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District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	FILED IN THE DISTRICT COURT COUNTY COURT EL PASO COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ROBERT LEWIS DEAR, Defendant	JAN 11 2016 DR. LYNETTE D. CORNELIUS CLERK OF COURT • 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: state.pubdef@coloradodefenders.us	Case No. 15CR5795 Division 10
D-016 MOTION FOR PROTECTIVE ORDER CONCERNING COMPETENCY EVALUATION	

Robert Dear, through counsel, hereby moves this Court for a protective order preventing the Colorado Mental Health Institute at Pueblo (hereinafter, "CMHIP") from distributing any information pertaining to the competency evaluation of Mr. Dear to the prosecution at this stage in the proceedings. In support of this motion, Mr. Dear states the following:

1. The competency statute is clear that a defendant waives any claim "as to confidentiality or privilege" only "[w]hen 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." C.R.S. § 16-8.5-104(1) (emphasis added).

2. Neither of those two circumstances exists at this time. The Court raised the issue of Mr. Dear's competency on its own motion on December 23, 2015. It found that it did not have sufficient information to determine whether Mr. Dear was competent, and ordered a competency evaluation. Mr. Dear did not raise competency, nor has the Court yet found that Mr. Dear is incompetent to proceed.

3. Thus, to the extent there is a forced limited waiver of privilege to enable CMHIP to conduct the competency evaluation, such waiver must be limited to CMHIP and the mental health professionals involved in the evaluation. The waiver does not extend to the prosecution.

4. Interpreting the waiver provision of the competency statute to allow the prosecution access to the competency evaluation and the materials relied upon by the examiner under the present circumstances would not only be contrary to the statute, but would violate Mr. Dear's constitutional right to effective assistance of counsel, to remain silent, to be free from compulsory self-incrimination, to due process, and to be free from cruel and unusual punishment.

See, e.g., U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, §§ 16, 18, 20, 23, 25. It would also violate the attorney-client privilege and the physician/psychologist-patient privilege. See C.R.S. § 13-90-107.

5. As a result of the forced limited waiver of privilege, the defense may need to disclose information to the competency evaluator regarding Mr. Dear's medical and mental health history, obtained as a result of its constitutional duty to investigate the case and provide Mr. Dear with the effective assistance of counsel. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Hutchinson v. People*, 742 P.2d 875, 881-882 (Colo. 1987) ("We believe the confidentiality and loyalty of expert consultants traditionally enjoyed by defendants and defense counsel is a crucial element in the effective legal representation of the defendant.").

6. If any such information is provided in turn to the *prosecution* at this stage in the proceedings – before the court has even made a competency finding, and before Mr. Dear has entered any plea at all, let alone a plea involving his mental state or mental condition – this would not merely "accelerate" disclosure of information the prosecution will eventually obtain, but the prosecution will have access to information about the defendant that may otherwise never be revealed at trial or sentencing. Such forced disclosure to the prosecution of confidential and privileged material gathered by the defense would violate Mr. Dear's constitutional right to effective assistance of counsel. See *Hutchinson*, 742 P.2d at 882; U.S. Const. amends. VI, XIV; Colo. Const. art. II, secs. 16, 25. 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.").

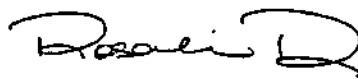
7. Moreover, such a forced disclosure would assist the prosecution in its investigation of Mr. Dear's background, which it could then attempt to use against him at trial or at any potential capital sentencing proceeding, in violation of his rights to due process and against self-incrimination and cruel and unusual punishment. See *Estelle v. Smith*, 451 U.S. 454, 462 (1981) ("Just as the Fifth Amendment prevents a criminal defendant from being made the deluded instrument of his own conviction, . . . it protects him as well from being made the deluded instrument of his own execution." (internal quotations and citations omitted)); U.S. Const. amends. V, VIII, XIV; Colo. Const. art. II, § 18, 20, 25.

8. Therefore, the defense respectfully requests the Court to order CMHIP to refrain from providing the report of the competency evaluation as well as information and documents relating to the evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation to the prosecution, and to furnish these items only to the defense and the Court at this stage in the proceedings.

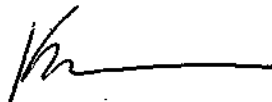
Mr. Dear files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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 11, 2016

I hereby certify that on 1-11, 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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Michael