

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: March 31, 2023 4:38 PM
<b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>AHMAD AL ALIWI ALISSA</b> Defendant	<b>COURT USE ONLY</b>
Michael T. Dougherty, District Attorney 1777 Sixth Street Boulder, CO 80302 Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: mdougherty@bouldercounty.org Atty. Reg. #41831	Case No. 21CR497  Div:13
<b>People's Reply in Support of Motion for Restoration Hearing          (P-014)</b>	

On March 20, 2023, the People filed a Motion for a Restoration Hearing (the "Motion"). On March 27, 2023, Defendant filed a response to the Motion, in which Defendant objected to a restoration hearing being ordered by the Court. On March 28, 2023, the Court ordered the People to file this Reply addressing the points raised by Defendant.

On December 3, 2021, the Court found Defendant incompetent to proceed forward in this case. The Court committed Defendant to the care and custody of the Colorado Department of Human Services. Since Defendant's admission to CMHIP in mid-December of 2021, CMHIP has provided the Court and the parties with statutorily required competency evaluations approximately every 91 days.

The decision as to Defendant's competency rests with this Court. The Court is legally authorized to conduct a hearing as to Defendant's competency. As the Court affirmed in its March

13 Order, pursuant to C.R.S. § 16-8.5-113(1), the “court may order a restoration hearing at any time on its own motion, on motion of the prosecuting attorney, or on motion of the defendant.”

The People are now seeking the opportunity to present evidence of Defendant’s competency through witnesses and evidence so that the Court may decide the issue of Defendant’s competency through complete and substantial evidence. At the hearing, the burden will be on the People to prove by a preponderance of the evidence that Defendant is competent. C.R.S. § 16-8.5-113(6).

At the conclusion of the hearing, the Court shall determine whether the defendant is competent to stand trial. C.R.S. § 16-8.5-113(6). The Court can decline to adopt the conclusions of CMHIP. The statute does not require the Court to agree with the findings of any particular doctor in determining whether Defendant is competent. Additionally, as stated in C.R.S. § 16-8.5-114(2), “if, after the hearing held pursuant to section 16-8.5-113, the Court determines that the defendant remains incompetent to proceed, the Court may continue or modify any orders entered at the time of the original determination of incompetency and may commit or recommit the defendant or enter any new order necessary to facilitate the defendant's restoration to mental competency.” The Court has the authority to determine whether the defendant is competent and, if not, to modify its order to facilitate the defendant’s restoration to competency.

#### **I. Offer of Proof**

At the hearing, the People will present witnesses and evidence. The People will demonstrate that the diagnosis from the CMHIP is flawed and inaccurate, as a medical diagnosis and legal matter. The evidence will prove, by a preponderance of the evidence, that Defendant is competent to stand trial. The evidence will include, but is not limited to, the areas covered in this Reply.

CMHIP is besieged with significant staffing issues. The complex problems at CMHIP have resulted in an extraordinary backlog of cases. For example, there are currently fifty-nine (59) individuals in custody at the Boulder County Jail awaiting transport to, and treatment at, the State Hospital. The backlog impacts the jails, community safety, the individuals in custody, and the prosecution of cases. Those issues have, also, exacerbated their treatment and care for individuals in their custody.

These issues are relevant to the extent that it has impacted the time, attention, treatment, and evaluation for Defendant as evidenced by the lengthy delays in responding to requests from the Court and the People, the lack of staff available to conduct a neuropsychological exam, and their overall evaluation of Defendant. The Court can consider the significant issues at CMHIP, particularly the effects on this case, in deciding whether the Court chooses to rely solely on CMHIP's current diagnosis in making the Court's decision. The Court should conduct the same analysis that it would with any expert witness.

On February 16, 2022, this Court issued a Citation to Show Cause for CMHIP's failure to comply with Court Orders issued on December 3, 2021, and January 31, 2022. On February 22, 2022, the Citation to Show Cause was vacated because CMHIP complied with the Court's Orders.

In their reports to this Court, the doctors have repeatedly informed the Court that Defendant fails to answer questions and remains non-communicative with staff. They conclude that the failure to communicate appears likely related to ongoing symptoms of schizophrenia.

Defendant was admitted on December 15, 2021. Shortly after arriving at the hospital, Defendant repeatedly told medical staff that his attorneys had directed him to not answer their questions. However, that information was not shared with this Court.

In the first Competency Re-evaluation Report dated February 25, 2022, the doctors observed, “Although he spoke more when compared to our prior interaction, his speech was still minimally elaborative, lacked spontaneity, and he often paused for a significant amount of time before answering questions. The content of his speech matched the topic of the conversation, but he still frequently reported not knowing information or being uncertain as to how to respond and required prompting to expand upon or clarify his statements. Given his ongoing psychotic symptoms, this style of responding often appeared most consistent with negative symptoms of schizophrenia (i.e., social withdrawal, lack of motivation, difficulty producing meaningful conversation) but there is also the possibility that he was occasionally voluntarily withholding some information.”

The information provided to the Court was, at best, incomplete. At the time of this report, the doctors were aware that Defendant had made statements to staff that he refused to answer questions per his attorney’s instructions. *See* Alissa Case File Part 1, *supra*. Rather than provide this information to the Court, the doctors claimed that Defendant’s failure to communicate was “impaired.” Choosing to remain silent under the advice of counsel is inconsistent with a mental impairment.

That information was, however, omitted from the report to this Court. It was only months later, through a Court-ordered production of records, that the People learned that Defendant refused to answer questions because his “attorney said not to answer questions.” The failure to answer questions and attend treatment is relevant in determining whether Defendant is competent. This information should have been shared with the Court, especially when the doctors concluded that his silence was due to a mental disorder. It only came to light because this Court ordered the additional documents be provided, which CMHIP had initially refused to do.

During Defendant's time at CMHIP, he has repeatedly declined to attend group sessions, including programming specifically aimed at improving his functional abilities, and he has repeatedly failed to fully comply with the restoration process.

On March 28, 2023, CMHIP filed a copy of an involuntary medication order received from the Pueblo District Court. *See* Filing Other, filed with the Court on March 28, 2023. C.R.S. 16-8.5.-112(2) states, "The department shall promptly deliver a copy of the order granting or denying the petition to the court that committed the defendant to the custody of the department, the prosecuting attorney, and the defendant's legal representation in the criminal case ..." The Pueblo District Court issued the Order on March 13, 2023. As reflected in the Order, Defendant has refused to take medications prescribed by his treating physician.

Defendant is charged with committing a mass murder. He is now refusing to take medication, comply with treatment, and answer questions. However, CMHIP has not conducted formal testing of Defendant to determine if Defendant is unable to communicate about his case and comply with the restoration process because of a mental health disorder or because he is making a choice to remain noncompliant. To date, the doctors have failed to do so. The failure to conduct objective testing is exacerbated by the disclosure that the defendant had been advised to not answer questions. The Court should not rely on summary conclusions in determining whether the defendant is competent.

At the hearing, the People will call Dr. Scott Bender to testify. (Curriculum Vita attached as Exhibit 1). Dr. Bender is a renowned expert and board-certified forensic neuropsychologist. He has written on malingering and deception, neuropsychological considerations in forensic mental health assessments, and competency to stand trial.

Dr. Bender will testify that CMHIP does not possess real, objective evidence with which to evaluate Defendant appropriately. Dr. Bender will address the utility of a forensic neuropsychological exam and the clinical need for it. By failing to conduct such an exam, CMHIP lacks the appropriate and objective basis for reaching their conclusion. He will testify that, in his experience, he has never seen such a failure.

Dr. Bender will, also, address competency. Since he is not permitted access to Defendant, Dr. Bender will talk in objective, independent terms about competency to stand trial. The Court should evaluate whether CMHIP doctors are employing the appropriate use of the competency standard.

“Competent to proceed” means that Defendant “does not have a mental disability or developmental disability that prevents [him] from having sufficient present ability to consult with [his] lawyers with a reasonable degree of rational understanding in order to assist in the defense.”

In their latest Competency Re-evaluation Report, the doctors assessed his ability to have a rational and factual understanding of the proceedings, stating:

“His conduct during the current interview, as well as since the time of the last evaluation, indicate the capacity for appropriate courtroom behavior, as he has demonstrated calm and respectful behavior during interactions with others, as well as the ability to track information. During previous evaluations, he has demonstrated an understanding of the fundamental purpose of a trial, as well as the roles and responsibilities of various courtroom personnel, to include the judge, jury, prosecutor, and defense attorney. Mr. Alissa has also been cognizant of the adversarial nature of criminal proceedings and the neutral position of the judge, and has been able to provide reasonable definitions of the meanings and consequences associated with pleas of guilty, not guilty, and not guilty by reason of insanity, as well as the plea bargaining process. His appreciation of the advantages and disadvantages associated with a defendant testifying on their own behalf remained poor, and he only offered brief (i.e., two-word) replies to inquiries intended to assess his understanding of the implications of such a decision.”

In assessing his ability to assist in his defense, the doctors conclude:

“Of greatest concern regarding his current competency is Mr. Alissa’s demonstrated communication deficits. While his limited speech appeared organized and free of delusional content, the symptoms of his illness, as noted above continue to impair his ability to articulate his ideas, reason aloud, and engage in productive discussions about most things, to include case-related matters. His responses to questions were minimal, required significant prompting, and often conveyed little meaningful information. In considering evidence to the contrary, we are mindful that it is conceivable that Mr. Alissa is voluntarily withholding information or is simply unwilling to discuss such matters; however, the totality of the data - to include observations from treatment staff - indicate that his current functioning remains compromised by ongoing symptoms of schizophrenia. This data raises concerns about his capacity to adequately consult with counsel, assist in his defense, and testify, should the latter be necessary.”

Based on the testimony from CMHIP doctors and Dr. Bender, the Court will be able to make its decision as to whether the testing is required and, in addition, whether the Defendant can now be determined as competent.

Furthermore, in addition to Dr. Bender, the People will call another expert witness to testify as the industry standards on assessment and competency. The Court is correct that treatment is within the province and control of CMHIP. However, this expert will opine on the assessment process because, without an accurate assessment, there cannot be proper diagnosis. The expert will explain how the diagnosis relates directly to the competency determination. An objective assessment is necessary and essential to make a proper diagnosis and competency determination. In addition, the expert will address the importance of objective, collateral information in determining diagnosis, treatment, and the determination as to competency. Finally, the expert will testify as to the competency standard and what is accepted in the industry. As a result of their testimony, the People will be able to prove that the competency standard utilized by CMHIP is

flawed and out of line with the industry. Once the hearing is ordered and scheduled, the People will provide the curriculum vitae of the expert who is available based on scheduling. The People have consulted with several experts who share this view and could be called to testify.

Through this evidence and testimony, the People will prove that Defendant is competent to stand trial. The People recognize that CMHIP has reached a different conclusion. That conclusion is based on incomplete information and a higher standard than required by law. In their most recent Competency Re-evaluation Report, the doctors concluded, “[Defendant]’s functioning has gradually improved since his admission to CMHIP, and we remain hopeful that with continued adherence to an adequate medication regimen, the symptoms of his illness will continue to lessen. There continues to be a good likelihood that he may be restored to competency within the foreseeable future.” It is the People’s position that the Court should conduct a hearing to determine whether that point has come. The People are asking the Court to allow the People the opportunity to present evidence of Defendant’s competency through witnesses and evidence so that the Court may decide the issue of Defendant’s competency through complete and substantial evidence.

WHEREFORE, the People hereby renew the request for a restoration hearing.

Respectfully submitted,

MICHAEL T. DOUGHERTY  
DISTRICT ATTORNEY

By:  
s/Michael T. Dougherty  
Michael T. Dougherty  
District Attorney  
March 31, 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 March 31, 2023, and addressed as follows:

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*s/Michael T. Dougherty*  
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