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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 OF COUNTY COURTS OF EL PASO COUNTY, COLORADO |
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ROBERT LEWIS DEAR, Defendant | MAR 8 1 2016 DR. LYNETTE 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 |
| P-011 RESPONSE TO PROSECUTION'S MOTION FOR DISCOVERY | |

Mr. Dear, through counsel, submits the following in response to Motion P-011:

1. The prosecution has filed a motion making a variety of discovery requests in advance of the competency hearing set in this matter for April 28, 2016. In paragraph 4 of its motion, it requests the following:

- a. Any and all reports of competency evaluations, including second evaluations or other evaluations, whether formal or informal, of the Defendant by any potential witness, whether an expert or not, to be called by the defense;
- b. Any and all information, testing, documents, working files, and/or video/audio relating to the competency evaluation(s) that are/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;
- c. The names, address [sic], reports, and statements of each physician, psychologist, or other mental health treatment provider who has examined and/or treated the defendant for competency;
- d. The names, addresses, reports, and/or statements of each physician, psychologist, or other mental health treatment provider who has examined and/or treated the defendant for a mental disease or disability;
- e. Memorial Hospital Records of Robert Lewis Dear for treatment on November 27, 2015;

- f. Any and all information and/or records including but not limited to: files, testing, data (including any “raw data”), notes, observations logs, working files, report and full disclosure of any conversations with the defendant and/or his counsel, audio/video from the Colorado Mental Health Institute at Pueblo. [REDACTED]
- g. Any and all records pertaining to medical and mental health treatment at the El Paso County Jail.

Motion P-011, paragraph 4.

2. 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). As was the case when the defense filed Motion D-016, neither of these two circumstances exists.

3. The prosecution alleges in its pleading that “[t]he Defendant has placed his mental health, in particular his competency, at issue.” Motion P-011, para. 3. The defense vigorously disagrees. Mr. Dear has done nothing to inject the issue of competency into these proceedings. Rather, it was the *Court* that raised the issue of Mr. Dear’s competency on its own motion on December 23, 2015. Then, at the March 24, 2016 status hearing in this matter, the *prosecution* requested a hearing on competency pursuant to C.R.S. § 16-8.5-103(3). All the defense has done is to state its position on the record that the Court should accept the conclusion of the evaluation that was conducted at the Court’s request.

4. Additionally, the Court has not yet made a determination or entered a finding that Mr. Dear is incompetent, nor has it yet ordered restoration treatment.

5. Thus, for the reasons stated in Motion D-016, and based on the points and authorities cited therein, the defense maintains its position that Mr. Dear has not triggered any sort of statutory waiver that should result in the disclosure to the prosecution of any privileged mental health information.

6. If the Court disagrees with this position, then at most, it should sanction disclosure of only those items listed in C.R.S. § 16-8.5-104, which reads, in relevant part:

(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.

(2) Upon a request by either party or the court for the information described in subsection (1) of this section, the evaluator or treatment provider shall provide the information for use in preparing for a hearing on competency or restoration and for use during such a hearing.

(3) An evaluator or a facility providing competency evaluation or restoration treatment services pursuant to a court order issued pursuant to this article is authorized to provide, and shall provide, procedural information to the court, district attorney, or defense counsel, concerning the defendant's location, the defendant's hospital or facility admission status, the status of evaluation procedures, and other procedural information relevant to the case.

...

(5) The court shall order both the prosecutor and the defendant or the defendant's counsel to exchange the names, addresses, reports, and statements of each physician or psychologist who has examined or treated the defendant for competency.

7. The prosecution's list of requested items in paragraph 4 of Motion P-011 far exceeds the scope of the materials covered by the competency statute.

8. For instance, the prosecution is not only requesting the material outlined in subsection (5) of the statute with respect to each physician or psychologist who has examined or treated the defendant for competency, but is requesting this information for "each physician, psychologist, or other mental health treatment provider *who has examined and/or treated the defendant for a mental disease or disability.*" See Motion P-011, para. 4(d). In paragraphs 4(e) and (g) the prosecution requests hospital records for Mr. Dear from November 27, 2015 as well as "[a]ny and all jail records pertaining to medical and mental health treatment at the El Paso County Jail," regardless of whether or not such records were reviewed or relied upon by the competency examiners at CMHIP.

9. The prosecution urges the Court to order disclosure of this additional information pursuant to C.R.S. § 16-8.5-104(4), which provides:

Nothing in this section limits the court's ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator, or to either party to the case, nor does it limit the information that is available after the written consent of the defendant.

10. However, ordering broad, discretionary disclosure of medical and mental health information beyond those materials that are required to be disclosed by the statute is inappropriate under these circumstances. First, ordering such forced, expanded disclosure of protected mental health information would violate Mr. Dear's rights to due process and against self-incrimination and cruel and unusual punishment, given that the defense has done nothing to affirmatively inject the issue of Mr. Dear's mental health or competency into these proceedings. *See Estelle v. Smith*, 451 U.S. 454, 462 (1981); U.S. Const. amends. V, XIII, XIV; Colo. Const. art. II, secs. 18, 20, 25.

11. Second, although subsection (4) authorizes the Court to order disclosure of additional information, it does not provide the Court with the ability to override other statutory privileges. For example, any medical and mental health records pertaining to Mr. Dear that were not disclosed to or relied upon by competency evaluators remain protected by HIPAA as well as C.R.S. §13-90-107(1)(d) &(g).

12. Third, any forced disclosure of information beyond that which is outlined in C.R.S. §16-8.5-104 at this stage in the proceedings, before Mr. Dear has entered any plea at all, let alone a plea involving his mental state or mental condition, would provide the prosecution with 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 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."); 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.')

13. Moreover, a forced disclosure beyond the scope of C.R.S. § 16-8.5-104 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.

14. Finally, given the circumstances, the prosecution has no need for expanded discovery of this protected information. The Court ordered a competency evaluation. Evaluators at CMHIP subsequently conducted that evaluation and found Mr. Dear to be incompetent. The

prosecution did not ask for a second evaluation, nor has it indicated that it actually disagrees with the CMHIP evaluators' finding of incompetence. Rather, the prosecution has simply stated that it is "challenging the Defendant to prove his incompetency to this court [sic] in a testimonial hearing and not merely through a written document." Motion P-011, para. 2. At this point, it appears that any evidence presented at the competency hearing will be based on the report by the CMHIP evaluators. Thus, the prosecution can obtain all that it needs from the disclosures required by the statute.

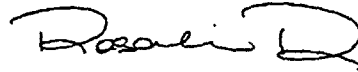
15. In essence, it appears that prosecutors are attempting to use these competency proceedings as an opportunity to obtain as much information as possible about Mr. Dear's mental health to aid them in preparing to rebut a potential insanity defense at trial. Indeed, the district attorney himself stated as much, when he announced at a press conference following the hearing, "By asking for the hearing we now get discovery of what mental health records may be at the jail, what mental health records the defense may have." *See* <http://fox21news.com/2016/03/24/competency-hearing-set-for-robert-lewis-dear/>. The Court should refuse to indulge these efforts to embark upon such a fishing expedition, and should limit disclosure to those materials that bear directly on the more narrow issue of competency.

16. In conclusion, the defense first requests that the Court find that Mr. Dear has not waived privilege pursuant to C.R.S. § 16-8.5-104. If the Court disagrees, in the alternative, the defense requests that the Court limit the disclosures only to those materials required to be disclosed by the competency statute.

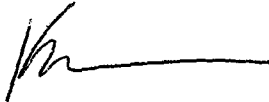
Mr. Dear files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, 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: March 31, 2016

I hereby certify that on 3/31, 2016, I

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