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FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO	
DISTRICT District Court, El Paso County, Colorado Court Address: 270 S. Tejon St. Colorado Springs, Colorado 80903	JAN 20 2016 DR. LYNETTE CORNELIUS CLERK OF COURT
People of the State of Colorado vs. Defendant: Robert Dear, Jr.	▲ COURT USE ONLY ▲ Case #: 15CR5795 Division #: 10
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	
D-016	
PEOPLE'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER CONCERNING COMPETENCY EVALUATION	

COMES NOW, DANIEL H. MAY, by and through his duly appointed deputy and hereby submits the following People's Response to Defendant's Motion For Protective Order Concerning Competency Evaluation (D-16). 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.

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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 argues that since the Defendant did not raise competency on December 23, 2015 that there is, at best, a forced limited waiver of privileged materials and, therefore, the prosecution should not be entitled to a copy of the competency report or the information in it. The Defendant argues that the report and any information utilized by the evaluator should only be provided to the Court and to the Defendant's attorneys until the defendant has raised the or the Court has made a finding of incompetency and ordered restoration of competency treatment.
8. The suggestion and conclusion of the Defendant's motion deviates from the competency statutes as a whole and is without any support in case law.

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 view of the other statutes within the statutory section on matters concerning competency, 16-8.5-105 (4) requires that the report shall be prepared in triplicate and delivered to the Court and "[t]he clerk *shall* provide a copy of the report both to the prosecuting attorney and the counsel for the defendant." (emphasis added). There is no exception to that requirement and nothing that would allow the Court to deny providing copies to the prosecution as requested by the Defendant.
13. The Defendant in furtherance of their position, cite only a portion of the specific statute and do not address the entirety of the statutory scheme concerning competency at all. The statute, C.R.S. §16-8.5-104 as a whole reads:

"(1) When a defendant raises the issue of competency to proceed, or when the court determines that the defendant is incompetent to proceed and orders that the defendant undergo restoration treatment, any claim by the defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:

- (a) Reports of competency evaluations, including second evaluations;
- (b) Information and documents relating to the competency evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation; and
- (c) The evaluator, for the purpose of discussing the competency evaluation.

(2) **Upon a request by either party** or the court for the information described in subsection (1) of this section, the evaluator or treatment provider **shall provide** the information for

use in preparing for a hearing on competency or restoration and for use during such a hearing.

(3) An evaluator or a facility providing competency evaluation or restoration treatment services pursuant to a court order issued pursuant to this article is authorized to provide, and shall provide, procedural information to the court, district attorney, or defense counsel, concerning the defendant's location, the defendant's hospital or facility admission status, the status of evaluation procedures, and other procedural information relevant to the case.

(4) **Nothing in this section limits the court's ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator, or to either party to the case, nor does it limit the information that is available after the written consent of the defendant.**

(5) The court shall order both the prosecutor and the defendant or the defendant's counsel to exchange the names, addresses, reports, and statements of each physician or psychologist who has examined or treated the defendant for competency.

(6) Statements made by the defendant in the course of any evaluation shall be protected as provided in section 16-8.5-108." (**emphasis added**).

14. The defendant cites only paragraph 1. Paragraph 2 plainly states that "upon request by either party" the information described in subsection (1) "**shall**" be provided. Paragraph 2 also indicates the reason for access to the information: "for use in preparing for a hearing. . . ."

15. Paragraph 4 is all encompassing permitting not only evidence that is described in subsection (1) and (3) but any other evidence relevant to the issue to be "provided to the evaluator, or to either party to the case"

16. Subsection (5) requires that the prosecutor and defendant provide information concerning other examinations for competency. The People make a specific demand under the statute that the defendant immediately provide this information to the People.

17. Further, the statute refers to another statute in subsection (6). That other statute which provides protections for the Defendant, C.R.S. §16-8.5-108 reads:

"(1)(a) Except as otherwise provided in this subsection (1), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a competency evaluation or involuntary medication proceeding is **not admissible against the defendant on the issues raised by a plea of not guilty**, or, if the offense occurred before July 1, 1995, a plea of not guilty by reason of impaired mental condition. Such evidence **may be admissible at trial to rebut evidence introduced by the defendant of the defendant's mental condition to show incapacity of the defendant to form a culpable mental state; and, in such case, the evidence may only be considered by the trier of fact as bearing upon the question of capacity to**

form a culpable mental state, and the jury shall be so instructed at the request of either party.

(b) Evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a competency evaluation or involuntary medication proceeding is **admissible at any sentencing hearing** held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., **only to prove the existence or absence of any mitigating factor.**

(c) If the defendant testifies on his or her own behalf upon the trial of the issues raised by the plea of not guilty or, for offenses that occurred before July 1, 1995, a plea of not guilty by reason of impaired mental condition, or at a sentencing hearing held pursuant to section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, C.R.S., the provisions of this section shall not bar any evidence used to impeach or rebut the defendant's testimony.

(2) In any hearing concerning competency to proceed or restoration to competency, competency evaluators and other **experts may testify** as to their conclusions reached from their examination of hospital records, laboratory reports, X-Rays, electroencephalograms, and psychological test results if the material that they examined in reaching their conclusions is produced at the time of the hearing. Nothing in this section prevents the parties from obtaining the information authorized by section 16-8.5-104 prior to the hearing."

18. This statute limits the potential use of the defendant's statements made during competency evaluations. The statements are "not admissible" at the substantive trial, except they may be admissible to rebut evidence concerning the defendant's mental state. The statements are not admissible at any death penalty sentencing except to rebut any mitigating factor presented by the defendant.
19. In addition, subsection (2) discusses the fact the experts may testify. But of primary importance is the second sentence of subsection (2) that states that there is no prohibition that "prevents the parties from obtaining the information authorized by section 16-8.5-104 **prior to the hearing.**" Thus, this subsection permits access to competency information by the prosecution.
20. There would be no need to provide protections on the use of the privilege if the People had no access to the reports as a matter of psychologist-patient privilege. The People would never have the information so that the prosecution would be unaware of and would necessarily not be able to use the information. The limitation on the use demonstrates the information would be provided to the prosecution.
21. 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 have 14 days to request a hearing and/or request additional evaluations. C.R.S. 16-8.5-103(3). These requests for a hearing or for a second evaluation would be prior to the Court issuing its preliminary finding. If the prosecution is unable to obtain a copy of the report, the request for a hearing and/or second evaluation would be meaningless and without knowledge of what is in the report or a way to make a good faith and reasoned request. This request for a hearing and/or second evaluation, by operation of the statute, occurs within the timeframe before the Court makes its final determination regarding competency.

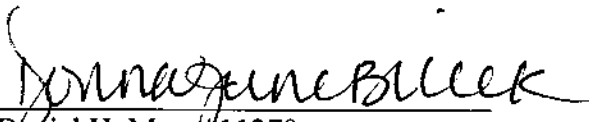
22. Further, if a hearing is set to determine competency or a second evaluation is conducted, the logic pressed by the Defendant would not allow for the additional evaluator(s) to have access to the information that the Defendant seeks to protect and renders a second evaluation requested by the prosecution or the Court meaningless as the evaluator would have nary the information relied upon by the first evaluator. And, under the reading of the statute as the Defendant has suggested, the waiver provision would never become operable under this type of circumstances which essentially negates having a hearing or conducting additional evaluations.
23. To follow the logic of the Defendant's motion it fails to recognize that common law privileges are personal and therefore, the privilege belongs to the Defendant. As the privilege is personal to the Defendant, the Defendant's attorneys would not be allowed to have access to the report and neither would the Court. The Defendant's attorney-client relationship with the Defendant does not waive the Defendant's other privileges without a specific waiver by the Defendant and/or a waiver by operation of the statute. Such logic would defeat the purpose of a competency evaluation if there wasn't an automatic operation of a waiver of privilege.
24. When read as a whole, this statutory scheme clearly permits the People to have access to competency reports at the time the report is provided to the Court. In all reality, the possibility of this case having requests for hearings and second evaluations is extremely likely and ultimately the information will have to be provided to the prosecution regardless of posited claims by the defense that they would somehow be prejudiced by it.

WHEREFORE, the People ask this Court to deny the motion and that this Court deny the Defendant's motion without a hearing.

Respectfully submitted this 20th day of January, 2016.

DANIEL H. MAY, #11379
DISTRICT ATTORNEY

By:


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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PEOPLE'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER CONCERNING COMPETENCY EVALUATION (D-016)** has been forwarded to the Public Defender's Office by placing it into the Public Defender's box for pickup:

1/20/16

Aina Gueyes