

4. When counsel asked this Court to allow time prior to a preliminary hearing so that they could investigate the nature and severity of Mr. Alissa's mental illness they did so for a reason: they knew from experience how difficult this type of assessment is and how long it takes. Rapport must be established over many hours, witnesses have to be interviewed, data gathered and all needs to be given to a mental health professional who then has to parse out all these issues and make a determination. It would be completely inappropriate and ineffective to rush or truncate this process.

5. The reason that counsel could not file the notice of incompetency early was quite simply because the evaluation was ongoing and the determination had not been completed. Contrary to the prosecution's characterization, counsel's motion is not an "eleventh hour" request. This case has not proceeded to a preliminary nor a motions hearing because it is in its infancy. The date of the filing of this pleading was the first date following the determination being made and communicated the night before.

6. Counsel would apologize for the timing of the filing if it causes any difficulties with the government's witnesses or the Victims and the family members of the victims. The filing, as noted before, was predicated on the determination that Mr. Alissa is not competent.

7. If the judge has reason to believe that the defendant is incompetent to proceed, it is the judge's duty to suspend the proceeding and determine the competency or incompetency of the defendant pursuant to section 16-805-103. *C.R.S. 16-8.5-102(2)(a)*.

8. Colorado Revised Statute 16-8.5-102(1) provides that "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 with the personal participation of the defendant." While the statute lists a preliminary hearing as a proceeding that may be decided without a defendant's personal presence, Mr. Alissa's personal presence is required here. This is not a simple case: the allegations are serious and the amount of discovery is mountainous. His personal presence is required as a matter of due process and as necessary to afford him his constitutional rights to the effective assistance of counsel. *See* U.S. Const. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Strickland v. Washington*, 466 U.S. 668 (1984). Nothing the government cites in section 16-8.5-102(1), C.R.S., prohibits this Court from suspending proceedings in order to ensure the defendant's constitutional rights are protected.

9. [In *Schwader v. District Court*, 474 P.2d 607, 610 \(Colo. 1970\)](#), the Court determined that the right to counsel is a meaningless right unless the defendant has the capacity to confer with his attorney regarding the pending charges and the testimony presented at the preliminary hearing. On this basis the Court held that a defendant is entitled to have a determination made as to his competency prior to a preliminary hearing.

10. In *People v. Fletcher*, 546 P.2d 980 (Colo. App. 1975), the court of appeals followed *Schwader* and held that the defendant's constitutional rights to counsel entitle him to a court competency determination prior to a preliminary hearing. However, in that case, the court

held that while the trial court committed constitutional error by not making a competency determination prior to the preliminary hearing, there was no prejudice because, in pertinent part, there was “no basis in the record . . . to conclude that defendant was incompetent at the time of the preliminary hearing.” *Id.* at 982–83. Here, there is ample basis to believe that Mr. Alissa is currently incompetent. Counsel hereby certifies that they have a reasonable belief that Mr. Alissa suffers from a mental disability, which renders him unable to have a rational understanding of the proceeding, or to assist counsel in his defense. *Dusky v. United States*, 362 U.S. 402 (1960).

11. This reasonable belief is based on numerous direct personal interactions with Mr. Alissa, information gained from family members and others, information contained in the discovery, and professional opinion.

WHEREFORE, Mr. Alissa hereby moves this Court to vacate the currently set preliminary hearing, suspend the proceedings and make a preliminary determination that Mr. Alissa is at this time incompetent to proceed. C.R.S. 16-8.5-103. This motion is made pursuant to U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25.

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Certificate of Service

I hereby certify that on 9/2/2021, I served the foregoing document through Colorado E filing to all opposing counsel of record.

_____skoslosky_____

Dated: September 2, 2021