

# REDACTED

District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	DATE FILED: October 26, 2016 12:25 PM
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	♦ COURT USE ONLY ♦
<b>ROBERT LEWIS DEAR,</b> 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: <a href="mailto:state.pubdef@coloradodefenders.us">state.pubdef@coloradodefenders.us</a>	Case No. <b>15CR5795</b>  Division 10
<b>P-014</b>  <b>RESPONSE TO PROSECUTION'S SUBMISSION OF PROPOSED ORDER REGARDING RECORDS REQUESTED PURSUANT TO A SUBPOENA DUCES TECUM TO THE COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO AND NOTICE TO COURT</b>	

Mr. Dear, through counsel, submits the following in response to Motion P-014:

1. On Monday, the prosecution filed pleading P-014 submitting a proposed order to the Court regarding the subpoena duces tecum the prosecution previously issued for Mr. Dear's records from CMHIP. The defense feels compelled to respond to correct some misimpressions left by the prosecution's acrimonious pleading and to further explain its objection to certain language in the proposed order.

2. First, the prosecution's pleading inaccurately portrays defense counsel as completely unresponsive to the prosecution's request for input on the proposed order and baldly defiant of the Court's directive to the parties to confer about a proposed order by the week's end. What in fact occurred is that Ms. Billek emailed Ms. Roy on Thursday, October 20, 2016, at 9:39 a.m. and stated,

Good morning Rose –

I'm still quite a bit under the weather and may not be able to get the proposed order to you for review before tomorrow. Are you okay if I contact Judy and ask her if we can have until the end of next week?

Please let me know.

Donna

3. Ms. Roy responded at 9:51 a.m.,

Donna,

Sorry to hear that you are still feeling poorly. Of course, next week is perfectly fine with me.

Rose

4. After that exchange, Ms. Roy assumed that Ms. Billek had asked the Court for additional time to submit the proposed order, as Ms. Billek indicated she was going to do. Ms. Roy was then first occupied with other matters and subsequently was out of the office when Ms. Billek's follow-up emails came through. Ms. Roy did not see Ms. Billek's follow-up emails until Sunday afternoon at 3:49 p.m., at which time she responded to Ms. Billek's email from Friday stating,

Sorry Donna,

When you asked to get this to the judge later, I took Friday off. I will talk to Dan and Kristen in the morning and get back to you asap.

Rose

Ms. Nelson then promptly responded to Ms. Billek on Monday morning after Mr. King, Ms. Roy, and Ms. Nelson had an opportunity to discuss the language of Ms. Billek's proposed order.

5. Thus, it is not the case that Ms. Roy simply ignored Ms. Billek's efforts to submit a proposed order to the Court by the end of the week, as the prosecution's pleading suggests. Ms. Roy believed that Ms. Billek had requested additional time from the Court to submit the proposed order, and was subsequently out of the office.

6. Second, and more importantly, given the prosecution's choice of language in P-014 suggesting that the defense is being unnecessarily obstructionist ("Based on the response received from defense counsel, it would be fruitless for the People to attempt any further communication regarding working with the defense to develop language for the proposed order...."), the defense feels compelled to provide an explanation for its objection to the portion of the proposed order quoted in paragraph 4 of the prosecution's pleading.

7. The defense objects to that language because that passage of the proposed order includes information that is not necessarily related to Mr. Dear's competency evaluation, such as medication logs, food logs, security reports, and grievance forms. The prosecution states that "the language tries to delineate the types of documents the People and the defense know should be included in the Defendant's file at the Colorado Mental Health Institute at Pueblo." However, simply because material is contained in Mr. Dear's file at CMHIP does not mean that is covered by the waiver provision of the competency statute.

8. That statute reads as follows:

- (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.
- (4) 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.

- (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.
- (6) Statements made by the defendant in the course of any evaluation shall be protected as provided in section 16-8.5-108.

Colo. Rev. Stat. Ann. § 16-8.5-104 (West).

9. As counsel have previously stated, they continue to object to the release of *any* of Mr. Dear's CMHIP records under the circumstances. *See* Defense Motions D-016, D-027. However, without waiving those objections and understanding that the Court has rejected their previous arguments, the defense contends that the prosecution is not entitled to material such as food logs, medication logs, security reports, and grievance forms under C.R.S. §16-8.5-104 unless the Court makes a specific ruling allowing the prosecution access to such information pursuant to subsection (4), which it has not done. None of these categories of materials have anything to do with the hospital's evaluation of Mr. Dear's competency or even mental illness *per se*.<sup>1</sup>

10. Indeed, by the hospital's own admission, the entire forced medication proceeding that was recently initiated by the state hospital and culminated in a hearing in Pueblo on October 13, 2016 had nothing to do with any efforts to restore Mr. Dear to competency. Rather, the hospital initiated a forced medication petition under *People v. Medina*, 705 P.2d 961 (Colo. 1985), which addresses the standard for obtaining a court order authorizing forced medication when such medication is necessary to prevent a significant and likely long-term deterioration in the patient's mental condition or to prevent the likelihood of the patient causing serious harm to himself or others in the institution. The hospital explicitly chose *not* to proceed with its request to forcibly medicate Mr. Dear under *Sell v. United States*, 539 U.S. 166 (2003), which governs the standard for forced medication for the purposes of competency restoration.

11. Defense counsel acknowledge that they previously requested this Court to assume jurisdiction over the recent forced medication matter that resulted in the creation of Pueblo District Court Case No. [REDACTED]. As explained in Motion D-028, one reason undersigned counsel made this request is because the hospital's attempt to forcibly medicate Mr. Dear could have *impacted* Mr. Dear's competence to stand trial *if* the request to forcibly medicate Mr. Dear had been successful, and this Court will be the venue in which Mr. Dear's competency will continue to be re-examined. However, this Court rejected that argument, and the matter was

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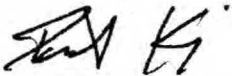
<sup>1</sup> The prosecution's proposed language is also objectionable because it expands the Court's ruling to allow the prosecution access to records and information that broadly relate to Mr. Dear's "diagnosis of delusional disorder." C.R.S. § 16-8.5-104 does not automatically entitle the prosecution to all records pertaining to Mr. Dear's mental illness in general. The waiver provision of the statute is narrowly tailored to focus exclusively on information pertaining to a defendant's competency evaluation.

instead heard in Pueblo District Court. By the end of that litigation, it became clear that the state hospital's purported primary objective in attempting to forcibly medicate Mr. Dear was to prevent him from [REDACTED]

[REDACTED] Moreover, the state hospital's attempt to forcibly medicate Mr. Dear on these grounds was ultimately unsuccessful. Under these circumstances, C.R.S. § 16-8.5-104 does not entitle the prosecution to the records and information that led to the state hospital's recent forced medication request.

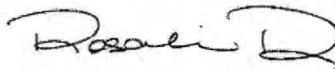
12. In sum, defense counsel's position regarding the prosecution's access to Mr. Dear's CMHIP records remains as stated in Motions D-016 and D-027. However, the defense understands that the Court has ruled that the prosecution is entitled to CMHIP records pertaining to competency as provided by the waiver provision of the competency statute. The defense specifically objects to the language in italics in paragraph 4 of pleading P-014 because the language is overbroad, and privilege has not been waived with respect to such material pursuant to C.R.S. § 16-8.5-104.

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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Daniel King (No. 26129)  
Chief Trial Deputy State Public Defender



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Rosalie Roy (No. 26861)  
Deputy State Public Defender



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Kristen M. Nelson (No. 44247)  
Deputy State Public Defender

Dated: October 26, 2016

I hereby certify that on October 26, 2016, I electronically served a true and correct copy of the above and foregoing document to:

Dan May  
Donna Billek  
Jeff Lindsey  
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/s/ Nicole Colt