

District Court, Boulder County, Colorado Court Address: 1776 6 <sup>th</sup> Avenue Boulder, CO 80306	
THE PEOPLE OF THE STATE OF COLORADO  v.  <b>AHMAD AL ALIWI ALISSA</b> Defendant.	DATE FILED: October 7, 2021 2:24 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 Deputy State Public Defender Boulder Regional Public Defenders 2555 55 <sup>TH</sup> Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. <b>21CR497</b>  Division 13
<b>RESPONSE TO THE PROSECUTION’S REQUEST FOR SECOND COMPETENCY          EVALUATION AND HEARING          (P-009)</b>	

Through counsel, Mr. Alissa respectfully requests this Court deny the prosecution’s request for a second competency evaluation. He states:

1. The prosecution has insisted on fast-tracking the competency proceedings to-date and had voiced displeasure with counsel for Mr. Alissa raising the issue at this stage. Now, the prosecution seeks to further delay competency proceedings and delay Mr. Alissa’s potential restoration by asking for another, and superfluous, competency evaluation. It suggests the competency evaluation it intended to rush is inadequate.
2. The prosecution’s request is legally and factually baseless, and this Court should deny the prosecution’s request because the request was not made in good faith.

**Background**

3. The prosecution has asked for a second competency evaluation and a hearing, under section 16-8.5-103(3), C.R.S. According to the prosecution, when it asked for a second evaluation, it had only “just” received the State’s competency report. The prosecution apparently does not contend that Mr. Alissa does not suffer a mental disability. Instead, it

highlights certain parts of the report, which it characterizes as follows: “Defendant indicates an understanding of his charges, the potential sentence, the roles of the judge, prosecutor, and defense attorney.”

4. Additionally, the prosecution requested materials that counsel for Mr. Alissa provided to the evaluators after receiving the evaluation and after requesting a second evaluation. The prosecution notes that it is entitled to these materials, under section 16-8.5-104, C.R.S. Under this authority, the prosecution was within its rights to request these materials at least upon receipt by the evaluator. § 16-8.5-104(1)(b), C.R.S.
5. Counsel for Mr. Alissa raised the issue of competency on September 1, 2021, and the Court subsequently ordered that he be evaluated.
6. The prosecution spoke with the evaluators on September 16, 2021 and was aware they had spoken with the defense. *People’s Response to Defendant’s Motion to Waive . . .*, pp. 1-2.
7. Mr. Alissa then moved to waive the 21-day deadline, noting a concern the evaluators had received a tremendous amount of information and that they would need additional time to perform a reliable assessment.
8. The prosecution opposed Mr. Alissa’s request for a waiver of the 21-day rule for completion of the competency evaluation, noting that it would “only lead to further unnecessary delay of the proceedings in this case” Additionally, as bases to oppose Mr. Alissa’s request, the prosecution noted its obligations under the Victim’s Rights Act (VRA) and stated that the victims’ families opposed any “further delay.”
9. Its current request for a second evaluation, which will further delay matters, contains no VRA notice or position the victims’ families have on its request.

**This Court should deny the prosecution’s improper request.**

10. Due process requires more than a defendant be “oriented to time and place” and have “some recollection of events” in order to try him. *Dusky v. United States*, 362 U.S. 402 (1960). The statutory and due process test for competency is such that a defendant may not be tried if

as a result of mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant’s lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings.

§ 16-8.5-101(12), C.R.S. 2021; *Dusky*, 362 U.S. at 402.

11. Under Colorado law, a “mental disability” is “a substantial disorder of thought, mood, perception, or cognitive ability that results in marked functional disability, significantly interfering with adaptive behavior.” § 16-8.5-102(15), C.R.S. “Substance abuse that results in a long-term, substantial disorder of thought, mood, or cognitive ability may constitute a mental disability.” § 102(15). However, “acute intoxication from alcohol or other substances, substance abuse withdrawal, or antisocial behavior” may not constitute a “mental disability.” § 102(15).
12. No authority supports an argument that a defendant is competent in virtue of knowing the charges and his attorneys’ names, as the prosecution implies. *See, e.g., Nagi v. People*, 389 P.3d 875, 879 (Colo. 2017)<sup>1</sup>; *People v. Zimmer*, 491 P.3d 554, 560 (Colo. App. 2021) (holding that defendant’s purported belief that an imposter, rather than the victim, testified at trial created “sufficient doubt” about his competency to proceed).
13. Although the report speaks for itself, it is notable that the prosecution does not accurately characterize it when attempting to support its request for an additional evaluation. For example, the prosecution contends that Mr. Alissa understands the potential sentence, but the report indicates otherwise. The death penalty is *not* a potential sentence in this case, and the report reflects his fixation on that as a sentence. Nor does Mr. Alissa understand the role of the judge, as the prosecution tells it. The judge does not decide the verdict, as Mr. Alissa told the evaluator. But, most importantly, nothing in the report suggests there is any basis to believe Mr. Alissa has a “sufficient present ability to consult with [counsel] *with a reasonable degree of rational understanding in order to assist in the defense . . .*” § 16-8.5-102(12), C.R.S. (emphasis added).
14. Section 16-8.5-103(3), C.R.S., does not give the prosecution an unqualified entitlement to a second evaluation. The state supreme court has recognized that competency evaluations

---

<sup>1</sup> “Ample grounds” to question the defendant’s competency were present even where ignorance of counsel’s name and the charges were apparently not an issue:

[I]n addition to the trial court’s belief that the defendant was not making a rational choice concerning representation, in the final few weeks before the order at issue here, his aberrant behavior—including such things as his wild accusations of collusion between his counsel and the prosecution, his questioning of his counsel’s integrity regarding ongoing investigation, his claim that he was inspired, his fatalism concerning God’s will, and his vacillation between contradictory stances regarding his desire for representation by counsel—provided ample grounds for any court to at least question his competency.

*Nagi*, 389 P.3d at 879.

should be ordered based only on need and not to gain tactical advantage. *See People v. Lindsey*, 459 P.3d 530, 538 (Colo. 2020) (stating that its holding aligned with “the notion that a trial court should only order competency evaluations when they are warranted.”). And the court has recognized that a party may avail itself of the statutory procedures in article 8.5 only if it acts in good faith. *See Nagi v. People*, 389 P.3d 875, 879 (Colo. 2017). The corollary is a party may not invoke the procedures governing competency in bad faith, as the prosecution has done here. *Cf. id.* (“Should a trial court act in other than good faith, ordering a competency evaluation for purposes of delay or to deprive the defendant of some other right to which he would be entitled, exclusion of the time required for such an evaluation would simply not be within the contemplation of the statute. The defendant does not assert, and the record clearly would not support, such a finding of bad faith in this case.”).

15. Regardless, elementary principles of due process require the prosecution to treat a defendant fairly and not resort to tactics the law tolerates by its letter but which serve no purposes in the advancement of justice.
16. A prosecutor must comply with higher ethical standards than those demanded of typical lawyers because he or she is “a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct” that may prejudice a defendant. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005); *DeGesualdo v. People*, 364 P.2d 374, 378 (Colo. 1961). Thus, the unique role of a prosecutor as both a state representative and a legal advocate requires that his behavior in court further the state’s interest in guaranteeing a just proceeding rather than any personal interest the prosecutor himself may have in “winning” a case. *See DeGesualdo*, 364 P.2d at 378.
17. The accused have a due process right to be treated with fairness by the prosecution. *See* U.S. Const. amend. XIV; Colo. Const. art. II, § 25; *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”); *People v. Romero*, 745 P.2d 1003, 1009-10 (Colo. 1987) (citing *Santobello v. New York*, 404 U.S. 257 (1971)). The prosecutor “owes a duty to the accused as well as to the state; and abuse of a defendant, baseless insinuations against his witnesses, and acts of disrespect toward opposing counsel comport neither with that duty, nor with the dignity of the office of public prosecutor.” *Hillen v. People*, 149 P. 250, 253 (Colo. 1915).
18. The prosecution’s inconsistent positions attempting to fast-track competency proceedings against an incompetent defendant and cause delays through an unnecessary second examination show a single-minded tactic of trying an obviously incompetent defendant and stalling potential restoration. As the prosecution’s request for a second evaluation and its addendum show, it has no basis in fact or in law to believe Mr. Alissa is presently competent to proceed, and this Court should therefore deny the prosecution’s request for

an additional evaluation. *See* U.S. Const. amend. XIV; Colo. Const. art. II, § 25. Notably, the prosecution did not endeavor to seek materials in the evaluators' possession until *after* making its request.

19. At minimum, in light of the prosecution's actions, it should be first required to certify it has read the evaluation reports in full and reviewed the materials upon which the evaluators relied before seeking a second evaluation.

MEGAN A. 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  
Deputy State Public Defender

**Certificate of Service**

I hereby certify that on October 7, 2021, I served the foregoing document by E filing same to all opposing counsel of record.  
/s/ skoslosky

Dated: October 7, 2021