



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	SF JAN 25 2016  <b>DR. LYNETTE CORNELIUS</b> <b>CLERK OF COURT</b>  ♦ COURT USE ONLY ♦
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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>15CR5795</b>    Division 10
<b>D-16</b>  <b>REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER CONCERNING          COMPETENCY EVALUATION</b>	

Mr. Dear, through counsel, files the following in reply to the prosecution's response to his Motion for Protective Order Concerning Competency Evaluation:

1. The prosecution opposes the relief requested by Motion D-016. It alleges that the defense's request for a protective order prohibiting CMHIP from providing the prosecution with access to the competency evaluation and the materials relied upon by the examiner under the present circumstances is inharmonious with the statutory scheme when it is "read as a whole." See Response to D-016, para. 24.

2. The defense disagrees for several reasons. First, the statutory provision at issue expressly provides for the two circumstances under which the defendant's claim of confidentiality or privilege has been deemed waived, neither of which has occurred yet in this case. See C.R.S. § 16-8.5-104(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 . . ."). The Court cannot and should not ignore this clear statutory language.

3. Second, the prosecution's claim that the remaining provisions of that statute authorize the immediate disclosure of the competency evaluation and supporting materials to the prosecution at this point in time is incorrect. Those provisions provide, *inter alia*, that the evaluator disclose these materials to either party "for use in preparing for a hearing on competency or restoration" (subsection (2)), that the evaluator provide "procedural information to the court, district attorney, or defense counsel" concerning the evaluation (subsection (3)), and that the court can provide *additional* information to the parties beyond that outlined in

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subsections (1) through (3). There is nothing in C.R.S. §16-8.5-104(2) – (4) that contradicts the language in subsection (1) limiting the waiver of privilege to instances in which the defense has raised competency or when the court has made a finding of incompetency and has ordered restoration. Nor do these subsections of the statute contradict the relief requested by the defense.

4. The prosecution's concern that the defense's interpretation of the statute would preclude it from obtaining the information at issue in the event of a hearing is also unfounded. Once the court receives the report from the CMHIP evaluator, it will enter a finding of incompetency or competency. *See* C.R.S. § 16-8.5-103(1). The prosecution and the defense will, of course, be notified of this finding. If the court enters a finding that the defendant is incompetent to proceed and orders restoration, then the waiver provision of C.R.S. § 16-8.5-104(1) would be triggered and the prosecution would receive this information prior to any hearing on the issue.

5. In other words, the statute allows for the prosecution to obtain privileged and protected information, but only when certain conditions exist that render such disclosure necessary. If those conditions do not arise, then there is no reason for the prosecution to have privileged and confidential medical and mental health information about the defendant to which it would otherwise not be entitled. *Cf. People v. District Court*, 187 Colo. 333, 531 P.2d 626 (Colo. 1975) (upholding constitutionality of defense disclosure provisions of Rule 16 because discovery is limited to matters which would eventually be revealed at trial.”).

6. Moreover, to the extent there is any ambiguity in the statutory scheme, that ambiguity must be resolved in favor of the defense pursuant to the rule of lenity. *See People v. Summers*, 208 P.3d 251, 258 (Colo. 2009).

7. Finally, the prosecution's argument that that “[i]n all reality, the possibility of this case having requests for hearings and second evaluations is extremely likely” and thus “ultimately the information will have to be provided to the prosecution” is not a justification for allowing CMHIP to reveal that information to the prosecution prematurely under the current circumstances and posture of this case. The Court should take every measure to protect Mr. Dear's state and federal constitutional rights to due process and against self-incrimination and cruel and unusual punishment at this stage in these very serious proceedings, *see* U.S. Const. amends. V, VIII, XIV; Colo. Const. art. II, § 18, 20, 25, and should order the relief requested by the defense.

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.




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Dated: January 25, 2016

I hereby certify that on 1-25, 2016, I

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

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

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