

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3674	DATE FILED: September 2, 2021 4:41 PM
<b>PEOPLE OF THE STATE OF COLORADO</b>  <b>v.</b>  <b>AHMAD AL ALIWI ALISSA,</b> <b>DEFENDANT</b>	<b>▲ COURT USE ONLY ▲</b>
<i>Attorneys for the People:</i> Michael Dougherty & Adam Kendall <i>Attorneys for the Defendant:</i> Daniel King, Samuel Dunn, & Kathryn Herold	Case Number: 2021CR497  Division: 13 Courtroom: G
<b>ORDER RE: THE PEOPLE’S REQUEST FOR CLARIFICATION AND THE DEFENDANT’S NOTICE OF RAISING COMPETENCY AND MOTION TO VACATE PRELIMINARY HEARING AND SUSPEND THE PROCEEDINGS</b>	

THIS MATTER comes before the Court on the Defendant’s September 1, 2021 *Notice of Raising Competency* and *Sealed Motion for a Preliminary Finding of Incompetence and to Suspend Proceedings* and September 2, 2021 *Motion to Vacate Preliminary Hearing and Suspend the Proceedings*. The Court issued *Order: Notice of Raising Competency* on September 1, 2021, indicating the Court would address the issue at the Preliminary Hearing/Proof Evident Presumption Great Hearing scheduled for September 7, 2021. On September 1, 2021, the People filed *People’s Request for Clarification from the Court Following the Filing of Defendant’s Notice of Raising Competency*. Having carefully considered the pleadings and applicable law, the Court enters the following rulings and orders:

**BACKGROUND**

On March 24, 2021, the People filed *Complaint and Information*, charging the Defendant with 10 counts of first-degree murder. The People filed *Motion to Amend Criminal Complaint and Information* and *Second Motion to Amend Criminal Complaint and Information* on April 21, 2021 and May 24, 2021 respectively. The Defendant is presently charged with 10 counts of first-degree murder, 47 counts of attempted first-degree murder, one count of first-degree assault, 10 counts of possession of a prohibited large capacity magazine, and 47 violent crime sentence enhancers. The Court held a Rule 5 Advisement on March 25, 2021. The Defendant waived his right to a Preliminary Hearing within 35 days. The Court held a Status Conference on May 25, 2021 and set a Preliminary Hearing/Proof Evident Presumption Great Hearing for September 7, 2021.

On September 1, 2021, the Defendant filed *Sealed Motion for a Preliminary Finding of Incompetence and to Suspend Proceedings* and *Notice of Raising Competency*. The Defendant moves the Court to suspend proceedings, vacate the upcoming Preliminary Hearing/Proof Evident

Presumption Great Hearing, and make a preliminary determination that he is incompetent to proceed.

The People filed *People's Request for Clarification from the Court Following the Filing of Defendant's Notice of Raising Competency* on September 1, 2021. The People argue the Court can hold the Preliminary Hearing under § 16-8.5-102(1), C.R.S. before determining competency and even if the Defendant has been found incompetent. The People note many victims in the instant case have made expensive, time-consuming travel arrangements to be present for the September 7, 2021 Hearings. Accordingly, the People request the Court issue an order on or before September 3, 2021 to clarify whether the Hearings will proceed as scheduled.

On September 2, 2021, the Defendant filed *Motion to Vacate Preliminary Hearing and Suspend the Proceedings*, requesting the Court vacate the Preliminary Hearing and use the September 7, 2021 setting to advise the Defendant.

### **APPLICABLE LAW**

While a defendant is incompetent to proceed, “the defendant shall not be tried or sentenced, nor shall the court consider or decide pretrial matters that are not susceptible of fair determination without the personal participation of the defendant.” § 16-8.5-102(1), C.R.S. A determination that a defendant is incompetent to proceed “shall not preclude the furtherance of the proceedings by the court to consider and decide matters, including a preliminary hearing and motions, that are susceptible of fair determination prior to trial and without the personal participation of the defendant.” *Id.* Such proceedings “may be later reopened if, in the discretion of the court, substantial new evidence is discovered after and as a result of the restoration to competency of the defendant.” *Id.*

The right to counsel at a preliminary hearing “reaches constitutional proportions[,] . . . [b]ut the right to counsel is a meaningless right unless the accused has the capacity to confer with counsel regarding the accusation, the nature of the proceedings, and the testimony of the witnesses.” *Schwader v. District Court*, 474 P.2d 607, 610 (Colo. 1970). Therefore, when a preliminary hearing is held first and a sanity hearing is held second, “if the outcome of the sanity hearing is that the defendant is presently insane, then upon his return to sanity another preliminary hearing must be held.” *Id.* (prohibiting the district court from holding a preliminary hearing before resolving the pending issue of whether the defendant is insane). *See also People v. Scherrer*, 670 P.2d 18, 19 (Colo. App. 1983) (holding the district court properly suspended all further proceedings, including the preliminary hearing, when the court had concerns regarding the defendant's competency to proceed).

In *People v. Fletcher*, the Court of Appeals affirmed the rule in *Schwader* that a defendant is entitled to a competency determination prior to the Court holding a preliminary hearing. 546 P.2d 980, 982 (Colo. App. 1975), rev'd on other grounds, 566 P.2d 345 (Colo. 1977). However, the denial of a competency hearing prior to a preliminary hearing does not require reversal of a subsequent conviction unless the defendant demonstrates he was prejudiced. *Id.* In *Fletcher*, the court held the defendant was not prejudiced by the trial court holding a preliminary hearing before a competency hearing because “the trial court ultimately conducted a thorough examination of

[the] defendant’s competency prior to trial[,]” the defendant was found to be competent, and there was “no basis in the record for [the Court of Appeals] to conclude that [the] defendant was incompetent at the time of the preliminary hearing.” *Id.*

Although both the Defendant and the People focus on whether the Court should hold the Preliminary Hearing, the Court must also consider the fact that the Defendant is being held without bond and is entitled to a hearing pursuant to the Colorado Constitution. Under Article II, § 19, a defendant charged with a capital offense is entitled to bail “unless the district attorney meets the burden of establishing . . . that the ‘proof is evident or the presumption great.’” *Lucero v. Dist. Court*, 532 P.2d. 955, 957 (Colo. 1975) (quoting Colo. Const. art. II, § 19). The mere fact a court finds probable cause and bounds a defendant over for trial does not equate to the “determination that the proof of guilt is evident or the presumption great.” *Orona v. Dist. Court*, 518 P.2d 839, 840 (Colo. 1974). Rather, the required standard to deny a defendant’s constitutional right to bail is “greater than probable cause—though less than that required for a conviction.” *Id.*

### **ORDERS**

Initially, the Court understands the People’s position with respect to the inconvenient timing of the filing of Defendant’s *Notice* and *Sealed Motion*. Given the timing of the Rule 5 Advisement and Status Conference, it was the Court’s hope and expectation that Defense Counsel would have had ample time and opportunity to investigate any competency concerns and would have raised the issue of competency before a week prior to the Hearings. However, either party or the Court may raise the issue of competency at any time if there is “reason to believe that the defendant is incompetent to proceed[.]” § 16-8.5-102(2), C.R.S.

The Court is cognizant of the impact delay can have on the victims, their family members, and the community, as well as the family members of the Defendant. While the Court understands § 16-8.5-102(1), C.R.S. indicates the Court can conduct matters “that are susceptible of fair determination prior to trial without the personal participation of the defendant[,]” including preliminary hearings, the Court interprets *Fletcher* narrowly and finds conducting a preliminary hearing prior to determining competency is not the proper order of events.

The Court finds the *Fletcher* Court ruled the defendant was not prejudiced by the district court’s decision to conduct a preliminary hearing prior to determining competency only because the defendant was later found to be competent. The Court seeks to avoid a situation in which it must take additional evidence subsequent to the preliminary hearing, or, conduct a second preliminary hearing, because the Defendant is found not competent to proceed following the initial preliminary hearing and is subsequently restored. The Court believes this situation would create significantly more delay and risks violating the Defendant’s Sixth Amendment right to effective assistance of counsel.

Although the Court can arguably make a probable cause determination under § 16-8.5-102(1), C.R.S. without the personal participation of the Defendant, in this case, the Court must also determine whether the Defendant should continue to be held without bond during the pendency of the case. Regarding the issue of bond, the Court finds it cannot make adequate

findings without the personal participation of the Defendant, and therefore, the Court must make a competency determination prior to holding the Proof Evident Presumption Great Hearing.

Accordingly, in an abundance of caution, the Court GRANTS the Defendant's request to suspend proceedings.

However, based on the Defendant's *Sealed Motion for a Preliminary Finding of Incompetence and to Suspend Proceedings* and *Motion to Vacate Preliminary Hearing and Suspend the Proceedings*, the Court cannot make a preliminary finding of incompetence.

The September 7, 2021 Preliminary Hearing/Proof Evident Presumption Great Hearing is therefore VACATED and CONVERTED to a competency advisement pursuant to § 16-8.5-109, C.R.S.

Upon advising the Defendant, the Court will order a competency evaluation pursuant to § 16-8.5-105, C.R.S. The Court will then reset this matter for a review hearing within 30 days of the competency advisement. Additionally, the Court will reset the Preliminary Hearing/Proof Evident Presumption Great Hearing within approximately two weeks of the review hearing.

**SO ORDERED** this 2nd day of September, 2021.

BY THE COURT

A handwritten signature in black ink, appearing to read 'Ingrid S. Bakke', written over a horizontal line.

Ingrid S. Bakke  
District Court Judge