

District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	FILED-DISTRICT & COUNTY COURTS-EL PASO CO., CO JAN 27 2016 DIVISION 10 ♦ COURT USE ONLY ♦
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ROBERT LEWIS DEAR, Defendant	
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Chief Trial Deputy State Public Defender 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 15CR5795 Division 10
<p>D-018</p> <p>MOTION TO PROHIBIT THE PROSECUTION AND ITS AGENTS FROM OBTAINING EL PASO COUNTY JAIL RECORDS OF MR. DEAR</p>	

Mr. Dear moves this Court to enter an order prohibiting the prosecution and its agents from obtaining any records relating to Mr. Dear from detention facilities, including but not limited to, visitor logs and records, medical or nursing records, and any other records that are generated by the El Paso County Jail or any other detention facility on the following grounds:

1. Mr. Dear is currently housed at the El Paso County Jail. Mr. Dear is currently charged, *inter alia*, with several counts of first-degree murder, which is a class one felony for which death is a potential penalty.
2. It is the jail's practice to keep visitor logs and jail incident reports. These logs usually include information regarding those individuals who have visited an inmate, when they visited the inmate, and how long they stayed. This log includes information about visits with attorneys, investigators, and confidential experts, and may contain privileged medical, religious, and psychological information as well.
3. The prosecution has no right to this information. In fact, disclosure of much of this information violates Mr. Dear's rights to effective assistance of counsel, including the right to meet with his attorneys and establish a confidential relationship with them, and the right to properly investigate and prepare all possible defenses.
4. Any seizure and dissemination of jail visitation logs - which include professional visitors required as part of the pre-trial investigation and preparation of Mr. Dear's case constitutes an impermissible violation of Mr. Dear's constitutional right to counsel, the attorney-client privilege, the work product doctrine, his rights to privacy and his constitutional right against self-incrimination and the constitutional rights to due process and equal protection. *See*

U.S. Const. amends, V, VI, VIII, XIV; Colo. Const. art. II, §§ 16, 18, 20, 25; C.R.S. § 13-90-107(1)(b).

5. As part of counsel's duty to provide effective assistance to the accused, counsel is required to make reasonable investigations in connection with the case. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. White*, 514 P.2d 69, 71 (Colo. 1973).

6. The essence of the Sixth Amendment right is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense. *Michigan v. Haney*, 494 U.S. 344, 348 (1990). Counsel in any criminal case, and particularly in a capital case, "has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Brecheen v. Reynolds*, 41 F.3d 1343, 1366 (10th Cir. 1994).

7. Mr. Dear is entitled to a confidential pre-trial investigation. See *Richardson v. District Court*, 632 P.2d 595 (Colo. 1981) (reversing trial court's order granting the prosecution's motion for pre-trial discovery of the written and recorded statements of non-expert defense witnesses which were made to an investigator of the public defender's office in the course of his pre-trial investigation of the case on behalf of the defendant's attorney); see also *Hutchinson v. People*, 742 P.2d 875, 881 (Colo.1987) (analogous analysis concerning why accused is entitled to confidential expert); *Perez v. People*, 745 P.2d 650 (Colo. 1987); *Miller v. District Court*, 737 P.2d 834 (Colo. 1987).

8. In order to function effectively in a potential capital case, counsel must begin to investigate mitigation immediately and forcefully, with attention to the client's medical, neurological, educational, and social history, historic and current brain function, diseases, medico-neurological events, and a significant number of other related inquiries. To conduct this investigation, counsel must bring the client together with a number of professionals from various disciplines, and the best people in some of those fields are so well known that their very names are indicative of precisely what counsel is looking for or assessing. Jail security concerns purport to require that these professionals leave a written record of information concerning their identities, who they are there to visit, and the length of their visits, so the information is collected and resides in an electronic file. This circumstance becomes instantly problematic if the information is not "secure" against disclosure.

9. In *Hutchinson v. People*, 742 P.2d 875, 883 (Colo. 1987), the Colorado Supreme Court announced: "to safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial."

10. It is the also practice of the jail to keep records regarding medical treatment, psychiatric treatment, and other related treatment. These records are privileged under Colorado statutes and the Colorado Constitution. Mr. Dear expressly maintains all privileges and in no way waives those privileges.

11. The prosecution has no right to know who visits Mr. Dear and when. They have no right to know whether experts or religious persons visit Mr. Dear. They have no right to receive information concerning Mr. Dear's medical and psychological treatment at the jail.

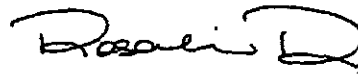
12. The denial of bond to Mr. Dear cannot constitutionally be employed as an affirmative weapon against Mr. Dear by the State. The denial of bond to Mr. Dear cannot constitutionally be construed as a "waiver" of rights or privileges by the court or the State. If Mr. Dear was at liberty on bond, the prosecution would not have access to this type of information concerning Mr. Dear.

13. Mr. Dear moves for a hearing on this motion.

Mr. Dear files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Rosalie Roy (No. 26861)
Deputy State Public Defender



Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: January 27, 2016

I hereby certify that on 1-27, 2016, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

Dan May
Donna Billek
Jeff Lindsey
Office of the District Attorney
105 East Vermijo Avenue
Colorado Springs, Colorado 80903
Fax: 719-520-6185

