

# REDACTED

<b>DISTRICT</b> District Court, El Paso County, Colorado Court Address: 270 S. Tejon St. Colorado Springs, Colorado 80903	<b>▲ COURT USE ONLY ▲</b>
<b>People of the State of Colorado</b> vs. <b>Defendant: Robert Dear, Jr.</b>	
District Attorneys: Daniel H. May, #11379, Jeffrey Lindsey, #24664, and Donna Billek, #30721 105 E. Vermijo Colorado Springs, CO. 80903 Phone Number: 719-520-6000 District Attorney: Daniel H. May, #11379	Division #: 10
<b>D-026</b>	
<b>PEOPLE'S RESPONSE TO DEFENDANT'S MOTION FOR COURT ORDER DIRECTING THE COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO TO PROHIBIT MR. DEAR, WHO HAS BEEN FOUND INCOMPETENT, FROM COMMUNICATING WITH THE NEWS MEDIA</b>	

COMES NOW, DANIEL H. MAY, by and through his duly appointed deputy and hereby submits the following People's Response to Defendant's Motion for Court Order Directing the Colorado Mental Health Institute at Pueblo to Prohibit Mr. Dear, Who Has Been Found Incompetent, From Communicating with the News Media. The People state their position as follows:

1. The motion filed by the defense requests the Court to order the Colorado Department of Human Services, specifically the Colorado Mental Health Institute at Pueblo (CMHIP), to restrict any and all contact the Defendant has or attempts to have with the media.
2. The motion fails to indicate the Defendant's position, but based on prior court hearings and comments made by Mr. Dear, there is a strong presumption that he would object to his defense attorneys making such a request.
3. The assertion that the defense is attempting to protect the Defendant's rights to a fair trial is not supported by their actions to date.
4. The People do not believe they can take a position on the request by the defense. However, due to the nature of the case and the defense request to significantly curtail the Defendant's constitutional rights, the People submit this response to the Court to provide some guidance.

5. Freedom of speech is one of the paramount rights provided to all citizens in the United States and in the State of Colorado. In fact, the Colorado courts have determined that Article II, Section 10 of the Colorado Constitution confers greater protection to the freedom of speech rights than the First Amendment of the United States Constitution. *See Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676 (Colo. App. 2001).
6. "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). A court must carefully balance the two competing interests. "[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Id.* at 565. The court "must take steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).
7. "The term 'prior restraint' describes 'administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004)(emphasis in the original) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Prior restraints on speech are considered "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. When issuing such an order, a court must have considered and the record have sufficient information of the following: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562.
8. In order for the Court to order a restraining order and such restraining order pass constitutional muster, the state actor (in this case, the Court or its third party actor by virtue of the Court's order, CMHIP) "must have an interest of the 'highest order' it seeks to protect." *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). "The restraint must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures." *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004)(citing *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994); *Nebraska Press Ass'n*, 427 U.S. at 562)).
9. Pretrial publicity and speculative concern about pretrial publicity on potential jurors is not the only factor that the Court must review and it will rarely be a sufficient reason for the justification of a prior restraint. *Nebraska Press Ass'n*, 427 U.S. at 563.

10. The majority of cases involving prior restraints are orders issued by a court restricting the *media* from publishing information. The People have been unable to find a case similar to this case, wherein a defendant and his attorneys are at odds about communication with the media and the defendant has been determined to be incompetent to proceed to trial.
11. However, even considering the request in light of the First Amendment restrictions for inmates at a jail or corrections facility, the Court would still need to have some information in the record to support such a restriction. The motion filed by the defense is devoid of any policies, procedures, or rules at CMHIP that would support such a restriction on the patient-inmate. "Prison walls do not form a barrier separating prison inmates from the protection of the Constitution." Turner v. Safley, 482 U.S. 78 (1987). It stands to reason that the walls of CMHIP also do not create a barrier to the Defendant from exercising his rights. If there is such a regulation that allows the state hospital to act in the place of a state actor and restrict a patient-inmate's Constitutional rights, there must be a "valid, rational connection" with the regulation and a legitimate governmental interest set forth to justify the regulation. Id. at 89 (citing Block v. Rutherford, 468 U.S. 576, 586 (1984)). There is nothing here to indicate that CMHIP has promulgated such a regulation or has guidelines on when it would enforce such a regulation when there is concern that an inmate-patient is contacting the media. Further, it is questionable that a specific constitutional restriction of rights for a particular inmate-patient due to the nature of his underlying offenses is constitutional and does not violate equal protection.
12. The defense motion makes a general reference to the Court's Order Re: Motion to Limit Pre-Trial Publicity (C00-3). Although they do not specifically state whether they want the Defendant added to the "gag order", such an addition by the Court would not further the concerns, that the Court may have regarding protecting both the Defendant's right to a fair trial and his rights to freedom of speech. A gag order issued on a defendant is still a restraining order (*i.e.*, prior restraint) based on speculation the Defendant will do something that will be harmful, such that a restriction of speech is necessary. The Court acknowledged its Order was "meant to provide guidelines to all involved in the case" after the Court considered "anticipated publicity and the difficulty in anticipating all possible scenarios." The Court's gag order and the corresponding Rules of Professional Conduct for Attorneys contain specific areas of speech that the parties to the order are restrained from discussing. It is not a blanket restriction on media contact. However, the defense motion requests that the Court go further, denying the Defendant access to all media, for any reason, whether or not the reason for the contact is related to his case.
13. At no time prior to the defense's filing of D-026 has there been a request to add the Defendant as a party to the Court's gag order or for a restraining order. The request comes almost 8 months post-filing of charges and with various instances of the Defendant speaking to the media, primarily at his request or invitation. Additionally, the statements made by the Defendant to the media involve similar recitations as to the Defendant's motivation for the commission of the crimes and his historical life

perspective starting with the events of Waco and the Branch Davidians. The only concern raised by the defense about media access to the Defendant occurred in March 2016, when the defense sent a letter requesting to be notified in advance of when there would be interaction between the Defendant and the media. The El Paso County Sheriff's Office (EPSO) declined to "run interference" for the defense, noting that the Defendant has the same rights as other inmates to use the telephone and/or have video visitation and EPSO was not providing any special access for the media to the Defendant. See Exhibit 1.

14. The Court must also consider how the restraining order would be applied. It is unclear how the state hospital would comply with or enforce an order. The state hospital has documented staffing issues and is hardly in a place to be expending efforts to enforce compliance with an order requiring them to restrict all of the Defendant's access to media. Such restriction would require denial of or monitoring of all telephone conversations of the Defendant, review of and censorship of all mail sent out by the Defendant, denial of or monitoring of all in-person visitations with the Defendant, and denial of or monitoring of all casual contacts between the Defendant and other inmate-patients housed at CMHIP. Additionally, if the Court orders such a restriction, the question arises as to who determines whether a particular piece of information (*e.g.*, letter, discussion during a visitation, discussion on the ward, or discussion during a telephone call) will be cataloged or noted as being restricted and how will that information be provided to the parties. If some communication were to take place, would the Court order the third party to abide by the same speech restriction against the defendant and, if possible, return the information?
15. Finally, the Court would have to determine what would constitute a violation of the Order and the possible punishment for the violation. One has to question the viability of contempt proceedings against the Defendant if he should violate the order, as he has been found incompetent to proceed to trial by the Court. Would the Court seek to subject a private person, the media, or CMHIP to contempt if information from Mr. Dear was made public?
16. The defense cites only a small section of Rule 1.14 of the Rules of Professional Conduct and fails to address the remainder of the Rule or the comments. The record reflects that the 'normal client-lawyer relationship' has not been maintained and is, in fact, in a state of conflict. The Defendant has expressed his displeasure with his attorneys, specifically Mr. King, since the first appearance in this case. The defense has made it very clear to their client that he has absolutely no say in the direction of his case including a decision of whether he should be allowed to testify or not at a hearing. See 5-10-16 Hearing Transcript, p. 97, line 12 to p. 98, line 3. The Defendant has stated on a recorded jail call that things with his attorneys would be in less conflict if they would just listen to him and do what he is asking of them. See 4-28-16 Hearing Transcript, p. 75, line 22 to p. 76, line 2. Piecing together statements made by the Defendant, it appears that there has been no

attempt by the defense to maintain a normal client-lawyer relationship. Clearly the rule sets out less drastic remedies than the defense requesting the Court issue a restraining order against their client to prohibit him from contacting the media. Comments to Rule 1.14 and paragraph (b) of the Rule indicate that independent counsel can be appointed for the Defendant. The defense fails to make this suggestion to the Court. Due to the antagonist nature of the client-lawyer relationship between the Defendant and his attorneys, the appointment of independent counsel who specifically practices in First Amendment issues should be appointed for the Defendant.

17. The defense request is prospective and speculative in nature. In addition to the motion containing no legal authority, there is no factual information contained in the motion, other than an unattributed, generic assertion that 'someone' from the Department of Human Services notified them that the Defendant was 'communicating' with the media. The motion does not provide when the alleged communication occurred, who the Defendant allegedly contacted, what was the nature of the communication, how the information about the communication was collected, or who provided the information to the defense. There is also no information in the motion that this specific type of communication with the media involved particular factual aspects of this case and what the concern was to prompt the request for the restraining order. Interestingly, the three media exhibits attached the defense motion predate the alleged communication from the unnamed party at the Department of Human Services.
18. In an attempt to follow-up on the allegation contained in the defense motion, the prosecution contacted the Attorney General's Office to identify who provided this information to the defense and what information was provided. Assistant Attorney General Libby McCarthy refused to provide the information, stating that such information was privileged. See Exhibit 2. The People are unaware of what privilege could be construed so broadly as to protect the identity of who contacted the defense and the information provided to the defense, as the members of the Colorado Department of Human Services and/or the Colorado Mental Health Institute at Pueblo do not have a therapeutic relationship with the Defendant by virtue of the nature of the proceedings. The Defendant's medical and psychological privileges were waived when the Defendant's competency was placed at issue by the defense in these proceedings. However, if the information is privileged, the fact that the defense is requesting the Court to rely on the statement as a reason or basis for an order restricting the Defendant's freedom of speech should be deemed a waiver.
19. The People have been unable to secure the records from the Colorado Mental Health Institute at Pueblo. The People issued a *subpoena duces tecum* in order to obtain an update on the course of the Defendant's restoration treatment. The records were delivered to the Court; however, the defense filed a motion to quash the subpoena. The matter is set on the Court's docket for October 18, 2016. It is unknown what, if anything, is contained in the records regarding this issue.

20. The recent restoration report provided to the Court includes no mention of any concerns regarding media contact from either the evaluators or from the Defendant's treatment team. Despite statements made by the defense at the review hearing, the Attorney General's Office has indicated via an email that they are not filing a response to the defense motion and are not taking a position on the matter.
21. The only information that the People have that the Defendant has contacted the media is from a newspaper article published by the *Gazette* on July 28, 2016. The newspaper published a photograph of a letter received from the Defendant. In his three sentence long, handwritten letter, the Defendant claims that the 'state mental house' is abusing its patients, he identifies who he is, and invites the newspaper to contact him for more information. The *Gazette* declined the invitation to contact the Defendant. See Exhibit 3. This communication is hardly prejudicial or of a grave and great concern regarding the Defendant's right to a fair trial such that he should be denied all access to the media.
22. In summary, the request submitted by the defense is not founded in case law or legal authority, and is bereft of facts that would support this Court ordering such a broad, unlimited, and potentially indefinite restriction. There is nothing in the motion provided by the defense that shows that the Defendant should be subjected to a prior restraint. The defense has failed to show that there is a certain harm that will be done and that the concern is grave and great. In reality, the request is an effort by the defense to see who the Defendant is contacting and what he is saying. While at the El Paso County Jail, the defense received copies of the Defendant's mail and recorded jail calls. They have now lost the ability to have that information copied for them and are concerned about what he may be saying or doing and are requesting a restraining order to be able to now obtain that information.

WHEREFORE, submit this response to the Court regarding the defense request for the Defendant to be restrained from any and all contact with the media.

Respectfully submitted this 12th day of September, 2016.

DANIEL H. MAY, #11379  
DISTRICT ATTORNEY

By: /s/ Donna J. Billek  
Daniel H. May, #11379  
Jeffrey Lindsey, #24664  
Donna Billek, #30721

# EL PASO COUNTY



DATE FILED: September 12, 2016 3:55 PM

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re: letter to Sheriff Elder dated March 3, 2016

March 4, 2016

Dear Mr. King and Ms. Roy:

Thank you for your letter dated March 3, 2016. In your letter, you request that EPSO notify you prior to any interaction with the media. This letter serves as a response to that request.

EPSO is following the law as outlined in Pell v. Procunier, 417 U.S. 817 (1974). In the Pell case, prison inmates filed suit challenging the constitutionality of a regulation that prohibited the press and other media interviews with "specific inmates." The Supreme Court ruled that an inmate retains his First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. The law requires that EPSO must honor the rights of Mr. Dear to communicate, unless a legitimate penological objective necessitates interference.

At this time, EPSO has determined that Mr. Dear has the same opportunity as any other inmate to speak with members of the public. The press are members of the public, and EPSO cannot cite a legitimate penological interest (ie security/safety reasons or impact on the facility) to curtail that contact with the public.

Accordingly, absent court order, or a legitimate penological interest, EPSO will not interfere with Mr. Dear's access to phone calls and video visitation.

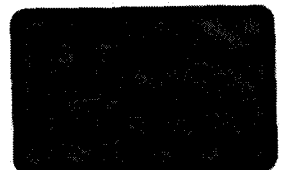
Please be advised that the press is accorded no special access to Mr. Dear. The press must follow the same procedures as the public. Your client has the right and opportunity to not make phone calls, and to not participate in video visitation. He is an adult and can make his own decisions. The general public is not allowed to video or record any video visitation-the press is obligated to follow the same rules. As you are aware, the phone calls made from the jail are recorded by the jail (except for those that are privileged). Any calls between Mr. Dear and a member of the public are recorded as a general business matter.

Should the Court issue an order prohibiting Mr. Dear from making phone calls, or having access to video visitation, EPSO will certainly follow the order. Short of a total prohibition on phone calls, it is impossible for EPSO to stop the phone calls in advance.

200 S. CASCADE AVENUE  
OFFICE: (719) 520-6485



COLORADO SPRINGS, CO 80903  
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EPSO understands your concerns, and quite frankly, has also received concerns from the victims. EPSO has neutrally applied its policy and has followed the law in terms of affording Mr. Dear his rights.

Be assured that should a legitimate penological interest arise, EPSO will document the security/safety reason, or the impact to the facility. To date, Mr. Dear has followed the rules for access to the phone, and to video visitation. It is provided within his assigned housing area. It has not caused hardship within the facility as Mr. Dear has no greater access to those systems than any other inmate.

To curtail the First Amendment rights of Mr. Dear, without appropriately balancing his right against the penological needs of the institution may lead to litigation under section 1983. It may also lead to violence and/or outburst from Mr. Dear. Since he is following the rules, and the impact to the facility is no greater than any other inmate who has access to the public, EPSO will not curtail those rights.

The media has contacted EPSO and requested face to face contact with Mr. Dear, and requested an interview on camera. That has been denied. Case law is clear that face to face contact can be denied, as long as there are other methods to exercise the constitutional rights.

Accordingly, EPSO denies your request to run interference, or to notify you of when the press seeks contact with Mr. Dear.

Thank you for your letter.

Sincerely,



Elizabeth A. Kirkman 19055  
Senior assistant county attorney  
Attorney for EPSO



**Donna Billek**

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**From:** Libbie McCarthy <Libbie.McCarthy@coag.gov>  
**Sent:** Wednesday, August 10, 2016 1:38 PM  
**To:** 'lynette.cornelius@  
**Cc:** 'daniel.king@coloradodefenders.us'; 'Nelson, Kristen'; 'Roy, Rosalie';  
'districtattorney@elpasoco.com'; Donna Billek; 'jeffreylindsey@elpasoco.com'  
**Subject:** FW: Robert Dear 15CR5795

Ms. Cornelius,

I'm writing to notify you that the Colorado Department of Human Services is not filing a response to D-026, Motion for Court Order Directing the Colorado Mental Health Institute at Pueblo to Prohibit Mr. Dear, who has been Found Incompetent, from Communicating with the News Media. CDHS is not taking a position on the Motion.

Thank you,

Libbie McCarthy

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# Attorneys want to end media interviews with admitted Colorado Springs Planned Parenthood shooter

DATE FILED: September 12, 2016 4:16 PM

By: **Lance Benzel** July 28, 2016  
*Updated: July 29, 2016 at 6:38 am*





COLORADO SPRINGS, CO - December 09:  
Attorney Kristen Nelson left. and an El Paso

Attorneys for admitted Planned Parenthood shooter Robert Dear Jr. want to curb their client's penchant for making public statements.

A motion filed last week seeks to bar the 58-year-old Hartsel man from interacting with reporters at the

Pueblo State Mental Health Institute at Pueblo, where he is confined for treatment while the case against him is on temporary hold.

Dear's overtures to reporters are a "recurring issue" abetted by "unethical" reporters in search of a scoop, the motion argues in asking 4th Judicial District Chief Judge Gilbert Martinez to direct hospital administrators to restrict reporters' access to Dear.

"Some of these communications were initiated by Dear himself," the motion reads. "Others were unfortunately initiated by members of the news media, who appeared determined to exploit this mentally ill man."

## **Admitted Planned**

***Related:* Parenthood shooter  
found incompetent  
to stand trial**

A response by prosecutors hasn't been filed.

Calling himself a "warrior for the babies," Dear has repeatedly admitted responsibility for the Nov. 27 attack on Colorado Springs' only Planned Parenthood clinic, which killed three people, including a police officer, and wounded nine others. He surrendered at the end of the five-hour rampage. He is charged with 179 counts.

- In January, Dear placed a collect call to CBS4 in Denver from the El Paso County jail, giving the first in a series of interviews with reporters.

