

Supreme Court, State of Colorado 2 East 14 <sup>th</sup> Avenue Denver, CO 80203	DATE FILED October 31, 2025 2:41 PM FILING ID: 41845F5CD3E41 CASE NUMBER: 2025SA224
Original Proceeding District Court, Larimer County, 2021CR991 Hon. Susan J. Blanco	
<b>In Re:</b>  <b>Plaintiff:</b>  The People of the State of Colorado  <b>v.</b>  <b>Defendant:</b>  Austin Rhys McGee	
GORDON P. McLAUGHLIN District Attorney; Eighth Judicial District of Colorado  RUSSELL CONNELLY, #49691 Deputy District Attorney 201 La Porte Avenue, Suite 200 Fort Collins, CO 80521-2763 Phone: (970) 498-7200; Fax: (970) 498-7250	<b>▲ COURT USE ONLY ▲</b>  Case No: <b>2025SA00224</b>
<b>PEOPLE’S ANSWER BRIEF</b>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

X It contains 3847 words.

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    For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.\_\_\_\_, p.\_\_\_\_), not to an entire document, where the issue was raised and ruled on.

X For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

X I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Russell B. Connelly

RUSSELL B. CONNELLY, #49691

Deputy District Attorney

## **TABLE OF CONTENTS**

CERTIFICATE OF COMPLIANCE .....	2
TABLE OF AUTHORITIES .....	4
FACTUAL AND PROCEDURAL BACKGROUND.....	5
PRESERVATION AND STANDARD OF REVIEW .....	9
ANALYSIS.....	9
CONCLUSION.....	15
CERTIFICATE OF SERVICE .....	17

## **TABLE OF AUTHORITIES**

### **Cases**

<i>People v. Kilgore</i> , 992 p.2d 661, 663 (Colo.App.1999) .....	10
<i>People v. Lindsey</i> , 459 P.3d 530 (Colo.2020).....	8, 9, 10, 13
<i>People v. Morino</i> , 743 P.2d 49 (Colo.App.1987) .....	9
<i>People v. Rodriguez</i> , 521 P.3d 678 (Colo.App.2022).....	9, 14
<i>People v. Stephenson</i> , 165 P.3d 860 (Colo.App.2007).....	10
<i>Simpson v. Cedar Springs Hospital, Inc.</i> 336 P.3d 180 (Colo.2014). ....	8

### **Statutes**

C.R.S. 16-8.5-103 .....	8
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COMES NOW GORDON P. MCLAUGHLIN, District Attorney in and for the Eighth Judicial District of the State of Colorado, by and through Russell B. Connelly, his duly appointed, authorized and acting Deputy District Attorney, and hereby respectfully responds to this Court's Order to Show Cause.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The defendant, Austin McGee, was charged by Complaint and Information on June 8, 2021 with two counts of Internet Sexual Exploitation of a Child (a class four felony), Sexual Assault on a Child (a class four felony), Sexual Assault on a Child – Pattern of Abuse (a class three felony), Unlawful Sexual Contact (a class four felony), Internet Luring of a Child (a class four felony), Sexual Exploitation of Children (a class three felony), four counts of Sexual Exploitation of a Child (a class five felony), and Promotion of Obscenity to a Minor (a class six felony).

On April 4, 2022, Public Defender Matt Mulch filed a Motion for Competency Evaluation. As grounds for this Motion, Mr. Mulch stated that he did not believe that Mr. McGee was able to process what was happening to him and was incapable of making decisions regarding his case. Mr. Mulch also stated that he believed Mr. McGee was very likely insane at the time of the offense. (Suppressed Appendix p. 3). In response to this motion, the trial court ordered the first of what would ultimately be four competency evaluations. On June 2, 2022, an evaluation report by Dr. Alex Rodrigues opining that Mr. McGee was competent to proceed was filed with the Court. (Suppressed Appendix pp. 6-20). On June 9, 2022, counsel for Mr. McGee requested a second competency evaluation, which the trial court ordered. The second competency evaluation, performed by Dr. Nicole Mack, was filed with the Court on August 2, 2022. Like the initial evaluation done by Dr. Rodrigues, it

opined that Mr. McGee was competent to proceed. (Suppressed Appendix pp. 19-31).

On November 9, 2022, Mr. Mulch filed a motion to withdraw as counsel of record for Mr. McGee, citing a complete breakdown in communication. The trial court granted this request the next day, and attorney Troy Krenning was appointed to represent Mr. McGee as Alternate Defense Counsel. On May 16, 2023, Mr. Krenning filed a motion to withdraw as counsel, citing an irreconcilable conflict and a complete breakdown in the attorney/client relationship. After conducting a *Bergerud* hearing on May 17, the Court allowed Mr. Krenning to withdraw as counsel for Mr. McGee. On May 22, 2023, the Court appointed John Gifford to represent Mr. McGee as Alternate Defense Counsel.

On August 20, 2023, Mr. Gifford filed a motion raising competency for the second time. This motion stated that Mr. McGee had been diagnosed with a number of serious mental health and neurodevelopmental disorders, including autism spectrum disorder, bipolar disorder, obsessive-compulsive disorder, depression, anxiety, ADHD, and post-traumatic stress disorder. Mr. Gifford stated that Mr. McGee was not willing to accept the plea offer made by the District Attorney and was also unable to enter a not guilty plea of any kind. Mr. Gifford stated that Mr. McGee appeared to be mostly unable to discuss what to do with his case if there was not a plea offer that was acceptable to him, and that Mr. McGee did not appear to be able to make rational decisions, evaluate his options, or work with counsel in a manner that a competent person would. (Suppressed Appendix, pp. 32-36). Notably, while this motion was much more detailed than the one filed by Mr. Mulch, Mr. Gifford's concerns appeared to be quite similar to those expressed by prior counsel. As an exhibit to his motion, Mr. Gifford filed a psychological evaluation of Mr. McGee done by Dr. Katelyn Hernandez. On August 20, 2023, the trial court ordered a third competency evaluation. This evaluation was performed by Dr. Steven Gale

and was filed with the court on September 21, 2023. Like the two evaluators before him, Dr. Gale concluded that Mr. McGee was competent to proceed. (Suppressed Appendix, pp. 68-75). The trial court conducted a competency hearing on October 4, 2023, at which Mr. Gifford did not object to Dr. Gale's findings. Mr. McGee proceeded to interject and requested an additional competency evaluation. The Court denied this request, as Mr. McGee had already had three competency evaluations that concluded that he was competent to proceed. (Public Appendix pp. 23-29). At the same hearing, Mr. McGee entered a plea of not guilty by reason of insanity and the Court ordered a sanity evaluation. (Public Appendix pp. 25-35).

On March 27, 2024, Mr. Gifford moved to withdraw as counsel for Mr. McGee, stating that C.R.P.C. 1.16 required that he terminate his representation. On April 18, 2024, Mr. Gifford and Andrew Sidley-Mackie jointly filed a substitution of counsel; Mr. Sidley-Mackie commenced representation of Mr. McGee and Mr. Gifford withdrew. The Court granted this substitution of counsel on April 23, 2024.

On August 1, 2024, the sanity evaluation that had been ordered on October 4, 2023 was filed with the Court. In this evaluation, Dr. Ann Joseph opined that Mr. McGee was competent to proceed and was legally sane at the time of the alleged offenses. On September 6, 2024, defense counsel filed a motion requesting a second sanity evaluation paid for by the state. On September 27, 2024, the Court denied this request.

On May 27, 2025, defense counsel filed a motion for a competency evaluation. This marked the third time that competency had been raised in this case. The specific issues raised in this motion were extremely similar to the issues previously raised by Mr. Mulch and Mr. Gifford in their respective motions for competency evaluations; namely communication difficulties between Mr. McGee and defense counsel and anxiety that prevented Mr. McGee from rationally considering the pros and cons of the various options available to him regarding his

decision as to whether to accept a plea agreement or proceed to trial in this case. (Suppressed Appendix pp. 94-112). On May 28, 2025, the court ordered a fourth competency evaluation. This fourth competency evaluation was filed with the court on June 20, 2025 and was authored by Dr. Sarah Velsor. Like every evaluator before her, Dr. Velsor concluded that Mr. McGee was competent to proceed. On June 26, 2025, Defense Counsel filed a request for an additional competency evaluation and hearing regarding competency. The court denied this motion with regard to an additional competency evaluation and granted it with regard to the request for a hearing to determine competency.

In denying the Defendant's motion for a fifth competency evaluation, the trial court noted that the most recent motion for a competency evaluation did not raise a new indicia of incompetency nor a different medical or psychological explanation regarding the defendant. The trial court also noted that the defendant had been found competent four times in the past three years. (Order:(38) Request for Competency Hearing and Second Evaluation Regarding Competency, 6/30/2025). In response to a written request for clarification from defense counsel, the trial court further stated as follows:

“This Court has had roughly four years with Mr. McGee before it and multiple attorneys representing the same concerns Defense Counsel has raised on May 27, 2025. Despite the Court having no concern regarding the Defendant's competency, the Court obliged an evaluation merely for the benefit of the Defense but made a record that the Court does not share any concerns. This is due to the Court's long history with the Defendant, the number of evaluations all finding Mr. McGee competent to proceed, and no change in Mr. McGee's presentation before the Court. In fact, the Court has had a series of longer hearings with Mr. McGee present in Court and appearing virtually with no concern in any changes of his behaviors before the Court. The truth is, Mr.



McGee has been clear that he does not want to have the case litigated and has created a multitude of reasons to delay the case from proceeding over the course of the last four years. Within reason, the Court has allowed more than what would have been necessary to protect Mr. McGee's rights but we are coming up on the eve of trial and these requests seem wholly unfounded and appear to be another tactic to delay the case.” (Order: Request for Clarification of Order:(38) Request for Second Competency Evaluation and Hearing Regarding Competency, 7/1/2025).

In response to the court’s ruling on the motion for a fifth competency evaluation, defense counsel filed a petition for order to show cause pursuant to C.A.R. 21.

### **PRESERVATION AND STANDARD OF REVIEW**

The People do not dispute that this issue was properly preserved, as defense counsel filed a motion requesting a second competency evaluation within the time frame set forth in C.R.S. 16-8.5-103(3). Issues of statutory interpretation are reviewed de novo. *Simpson v. Cedar Springs Hospital, Inc.* 336 P.3d 180 (Colo.2014). The correct standard of review pertaining to whether the competency motion filed by Mr. Sidley-Mackie in 2025 satisfied the necessary threshold requirements is an abuse of discretion. *People v. Lindsey*, 459 P.3d 530, 531 (Colo.2020).

### **ANALYSIS**

C.R.S. 16-8.5-103 sets out the applicable procedures regarding steps that are taken when a defendant’s competency is raised, and C.R.S. 16-8.5-103(3) and (4)

govern a defendant's entitlement to a second competency evaluation. However, in order to trigger the procedures set forth therein, the defendant must satisfy certain threshold requirements. Specifically, counsel must make a motion in writing, certify that he has a good faith doubt that the defendant is competent to proceed, and set forth the specific facts that have formed the basis for the motion. *Id* at 535. Trial courts retain sufficient discretion to reject a competency motion that rests on counsel's inadequate proffer. *Id* at 538, and C.R.S. 16-8.5-103 does not state whether a defendant is entitled to a second evaluation in the event that the trial court orders an evaluation in spite of the threshold requirements not being met.

A trial court does not abuse its discretion by denying a defendant's subsequent motion for a determination of competency where (1) one or more specialists previously examined the defendant and concluded he or she was competent to proceed and (2) the subsequent motion presents neither previously unexamined indicia of the defendant's lack of competency nor a different medical or psychological explanation for why the defendant, despite having previously been found competent, is no longer competent to proceed. *People v. Rodriguez*, 521 P.3d 678 (Colo.App.2022). "A trial court should only order competency evaluations when they are warranted. Doing otherwise has the potential to adversely affect defendants (including those in custody) who are deserving of a competency evaluation and are patiently awaiting their turn. In the recent past, all three branches of our state government have devoted substantial time and energy to addressing the lengthy backlogs that exist regarding competency evaluations. Ordering a competency evaluation when there is not a good-faith doubt about a defendant's competency would undermine those efforts and further exacerbate the situation." *Lindsey*, 459 P.3d at 538. "Stripping district courts of their discretion to decline to order a competency evaluation where no such evaluation is warranted would allow lawyers to delay trials for years, if not decades, by filing competency motion after

competency motion. No reasonable reading of sections 16-8.5-102 and 16-8.5-103 would allow criminal cases to become trapped in such a time loop.” *Rodriguez*, 521 P.3d at 688.

The need to protect an accused from proceeding to trial or sentencing while incompetent dictates that if a “sufficient doubt” of competency has been raised, a trial court’s failure to make a competency determination violates due process requirements. *People v. Morino*, 743 P.2d 49, 51 (Colo.App.1987). However, due process does not require trial courts to “accept without questioning a lawyer’s representations concerning the competence of his client.” Rather, it is only if such representations, either alone or in conjunction with other evidence, raise a “bona fide doubt” of the defendant’s competence that a court must address the issue. *Id* at 51, *People v. Kilgore*, 992 p.2d 661, 663 (Colo.App.1999). There is an initial presumption of competency. *People v. Stephenson*, 165 P.3d 860, 866 (Colo.App.2007). Because the trial court has the opportunity to observe a defendant’s actions and general demeanor, it has substantial discretion in determining whether a legitimate issue respecting that defendant’s competency has been raised. *Kilgore*, 992 P.2d at 663-64.

While trial courts should be mindful that defense counsel will generally be in the best position to address whether there is a competency concern with a defendant, *Lindsey*, 459 P.3d at 538, the court in this case was well-positioned to arrive at the conclusion that there were no competency concerns with Mr. McGee. At the time the court denied defense counsel’s request for a fifth competency evaluation, Mr. McGee’s case had been pending before the court for over four years. During that time, there had been a revolving door of attorneys representing Mr. McGee; Mr. Sidley-Mackie was the fourth attorney to represent him in this matter. Of the attorneys who had represented Mr. McGee, three of them had raised competency during the pendency of the case. The previous competency motions filed by Mr.

Mulch (Suppressed Appendix, pp. 1-2) and Mr. Gifford (Suppressed Appendix, pp. 32-36), as well as the competency motion filed by Mr. Sidley-Mackie (Suppressed Appendix, pp. 94-112), all raised the same fundamental issues; namely that Mr. McGee lacked a rational understanding of the proceedings against him and was therefore unable to assist in his defense, and that he was unable to effectively communicate with his attorneys, not due to any intellectual shortcomings on his part, but rather because of issues with appropriate social interactions and emotional regulation.

These concerns were addressed in no fewer than four separate competency evaluations and a sanity evaluation, all of which found that Mr. McGee was competent to proceed. After competency was raised by Mr. Mulch, Mr. McGee was evaluated by Dr. Rodrigues, who made detailed findings in his evaluation that Mr. McGee was able to have a factual and rational understanding of the proceedings against him and was able to consult with his lawyer in order to assist in his defense. (Suppressed Appendix, pp. 4-18). After Mr. Mulch requested a second evaluation, Mr. McGee was evaluated by Dr. Mack. Much like Dr. Rodrigues, Dr. Mack opined that Mr. McGee had a factual and rational understanding of the proceedings and was able to consult with his attorney in order to assist in his defense. Dr. Mack noted that during her evaluation of Mr. McGee, he “exhibited a coherent, logical, and goal-directed thought process,” and further noted that “he demonstrated a good understanding of his legal situation and basic legal concepts,” and that “his presentation in the evaluation also suggested that he has the ability to work cooperatively with his attorney to assist with his case, if he chooses to do so.” (Suppressed Appendix, pp. 19-31).

After Mr. Gifford replaced Mr. Mulch as counsel of record for Mr. McGee, competency was raised once again. In his motion, Mr. Gifford raised essentially the same competency concerns as Mr. Mulch; namely that Mr. McGee was unable to

rationally understand the proceedings against him and communicate with his attorneys, and was unable to make decisions pertaining to his case. (Suppressed Appendix, pp. 32-36). The court ordered another competency evaluation, and Mr. McGee was evaluated by Dr. Steven Gale. Dr. Gale noted that “Mr. McGee carries a diagnosis of Autism Spectrum Disorder, though with limited impairment of language and no intellectual impairment...Mr. McGee also expressed some paranoia regarding his treatment by the legal system...It is also noteworthy that Mr. McGee’s general paranoia or cynicism regarding the legal system did not impede his understanding of the potential consequences of decisions he might make regarding his case.” Dr. Gale further went on to state that “I found that Mr. McGee demonstrated very clear understanding of the potential outcomes of his case and of various decisions that he might face. It was true that Mr. McGee expressed a great deal of reluctance to finalize some of these decisions, such as making a decision regarding a potential plea bargain. Nevertheless, based on his explanation of his thought process in considering this decision, his reluctance to make this decision appears to be solely based in his unhappiness with each potential outcome rather than in a lack of ability to rationally understand those outcomes. In short, it’s not that he is unable to choose, so much as it is that he doesn’t like the choices that have been presented to him to date.” Dr. Gale concluded that Mr. McGee did not have a mental disability or developmental disability that prevented him from consulting with his lawyer with a reasonable degree of rational understanding in order to assist in his defense or prevented him from having a rational and factual understanding of the criminal proceedings, and stated that “ultimately, in spite of challenges that will likely continue to arise in Mr. McGee’s working relationship with his lawyer, it is my opinion that he is able to rationally participate in this process, should he choose to do so.” (Suppressed Appendix, pp. 68-75).

Approximately nine months after Dr. Gale's evaluation, Mr. Sidley-Mackie had replaced Mr. Gifford as counsel for Mr. McGee, and competency was once again raised. The grounds set forth in Mr. Sidley-Mackie's motion raising competency were largely identical to those in the motions previously filed by Mr. Mulch and Mr. Gifford. Mr. Sidley-Mackie's motion stated that he had difficulty communicating with Mr. McGee, and that Mr. McGee suffered from paranoid and grandiose thinking, which contributed to his difficulties effectively communicating with counsel. Mr. Sidley-Mackie also raised concerns that Mr. McGee would not be able to function during a jury trial; however these concerns were not corroborated by the forensic psychological evaluation report that was attached with the pleading, which recommended that accommodations be made at trial in order to "ensure the greatest possibility for success." (Suppressed Appendix, p. 124).

Given the circumstances of this case, the trial court would have been well within its authority to reject Mr. Sidley-Mackie's motion raising competency as failing to meet the threshold requirements of C.R.S. 16-8.5-102(2)(b). *Lindsey*, 459 P.3d at 531. At the time the motion was filed, four separate evaluations (three competency evaluations and a sanity evaluation) had found that Mr. McGee was competent to proceed. The motion did not raise any new indicia of incompetency or of a different medical or psychological explanation for why Mr. McGee was now incompetent when he had been competent previously, and the trial court made a finding to that effect in denying defense counsel's request for a second evaluation. (Order:(38) Request for Second Competency Evaluation and Hearing Regarding Competency, 6/30/2025). The trial court also made a record that it had not observed any changes of concern in Mr. McGee's behavior over the course of a series of hearings and both in-person and virtual appearances. Finally, the trial court had concerns that Mr. McGee was malingering based on his refusal to either accept a plea or proceed to trial, statements made in the prior competency evaluations

indicating that he had the ability to make decisions in his case and refused to do so, and the fact that the case had been pending for over four years. The court stated in a written order clarifying its ruling on the request for a second competency evaluation and hearing that “Mr. McGee has been clear that he does not want to have the case litigated and has created a multitude of reasons to delay the case from proceeding over the course of the last four years.” (Order:Request for Clarification of Order:(38) Request for Second Competency Evaluation and Hearing Regarding Competency, 7/1/2025).

As the trial court made a record that Mr. Sidley-Mackie’s competency motion did not raise new indicia of incompetency and Mr. McGee had been previously examined and determined to be competent, the statutory procedures for determining competency were not triggered. *Rodriguez*, 521 P.3d at 688. As a result, the trial court did not have an obligation to order a new competency evaluation for Mr. McGee. Instead, the trial court exercised its discretion in ordering a new competency evaluation out of an abundance of caution. After that evaluation concluded, for the fifth time, that Mr. McGee was competent to proceed (Suppressed Appendix, pp. 165-173), the trial court further exercised its discretion in denying defense counsel’s request for a fifth competency evaluation, and did not abuse its discretion in doing so.

## **CONCLUSION**

WHEREFORE, the People respectfully request that this Honorable Court uphold the district court’s order denial of a second competency evaluation.

Respectfully submitted this 31<sup>st</sup> day of October, 2025.

GORDON P. MCLAUGHLIN

District Attorney

*s/ Russell Connelly*

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RUSSELL CONNELLY, #49691

Deputy District Attorney



## **CERTIFICATE OF SERVICE**

### **Certificate of Service**

I certify that a copy of the above and foregoing was  
efiled via CCEF to counsel of record on 10/31/2025.

\* /s/ Russell Connelly