

**REDACTED**

FILED IN THE DISTRICT AND COUNTY COURTS OF	
EL PASO COUNTY, COLORADO	
JAN 20 2016	
DR. LYNETTE CORNELIUS CLERK OF COURT	
▲ COURT USE ONLY ▲	
<b>DISTRICT</b> District Court, El Paso County, Colorado Court Address: 270 S. Tejon St. Colorado Springs, Colorado 80903	Case #: 15CR5795 Division #: 10
<b>People of the State of Colorado</b> vs. <b>Defendant: Robert Dear, Jr.</b>	
District Attorneys: Daniel H. May, #11379, Jeffrey Lindsay, #24664, and Donna Billek, #30721 105 E. Vermijo Colorado Springs, CO. 80903 Phone Number: 719-520-6000 District Attorney: Daniel H. May, #11379	
<b>D-015</b>	
<b>PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO LIMIT SCOPE OF COMPETENCY EVALUATION</b>	

COMES NOW, DANIEL H. MAY, by and through his duly appointed deputy and hereby submits the following People's Response to Defendant's Motion to Limit the Scope of the Competency Evaluation (D-15). The People object to the Court granting the Defendant's request for the following reasons:

**FACTUAL PROCEEDINGS**

1. Defendant is currently charged with 179 counts of Murder, Attempted Murder, First Degree Assault, and Criminal Mischief. The nature of the proceedings involves the Defendant's involvement in the standoff that occurred on November 27, 2015 at the Colorado Springs Planned Parenthood Office. The Defendant murdered 3 people and manifested extreme indifference to the value of human life.
2. Since the date of the filing of charges, the Defendant has raised concerns about his legal representation and has expressed a desire to exercise his rights to act as his own attorney. The Defendant has appeared lucid at the court dates and clearly has an understanding of the nature of the charges, the possible penalties, recognition of his attorneys, voiced his apparent dislike or distrust of his attorneys, recognition of the court, and acknowledgment of the general court process.
3. On the date of the filing of charges, the Defendant raised concerns regarding his attorney. Neither the Court or the defendant's attorneys raised competency such that it would trigger an evaluation. Instead, the defense attorney hinted that there may be some competency issues but did not specifically file any documents, requests, or affidavits with the Court that would trigger competency proceedings.

**EC**

4. The Defendant had at that time refused all professional visits with his attorneys and continues to refuse to meet with them.
5. At a hearing on December 23, 2015, the Court ordered the Defendant undergo a competency evaluation because the Court felt it did not have sufficient information to make a finding of competency and the Defendant's ability to knowingly and intelligently waive his right to an attorney. The Court made this decision after holding an ex-parte proceeding in which the prosecution was not allowed to attend and was over the objection of the People. The context of the hearing appears to be related to the Defendant's request to proceed pro se and apparent concerns raised by the defense attorney regarding the Defendant's competency. Although defense counsel did not make any statements outside of the ex-parte hearing regarding the Defendant's competency it had clearly been an issue at the prior court date and the defendant was still refusing all professional visits with his attorneys.

The People are unaware of what occurred during the ex-parte proceeding. The People requested the Court make findings regarding the reason for ordering the Defendant to undergo a competency evaluation and on what information the Court relied to issue that order but the Court refused. It can only be surmised that the majority of the decision was based on the ex-parte proceedings and the Court's colloquy with the Defendant during that proceeding. The People have requested that the transcript of the ex-parte proceeding be unsealed but the Court has refused. The People are at a distinct disadvantage to determine who requested and how the request or suggestion for a competency evaluation arose on December 23, 2015.

6. The Court, over the Defendant's objection, was ordered to undergo a competency evaluation. The Court read the Defendant a lengthy advisement and provided the Defendant with a written copy of it. The Defendant acknowledged the Court and remained adamant that he would not cooperate with the evaluation and that he wanted to exercise his right to proceed without counsel.

#### **DEFENDANT'S ARGUMENT**

7. Defendant seeks to limit the scope of the competency evaluation such that the Defendant is not asked about the incident that lead to the Defendant being charged. The Defendant's argument rests on the argument that Defendant's right against self-incrimination would be violated if he were asked any information relating to the incident. Additionally, the Defendant argues that because it was the Court who ordered the evaluation to be conducted, the Defendant is afforded protections under Estelle v. United States.
8. The suggestion and conclusion of the Defendant's motion is misplaced and fails to account for the protections afforded to the Defendant within the statutes involving competency determinations. Defendant's request does not comport with the statutes or the guidelines for the determination of competency. The limitation that the Defendant seeks would lead to an incomplete and potentially inaccurate competency evaluation.

#### **COMPETENCY STATUTES, EVALUATION GUIDELINES, AND STATUTORY CONSTRUCTION**

9. Proceedings involving the competency of a defendant in Colorado are controlled by C.R.S. 16-8.5-101 et. seq. When reviewing statutes, the Court must ascertain and give effective to the General Assembly's intent. People v. Hunter, 307 P.3d 1083, 1086 (Colo. 2013). The Court must look to and rely on the plain language of the statute. People v. Sexton, 296 P.3d 157, 161 (Colo. App. 2012). A consistent, harmonious, and sensible effect to all of the statute's parts must be given to avoid an interpretation or construction that essentially renders a statute meaningless. People v. Perez-Hernandez, 348 P.3d 451, 457 (Colo. App. 2013). If a statute is unambiguous, there is no need for the Court to do further inquiry. People v. Cito, 310 P.3d 256, 259 (Colo. App. 2012).
10. A defendant is considered competent to proceed if "the defendant does not have a mental disability or developmental disability that prevents the defendant from having 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 prevents the defendant from having a rational and factual understanding of the criminal proceedings." C.R.S. 16-8.5-101(4).
11. The test for determination of competency as set out by the United States Supreme Court is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960), first cited in Colorado in Labor v. Gibson, 195 Colo. 416, 418, 578 P.2d 1059, 1060 (Colo. 1978), most recently cited in People v. Davis, 352 P.3d 950, 954 (Colo. 2015).
12. In the case in which a defendant seeks to waive his right to the assistance of counsel, the standard for competency is the same as competency to stand trial. People v. Davis, 352 P.3d 950 (Colo. 2015). A waiver of the right to counsel must be voluntary, knowing and intelligently made. "[A] defendant is competent to waive his right to counsel if he has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [] and ... has a rational as well as factual understanding of the proceedings against him'." Id. at 954 citing Dusky v. United States, 362 U.S. 402 (1960). When the Court finds that the waiver is voluntary, the Court must determine if the waive is knowing and intelligent. "A waiver is knowing and intelligent when the totality of the circumstances demonstrates that the defendant 'understands the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'" Id. at 955 citing People v. Arguello, 772 P.2d 87, 94 (Colo. 1989).
13. A defendant is presumed competent. People v. Morino, 743 P.2d 49, 51 (Colo.App.1987); People v. Kilgore, 992 P.2d 661, 663 (Colo. App. 1999).
14. This presumption continues unless or until the Court is presented with sufficient facts that indicate a substantial issue has been raised as to the defendant's competency to proceed. It is only when representations of the parties, the Court's observations, and/or in conjunction with other evidence available to the Court that the evidence raises a substantial issue of a defendant's competence such that the Court must address the issue of competency and to trigger the proceedings outlined in C.R.S. 16-8.5-102 et. seq. People v. Morino, 743 P.2d 49, 51 (Colo.App.1987)

15. Once competency is raised, the statute provides for a two-part process. The Court must make a preliminary finding and must make a final determination. C.R.S. 16-8.5-103. If the Court has sufficient information before it to make a preliminary finding, the Court may do so. However, if the Court believes that additional information may be needed and believes that it has inadequate information to make a preliminary finding, the Court is authorized to order a competency evaluation or any other investigation it deems necessary to assist the Court in making its preliminary finding. C.R.S. 16-8.5-103(2). Once the report is received, the parties may request a hearing and/or request additional evaluations. C.R.S. 16-8.5-103(3).
16. The Court is given discretion to order where a defendant shall undergo the evaluation for competency. C.R.S. 16-8.5.105.
17. Regardless of the basis for the evaluation being ordered or who asked for the evaluation, an evaluator tasked with determining competency must assess the defendant "with specific reference to the nature of the proceedings with which he is confronted and the appropriate level of understanding necessary for meaningful cooperation with his attorney." Jones v. District Court, 617 P.2d 803, 807 (Colo. 1980). This by its nature requires the evaluator to delve into the factual issues that relate to the nature of the proceedings, the charges, possible defenses, and generally the ability to cooperate with a defendant's attorney. A competency evaluator can use all facts known or acquired during the course of the evaluation to assist in the determination of a defendant's competency. This information can include confessions/admissions made by the defendant whether while undergoing the evaluation or previous to the evaluation, a review of available police reports, review of available medical reports, information obtained about social and family history, or any other information the evaluator determines is useful and necessary to arrive at an opinion of the Defendant's competency. The criteria are contained within the statute, 16-8.5-105(3):
- "To aid in forming an opinion as to the competency of the defendant, it is permissible in the course of an evaluation under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant."
18. Current standards for a mental health evaluation and report must document how the evaluator developed information and should include specific areas of inquiry and opinion. The evaluation should include identifying information including the defendant's name, age charges, and who raised competency. The sources of information that the evaluator can consider and should document whether they were considered include: interview(s) of the defendant; psychological tests that were administered; police reports; mental health records; other records available; contact or attempted contact with both prosecution attorneys and defense attorneys; contact with other mental health professionals, family members, or others. The report should also indicate notification to the defendant of the purpose of the examination, absence of confidentiality, who would obtain copies of the report, and that the examiner might be required to testify. Additionally, the report shall include information developed or reviewed by the evaluator that includes family history, social history, medical history, substance use history, prior psychiatric treatment, and current medications. Finally, the report should also contain the current clinical

observations of the evaluator of the defendant (including any psychological test data), a diagnostic impression, and an evaluation of the defendant's functional abilities in relation to the definition of competency in the statute. See 2 CO ADC 502-1:21.940. The substance of any report is mandatory under 16-8.5-105(5):

(5) The report of evaluation shall include but need not be limited to:

(a) The name of each physician, psychologist, or other expert who examined the defendant; and

(b) A description of the nature, content, extent, and results of the evaluation and any tests conducted; and

(c) A diagnosis and prognosis of the defendant's mental disability or developmental disability; and

(d) An opinion as to whether the defendant suffers from a mental disability or developmental disability; and

(e) An opinion as to whether the defendant is competent to proceed.

19. Concerns about admissions/confessions made by a defendant were considered by the legislature and a statutory procedure was adopted to address those particular concerns. Even in the instance of the court *sua sponte* orders a defendant to undergo a psychiatric evaluation to determine competency, the Court is only required to advise a defendant of his right to self-incrimination and his right to remain silent and there is no adverse consequence for exercising that right. If a defendant waives those rights, after having been advised of them by the Court, there is no violation of a defendant's rights. See Estelle v. Smith, 451 U.S. 454 (1981).

While the Defendant does have the right against self-incrimination during the course of the evaluation, any non-cooperation on the part of the Defendant may be used in limited circumstances against the defendant at hearings involving the defendant's competency. 16-8.5-105(2). Statements or any direct or indirect evidence obtained for the first time during the course of the evaluation may only be used at a sentencing hearing to prove the existence or absence of a mitigating factor. C.R.S. 16-8.5-108(1)(b). Additionally, the evidence may be used if a defendant testifies at trial or sentencing and the evidence is necessary to impeach or rebut the defendant's testimony. C.R.S. 16-8.5-108(1)(c); See People v. Kruse, 839 P.2d 1 (Colo. 1992); People v. Branch, 805 P.2d 1075 (Colo. 1991).

20. Once the competency evaluation is received, the Court clerk is required to, "shall," provide copies to the defense attorney and to the prosecuting attorney. 16-8-106(4).

21. At this point, the Court is to review the evaluation and make a preliminary finding. The Court is required to immediately notify the parties of its preliminary finding. 16-8-111 (2). At this point the parties may request a competency hearing and/or additional evaluations to be completed. 16-6-111(2).

#### ARGUMENT

The Defendant's request to limit the scope of the inquiry of the evaluator for the competency evaluation is without statutory support or case law. The Defendant does not and cannot point out a case, regulation, or exception in the statute that would limit the evaluator's inquiries. The evaluator can and should consider a number of things to determine his or her opinion. The law does not limit the evaluator to a small snapshot in time (i.e. when the Defendant is at the state hospital) but rather the evaluator is to consider a number of sources and information outside of that timeframe. The standard to determine competency necessarily includes events that led up to the reason a competency determination is being sought.

When determining competency and, in this case, how competency relates to a waiver of the right to counsel the Court must consider several factors and rely on an evaluator's opinion. Some discussion of the incident that led to the defendant being charged is germane to the issue of whether a defendant can adequately and meaningfully discuss his case with his attorneys and whether the Defendant understands the charges, the nature of the proceedings, defenses, possible penalties, and a general understanding of the circumstances that bring the Defendant before the Court.

The statute and advisement by the Court provides for sufficient procedural safeguards of the Defendant's rights. Limitations are placed on the use of any evidence obtained through the course of the evaluation and is not being used as an end-run to a Defendant's rights or gathered to determine guilt but rather utilized by the evaluator and, ultimately, the Court to determine the mental processes and the status of the Defendant in relation to competency.

The Defendant has been advised by the Court regarding his rights, the effect of the waiver of those rights, and the effect of the refusal to cooperate with the evaluation. Defendant's reliance on juvenile transfer cases have little relevance to this particular case and Defendant's quote used from Estelle is out of context and is not binding on the Court as referenced by the Defendant in his motion.

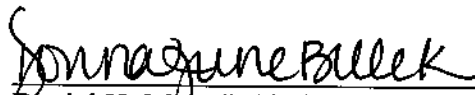
The People object to the Court limiting the scope of the evaluation. Limitation of the evaluation or precluding an evaluator from asking particular questions unnecessarily places the validity of the evaluation into question. When read as a whole, the statutes support that the evaluator should not be limited in scope to determine competency as the General Assembly has provided sufficient procedural safeguards.

WHEREFORE, the People request the Court to deny the Defendant's Motion to Limit the Scope of the Competency Evaluation without a hearing.

Respectfully submitted this 19<sup>th</sup> day of January, 2016.

DANIEL H. MAY, #11379  
DISTRICT ATTORNEY

By:



Daniel H. May, #11379  
Jeffrey Lindsay, #24664  
Donna Billek, #30721

## APPENDIX 1

2 CO ADC 502-1:21.940

Each report shall document development of information pertaining to each of the following areas:

- A. Identifying information, including defendant's name and age, charges and county of origin, competency issue raised by whom (if known);
- B. Sources of information used, including:
  1. Interview(s), date(s) and length(s) of time spent with defendant at each meeting, and any psychological tests administered;
  2. Police records;
  3. Mental health records;
  4. Other records as available;
  5. Contact or attempted contact with both attorneys; and,
  6. Contacts with other mental health professionals, family members, and others, as needed and appropriate.
- C. Notification of purpose, including informing defendant of the purpose of examination, of the absence of confidentiality, to whom a report would be sent, and that the examiner might be required to testify.
- D. Background information, including family history, social history, medical history, substance use history, prior psychiatric treatment, and current medications. Evaluations of a defendant's restoration to competency following a determination of incompetency do not need to reiterate all of this information, but should contain a review of prior evaluations of competency to proceed on the current matter.
- E. Course of treatment, including specific reference to condition of the person at the time they were admitted to CMHIP, medication(s) administered, need for emergency medications or petition(s) for administration of involuntary medications, significant behavioral problems, treatment involvement, and other notable events (this section may not be relevant if the person being evaluated is incarcerated, or if the person is not institutionalized).
- F. Current clinical observations such as mental status examination and current psychiatric status, including psychological test data when available.
- G. Diagnostic impression.
- H. Evaluation of functional abilities requisite to competency as defined in statute, identifying specific ways in which identified psychiatric deficits impede each or all of these functional abilities, if any.
- I. A summary statement, including specific citation of clinical information that supports the evaluator's opinions regarding mental disease or defect and resultant impairments in functional abilities pertaining to competency, as well as a comment regarding the prognosis for the defendant's mental disability or

developmental disability (if any). If the defendant is a juvenile, there must be a statement regarding the potential for restorability to competency.

J. Statutory opinion, which is a clear statement of the evaluator's opinion regarding the defendant's competency to proceed, using language as specified in Section 16-8.5-101(4) and 16-8.5-101(11), C.R.S.



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO LIMIT SCOPE OF COMPETENCY EVALUATION (D-015)** has been forwarded to the Public Defender's Office by placing it into the Public Defender's box for pickup:

1/20/16

Aina Reyes