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| District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903 | DATE FILED: August 22, 2016 12:04 PM |
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff | |
| v. | σ COURT USE ONLY σ |
| ROBERT LEWIS DEAR, Defendant | |
| 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-027 | |
| MOTION TO QUASH SUBPOENA DUCES TECUM | |

Mr. Dear, through counsel, respectfully moves this Court to quash the subpoena duces tecum served on the Colorado Mental Health Institute at Pueblo on Friday, August 12, 2016:

1. The subpoena duces tecum issued by the prosecution seeking to obtain records pertaining to Mr. Dear at the Colorado Mental Health Institute at Pueblo should be quashed because it is overbroad. The records sought include privileged information that is not subject to the waiver provisions of the competency statute.

2. C.R.S. § 16-8.5-104 states:

(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, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:

(a) Reports of competency evaluations, including second evaluations;

(b) Information and documents relating to the competency evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation; and

(c) The evaluator, for the purpose of discussing the competency evaluation.

3. The materials sought by the subpoena issued by the prosecution extend beyond the waiver provisions of the competency statute. The subpoena is overbroad in several ways.

4. First, the subpoena duces tecum is not limited to records pertaining to Mr. Dear's competency. The language of the first sentence of the subpoena seeks "any and all records of Robert Lewis Dear, Jr., DOB: 4/16/1958 beginning May 20, 2016 to present." Thus, the prosecution has included in its request a demand for the production of medical and/or other mental health records that do not specifically pertain to competency. Any such medical records do not fall within the purview of C.R.S. § 16-8.5-104 and are still protected by medical privilege.

5. The subpoena also states:

Include any and all reports on competency, whether formal or informal, completed by or relied on by the evaluators; all documents; observation logs; notes; testing (including raw data); working files; any video and audio that were created by, obtained by, reviewed by, or relied on by any evaluator, including but not limited to, the court-ordered evaluators from the Colorado Mental Health Institute at Pueblo. This includes information and documentation created and relied on by Scott Young, PsyD; Julie Meeker, M.D.; Thomas Gray, Psy.D; and Jackie Grimmatt, PsyD.

6. The language of the subpoena and its use of semi-colons suggests that the prosecution seeks *all* documents, observation logs, notes, testing (including raw data), and working files pertaining to Mr. Dear, rather than *just* those documents, observation logs, notes, testing (including raw data), and working files that were created by, obtained by, reviewed by, or relied on by evaluators during the court-ordered competency examination.

7. Moreover, the language of the subpoena does not limit the request for production to those documents and other information that were created by, obtained by, reviewed by, or relied on by an evaluator *performing a court-ordered evaluation*. Rather, the subpoena requests these items as they pertain to "*any evaluator, including but not limited to, the court-ordered evaluators from the Colorado Mental Health Institute at Pueblo.*" (Emphasis added).

8. In those ways, the prosecution's request for production is overbroad. The language of C.R.S. § 16-8.5-104 clearly limits the prosecution's access to only the "information and documents" "that were created by, obtained by, reviewed by, or relied on by an evaluator who was performing a court-ordered evaluation" – rather than "all" documents, observation logs, notes, testing (including raw data), working files, video and audio created by, obtained by, reviewed by, or relied on by "any evaluator."

9. Additionally, the subpoena requests production of "video and audio that were created by, obtained by, reviewed by, or relied on by any evaluator. . . ." C.R.S. § 16-8.5-104 references only "information and documents." Video and audio are not included in the plain language of the statute.

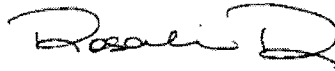
10. Finally, Mr. Dear continues to object to the disclosure of any privileged information under the circumstances of this case, and incorporates by reference the arguments and authorities contained in Motion D-016.

11. The prosecution has not yet indicated whether or not it is seeking the death penalty in this case. Because the death penalty has not yet been ruled out as a possible punishment, this Court should take particular care to construe the waiver provisions of C.R.S. § 16-8.5-104 as narrowly as possible to ensure full protection of Mr. Dear's constitutional rights. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 456 (1984) ("heightened standard of reliability" applies to capital proceedings); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

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: August 22, 2016

I hereby certify that on August 22, 2016, I electronically served a true and correct copy of the above and foregoing document to:

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/s/ Nicole Colt
