

District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>ROBERT LEWIS DEAR,</b> Defendant	MAR 02 2016  DR. LYNETTE D. CORNELIUS CLERK OF COURT  σ COURT USE ONLY σ
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. <b>15CR5795</b>    Division 10
<p><b>D-018</b></p> <p><b>REPLY IN SUPPORT OF MOTION TO PROHIBIT THE PROSECUTION AND ITS AGENTS FROM OBTAINING EL PASO COUNTY JAIL RECORDS OF MR. DEAR</b></p>	

Mr. Dear, through counsel, files the following in reply to the prosecution’s response to his Motion to Prohibit the Prosecution and its Agents from Obtaining El Paso County Jail Records of Mr. Dear:

1. The prosecution opposes the relief requested in Motion D-018. It first argues that “the procedures for logging visitors, times, and the type of visitor has been a long-established procedure in this jurisdiction.” Response, p. 1. The prosecution further argues that “[t]he Defendant cannot mandate who or what should or shouldn’t be listed on an administrative document at the jail.” *Id.* at 2.

2. These arguments are entirely inapposite. The defense is not asking the Court to direct the El Paso County Jail to change its procedures for logging visitors, or to interfere with the jail’s record-keeping in any way. Rather, the defense is simply requesting a court order prohibiting the jail from *providing* these records to the prosecution in order to ensure that Mr. Dear’s state and federal constitutional rights to the effective assistance of counsel and due process, including the right to a confidential pre-trial investigation, are protected.

3. Second, the prosecution argues that jail records are governed by the Colorado Criminal Justice Records Act, *see* C.R.S. § 24-72-301, *et. seq.*, and that “[t]he Defendant has failed to show that the records he seeks to deny access to are protected by law.”

4. Again, the prosecution misses the point. C.R.S. § 24-72-305(1)(b) provides that the custodian of criminal justice records “may allow” any person to inspect such records or any portion thereof except if “[s]uch inspection is prohibited . . . by the order of any court.” That is precisely what the defense is seeking in Motion D-018 – an order from this Court prohibiting the

records custodian at the El Paso County Sheriff's Office from disclosing these records to the prosecution for the reasons articulated in Motion D-018.

5. Next, the prosecution argues that there is nothing contained in the jail visitor logs that is protected by either attorney-client or medical privilege *or* the Constitution. The prosecution argues that the fact that it is able to obtain "the name, address of a visitor, the date of the visit, and the length of a visit" does not reveal any information that is pertinent to defense counsel's ability to conduct pre-trial investigation or that inhibits counsel's ability to seek out experts in their preparation of the Defendant's case.

6. This argument is not only untrue, it ignores the basic facts and issues involved in this case. First, Mr. Dear has expressed a desire to represent himself. The relationship between Mr. Dear and defense counsel has been and will continue to be an issue during upcoming proceedings in the case. Allowing the prosecution to be privy to how frequently defense counsel are visiting Mr. Dear, whether those visits are accepted, and how long the visits last provides it with insight into and information about that relationship to which it is not entitled. *See, e.g., People v. Bergerud*, 223 P.3d 686, 703 (Colo. 2010) (when defendant expresses displeasure with defense counsel, any inquiry into attorney-client relationship must take place "outside the presence of opposing counsel").

7. Likewise, allowing the prosecution to have access to the identities of experts who have gone to the jail to meet with Mr. Dear provides far more than just a name, as the prosecution contends. *See* Response, p. 3 ("The prosecution would have a name. That's it."). Armed with information about the identities of any experts the defense has chosen to retain, the prosecution is able to conduct background research on these experts that may reveal information about defense strategy that may in turn assist the prosecution's ability to develop its own case well ahead of any disclosures ultimately required under Rule 16 or C.R.S. § 16-8-103.6.<sup>1</sup> Indeed, the prosecution's strong protestation that there is nothing of value to be gained from these jail visitor logs is undercut by its fervent arguments in support of its ability to obtain these records. If there is no information in the jail visitor logs that reveals anything about defense investigation and strategy that is of interest to the prosecution, then there would be no reason for the prosecution to contest Motion D-018 so strongly.

8. The prosecution alleges that the issue presented here is distinguishable from the issue presented in *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987) because *Hutchinson* focused on the prosecution's ability to obtain a confidential defense expert's statements and reports, rather than simply his identity. What the prosecution overlooks, however, is that the principle of *Hutchinson* applies equally here. Both *Hutchinson* and the present situation involve information that is otherwise not discoverable under Rule 16. There is no provision of Rule 16 that requires the defense to turn over a list of the dates, times, and durations of visits between attorney and client – not at this stage in the proceedings, and not ever. Nor is there any provision of Rule 16 that requires the defense to disclose to the prosecution the names of experts it has hired but may not present at trial. Just as in *Hutchinson*, providing the prosecution access to information about

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<sup>1</sup> Moreover, the prosecution may obtain information about expert witnesses through the jail visitor logs that it would otherwise never receive even under the rules of discovery, depending on the course of this case and the plea that is ultimately entered.

the length and frequency of professional visits and the identities of professional visitors creates a risk that the criminal justice process will lose “its character as a confrontation between adversaries.” 742 P.2d at 880-81.

9. 

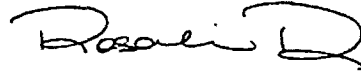
10. Mr. Dear is entitled to a “meaningful adversarial exchange guaranteed by the sixth amendment and article II, section 16 of the Colorado Constitution.” *Hutchinson*, 742 P.2d at 882. Allowing the prosecution access to the jail visitor logs will provide it with protected information to which it is not otherwise entitled and will inhibit the defense’s ability to conduct a confidential pre-trial investigation at this early stage in the case. This Court should grant the relief requested in Motion D-018 based on the “fundamental tenet underlying our adversarial system and inherent in a defendant’s guarantees of counsel, due process and the privilege against self-incrimination that the defendant has a right to require the prosecution to investigate its own case, find its own evidence and prove its own facts. *See United States v. Wright*, 489 F.2d 1181, 1195 (D.C.Cir.1973); *Miller v. District Court*, 737 P.2d at 838–39; *see also Noggle v. Marshall*, 706 F.2d 1408, 1421 (6th Cir.), *cert. denied*, 464 U.S. 1010, 104 S.Ct. 530, 78 L.Ed.2d 712 (1983) (Edwards, C.J., dissenting).” *Id.*

Mr. Dear files this reply, 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.



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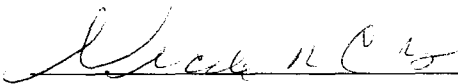
Dated: March 2, 2016

I hereby certify that on 3/2, 2016, I

mailed, via the United States Mail,  
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a true and correct copy of the above and foregoing document to:

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