

District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	DATE FILED: July 13, 2020
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. LETECIA STAUCH, Defendant	
MEGAN A. RING, Colorado State Public Defender Kathryn Strobel (No. 42850) Deputy State Public Defender 30 E Pikes Peak Ave Suite 200 Colorado Springs, Colorado 80903 C. Colette LeBeau (No. 43164) Deputy State Public Defender 132 W B St #200 Pueblo, CO 81003 Phone (720) 475-1235 Fax (719) 7475-1476 E-mail: Kathryn.strobel@coloradodefenders.us Colette.LeBeau@coloradodefenders.us	σ COURT USE ONLY σ Case No. 20CR1358 Division 15S Ctrm: S403
[P-12 DEFENSE REPONSE] DEFENSE MOTION TO QUASH THE PEOPLE'S SUBPOENA FOR PRODUCTION OF MEDICAL AND MENTAL HEALTH RECORDS FROM THE EL PASO COUNTY JAIL	

The Defense files this motion to quash the people's subpoena to the El Paso County Criminal Justice Center that requests any and all medical and mental health records relating to Letecia Stauch because it is overbroad, oppressive, and unreasonable and violates State and Federal law and the warrant requirements.

- I. The prosecution issued a subpoena to the custodian of records at the El Paso County Criminal Justice Center to produce Ms. Stauch's medical and mental health records and the custodian of records provided these protected documents directly to the prosecution.

1. On June 29, 2020, the people filed a subpoena on Colorado Courts e-filing system (ICCES) directing custodian of records, Amanda Zamora, to produce "any and all medical or mental health records relating to Letecia Stauch (DOB 08/04/1983), to include but not be limited to kites, notes, treatment records, testing records, raw data, progress notes, and daily logs of all treatment providers and staff."

2. For an unknown reason, the custodian of records, Amanda Zamora, delivered private, confidential, and privileged medical and mental health records directly to the district attorney's office without permission from Ms. Stauch in violation of State and Federal laws. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA); 45 C.F.R. §164.502(a) (“A covered entity or business associate may not use or disclose protected health information...”); 45 C.F.R. §164.508(a) (“... a covered entity may not use or disclose protected health information without an authorization that is valid under this section...”; C.R.S. §13-90-107(1)(d),(g) (Who may not testify without consent); C.R.S. §18-4-412 (theft of medical records or medical information).

3. The prosecution acknowledges that their office directly received documents from custodian of records Amanda Zamora labeled “ ” and “ ” (presumably mental health kites) pursuant to their subpoena duces tecum (SDT) requesting this protected information and acknowledge that these documents could potentially contain Ms. Stauch's protected information. *See* P-10 “People's notice of receipt of potentially protected information through criminal justice center records” filed on July 2, 2020. The prosecution acknowledges in this motion that the court has not found a waiver of any privilege yet they are in possession of Ms. Stauch's protected medical and mental health records.

II. The prosecution's request to obtain any and all private, confidential, and privileged medical records and mental health records from the El Paso County Criminal Justice Center through a subpoena is a violation of State and Federal laws and the warrant requirements and is overbroad, unreasonable, and oppressive. This Court should quash the subpoena and require that the prosecution hand over the illegally obtained documents to the court to be destroyed.

4. The prosecution's request for any and all medical or mental health records relating to Letecia Stauch including kites, notes, treatment records, testing records, raw data, progress notes, and daily logs of all treatment providers and staff from the El Paso County Criminal Justice Center is an overbroad, unreasonable, and oppressive subpoena. In the prosecution's subpoena, they have not demonstrated their burden set forth in *People v. Spykstra*, 234 P.3d 662, 669 (2010) for the requested documents. In addition, the request for Ms. Stauch's private, confidential, and privileged medical and mental health records through a subpoena violates State and Federal law. The subpoena for this protected information is in effect a search warrant and this subpoena violates Ms. Stauch's constitutional right to be free from unreasonable searches and seizures by the government.

a. The prosecution's request for any and all of Ms. Stauch's medical and mental health records without permission violates State and Federal law.

5. The court may quash or modify the subpoena if compliance would be unreasonable or oppressive. Colo. Crim. Pro. Rule 17(c), (2020).

6. The Defense has filed responses to the prosecution's motion P-08 and P-09 outlining the prosecution's misinterpretation of the competency statute C.R.S. §16-8.5-104(1). At this time, there has been no finding about whether Ms. Stauch is incompetent to proceed or competent to proceed. The Defense raising competency does not open the door to the prosecution obtaining the entirety of Ms. Stauch's medical records, mental health records, and social history.

7. Ms. Stauch's private, confidential, and privileged medical information, mental health information, and social history is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Code of Federal Regulations and by Colorado statute. *See* 45 C.F.R. §164.502(a) ("A covered entity or business associate may not use or disclose protected health information..."); 45 C.F.R. §164.508(a) ("... a covered entity may not use or disclose protected health information without an authorization that is valid under this section..."; C.R.S. §13-90-107(1)(d),(g) (Who may not testify without consent); C.R.S. §18-4-412 (Theft of Medical Records or Medical Information).

8. Colorado law makes it a crime for any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information. *See* §18-4-412, C.R.S. (2020).

9. In Colorado, a medical record is defined as "the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health care services... that are performed at the direction of a physician or other licensed health care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency medical service providers,

mental health professionals, prehospital providers, or health care personnel.” § 18–4–411(2)(a), C.R.S. (2020).

10. In Colorado, medical information means “any information contained in the medical records or any information pertaining to the medical, mental health, and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician-patient privilege.” § 18–4–411(2)(b), C.R.S. (2020).

11. Ms. Stauch’s written consent is required to obtain her private, confidential, and privileged medical, mental health, and social history documents. C.R.S. §16-8.5-104(4). “Absent a waiver by the patient, the physician-patient privilege prohibits pretrial discovery of information within the scope of the privilege.” People v. Palomo, 31 P.3d 879, 885 (2001) *citing* People v. Overton, 759 P.2d 772, 774 (Colo. App. 1988). *See also* C.R.S. §13-90-107(1)(d),(g). In Palomo, 31 P.3d 879, investigators from the district attorney’s office obtained the personnel files for the defendant and the victim from their employer, Excel, without permission from the defendant or the victim’s representative. Id. at 881. The victim’s personnel file contained medical tests and examinations performed upon her that the court determined could be medical information. Id. at 884. The Colorado Supreme Court noted that if criminal charges arose for the theft of medical records against the employer, the trial court may properly appoint a special prosecutor to prosecute the case. Id. at 885.

12. In the instant case, the custodian of records for the El Paso County Criminal Justice Center provided documents labeled _____ and _____ directly to the prosecution without Ms. Stauch’s permission. These documents appear to contain Ms. Stauch’s medical records and medical information. This act is prohibited by C.R.S. §18-4-412 (theft of medical records or medical information). The custodian of records illegally disclosed medical records or medical information to an unauthorized person and without authority and the prosecution has caused to be made a copy of the medical record or medical information without authority. In addition, these acts violate federal law because the prosecution has no authority to obtain these protected documents and the custodian of records has no authority to disclose or make copies of these documents without authorization. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA); 45 C.F.R. §164.502(a); 45 C.F.R. §164.508(a).

b. The prosecution is using this subpoena as an investigatory tool and has not met their burden set forth in *Spykstra* to require pre-trial production of Ms. Stauch's protected medical and mental health information.

13. When a criminal pretrial third-party subpoena is challenged, the prosecution must demonstrate:

- (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
- (2) That the materials are evidentiary and relevant;
- (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
- (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
- (5) That the application is made in good faith and is not intended as a general fishing expedition.

People v. Spykstra, 234 P.3d 662, 669 (2010).

14. Each of these requirements ensures that a Crim. P. 17(c) subpoena is not an investigatory tool. Id. at 669. "A Crim. P. 17(c) subpoena is limited to "evidence," and when a subpoena is returnable pretrial, the trial court, if called upon, must also consider the circumstances of the subpoena to determine whether it is unreasonable or oppressive." Id. In *Spykstra*, the defense issued subpoenas duces tecum (SDT) to the parents of an alleged child sex assault victim. Id. at 664. The SDT commanded the parents to produce every electronic device in their possession. The district attorney moved to quash the subpoena as unreasonable and oppressive and asserted that compliance with the subpoena would expose irrelevant personal information including personal medical information. Id.

15. In the instant case, it appears that the prosecution has already obtained Ms. Stauch's medical and mental health records without permission from the El Paso jail. Thus, it appears that the El Paso County jail has protected medical and mental health information pertaining to Ms. Stauch. The prosecution has failed to set forth a specific factual basis that these records contain material that is evidentiary and relevant to the pending case. *See* *Spykstra*, 234 P.3d at 666. Any and all of Ms. Stauch's private medical and mental health records should not be procurable by the prosecution because these private health records are protected by State and Federal law and the prosecution has no authorization to obtain these documents. There has been no finding about whether Ms. Stauch

is incompetent or competent to proceed to trial. Thus, the prosecution cannot assert that they cannot properly prepare for trial without the production of these documents. The request for any and all medical and mental health records pertaining to Ms. Stauch from the El Paso County jail is a general fishing expedition. Spykstra, 234 P.3d at 669) *citing* Nixon 418 U.S. 683, 698 (1974)(explaining that Fed. R. Crim. P. 17(c) was “not intended to provide a means of discovery for criminal cases”). This Court should quash the prosecution’s overbroad, unreasonable, and oppressive subpoena.

c. The prosecution’s request for Ms. Stauch’s medical and mental health records through a subpoena converts the subpoena into a search warrant.

16. Recently, the United States Supreme Court explained that it has never held that the government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018). In Carpenter, the State obtained cell-site location information (CSLI) of the accused without a warrant but pursuant to a court order issued under the Stored Communications Act. The Court declined to grant the state unrestricted access to a wireless carrier’s database of physical location information and held that the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the fact that this information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The government’s acquisition of the cell-site records through a court order was a search under the Fourth Amendment. Id. at 2223.

17. In Carpenter, 138 S. Ct. 2206, Justice Alito argued that the warrant requirement did not apply when the government acquired records using compulsory process. Id. at 2221. The Court held that “Under Justice Alito’s view, private letters, digital contents of a cell phone- any personal information reduced to document form, in fact- may be collected by subpoena for no reason other than “official curiosity.”” Id. The Court declined to accept this view and held that a warrant is required when an individual has a legitimate privacy interest in records held by a third party. Id. at 2222.

18. An individual’s private medical records, mental health records, and social history are even more personal and deeply revealing than one’s physical location data contained in cell phone records. This is why there are State and Federal laws specifically protecting private, confidential, and privileged medical documents, mental health documents, and social history documents. *See* Health

Insurance Portability and Accountability Act of 1996 (HIPAA); 45 C.F.R. §164.502(a); 45 C.F.R. §164.508(a); C.R.S. §13-90-107(1)(g); C.R.S. §18-4-412.

19. The Fourth Amendment to the United States Constitution, and article two, section seven of the Colorado Constitution protects an individual against unreasonable searches and seizures by the government. U.S. CONST. amend. IV; *See also* COLO. CONST. art. II § 7. The basic purpose of these amendments is to “safeguard the privacy and security of individuals against arbitrary invasions by government officials.” Carpenter, 138 S.Ct. at 2213. The government is required to obtain a warrant supported by probable cause before acquiring records where the individual has a legitimate privacy interest in records held by a third party. Id. at 2221-22. *See also* People v. Mason, 989 P.2d 757, 760 (1999) *citing* Carlson v. Superior Court, 129 Cal. Rptr. 650, 655 (1976)(“an accused’s constitutional right to privacy in his papers and records is not diminished because law enforcement officials seek to obtain them by subpoena rather than by warrant). In the instant case, the prosecution is attempting to subvert the warrant requirements by subpoenaing third parties to produce Ms. Stauch’s private medical and mental health records without Ms. Stauch’s permission.

III. Conclusion

20. This Court should quash the subpoena to the El Paso County Criminal Justice Center and require that the prosecution turn over the illegally obtained documents to the court so that they may be destroyed. The prosecution’s subpoena for any and all of Ms. Stauch’s medical and mental health records from the El Paso County jail is overbroad, unreasonable, and oppressive. The prosecution has not demonstrated their required burden for the requested materials under Spykstra, 234 P.3d 662. Ms. Stauch’s medical and mental health records are protected by State and Federal law and the prosecution is not authorized to obtain these protected documents. Raising competency does not open the door to the prosecution obtaining Ms. Stauch’s entire social, medical or mental health records. Such an overbroad and invasive disclosure requirement would include information that has nothing to do with competency or the pending charges against Ms. Stauch. Circumventing the warrant requirement by issuing a subpoena to obtain personal information reduced to document form for official curiosity is not permitted under the law.

Wherefore, Ms. Stauch, through counsel, requests that this court quash the subpoena to El Paso County Criminal Justice Center to obtain any and all medical and mental health records relating to Ms. Stauch including kites, notes, treatment records, testing records, raw data, progress notes, or daily logs of all treatment providers and staff as this request is not supported by the law.

RESPECTFULLY SUBMITTED,



/ _____
Kathryn Strobel (No. 42850)
Deputy State Public Defender



C. Colette LeBeau (No. 43164)
Deputy State Public Defender

Dated: July 16, 2020