REDACTED

FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO

FEB 09 2016

DR. LYNETTE CORNELIUS
CLERK OF COURT

DISTRICT District Court, El Paso County, Colorado Court Address: 270 S. Tejon St. Colorado Springs, Colorado 80903	▲ **COURT USE ONLY** ▲
People of the State of Colorado vs. **Defendant: Robert Dear, Jr.**	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-018

PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO PROHIBIT THE PROSECUTION AND ITS AGENTS FROM OBTAINING EL PASO COUNTY JAIL RECORDS OF MR. DEAR

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 Prohibit the Prosecution and its Agents from obtaining El Paso County Jail Records of Mr. Dear. Contrary to the argument by the Defendant, the Defendant's jail records are not protected by privilege or confidentiality. The People object to the Court granting the Defendant's request for the following reasons:

Jail Records, with some exception, are considered open and public records

1. The Defendant has been housed, until recently, in the El Paso County jail while being held without bond due to being arrested for and charged with several counts of First Degree Murder. Currently, the Defendant has been transported to and is under observation at the Colorado Mental Institute in Pueblo (CMHIP). Upon completion of observation at CMHIP, the Defendant will be returned to the El Paso County Jail.

2. The People have lawful access to the jail records because they are public records and not subject to a claim of confidentiality or privilege. The Defendant fails to provide the Court with authority to support his request to expand the attachment of a confidentiality or privilege claim to any and all of the Defendant's jail records or detention records. The attempt to expand the attorney-client privilege doctrine and effective assistance of counsel requirement is beyond what has been recognized by the Courts.

3. The procedures for logging visitors, times, and the type of visitor has been a long-established procedure in this jurisdiction. There are no privileged communications contained in these

documents except for statements made by the Defendant to an El Paso County Deputy. Communications between the Defendant and his attorneys or the Defendant and any defense-retained expert are not contained in these records. As an inmate, the Defendant has a diminished expectation of privacy. *See* Hudson v. People, 585 P.2d 580 (Colo. 1978).

4. The Defendant's jail visitor logs or other non-medical related treatment records are not privileged records. The collection and dissemination of jail and prison records is controlled by the Colorado Criminal Justice Records Act, specifically C.R.S. §24-72-301 and §24-72-304(1) which provides that these records "may be open to inspection to any person at reasonable times, except as otherwise provided by law." The Defendant has failed to show that the records he seeks to deny access to are protected by law.

5. The records do not belong to the Defendant but are, in fact, the records of the El Paso County Sheriff's Office. The Defendant cannot mandate who or what should or shouldn't be listed on an administrative document at the jail. The persons visiting the Defendant are entering a public building and a secure building. How the El Paso County Sheriff's Office conducts supervision and management of its facility and internal procedures is within the discretion of the agency officials and the Court may not intervene unless there are exceptional circumstances. *See* People v. Rodriguez, 914 P.2d 230, 290 (Colo. 1996).

6. In Colorado privileges are provided for in C.R.S. §13-90-107. The privileges detailed in the statute relate to the communication and not to the fact of the existence of a communication. As for the medical/psychological treatment records, the Defendant is entitled to confidentiality of those particular records pursuant to C.R.S. §13-90-107 unless or until a waiver has been determined either by implied action, statutory construction, or a direct waiver. At this time the People have not obtained medical or psychological treatment records of the Defendant while he has been housed at the El Paso County Sheriff's Office. The mere fact of a visit by such a professional, however, is not protected by privilege and the Defendant cites no authority to support his position. This is supported by C.R.S. 13-90-107 (1)(d) which provides that "a physician, surgeon, or registered professional ...shall not be examined without the consent of his or her patient as to any **information acquired in attending the patient** that was necessary to enable him or her to prescribe or act for the patient." (emphasis added).

7. Extending a claimed medical/psychological treatment privilege to other administrative records or jail visitor logs and/or that the records might provide the inference of privileged material is also without support. As of the filing of this response, the People were unable to find after a WestLaw search case law that supported the Defendant's position.

8. Jail visitor logs or other administrative logs contain the name, address of a visitor, the date of the visit, and the length of the visit. None of this information infringes on privileged communications between the visitor and the inmate no matter if it is the Defendant's attorney visiting or a potential defense expert visiting the Defendant.

9. The fact that the records can be obtained by the People does not infringe on the Defendant's right to be provided effective representation of counsel; does not infringe on his attorneys' ability to conduct pre-trial investigation; and does not infringe on their ability to seek out experts in their

preparation of the Defendant's case. The fact that a possible defense expert is brought to the jail by the Defendant's attorneys to visit with the Defendant in no way means that the expert will be endorsed or called by the Defendant. However, the People are put on notice that the person may possess information that may be protected by a claim of privilege or the People will be provided knowledge that that particular expert cannot be retained by the prosecution. The fact that the name of a possible defense expert gives the prosecution information that the Defendant would not otherwise want the prosecution to know does not provide the prosecution with advance notice of what to do or what may happen. The prosecution would have a name. That's it. There is little else for the prosecution to do without knowing the opinion of the expert or even if the expert were going to testify. The People are provided no additional information than if a detective observed the expert go to the jail with the Defendant's attomeys and shared that information with the prosecution. There is nothing privileged about that scenario either and a desire to try and create a "defense by ambush" as the defense argues does not further the ends of justice for either the Defendant or the victims.

10. The use of a defense retained expert during the prosecution's case in chief, absent a waiver or other ruling by the court, may be prohibited by the attomey-client privilege. However, the mere knowledge that the expert has visited an inmate does not. *See* Miller v. District Court, 737 P.2d 834 (Colo. 1987), Hutchinson v. People, 742 P.2d 875 (Colo. 1987).

11. In Hutchinson v. People, the Court reviewed a very narrow issue regarding whether the prosecution could utilize a defense-retained expert witness in its case-in-chief. The Court disapproved of that practice under the facts of that case. The Court stated that a defendant is entitled to representation by his attomey that involves "reasonable investigations in connection with the case or to make a reasonable decision that makes particular investigations unnecessary" and noted that "[a]s a general matter, a proper investigation of the case is essential for adequate representation." 742 P.2d 875, 881 (Colo. 1987). Given this context, however, the Court focused in on statements and reports may be protected by privilege. The Court did not say that the mere knowledge that an expert was being contacted by the defense or that the expert's name appeared on a visitor log at a detention facility fell under the protections of privilege. The Court noted that "**statements** made to the expert by the defendant and counsel may be protected by the attomey-client privilege." 742 P.2d 875, 881 (Colo. 1987) (emphasis added). Further the Court indicated that discovery rules, within a normal context of a case, "[do] not authorize prosecution discovery of an expert's **reports or statements** if that information will not be used in trial." 742 P.2d 875, 881, 882 (Colo. 1987) (emphasis added). The Court addressed the work-product issue by stating the doctrine of work product "may shield from disclosure **materials** produced by an expert." 742 P.2d 875, 882 (Colo. 1987) (emphasis added). The Court recognized that there may be additional privileges that may be related to particular types of experts such as those privileged detailed in §13-90-107. Finally, the Court stated that a defendant's right to self-incrimination "may prohibit prosecution use of **statement** of an expert where the expert is repeating, as a 'conduit,' statements made by the defendant." 742 P.2d 875, 882 (Colo. 1987) citing People v. Roark, 643 P.2d 756 (Colo. 1982); People v. Rosenthal, 617 P.2d 551 (Colo. 1980). Ultimately the Court provided that it's ruling in Hutchinson "is of limited nature...and does not involve the rebuttal use of expert witnesses or prosecution use of non-expert witnesses." 742 P.2d 875, 886 (Colo. 1987). In reaching its decision, the Court ruled that a defense attomey should not be concemed with which experts were retained or not to advise the attomeys and/or the defendant because there were procedures in place that would protect the defendant from the prosecution compelling that

defense-retained expert from testifying against the defendant at trial.

12. At the time the Court addressed the issue in the Hutchinson, the Court addressed a similar issue in Perez v. People, 745 P.2d 650 (Colo. 1987). The Court had a similar factual pattern in that the prosecution became aware that a defense-retained expert who was not endorsed as a witness by the defense for trial was called as an expert witness in the prosecution's case-in-chief. The Court noted it adopted the same reasoning it did in Hutchinson and reversed the conviction and remanded the case to the trial court for a new trial. Nothing in the Perez opinion supports the Defendant's position that the Hutchinson decision was expanded to protect the name of or mere knowledge of the existence of a potential defense retained expert witness from the prosecution. In fact, the Court mentions no concern in either the Perez case or the Hutchinson case about how the prosecution became aware of the information about the knowledge of the defense retained expert.

13. Despite the Defendant's reliance on Hutchinson and Perez, the cases do not provide language or even a suggestion that the knowledge of an expert assisting the defense attorneys and the Defendant is a violation of any one of the privileges as argued by the Defendant in this case. In fact, the Court clearly focuses on the protection being that of statements, reports, and materials generated by the expert as possibly being protected. Expanding the ruling in Hutchinson or Perez as suggested by the Defendant is unsupported.

14. The Defendant has made no showing that administrative records or visitor logs contain information that impairs their ability to provide effective assistance of counsel, a violation of the attorney-client privilege, medical/psychological privilege, work product doctrine, rights to privacy or that there is a violation of due process or equal protection rights afforded to the Defendant.

15. While the Defendant is entitled to have investigation conducted on his case, there is no law to support that all investigation that is done is considered "confidential" as argued by the Defendant. The Defendant cites Richardson v. District Court to support their proposition but the case does not support a "confidential investigation" as argued by the Defendant. The case, viewed under Rule 16 discovery procedures, dealt with forcing a Defendant to reveal communications made by a witness to a public defender investigator. The case addressed a very narrow and specific issue in Rule 16 and does not further the argument made by the Defendant. The Court did not rule that the prosecution is barred from knowing of the existence of a witness but rather Rule 16 does not require that a defendant provide the witness statement to the prosecution. There are some exceptions to this rule. For example, the Court ordering the production of those statements when statements made to a defense investigator are used to impeach a witness at trial. *See* People v. Small, 631 P.2d 148 (Colo. 1981).

16. In this case, the People have not obtained the communications between the Defendant and his attorneys or the Defendant and any experts that may visit or have visited the Defendant at the El Paso County Jail or any other detention facility.

[redacted]Depending on the future progression of this case [redacted] would require the Defendant to provide all

reports, communications, documentation, testing, or other materials in possession of the defense, including any experts or other visitors to the jail [redacted], to be provided to the prosecution regardless of whether the Defendant has retained that expert or not and whether or not that expert intends to be called by the Defendant at trial. [redacted]

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 8th day of February, 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 TO PROHIBIT THE PROSECUTION AND ITS AGENTS FROM OBTAINING EL PASO COUNTY JAIL RECORDS OF MR. DEAR (D-018)** has been forwarded to the Public Defender's Office by placing it into the Public Defender's box for pickup:

2/8/16 _____ Gina Jacques _____