on the ground outside. Frederking testified that he saw Defendant surrendering and Defendant was brought out to the vestibule area where he was stationed. Frederking volunteered to take custody of Defendant and escorted him out of the store with Sgt. Drellis, walking Defendant to the northeast corner of the building to get him into a vehicle and away from the scene. As they were walking Defendant away, Sgt. Drellis asked Defendant whether there were other suspects in the store, if there was anyone else inside who was going to hurt someone, or if Defendant came on his own. Defendant said that he wouldn't answer the officers' questions until someone let him speak to his mom. Sgt. Drellis stated that he would let Defendant call his mom if he answered their questions first.

The People confirmed at the hearing that they were not contesting that Defendant was in custody or that he was subject to interrogation regarding the statements that Defendant made during and immediately after his apprehension at the Table Mesa King Soopers. However, the People argued that the statements fell under the public safety exception and so there is not a suppression issue with respect to a failure to *Mirandize* Defendant prior to asking him questions. The People argued that the public safety exception is something that has been recognized in Colorado for a long time – the Colorado Supreme Court recognized it almost a decade before the Supreme Court of the United States solidified it as good law. Additionally, the People argued that Defendant's statements were made voluntarily as there was no coercive police conduct that induced his statements.

The Court finds (and the People concede) that Defendant is essentially in custody from the moment that he surrenders to the police officers inside of King Soopers. When Defendant approaches the armed officers to surrender, he is immediately given orders and is handcuffed before being escorted outside. It is clear the Defendant was not free to leave and that his freedom of movement was restrained to the degree that a reasonable person would understand that they were under arrest. It is also true that the officers immediately start asking Defendant questions that are designed to elicit incriminating responses, such as whether Defendant had shot people or if he was "their shooter." Furthermore, Defendant was never *Mirandized* while in police custody at King Soopers – per the officers' testimony at the motions hearing, Defendant was first given a *Miranda* warning at the hospital around 2:40am the next morning.

Under normal circumstances, Defendant's responses to the officers' impromptu interrogation would be suppressed as statements clearly made in violation of *Miranda*. However, the Court agrees with the People's argument regarding the public safety exception to law enforcement's *Miranda* requirements. The Court finds under the totality of the circumstances, the officers' questioning related to an objectively reasonable need to protect the public and police from immediate danger. The police on the scene at the time of the shooting were still securing the area and unsure if there were any additional shooters that needed to be contained. The officers' questions are geared almost exclusively toward public

safety concerns, such as asking Defendant where he left the gun, whether he came to King Soopers alone, and whether there were any other people inside the building who were going to shoot at them. These are clearly the kinds of questions that are being contemplated by the *Quarles* and *Wakefield* courts under the public safety exception and were necessary to ensure the safety of the public and other officers, one of whom had already been shot and killed at the scene.

Finally, turning to the issue of whether Defendant responded to the officers' questions and made his statements voluntarily, the Court finds under the totality of the circumstances that there was no coercive police conduct that induced Defendant's statements. Though Defendant had surrendered, been handcuffed, and was surrounded by armed police officers, the officers made no threats or promises to induce Defendant's statements. The officers' tones were calm and professional. Though Defendant repeatedly asked to speak to his mother, and an officer told him that he would not be able to speak with her until after Defendant answered his questions, the People correctly argued that Defendant was not constitutionally entitled to speak with family and denying Defendant's request does not weigh against the voluntariness of Defendant's statements. *See People v. Clayton*, 207 P.3d 831, 836 (Colo. 2009). Therefore, the Court DENIES Defendant's *Motion to Suppress Statements – King Soopers (D-58)*. Defendant's statements to police upon his apprehension at King Soopers shall be admissible at trial.

2. Defendant's Motion to Suppress Statements – Hospital (D-59):

In their July 8, 2024, *Motion to Suppress Statements*, Defendant asserted while he was at the hospital receiving medical treatment for the gunshot wound to his leg, law enforcement attempted to interrogate Defendant "throughout the night and into the morning." Defendant asserted that law enforcement used coercive techniques in an attempt to get Defendant to speak with them, including using Defendant's family as a way to try to convince Defendant to speak with them. After two a.m., law enforcement read Defendant his *Miranda* rights. Defendant complained about how tired he was and eventually invoked his right to remain silent, prompting law enforcement to leave. Defendant argued that Defendant was clearly in custody while in the hospital and that any and all of his statements prior to being given a *Miranda* warning should be suppressed. Defendant additionally argued that any statements made were not voluntary and should be suppressed under the voluntariness standard as well.

In their July 26, 2024, *Response to Defendant's Motion to Suppress Statements*, the People conceded that Defendant was in custody during his time at the hospital. However, the People asserted that "many of the conversations between law enforcement and Defendant while at the hospital did not rise to the level of interrogation," but were merely voluntary exchanges about Defendant's background, family, education, food, and level of pain. Nonetheless, the People assert that they are not seeking to admit any of Defendant's statements while he is in the hospital at trial except for Defendant's invocation of his right to remain silent and right to counsel to rebut the defense of not guilty by reason of insanity. The People asserted that they will likely call two expert witnesses to testify regarding Defendant not being legally insane at the time of his alleged crimes and that their testimony may include Defendant's decision to refuse to answer questions and invoke his right to counsel.

Sgt. Pontiakos testified at the hearing that he initially reported to the scene as a first responder before being called to report to Boulder Community Hospital to aid in the ongoing investigation of the King Soopers shooting. When he arrived, Sgt. Pontiakos was shown to the emergency room where Defendant was being treated and eventually went with Defendant to another hospital room after he was stabilized a couple hours after Sgt. Pontiakos' arrival. Defendant remained handcuffed to the hospital bed throughout his time at the hospital. Sgt. Pontiakos wanted to interview Defendant to try to get his side of the story and he was accompanied by Boulder Police Department Detective Kwame Williams and FBI special agent Justin Stern. They talked about a multitude of topics with Defendant and he appeared to be tracking the conversation normally while not appearing to suffer from any hallucinations. Defendant mentioned several times that he wanted to rest or be left alone and the officers would generally honor that request and leave the room to let Defendant rest for some time before returning and resuming their conversation. On a few occasions, Sgt. Pontiakos would ask Defendant if he was willing to talk about what happened at King Soopers, and Defendant would decline to speak about that topic. Defendant did state that he wanted to speak to his mother, and after the officers mentioned that they had spoken with her at her residence, Defendant seemed more inclined to speak with them. However, after Sgt. Pontiakos advised Defendant of his *Miranda* rights around 2:40am before proceeding with more direct questioning, Defendant invoked his right to remain silent. Because of Defendant's invocation of his *Miranda* rights, the officers subsequently left the hospital room. Sgt. Pontiakos stated their tone and demeanor with Defendant was always conversational and respectful and Defendant was always handcuffed to the hospital bed while speaking with the officers.

Defendant argued at the hearing that regardless of whether sanity or mental condition is at issue, when a defendant invokes their right to remain silent, that cannot be introduced at trial, citing the precedent of *Wainwright v. Greenfield*, a Supreme Court of the United States decision from 1986. Defendant argued that in that case, prosecutors tried to use Defendant's post-arrest, post-*Miranda* silence as part of their rebuttal to that defendant's insanity defense, but the Court found that this was a violation of the defendant's due process rights under the 14th Amendment. Defendant argued that it would be an additional violation of Defendant's 5th Amendment rights if the Court allowed this evidence to be admissible. Defendant additionally cites the precedent of *People v. Castro*, 521 P. 3d 1035, a Colorado Court of Appeals case where the Court ruled that a prosecutor's cross-examination of a defendant regarding his post-*Miranda* silence for purposes of impeachment was improper. Defendant concludes their argument by asserting that the context of the circumstances shown in the bodyworn camera footage shows that Defendant's statements were not voluntary and Defendant was simply "parroting back" what he heard from Sgt. Pontiakos in order to try to get the officers to leave him alone.

The People argued that while Defendant is correct that normally a jury would never get to hear about a defendant invoking their right to remain silent or their right to counsel, they were purely seeking to admit this evidence as rebuttal to Defendant's insanity defense and that these statements were made voluntarily. The People argued there was no coercive police conduct involved during this period with

Defendant in the hospital room and that Defendant's *Miranda* protections do not prevent the prosecution from admitting Defendant's prior inconsistent statements, citing *Harris v. New York*, 91 S.Ct. 643, 401 U.S. 222 (U.S.N.Y. 1971). The People also cited to *Liggett v. People*, 529 P.3d 113, 2023 CO 22 (Colo., 2023), arguing that even statements that were inadmissible due to a *Miranda* violation would nonetheless be admissible on rebuttal for the purposes of impeachment.

The Court finds (and the People concede) that all of Defendant's statements while he was at the hospital occurred while he was in custody, prior to being given a *Miranda* warning. Sgt. Pontiakos testified that, although they would periodically leave Defendant alone to rest at his request, Defendant remained handcuffed to the hospital bed and it was clear that Defendant was not free to leave. The questions that law enforcement asked Defendant were clearly designed to elicit incriminating responses, so anything Defendant said prior to being given a *Miranda* warning at 2:40am was the result of custodial interrogation and would not be admissible at trial. The People have assured the Court that they do not seek to admit any of Defendant's pre-*Miranda* statements. However, the People seek to admit Defendant's response immediately after being given his *Miranda* warning, specifically his invocation of his right to remain silent, as rebuttal to Defendant's plea of not guilty by reason of insanity.

While the People are correct that *Liggett* holds that a defendant pleading not guilty by reason of insanity may open the door to some otherwise inadmissible evidence, such as statements made in violation of defendant's *Miranda* rights, this does not apply to Defendant's invocation of his right to remain silent. The Supreme Court of the United States has consistently protected the right to remain silent, finding that *Miranda* warnings contain an implied promise that a person's silence would carry no penalty and that "…it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 96 S.Ct. 2240, 2245, 426 U.S. 610, 618 (U.S. Ohio, 1976). The Supreme Court then extended this assurance specifically to a defendant who subsequently raised an insanity defense, finding that it would be fundamentally unfair for a prosecutor to breach that promise by using a defendant's post-arrest, post-*Miranda*-warning silence as evidence of sanity. *Wainwright v. Greenfield*, 106 S.Ct. 634, 474 U.S. 284 (U.S.Fla.,1986). Colorado courts have since applied this ruling, finding that the "use of an accused's post-arrest silence for impeachment purposes, after *Miranda* warnings have been given, violates due process of law." *People v. Hardiway*, 874 P.2d 425, 427 (Colo.App., 1993). See also *People v. Castro*, 521 P.3d 1035, 2022 COA 101 (Colo.App., 2022).

Therefore, given the People's assurance that they concede Defendant was subject to custodial interrogation at the hospital prior to being given a *Miranda* warning and they do not seek to introduce any of Defendant's pre-*Miranda* statements, the Court GRANTS Defendant's *Motion to Suppress Statements – Hospital (D-59)* and ORDERS that Defendant's post-*Miranda* invocation of his right to remain silent shall be suppressed and shall not be admissible at trial for any purpose. However, the Court also notes that in their original motion, Defendant additionally challenged the consent form signed by Defendant to release his medical records, arguing that Defendant was coerced by law enforcement into

signing the document and that the evidence should be suppressed as "fruit of the poisonous tree." This issue was not addressed at the motions hearing but may be addressed at trial, if necessary.

3. Defendant's Notice Regarding the Rule 24 Statement (D-65):

On August 12, 2024, Defendant filed their *Notice Regarding the Rule 24 Statement*, informing the Court that the parties had attempted to work together in creating a Rule 24 statement to be presented to the jurors during *voir dire*, but they were at an impasse and would submit two different versions for the Court to consider. The parties indicated that they were prepared to argue the issue at the motions hearing on August 15, 2024.

At the hearing, the People argued that any presentation of a joint Rule 24 statement was within the Court's discretion and that a factual statement is not required. The People asserted that the questionnaire being provided to potential jurors already included a factual summary and that nothing further was necessary. To the contrary, the People argued that Defendant's proposed Rule 24 statement goes far beyond what is necessary and advisable while the People's proposed alternative is much briefer and more direct. The People argue that a plain reading of Rule 24 says that a statement under that provision is "just to provide a relevant context for the jurors to respond to questions asked of them." Defendant's proposed Rule 24 statement contains much more information than is necessary to provide a proper context to the jurors, delving into factual matters such as how many shots were fired or how many people had shots fired at them. The People also note that the Colorado Model Criminal Jury Instructions from 2023 highlights that any Rule 24 statement should simply comply with the rule and be presented in plain and clear language the nature of the case, using applicable instructions, or alternatively, a joint statement of factual information intended to provide a relevant context. The point of the Rule 24 statement is simply to provide basic information to the jury while Defendant's proposed version takes up an entire page and goes far beyond what is required to have a thorough, open discussion with the jurors.

Defendant argued at the hearing that their proposed Rule 24 statement is a factual statement that is not argumentative in any way, but they believe that it would be an injustice to the potential jurors if they are not warned about what they are going to see and hear regarding what happened that day. Defendant asserts that the entire purpose of a Rule 24 statement is to assist the parties in effectively using their challenges for cause and peremptory challenges during voir dire, and to not have the jury be informed about the explicit nature of the evidence, including watching how the victims died, would open the door to the jurors becoming extremely prejudiced by the nature of the evidence and no longer being able to presume Defendant's innocence. Defendant argued that talking about it at the start of the trial would help the parties avoid this problem occurring in the middle of the trial.

The Court notes that the content of the Rule 24 statement presented to the jurors is within the Court's discretion and finds that the briefer statement proposed by the People is sufficient to orient the

jurors to the nature of the case and to provide them the necessary context for the parties to conduct their jury selection. However, due to the explicit nature of the evidence the impaneled jurors will need to witness during the trial, the Court finds that it would be prudent to prepare them. Therefore, the Court shall read the Rule 24 statement as follows:

"On March 22, 2021, Mr. Alissa drove from his home in Arvada to the Table Mesa King Soopers. Mr. Alissa was armed with an AR-15 pistol and 9mm handgun. Mr. Alissa used the AR-15 pistol to shoot and kill ten people at the King Soopers, including a Boulder police officer. After firing at police officers entering the building, Mr. Alissa was shot in the leg by the police. Mr. Alissa surrendered and was taken into custody on scene. In addition to those killed on March 22, 2021, many others were placed in risk of death by the 47 rounds fired. Much of what occurred on March 22, 2021, was recorded by various means, including by in-store video cameras and body cameras worn by law enforcement.

Mr. Alissa suffers from schizophrenia, a serious mental illness. He is asserting that he is not guilty by reason of insanity because his serious mental illness made him incapable of knowing the wrongfulness of his actions or prevented him from forming the intent or premeditation that are essential elements of first-degree murder."

4. Defendant's Motion for a Protective Order (D-66):

On August 14, 2024, Defendant filed his *Motion for a Protective Order (D-66)*, asserting that they were informed by Chief Goetz of the Boulder County Jail that he had contacted District Attorney Michael Dougherty to discuss Defendant's medical treatment at the jail, violating Defendant's HIPPA rights. Defendant argues that, to ensure that there are no further violations of Defendant's HIPPA rights, Defendant requests that the Boulder County Jail be ordered to put any communication made by Defendant that they believe falls within the waiver of C.R.S. § 16-8-103.6 (not guilty by reason of insanity statute) into writing and provide it directly to the Court for an in-camera review.

The People argued at the hearing that, assuming all facts as stated in the motion are true, the Court should nonetheless deny Defendant's motion. The People assert that Defendant argues C.R.S. 16-8-103.6 requires that only a defendant's statements made to a physician or a psychologist in the course of an examination or treatment are not privileged or confidential, so if a nurse or jail personnel had shared Defendant's statements to the prosecution, this would be improper. However, the People assert that *Liggett v. People* also provides some clarity on this issue, arguing that this kind of information disclosure is not limited solely to the treating or examining physician or psychologist, but that these statements made by Defendant are not confidential. The *Liggett* court found that under the statute, the defendant had waived "*any* claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist," requiring disclosure of all information concerning Defendant's mental condition to any healthcare provider, including records that pre-date or post-date the criminal offense.

The People further argued that the facts asserted in the motion were inaccurate because the District Attorney Michael Dougherty did not speak with Chief Goetz on August 14, 2024, as alleged, nor did he have an extensive discussion about Defendant's medical treatment with the jail. The People argued that Defendant's refusal to take medication as ordered is also not protected by HIPPA, otherwise, the parties would not have spoken about it in open court on multiple occasions. The People assert that it is entirely appropriate for the jail to notify the People that Defendant is refusing to take his medication, noting the *Amended Consent Order Authorizing Involuntary Treatment for Person Committed for Sanity or Competency Evaluation, or Committed as Incompetent to Proceed in a Criminal Case* states that, "If during the pendency of this Consent Order, a medication change or adjustment is needed, the People may file a motion to modify and request a hearing on this modification." The People argued that this implies that the People need to be notified if there is an issue with the order and if the order needs to be changed, making it permissible for jail personnel to inform the People if there are any issues with Defendant's medication.

Defendant argued at the hearing that C.R.S. § 16-8-103.6 waives Defendant's privilege *only* to issues surrounding their mental condition, not to all of their health information or medical treatment. Therefore, Defendant argued that the protective order is appropriate and should be issued so that prior to any of Defendant's private medical information be disclosed, it is reviewed to ensure that it falls under the statute rather than other information that is still protected under HIPPA. Defendant clarified that counsel went to the jail on August 14, 2024, and Chief Goetz came up to counsel and confronted him about Defendant's medical treatment, who told counsel that he had already called Mr. Dougherty and told him all about this. Defendant argued that this conversation was related to Defendant's heart medication and their concerns around what they may have to do if Defendant does not take his heart medication, not something that is considered under the statute when Defendant waives confidentiality related to his mental condition. Therefore, Defendant requests that if the jail feels that there is information pertinent to this case, they file it with the Court first for an in-camera review to ensure that the information that is intended to be disclosed actually falls under C.R.S. § 16-8-103.6 and Defendant's HIPPA rights are not being violated.

The Court finds that there is a distinction between Defendant's medical and health information related to his mental condition and that which relates to Defendant's more general physical health. Here, the Court agrees with Defendant and finds that under C.R.S. § 16-8-103.6, Defendant has waived any claim of confidentiality or privilege as to medical information and communications regarding his mental condition, including any communications made by professionals during the course of Defendant's examination or treatment for Defendant's mental condition, but not the rest of his general physical health. This waiver of privilege includes communications with jail staff who are taking part in Defendant's treatment as necessary during his stay in their custody, as the statutory scheme "recognizes that nonphysician medical providers may help treat patients under the supervision of physicians," and that this "relationship between a physician and a nonphysician provider is, in effect, a relationship between

a principal and an agent," which is often necessary for the proper treatment of a patient. Thus, Defendant's waiver of privilege regarding his treatment for his mental condition includes communications with a non-physician or non-psychologist medical treatment provider. *See Liggett v. People,* 529 P.3d 113, 126, 2023 CO 22, ¶ 59 (Colo., 2023). Furthermore, the *Amended Consent Order Authorizing Involuntary Treatment for Person Committed for Sanity or Competency Evaluation, or Committed as Incompetent to Proceed in a Criminal Case*, filed with this Court on May 7, 2024, does imply that the People should be informed of any issues with Defendant's mental health treatment and medications as it authorizes the People to file a motion to modify if and when necessary to ensure Defendant's ongoing compliance with the Consent Order. However, this waiver does not extend to Defendant's other general physical health information and communications, such as Defendant's heart medication. Therefore, the Court GRANTS Defendant's *Motion for a Protective Order (D-66)* in part, protecting Defendant's HIPPA rights as to his general physical health information, but denying the request as it relates to the treatment of his mental condition as Defendant has waived his confidentiality and privilege under C.R.S. § 16-8-103.6.

5. The People's Motion in Limine Regarding Competency to Proceed:

On August 12, 2024, the People filed their *Motion in Limine – Competency to Proceed,* asserting that defense witnesses should not be permitted to testify at trial that they met with Defendant for the purpose of evaluating Defendant's competency to proceed or that they formed an opinion concerning Defendant's competency to proceed. The People argued that, as a matter of law, witnesses may not testify regarding Defendant's competency and that competency and sanity are distinct issues. Furthermore, the People argue that the standards for competency and sanity require consideration of Defendant's mental state at different times, with the competency standard relating to Defendant's ability to assist his attorney during the pendency of the criminal proceedings while the insanity standard relates to Defendant's mental state at the time of the alleged crimes. The People further argue that the competency statute found within C.R.S. § 16-8.5-108 implies "that information gained during the competency process is relevant only to the extent that it bears on a defendant's sanity." Therefore, the People argued that the Court should exclude any evidence of competency proceedings and preclude any defense witnesses from opining regarding Defendant's competency.

Defendant presented their argument at the hearing, noting at the outset that the People's *Motion in Limine* was untimely and should be denied on procedural grounds. Defendant further argued that competency proceedings are admissible at trial and the Court cannot exclude testimony regarding it, citing *Ligget* and *People v. Herdman*, 310 P.3d 170, 2012 COA 89 (Colo.App., 2012). Next, Defendant argued that the People's assertion that C.R.S. § 16-8-114(3)(b) precluding evidence of prior competency or incompetency of a defendant at trial is not directly supported by case law, but a comparable statute in the juvenile code was interpreted by *People ex rel. C.Y.*, 275 P.3d 762 (2012), finding the statutory provision provides a grant of immunity to the defendant which can be waived by the defendant. Therefore, if Defendant can waive that protection, then the evidence should be admissible. Defendant

argued the evidence obtained as a result of his competency proceedings is highly relevant and the jury will be confused if they hear about Defendant being seen by all of these doctors but not being told the reason why he was being treated at CMHIP for so long, namely that he was undergoing competency and restoration proceedings. When the witnesses who were involved in both Defendant's competency evaluations and insanity mental condition evaluations are asked to testify, they should be permitted to testify as to their observations during the entire pendency of this case. Defendant argued that if the jury doesn't hear that these witnesses met with Defendant for the purposes of the competency proceedings in this matter, the parties are going to be met with a barrage of questions regarding why they met with Defendant so early and so often when insanity was not raised as an issue in this case until much later.

The Court finds that though the People's motion was filed in an untimely manner the issue was not discovered until recently and is significant enough that it needs to be addressed and ruled upon anyway. The Court finds that C.R.S. § 16-8-114(3)(b) is clear and explicit regarding the admissibility of any determination regarding Defendant's prior competency: "Evidence of any determination as to the defendant's competency or incompetency is not admissible on the issues raised by the pleas of not guilty or not guilty by reason of insanity." Additionally, the People are correct in their assertion that the standards for competency and sanity require consideration of Defendant's mental state at different times, with the competency standard relating to Defendant's ability to assist his attorney during the pendency of the criminal proceedings while the insanity standard relates to Defendant's mental state at the time of the alleged crimes. Furthermore, evidence that Defendant was deemed incompetent for an extended period of this case's pendency is far more prejudicial than it is probative regarding Defendant's mental condition at the time of the alleged crime. The risk of unfair prejudice substantially outweighs the probative value of such information as it is likely to confuse the jury as to the issues, so this evidence shall also be excluded under CRE 403 relevancy grounds. However, those witnesses who evaluated Defendant as part of this matter's competency proceedings, whether they were subsequently involved in the evaluation of Defendant's mental condition as part of his NGRI plea, may still have relevant testimony that "bear[s] upon the question of capacity to form a culpable mental state" at the time of the alleged crimes, and so they will be permitted to testify as necessary to those matters. See C.R.S. § 16-8.5-108(1)(a). Therefore, the Court GRANTS the People's *Motion in Limine Regarding Competency to Proceed* in part and ORDERS that any evidence or testimony regarding the purpose of their contact with the Defendant was for a competency evaluation or evidence or testimony regarding a final determination of Defendant's competency shall be excluded at trial, but the witnesses who took part in Defendant's competency evaluations shall nonetheless be permitted to testify as to their observations of Defendant *only* as it relates specifically to Defendant's mental condition at the time of the alleged crimes.

6. Argument Regarding Colorado Model Criminal Jury Instruction (COLJI) E:03:

At the August 15, 2024, motions hearing, the parties presented argument regarding the potential use of COLJI E:03. Defendant asserted that the previous COLJI E:03 that was used prior to the change in 2022 included a different definition of "reasonable doubt," which Defendant argued was more appropriate and less confusing for the jury to consider, particularly in a case such as this where

Defendant has pleaded not guilty by reason of insanity and the underlying matter at issue isn't whether Defendant factually committed the acts as alleged but whether he was mentally culpable for them at the time that they were committed. Defendant asserted the newer version of the reasonable doubt instruction merely instructs the jury that proof beyond a reasonable doubt is "proof that leaves you firmly convinced of the defendant's guilt. If you are firmly convinced of the defendant's guilt, then the prosecution has proven the crime charged beyond a reasonable doubt." Defendant argued that this newer definition will be more confusing for the jury than the older one, which read: "Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves. If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find the defendant guilty of that crime. If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime." Defendant argued that the older version leaves pure, factual guilt out of the equation and mentions "each and every element of the crime," which is crucial to the consideration of the affirmative defense of not guilty by reason of insanity.

The People objected to the use of the older version of the COLJI E:03 instruction, arguing that courts in this jurisdiction and throughout the state of Colorado have been using the new instruction without issue. The People argued that the new instruction is not a substantive change but rather a more accurate reflection of the law and that this new instruction was consistently upheld in federal courts prior to being brought to Colorado and codified in the 2022 edition of COLJI. The People argued that there were good reasons for the Colorado Supreme Court to modify the language of this instruction, as articulated by the committee in the comment to the new instruction, and the Court should stand by those justifications for the new instruction.

The Court finds that the older definition of reasonable doubt is appropriate in this matter where the affirmative defense of not guilty by reason of insanity is at issue. As the COLJI Committee noted in their comment on the new version of COLJI E:03, the U.S. Supreme Court has explicitly approved the previous definition, citing *Victor v. Nebraska*, 511 U.S. 1 (1994), wherein the Court stated that "the hesitate to act standard gives a common sense benchmark for just how substantial such a doubt must be." *Id*. at 20. Therefore, for the reasons argued by Defendant at the motions hearing, the Court ORDERS that the previous version of COLJI E:03 shall be used as a jury instruction at trial.

Dated August 22, 2024.

BY THE COURT

Ingrid S. Bakke
District Court Judge