COLORADO SUPREME COURT 2 EAST 14TH AVENUE DENVER, COLORADO 80203 Original Proceeding District Court, Larimer County The Honorable Susan J. Blanco Case No. 2021CR991	DATE FILED September 3, 2025 9:09 PM FILING ID: EB3C19B2787AF CASE NUMBER: 2025SA224
In Re: **Plaintiff:** The People of the State of Colorado **v.** **Defendant:** Austin Rhys McGee.	COURT USE ONLY
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AMICUS CURIAE BRIEF OF ACLU OF COLORADO IN SUPPORT OF PETITIONER

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Curiae brief complies with all requirements of C.A.R. 28(a)(2), 28(a)(3), 29(c), and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4674 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/Emma Mclean-Riggs

IDENTITY AND INTEREST OF AMICI CURIAE

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions. The ACLU of Colorado, with over 40,000 members and supporters, is a state affiliate of the ACLU. The ACLU is dedicated to the constitutional principles of liberty and equality, including the right to be put to trial only while competent. The ACLU and its state affiliates appear before courts throughout the country to protect the constitutional rights of those who are or may be incompetent to proceed to trial. The ACLU of Colorado has a unique interest in upholding Colorado's statutory protections effectuating these rights.

INTRODUCTION

The adversarial system relies on the idea that both parties—in criminal cases, the state and the accused—are able adversaries. The trial of a person who cannot understand what is happening to her or cannot defend herself is an offense to that system. It is also a profound wrong against the individual human being, who is by definition among the most vulnerable in our society. The mechanisms our legal system relies on to ensure adherence to these principles are not mere abstractions; they function in the real world, they are flawed, and they have material consequences. They emerge from specific historical conditions; in Colorado, from persistent unconstitutional conditions for those in the competency evaluation and restoration process and resulting litigation against the state.

They also suffer from the usual strains faced by institutions, including funding challenges, pressure toward efficiency, and being staffed by fallible actors. These pressures have produced a system for initial forensic evaluation of competency that is highly susceptible to error. The Colorado Department of Human Services, responsible for conducting these evaluations, has hiring, training, and output requirements that result in the

real possibility that an initial evaluator is inexperienced, minimally forensically trained, and under significant time pressure.

Colorado's General Assembly is tasked with creating a statutory framework that protects Coloradans' fundamental right to be competent when they are put to trial. Colo. Const. art. II, § 25. It has done so through Title 16, Article 8. The legislature determined that when an evaluation of competency is conducted by a state evaluator, a second evaluation by an outside evaluator is mandatory upon request. C.R.S. § 16-8.5-103(3) to (4). This Court should uphold this explicit statutory mandate because, given our state's legal and institutional structure, the most fundamental rights of Colorado's most vulnerable people depend on it.

ARGUMENT

I. The Due Process Right to Be Tried Only While Competent to Proceed is Fundamental to the Legal System, and State Statutory Schemes Must Guard It Carefully.

The requirement that an accused person be competent to stand trial before she may be tried predates the formation of the American republic.[1] The American criminal legal system has never operated without this requirement, and indeed, it could not. U.S. Const. amend. V; U.S. Const. amend. VI; Colo. Const. art. II, § 25; Colo. Const. art. II, § 16. *Sanders v. Allen*, 100 F.2d 717, 720 (D.C. Cir. 1938) ("The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of a free government.") The adversarial process relies on the accused's ability to present a defense.[2] The constitutional safeguards afforded to a criminal defendant, including the right to decide her plea, to exercise her right to a jury trial, to confront her accusers, to testify at trial, and whether to raise

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[1] Grant H. Morris et. al., *Competency to Stand Trial on Trial*, 4 Hous. J. Health L. & Pol'y 193, 201 (2004).

[2] Claudine Walker Ausness, Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit*, 66 Ky. L.J. 666, 669 (1978) (citing Frith's Case, Proceedings of the Old Bailey (Apr. 17, 1790) https://perma.cc/EP3Y-WRES).

certain defenses rely on her ability to make rational decisions. *See Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996); *Godinez v. Moran*, 509 U.S. 389, 398–99 (1993). The reliability and dignity of the proceedings, too, rest on the assumption that the defendant is competent: when he is not, the proceedings cannot produce accurate and legitimate verdicts.[3] The trial of an incompetent person is a wrong, not only against the accused but against "justice and our institutions." *Cooper*, 517 U.S. at 365 (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

Whether a person is competent to proceed is not and has never been an inquiry that could be definitively resolved pretrial. Long before the Supreme Court's decision in *Drope v. Missouri*, 420 U.S. 162 (1975), which held that founded concerns about an accused person's competency should suspend even a trial in progress, competency was understood as required throughout adjudication. In 1769, Blackstone articulated that if the accused became incompetent at any stage, the defendant was functionally absent,

[3] Note, *Incompetency to Stand Trial,* 81 Harv. L. Rev. 454, 457–58 (1967) (discussing interests in accuracy and appearance of justice served by the competency standard articulated in *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

and the trial and sentencing could not proceed.[4] No matter how inconvenient or inefficient, if "circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial [arise,] the correct course [is] to suspend the trial until such an evaluation [can] be made." *Drope*, 420 U.S. at 181.

Too much rests upon the right to be tried only when competent to allow it to be eroded by comparatively "modest" concerns regarding judicial efficiency or state expense. *Cooper*, 517 U.S. at 364. The state statutory schemes that breathe life into the competency right must guard it jealously. *See id*. at 367–68; *Drope*, 420 U.S. at 172–73.

The General Assembly has created a statutory scheme to do just that. One crucial aspect of that statutory scheme is the requirement that once an initial competency evaluation is completed, a second one, by the evaluator of the party's choice, is mandatory upon timely request. C.R.S. § 16-8.5-103(3). This Court should uphold this provision as an essential safeguard of the fundamental right to a fair trial in Colorado's unique legal, historical, and institutional landscape.

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[4] 4 William Blackstone, Commentaries *24.

II. The General Assembly Created a Statutory Right to a Second Evaluation to Address Colorado's Troubled Competency Evaluation and Restoration System.

The statutory scheme governing competency, and the second evaluation requirement, emerged from Colorado's legal and institutional context. Before the competency Article was enacted in 2008, there was no acknowledged constitutional right or statutory right to *any* professional evaluation in a competency proceeding in Colorado. The forensic mental health system was in acute crisis, creating unconstitutional conditions. Multiple class actions were brought on behalf of people trapped in this system, resulting in multiple consent decrees. This history prompted the requirement of a second mandatory evaluation upon request.

A. Before 2008, Accused People in Colorado Had No Right to a Professional Competency Evaluation.

From 1973 to 2008, competency to stand trial was governed by the "sanity" statute, C.R.S. § 16-8-101 *et seq.* (2007), which provided meager procedural protections regarding competency evaluations. Once competency was raised, the court was required to make a preliminary finding regarding competency. C.R.S. § 16-8-111(1) (2007) (repealed 2008). If the court "fe[lt] that the information available to it [was] inadequate," it *could*

order a competency examination by a licensed forensic psychiatrist or psychologist but was not required to. *Id.* Significantly, this version of the statute contained no requirement that any evaluation ordered by the court be conducted by a Colorado Department of Human Services ("Department" or "CDHS") evaluator. *Id.*

If either party objected to the preliminary finding, their recourse was to request a hearing, which was mandatory upon request. *Id.* § 111(2). Both parties had rights at such a hearing, including the right to introduce evidence, summon and cross-examine witnesses, and make arguments. *Id.* § 117. However, for the indigent defendant, and even for the defendant with means, these rights could be hollow given the broad discretion the court had over what competency evidence could be collected. *See id.* § 117; *see also generally id.* § 111.

If competency was initially raised by the defense, as is usually the case,[5] and the court had not ordered a forensic evaluation on its own

[5] Defense counsel, like the prosecutor and the court, is required to raise the issue of competency if concerns arise. *Blehm v. People*, 817 P.2d 988, 993 (Colo. 1991); *Williamson v. Ward*, 110 F.3d 1508, 1518 (10th Cir. 1997); *but see* John King, *Candor, Zeal, and the Substitution of Judgement: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U. L. Rev. 207 (2008) (arguing that the ethics of criminal defense conflict with the duty to raise competency). Defense

initiative, the defense had few means of obtaining one. *Id.* § 111(1).(2). If the accused had financial resources, he could attempt to show good cause for permission to have his own privately paid evaluation. *Id.* § 108. However, if the court believed there was no "good cause" for a private evaluation (as it well might, if it found no need to order one on its own initiative), the court could deny the defense the opportunity to conduct one. *People v. Palmer*, 31 P.3d 863, 871 (Colo. 2001) (holding that even "a paying defendant" exercising his right to a competency evaluation must show good cause to conduct one); *People v. Mack*, 638 P.2d 257, 262–63 (Colo. 1981) (finding no constitutional due process right to a second competency evaluation).

If an accused person was indigent, however, he had no access to a professional evaluation at all if the court "fe[lt] the information available" was adequate to determine his competency. *See Massey v. Dist. Ct. In & For Tenth Jud. Dist.*, 180 Colo. 359, 364–66 (1973). Until the General Assembly intervened in 2008, the degree of professional medical evaluation involved

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counsel is generally "in the best position to assess whether there is a competency concern" *People v. Lindsey*, 459 P.d 530, 538 (Colo. 2020), and therefore, competency "is most often raised by the defense." Colo. Office of Behavioral Health, *Understanding Competency to Stand Trial*, https://perma.cc/AHN8-FJTG.

in any competency determination, particularly if the defendant was poor, lay within the almost unfettered discretion of the trial court.

B. By the 2000s, Colorado's Competency Crisis Garnered the Attention of Courts and Legal Advocates.

The Department, which is responsible for competency evaluation, restoration, and treatment for those found not guilty by reason of insanity, has struggled for decades to provide constitutionally adequate services in any of these areas. The degree to which the Department has failed to comply with constitutional and statutory mandates has varied over the last forty years. The issue escalated into a crisis in the late 2000s, spurring the adoption of the safeguards in the current competency statute, and emphasizing how vital the legislature deemed the option to invoke a second evaluation, even amid disastrous backlog and delay.

In 1999, patients committed to the Colorado Mental Health Hospital in Pueblo ("the state hospital" or "CMHIP") after being found not guilty by reason of insanity sued, alleging they were receiving little treatment because of its inadequate staffing. *Neiberger v. Hawkins*, No. 1:99-cv-1120-LTB-MJW

(D. Colo filed June 16, 1999). In 2002, *Neiberger* settled, and the state agreed to reduce the number of forensic patients as well as staff-to-patient ratios.[6]

Between 2002 and 2006, the number of court orders for in-patient evaluation and restoration at the state hospital nearly doubled.[7] The Department reported that because of the terms of the *Neiberger* settlement, which prevented admissions to the state hospital that would exceed a cap on the number of patients or lower the staff-to-patient ratio, the number of people in county jails waiting for evaluation and treatment had ballooned to approximately 80, and people sometimes waited as long as six months to be transported to CMHIP for services.[8] The people held in county jails because state-mandated evaluation and treatment is unavailable often present a

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[6] Colo. Dep't of Human Servs., FY 2006-7 Supplemental Recommendation, 25 (Jan. 24, 2007), https://perma.cc/M9AN-CLLE.

[7] *Id.*

[8] *Id.* This number, while extremely alarming to the Department and the courts at the time, reads as quaint in comparison to today's conditions. The latest available data show that in April of 2025, 357 people, 47 of them classified as severely ill, were warehoused in county jails, waiting to be admitted to the state hospital for restoration. These most acutely ill people wait *more than eight times longer* to be admitted for restoration than currently permitted by statute. Groundswell Services, Inc., *Special Master Report to Judge Wang*, Center for Legal Advocacy v. Barnes, No. 11-cv-02285-NYW at 12 (May 8, 2025).

significant risk to themselves and others.[9] Accounts of people awaiting evaluation and restoration from the Department in various county jails describe horrifying conditions. Later examples of these conditions included pretrial detainees like S.D., who sat mute in his feces-covered cell awaiting evaluation for over three months, and N.C., whose attempt to end his life by swallowing razor blades was not enough to prompt timely transportation to the state hospital. Motion to Reopen Action for Enforcement of Settlement Agreement ¶ 12, *Ctr. for Legal Advoc. v. Bicha*, No. 11-CV-02285-NYW, ECF No. 53 (D. Colo. Oct. 28, 2015) ("*Bicha* Motion to Reopen").

Confronted with these conditions, the Denver District Court issued a show cause order in three criminal cases in which the accused were languishing in jail notwithstanding prior court orders for their admission for evaluation and treatment at CMHIP. *Bicha* Motion to Reopen, ¶ 49. The court found the Department and CMHIP in contempt of its orders. *Id.* The court appointed special counsel to prosecute the contempt citations, which led to a global settlement agreement ("the Zuniga Agreement") for all detainees awaiting inpatient evaluation and restoration. *Id.* at ¶ 50. The Zuniga

[9] Colo. Dep't of Human Servs., *supra*, at 24–25.

Agreement required CMHIP to admit detainees within 24 days of receipt of an order for inpatient services. *Id.*

C. In Response to the Ongoing Crisis, the General Assembly Overhauled the Competency Scheme and Provided a Right to Second Evaluations.

By the 2008 legislative session, it was clear that existing protections for people in competency proceedings were failing to prevent unconstitutional and abhorrent conditions. In response, the General Assembly passed a new, comprehensive scheme regarding competency to proceed in a criminal case. An Act Concerning Competency to Proceed in Adult Criminal Cases, 2008 Colo. Sess. Laws 1837 ("HB08-1392").[10] HB08-1392 came out of a working group that included the parties to the Zuniga Agreement.[11] Under the reformed law, both the first and second evaluation became required upon request. C.R.S. § 16-8.5-103(2),(3),(4).

The statute requires a first evaluation upon request by any party. C.R.S. § 16-8.5-103(2). That initial evaluation must be conducted by a Department

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[10] *See Hearing on HB08-1392 Before the H.Comm.on Judiciary*, 66thGen. Assembl. (Apr. 15, 2008) (Final Bill Summary), https://perma.cc/LU3R-V6HR; *see also id.*, Attachment D, https://perma.cc/SYJ8-HM3E); *id.*, Attachment E, https://perma.cc/5EGX-PRJD.

[11] Hearing on HB08-1392 Attachment D, *supra* n. 10.

evaluator. *Id.* In a summary of the proposed changes prepared by the Department for the House Judiciary Committee, "the reason for change" was that the court "should at least hear CDHS's opinion" before ordering inpatient evaluation or restoration "due to the high cost of inpatient care."[12]

The mandatory second evaluation provision was enacted alongside the requirement of an initial one.[13] The second evaluation was to be from a "non-CDHS source,"[14] and the cost of this evaluation was to be covered by the court when the evaluee was indigent. C.R.S. § 16-8.5-103(4); *Id.* § 107. That the mandates for these evaluations arose simultaneously indicates the General Assembly's intent that they operate together.

When the General Assembly adopted these provisions, no court had held that a second evaluation was statutorily or constitutionally required. Nonetheless, in a bill that sought to make competency proceedings *shorter* (to "streamline" the competency process and "reduce the backlog of competency cases in county jails by establishing timelines"[15]), and

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[12] *Id.* at 2.

[13] Hearing on HB08-1392 Final Bill Summary, *supra* n. 10.

[14] Hearing on HB08-1392 Attachment D, *supra* n. 10, at 4.

[15] Hearing on HB08-1392 Attachment E, *supra* n. 10.

responding in part to conditions caused by funding shortages, the General Assembly *added* a mandated second, independent, evaluation which would be free to indigent defendants. C.R.S. § 16-8.5-103(4); § 16-8.5-107.

In setting out to remedy the particular ills of Colorado's competency proceedings, the General Assembly deliberately made available an iterative evaluation procedure to safeguard the fundamental right to a fair trial in our state. It expressly determined that the opportunity for a second evaluation was crucial. That determination should be left undisturbed.

III. In Practice, the Colorado Department of Human Services' Hiring, Training, and Management of Competency Evaluators Necessitate the Option of a Second Evaluation.

The first evaluation is subject to material pressures that create a significant risk of error. The first evaluator must come from the Department's Court Services unit, consisting of 45 psychologists and support staff located in Pueblo and Denver.[16] Court services evaluators are hired, trained, and managed in ways that risk an accused person with complex psychiatric conditions being evaluated by an inexperienced, minimally trained, and rushed psychologist. The option to invoke a

[16] Colo. Office of Civil & Forensic Mental Health, *Court Services* (2025–26), https://perma.cc/4J9M-GY87.

mandatory second evaluation — by an evaluator not subject to these pressures — is a necessary safeguard against this risk.

A. Department Evaluators Handle Some of the Most Complex Mental Health Assessments in the State, Which Require Significant Skill, Experience, and Time.

The scope of professional knowledge and experience that forensic competency evaluations require is vast. Forensic evaluators must be conversant with the complex law surrounding competency, navigate the intricate ethical interplay between their medical training and role in the legal system, and maintain an extraordinarily broad general practice. Because the statutory definition encompasses those who are incompetent to proceed due to any "mental disability or developmental disability," C.R.S. § 16-8.5-101(12), competency evaluators must assess the full range of mental or developmental disabilities that may arise in Colorado's population, and each individual evaluation might involve assessments of multiple potential disabilities and the interplay between them.

Many psychologists in private practice focus their work on specific topics. In fact, the American Psychological Association ("APA") maintains a

list of recognized specialties, subspecialties, and proficiencies.[17] For example, a psychologist specializing in geropsychology focuses on "biopsychosocial problems" encountered by older adults.[18] A psychologist proficient in addiction psychology focuses on the treatment of addiction related to "the use of alcohol and other psychoactive substances."[19]

By contrast, forensic psychologists like those employed by the Department, must be proficient in "the entire clinical spectrum."[20] This clinical spectrum is extremely wide. The APA's current *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* ("DSM-V") contains a long list of potential diagnoses that fill a full eight pages of its Table of Contents.[21] Diagnoses range from Autism Spectrum Disorder to Schizotypal Disorder, and also include neurocognitive disorders caused by other medical conditions such as prion disease or Huntington's Disease. *Id.* As the APA

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[17] APA, *Recognized Specialties, Subspecialties, and Proficiencies in Professional Psychology* (2025), https://perma.cc/7EUV-V4E5.

[18] APA, *Geropsychology* (2025), https://perma.cc/BLB7-4Y8L.

[19] APA, *Addiction Psychology* (2025), https://perma.cc/J7DK-E986.

[20] APA, *Forensic Psychology* (2025), https://perma.cc/GL5G-UBJP.

[21] APA, *DSM-5 Table of Contents* (2013), https://perma.cc/37VK-WQCS .

states, forensic psychologists must be prepared to assess any of these conditions.

A proper forensic evaluation requires significant time and effort.[22] The more complex the evaluation, the longer it will take, and many characteristics common to people in competency proceedings—psychosis, aggression, being uncooperative, being mute, or being diagnosed with a developmental disability—substantially increase the complexity.[23] Even without these common complications, a forensic evaluation requires collateral information, including record review (which can include medical records, court and police records, and jail records) and live interviews of collateral sources (attorneys, family members, and other witnesses to the evaluee's behavior).[24] An interview of the evaluee must be conducted, if possible, involving a complex advisement regarding confidentiality and use

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[22] 2 C.C.R. § 505-1:21.940 (each report shall accord with "best practices for forensic assessment of competency to stand trial"); Graham D. Glancey et al., *Practice Guideline for the Forensic Assessment*, 43 J. Am. Acad. Psych. & L. 2 (2015 Supp.).

[23] *Practice Guideline for the Forensic Assessment* § 10.1 (Special Situations: Challenging Assessments), *id.* § 10.3 (Assessments of Persons with Intellectual Disabilities).

[24] *Id.* § 6.2 (Information Gathering); *id.* § 6.3 (Mental Status Examination).

of the evaluation.[25] Preparation of the court evaluation itself, which necessitates extensive findings, also requires significant time. C.R.S. § 16-8.5-105(5).

B. Competency Evaluators Occupy Entry-Level Positions That Do Not Require the Specialized Credentials and Experience Needed for Especially Complex Assessments.

Although Department Court Services psychologists must assess the full spectrum of mental and developmental disabilities, and make determinations that impact defendants' liberty interests, publicly available job listings show that the Department routinely hires entry-level psychologists for these roles. A Department job posting listed in July 2025 for a forensic evaluator states that the Department only requires candidates to be licensed psychologists who have "one (1) year of experience as a licensed psychologist or permitted psychologist candidate."[26] Because license eligibility in Colorado requires only a year's experience, any newly

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[25] *Id.* § 5.5 (Assessments Without an Interview) (noting that an evaluator should always report that their assessment was limited by lacking an interview, explain why there was no interview, and consult ethics guidelines when they must make such a report).

[26] Colo. Dep't of Human Servs., *Psychologist I-Forensic Evaluator-Statewide (Hybrid)* (July 10, 2025), https://perma.cc/V57W-RBF5.

licensed psychologist is eligible for the role.[27] Additionally, the Department's job posting does not require any specialization in forensic psychology.[28] While the American Board of Professional Psychology maintains a board certification in forensic psychology, the Department does not require board certification for its evaluators.[29] Thus, any psychologist eligible for licensing in Colorado meets the Department's experience requirements for a forensic evaluator, and the Department may hire entry-level, newly-licensed psychologists.

C. Training Required of Evaluators is Minimal, Compounding the Potential for Error Caused by the Minimum Qualifications Required for Employment.

The Department's regulations set out the minimum training required for forensic evaluators. Approved evaluators receive a minimum of six hours of introductory training – not even a full business day. 2 C.C.R. § 505-1:21.931(A). Eleven training topics are required. *Id.* Some of these are

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[27] Colo. Dep't of Regul. Agencies, *Psychology Licensing Guide* 5 (2025), https://perma.cc/MM64-Y6UQ (to be eligible for a license, applicants must "complete at least 1500 hours of post-degree experience . . . over a minimum of 12 months").

[28] Colo. Dep't of Human Servs., *Psychologist I*, *supra* n.26.

[29] *See id.*; Council of Specialties in Pro. Psych., *Specialties Represented on CoS: Forensic Psychology* (2021), https://perma.cc/48LZ-MRHD.

foundational, such as "legal standards for competency to proceed," "constitutional protections for defendants," and "ethical issues and challenges in competency evaluations." *Id.* § 21.931(A)(1)-(2). Other topics are specific, complex issues within this already complex field, like "evaluating developmentally delayed defendants," "special issues in evaluating juveniles," and "evaluations for competency to waive the right to counsel." *Id.* § 21.931(A)(7), (8), (11). Each year, Department evaluators are only required to complete four hours of ongoing training. *Id.* § 21.931(C).

A new evaluator must have their first two reports reviewed by a senior clinician. 2 C.C.R. § 505-1:21.950(A). However, under the regulations, it is permissible for an evaluator who is newly licensed, having received only six hours of formal forensic training, and submitted only two forensic evaluations, to submit an evaluation without supervision or review.

Of course, not all Department forensic evaluators are inexperienced and inadequately trained. Some Department psychologists are no doubt well-qualified forensic evaluators with considerable experience. However, evaluations are assigned based on availability, and there is no way for a party or a court to be sure an evaluator with the required skills for any specific case is assigned—even when a case is obviously particularly

complex. Given the minimum *requirements* for Department evaluations, the option to for a second evaluation is a necessary safeguard to prevent the disastrous potential consequences of an erroneous evaluation.

D. The Department Requires Evaluators to Complete Too Many Evaluations to Account for Those That are Unusually Difficult.

The Department's job listing for a forensic evaluator states that evaluators are required to complete "the equivalent of 12 court ordered evaluations for competency or restoration of competency per month" – or approximately three each week—with six evaluations to be performed in jail.[30] The location of each evaluation is set by court order, and the forensic evaluator must travel to each location and meet with the patient, gather collateral information, and issue a written report.[31] The job of a forensic evaluator requires "extensive travel."[32]

In practice, what this means is that a forensic evaluator is assigned court-ordered cases and is required to coordinate a travel schedule for at least six jail visits per month. This schedule may require travel throughout the state, and each visit requires a full evaluation of any mental or

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[30] Colo. Dep't of Human Servs., *Psychologist I*, *supra* n.26.
[31] *Id.*
[32] *Id.*

developmental disabilities the evaluee may have. The evaluator also needs to gather collateral information, which may include extensive record review and multiple interviews. The evaluator must then prepare the statutorily required written report, addressing each of the eight required topics. § 16-8.5-105(5). Assuming an average 20 working days per month, the evaluator has less than two days to complete all of these tasks for each assigned case. In short, in many cases, Department evaluators are set up to fail.

E. The Second Evaluation by an Independent Evaluator is a Necessary Protection Against the Present and Significant Risk of an Erroneous Evaluation.

The competency statute itself demonstrates that the legislature had well-founded concerns about the quality of competency evaluations. For example, the definition of competency evaluator requires that evaluators be "trained in forensic competency assessments" in addition to being licensed psychiatrists or psychologists. § 16-8.5-101(3). The statute also sets forth extensive requirements regarding what information a competency report must include. § 16-8.5-105(5). And in 2019, the legislature revised the statute to require that CDHS establish a forensic evaluation training program in partnership with an accredited institution of higher education, and to

require that an oversight program be established to ensure the quality of forensic evaluators. An Act Concerning Actions Related to Competency, 2019 Colo. Sess. Laws 2273 (amending C.R.S. § 16-8.5-122). Taken as a whole, the statute demonstrates a persistent concern by the legislature that, particularly given the volume and complexity of cases, Department competency evaluators may not always be able to provide thorough, high-quality evaluations.

The legislature's chosen safeguard against the variable quality of Department evaluations is the availability of a second opinion. Not only is the competency statute unambiguous in giving parties the right to a second opinion, it actually states three separate times that a defendant may seek a second opinion following the initial evaluation. § 16-8.5-103(3); § 16-8.5-106(1); § 16-8.5-107.

In this case, the trial court violated the statute and ignored each of the three separate statutory provisions requiring a second opinion upon request. The statute is clear that the accused can not only request a second evaluation but can also request an evaluator of their own choice. § 16-8-106(1). As discussed above, the Department's evaluators have a heavy caseload and must assess a very broad range of conditions. That makes the accused's right

to a second evaluator especially important, as the defense may seek out an evaluator with expertise in the particular conditions that impact the accused's competence. The statute is clear that Mr. McGee should have been granted a second opinion, and it is clear why – given Mr. McGee's complex medical history, the Department's evaluators, with their general expertise and limited time, may not be able to provide a thorough and well-informed evaluation of Mr. McGee's competency.

CONCLUSION

The statutory provision mandating second competency evaluations upon a party's timely request provides an essential protection of the right to a fair trial in Colorado. The Court should reverse and make the order to show cause absolute.

Respectfully submitted this 3rd day of September, 2025.

/s/Emma Mclean-Riggs

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CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2025, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF ACLU OF COLORADO IN SUPPORT OF PETITIONER** was served via the Colorado Courts E-Filing system, which notifies all counsel of record.

/s/Emma Mclean-Riggs