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COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

Appeal; Lake District Court; Honorable Catherine Ceroutes; and Case Number 2015CR26

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
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OPENING BRIEF

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I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,302 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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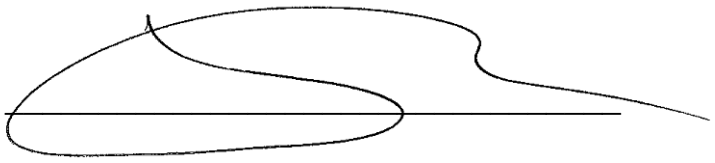

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ISSUES PRESENTED

Whether the court violated Ms. Day's constitutional right to present a defense when it precluded her from presenting relevant mental condition evidence?

Whether the restitution order must be vacated because (1) the court lacked authority to issue it more than 91 days after sentencing; and (2) the prosecution failed to meet its burden regarding the Crime Victim Compensation Board's payouts to the victim's siblings?

CASE AND FACTS

On July 8, 2015, Ms. Day[1], her boyfriend, John Martinez, and Ms. Day's mother went to Frisco to run some errands. (Env, PeoEx124; TR 2/5/20, p128) Martinez bought liquor for himself and flowers for the women. (*Id*.; TR 2/3/20, p162-64) Day was driving them in her car. (Env, PeoEx124; TR 2/3/20, p162-64) Martinez passed out in the car after drinking his bottle. (Env, PeoEx124) When they returned to Leadville around 4 pm, Day let Martinez out close to his house. (TR 2/3/20, p162-64,195-96; TR 1/29/20, p210-11,230-31) A neighbor heard the car door slam and the car drive away, but did not hear any other sounds. (TR 1/29/20, p188-89,191-92)

[1] At the time of the incident, Ms. Day went by the name, Linda Martinez. (TR 1/29/20, p255-56)

When Day restarted the car, however, her car accelerated unexpectedly, and she hit a concrete wall and potentially ran over a cement brick. (TR 1/29/20, p210-11,234,242-43; TR 1/30/20, p29-30,169-70; TR 2/3/20, p113,152-53,162-65,189-90; TR 2/5/20, p128) She also ran over Martinez in the process. (*Id*.) Day thought her transmission had been acting strangely, and she had run over a rock. (*Id*.) The defense contended Martinez stumbled or fell because of his intoxication, and Day unknowingly and accidentally hit him. (*Id*.; TR 2/6/20, p73-74,78-79,86)

After the accident, Day drove her mom home and called 911 approximately a half hour after the accident. (Env, PeoEx123; TR 1/29/30, p226-30,233,252-53; TR 2/3/20, p46,48-49,196) On the 911 call, Day was confused about her location but she was able to give the police directions to Martinez and her location about a block away. (*Id*.; TR 1/30/20, p17) Another passerby also called 911 when he saw Martinez passed out against the concrete wall. (Env, PeoEx122; TR 2/3/20, p198-99)

When the police arrived at the scene, Martinez was face down against the cement wall. (TR 1/29/20, p198-200,272-73; TR 1/30/20, p20,65-67) He was alive but barely responsive; initially they didn't know if his condition was due to intoxication or injuries. (TR 1/29/20, p236,238-39,275) When the first responders flipped him over, they observed a bottle of alcohol in his pocket, torn clothing, and

black marks on the legs of his pants. (TR 1/29/20, p201,274; TR 1/30/20, p20-21,31-32,68)

The police contacted Day at her family residence about a block away from the scene of the car accident. (TR 1/29/20, p206-07,218,285-88; TR 2/3/20, p59) Day asked whether she could ride in the ambulance with Martinez because he was her boyfriend. (TR 1/30/20, p30,60) She also asked numerous times about his condition. (*Id.*; TR 2/3/20, p95-96) She thought he might have broken his leg and didn't understand the severity of his injuries. (TR 2/3/20, p99,169; TR 1/29/30, p245-46)

Day went to the hospital with the police. (TR 2/3/20, p95-96) In the waiting room, Day saw an acquaintance and explained that she had let her boyfriend out by his house before she took her mom home, and a big rock caught her steering wheel and pulled her car, which caused her to accidentally hit Martinez. (*Id.*, p97,162-64).

Martinez died later that day. (TR 1/31/20, p90-91) His blood alcohol level was .383. (*Id.*, p57,74-75) The cause of death was the multiple injuries to his head, chest, and central nervous system. (*Id.*, p44,57) Additionally, he sustained a crushed pelvis and multiple fractures in his lower extremities. (*Id.*, p38-39)

Based on these events, the State ultimately charged Day with second degree murder, vehicular homicide, leaving the scene of the accident, and crime of violence sentence enhancers. (CF, p730-32,903-05)

The trial was not held for nearly five years after the incident because Day had to be evaluated repeatedly at the Colorado Mental Health Institute at Pueblo ("CMHIP"), was incompetent at various times, and had to be restored to competency. (*See* CF)

After a jury convicted her as charged, the court sentenced her to a total of 35 years in the custody of the Department of Corrections. (TR 2/6/20, p172-74; TR 8/19/20, p56)

ARGUMENT SUMMARY

I. Due process entitles a defendant to rebut evidence of her alleged culpability in her defense. Consistent with this constitutional right, section 16-8-107(3), C.R.S. permits a defendant to present expert testimony about her mental condition to negate the charged culpable mental state without entering a not-guilty-by-reason-of-insanity (NGRI) plea before trial. Here, the court refused to allow Day to introduce mental condition evidence because it erroneously concluded (1) Day did not cooperate with a court-ordered exam and (2) the admission of the evidence required a NGRI plea.

First, regarding the alleged noncooperation, the record reflects that Day was incompetent when the state hospital tried to examine her, and as such, her incompetence should have paused the proceedings. The record also reflects that Day complied with numerous other exams, and the state hospital squandered multiple opportunities to conduct the exam. Thus, the record does not support her noncooperation. Second, the evidence was not probative of insanity but rather it provided important context to understand Day's strange conduct following the accident. The court did not apply the correct analysis pursuant to *People v. Moore*, 485 P.3d 1088 (Colo. 2021). The court's erroneous exclusion of critical defense evidence requires reversal.

II. Section 18-1.3-603(1)(b) grants a court the authority to impose restitution within 91 days of entry of the order of conviction. Here, the court did not impose restitution until 159 days after sentencing, at which time it lacked authority to impose restitution. Therefore, the restitution order must be vacated in its entirety. Alternatively, this Court should also vacate the ordered restitution because the prosecution failed to meet its burden with regards to validity of the Crime Victim Compensation Board payouts. In addition to violating the statutory scheme, the court violated Day's due process rights by ordering her to pay restitution without requiring the State and the Crime Victim Compensation Board to specify

information about the provider payments or produce the records it claimed supported its restitution request. Accordingly, the restitution order is invalid and must be vacated.

ARGUMENT

I. THE COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT PRECLUDED HER FROM PRESENTING RELEVANT MENTAL CONDITION EVIDENCE.

A. Standard of Review

The right of the criminally-accused to present his version of the facts to the jury so it may decide where the truth lies is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Thus, a defendant possesses a constitutional right to present relevant evidence which tends to negate any of the elements of a charged offense or influences the determination of guilt. *People v. Vanrees*, 125 P.3d 403, 409 (Colo. 2005).

Preserved trial court error precluding defense evidence, and precluding jury consideration of said evidence, to contest the mens rea requirement of a criminal offense is reviewed for constitutional harmlessness because it implicates the defendant's rights to due process, to present a defense and subject the prosecution's case to meaningful adversarial testing, and to the presumption of innocence. *Hendershott v. People*, 653 P.2d 385, 397 (Colo. 1982); *In re Winship*, 397 U.S. 358

(1970); *Sandstrom v. Montana,* 442 U.S. 510, 520-24 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *see People v. Johnson*, 486 P.3d 1154, 1158, 2021 CO 35, ¶ 17 (Colo. 2021).

Under this standard, the State has the burden of proving beyond a reasonable doubt there is no reasonable possibility the error might have contributed to the defendant's conviction. *James v. People*, 2018 CO 72, ¶19.

This issue was preserved. (CF, p142,231-41,775-82,832-35,853-55,868-71; TR 10/10/19, p11; TR 11/7/19, p21-22,25-31)

B. Facts

In November 2015, Dr. Fukutaki conducted an evaluation of Day at defense counsel's request. (CF, p231-41) During the evaluation, Day denied having a history of "psychiatric symptoms" beyond depression, although she admitted to being previously hospitalized. (*Id.*, p234,236,238,240) Day informed Dr. Fukutaki that she had not taken her antipsychotic medicine, Abilify, for a couple of days prior to the car accident. (*Id.*, p233,240) Regarding the incident, Day explained that her car malfunctioned, and she delayed in contacting the police after the accident because she did not have a cell phone and was in a state of panic. (*Id.*) Dr. Fukutaki ultimately found her competent to proceed but did not offer any opinion regarding

Day's sanity at the time of the offense. Dr. Fukutaki did, however, find the following:

> Ms. Day's denial that she has ever experienced psychotic symptoms is in marked contrast to the overt psychotic symptoms she reportedly has exhibited in jail and at CMHIP. It raises significant questions as to whether her account of her mental state on the day of the accident is accurate. She appeared to have no insight into her mental illness or the reason she has been prescribed Abilify.
>
> She might not have appeared overtly psychotic after being off Abilify for two days, but could have been experiencing some thought disorganization that impaired her judgment and problem-solving abilities. She might have been experiencing some difficulty in her perception of reality that might have impacted her ability to recognize the severity of the situation and Mr. Martinez's need for immediate medical attention. Thought disorganization, impairment in problem-solving ability, and anxiety might have accounted for her having left the scene and having delayed contacting the police. It might also have accounted for her appearing to be under the influence to the police.

(*Id.*, p240)

In January 2016, relying on Fukutaki's report, defense counsel provided notice of Day's intent to present mental condition evidence. (CF, p142,230-41) In February 2016, the court ordered Day to undergo a court-ordered evaluation at CMHIP. (*Id*.)

In September 2016, the State moved for any evaluation of Ms. Day to be tape-recorded, which the court granted but rescinded after CMHIP notified the court that it lacked recording equipment. (CF, p329-39,365,368) In October 2016, the State's evaluator, Dr. Pounds, further opined that it would be harmful to videotape the evaluation with the incomplete video facilities. (CF, p356-61) Dr. Pounds also noted that he could not proceed with the evaluation until the prosecution provided him with discovery that they had "withheld." (*Id*.)

- ***2017: For most of the year, the parties waited for CMHIP to take custody of Day. After CMHIP finally admitted Day, CMHIP doctors failed to complete the mental condition evaluation as court-ordered. Day was cooperative.***

In February 2017, Dr. Pounds attempted to evaluate Day but he "terminated the evaluation due to ethical concerns." (CF, p378) At the beginning of the evaluation, Day clarified "this was a Mental Condition Examination" and agreed to continue based on that understanding. (CF, p377) However, as the evaluation continued, Dr. Pounds and Day both became confused. He seemed confused that she wanted to plead not guilty (even though that plea was consistent with her mental condition defense) and wrote that "[t]he only experiences I have involved NGRI pleas." (*Id.*, p378-79; TR 2/10/17, p) He concluded he could not offer a formal opinion until "this issue is resolved" and he received "further instructions." (*Id*.)

As defense counsel explained to the court, "there has been a profound misunderstanding as to whether this is [an] insanity or mental condition plea."(TR 2/10/17, p7) Counsel also expressed concern that Day could be decompensating as Day thought the doctor stated she had to plead guilty. (*Id*., p4-6) Counsel indicated it was difficult to parse out whether the misunderstanding stemmed from miscommunication between Day and Dr. Pounds, or whether Day had become incompetent. (*Id*.) Regardless, counsel reiterated that Day was not presenting an insanity defense but rather they sought to elicit evidence "to put Ms. Day's reaction, processing and immediate behavior in the aftermath of the chaotic event into context for the jury" as the defense anticipated that the prosecution would use her post-event conduct as evidence of her guilt. (*Id*., p4) Counsel offered to draft a more specific order, providing CMHIP with further information. (*Id*., p6-7,9) The court expressed frustration with CMHIP "because they're not doing what we told them to do a long time ago" and directed counsel to prepare another order. (*Id.*, p10-11)

In March 2017 (after some back and forth between the parties regarding statutory typos in the proposed order), the court ordered CMHIP to conduct an examination limited to "(1) whether Ms. Day is currently competent to proceed…; and (2) the effect of Ms. Day's mental illness on her mental perception /processing

of, and behavioral reaction to, the event upon which the charges are based." (CF, p393-96; TR 3/16/17 p2-3)

In May and June 2017, Day remained in the county jail, and the parties expressed frustration about CMHIP's failure to take custody of her and conduct the necessary evaluations. (TR 5/11/17, p2-5; TR 6/22/17, 2-5) The court indicated that CMHIP's delay was unfair to all parties involved. (*Id*.) Indeed, while waiting in the county jail, Day's mental health deteriorated as the jail stopped giving her all of her medications and did not provide proper medical care. (TR 8/16/17, p18-20)

In July 2017, defense counsel filed a motion, asserting that Day had fully decompensated to incompetency. (CF, p404-07)

At the subsequent hearing in August 2017, the court advised Day about the competency process, during which she seemed somewhat confused. (TR 8/16/17, p5-15) The parties discussed their understanding that CMHIP would conduct the competency evaluation separate from the mental condition evaluation and would not video-tape the competency evaluation. (*Id.*, p16) The court stated, "if somebody pleads incompetency, then that stops everything and that would include any mental health status stuff until we determine if she's competent. So I think they got to be two separate evaluations." (*Id.*)

In November 2017, CMHIP evaluator, Dr. Gray conducted a competency evaluation of Day. (CF, p430-38) At the outset, he noted that she was not always forthcoming or accurate in self-reporting. (CF, p432) He found "no evidence of an active psychotic illness or other serious psychiatric condition" that would meet criteria for a mental disability and opined that she was competent to proceed. (CF, p437-48) After finding her competent, he failed to conduct a mental condition evaluation (despite the multiple outstanding court orders).

When the parties met in December 2017 for a status hearing, defense counsel indicated that all parties understood Day was transported "to the state hospital for not just the competency piece, but the mental condition piece." (TR 12/7/17, p3) Counsel described how they contacted Dr. Gray in November and reminded him that both evaluations needed to be accomplished before Day returned to the county jail. (*Id*., p3-4,6-8) The defense also had the clerk resend the court's prior order, describing the mental condition evaluation. (*Id*.) Defense counsel stated, "I don't know that we can articulate it anymore clearly and I don't know why it wasn't done." (*Id*.)

The prosecution wanted to proceed without the evaluation because according to their read of the statutes, "the only way Ms. Day can raise her mental condition as a defense is if she pleads not guilty by reason of insanity, which she has not done."

(TR 12/7/17, p5-6) Defense counsel reiterated that they were not going to present an affirmative insanity defense; they were not arguing that Day's mental illness "created an inability to distinguish right from wrong or inability to form the culpable mental state." (*Id.*, p7) Rather, they planned to elicit limited mental condition evidence to explain Day's behavior and statements after the incident. (*Id.*, p7-8) The court indicated that it was permissible for the defense to raise this issue to explain her behavior, and expressed frustration that it needed to send another order to the CMHIP. (*Id.*, p8)

Alternatively, the prosecution argued the competency evaluation was sufficient substitute for the mental condition evaluation because Dr. Gray found that Day didn't have a mental disability. (TR 12/7/17, p10-11) Defense counsel responded the People could waive the mental condition evaluation if they wanted but the competency evaluation did not address the mental condition issue. (*Id.*, p11) The court agreed and issued yet another order, directing CMHIP to conduct a mental condition evaluation concerning "the effect of Ms. Day's mental illness on her mental perception/processing of, and behavioral reaction to, the event upon which the charges are based." (*Id.*; CF, p440-41)

- ***2018: The parties spent six months, waiting for CMHIP to effectuate the court's repeated orders for a mental condition evaluation. Due to insufficient medical care and medication in the county jail, Day became incompetent in the interim. When CMHIP finally attempted to conduct a mental condition evaluation, it went poorly because Day was incompetent.***

In February 2018, the parties appeared before the court but there was no progress because CMHIP still had not admitted Day or completed the evaluation. (TR 2/1/18, p2-4; CF, p443) Defense counsel reported that Day's mental health continued to deteriorate as Day was not receiving adequate care from the county jail. (*Id*.) Counsel asked that Day receive another competency evaluation due to her concerns about Day's mental deterioration. (TR 2/1/18, p4-7)

In March 2018, defense counsel filed a motion, requesting that Day receive a competency exam, and the district court granted the motion, ordering another competency evaluation. (CF, p445-447,452-53)

In June 2018, Dr. Hatfield conducted one thirty-minute evaluation of Day. (CF, p458) At the outset, Dr. Hatfield informed Day that he was video-taping the evaluation. (*Id*., p460) Day responded (correctly) that her evaluation was supposed to occur before the statute (concerning the videotaped evaluation) when into effect. (*Id*.) Day related that Dr. Pounds had previously told her that she had to plead insanity. (*Id*.) After Day asked Dr. Hatfield for copy of the order regarding the

evaluation, he exited the room but left the camera running. (*Id*., p460-61) During his absence, Day held a conversation the empty room, apparently responding to internal stimuli. (*Id*.) Her speech was not coherent. (*Id*.) When Dr. Hatfield returned with the order, she indicated that the order was outdated and she could not continue until he had a more recent order. (*Id.*)

Dr. Hatfield concluded she met the criteria for "unspecified schizophrenia spectrum" and found her incompetent to proceed. (CF, p461-62) His report acknowledged negative symptoms of this diagnosis include "diminished emotional expression and decreased self-initiated purposeful activities[.]" (*Id*.) As to her mental condition, he described her as lacking "insight" and noted her repeated history of denying "symptoms of psychosis" with previous evaluators. (*Id*., p459-61) Given this history and her incompetency, it seems highly unlikely that Ms. Day would have provided accurate information, had their interview continued. Nevertheless, he concluded he could not offer a mental condition opinion "regarding how Ms. Day's mental health may or may not have influenced her behaviors around the time of the alleged offense given her refusal to provide any information regarding the case." (*Id*., p162)

In August 2018, CMHIP admitted Day for restoration treatment to return her to competency; at intake, she was "delusional with apparent auditory hallucinations." (CF, p465,470)

In October 2018, a CMHIP doctor evaluated her competency and found that she was still incompetent. (CF, p467-71) Day was medicated at that point and cooperative during the entire evaluation. (*Id*.) Again, during the evaluation, Day "denied experiencing past or current symptoms of psychosis." (*Id*.) The evaluator did not conduct a mental condition evaluation or otherwise address her mental condition as relevant to her defense. (*Id*.)

In December 2018, a CMHIP doctor conducted another competency evaluation, finding her incompetent still. (CF, p474-82) Day was cooperative during the evaluation and again denied a history of any past or present psychotic symptoms. (*Id*.) The evaluation and report only addressed her competency, not her mental condition at the time of the offenses. (*Id*.)

- ***2019: Day regained competency, and the parties set the matter for trial. After the first trial mistried, the prosecution successfully moved to exclude Day's mental condition evidence.***

In March 2019, a CMHIP evaluator evaluated Day's competency and found that she had been restored. (CF, p499-506) Day cooperated in the evaluation. (Id.)

The evaluator did not, however, conduct a mental condition evaluation or otherwise address her mental condition at the time of the offenses. (Id.)

Defense counsel requested a second competency evaluation, which the court granted. (CF, p511-14,516) During that competency evaluation, Day told the evaluator, Dr. Chamberlain, that she had never had any auditory or visual hallucinations. (CF, p525) Dr. Chamberlain also noted that Day was "very cooperative" during the evaluation. (CF, p527) Dr. Chamberlain only addressed Day's competency, not her mental condition during the offenses.

The parties set the case for trial, starting in mid-August 2019. (TR 5/23/19, p8-9; CF, p528-29) The parties all understood that the defense planned to elicit expert mental condition evidence from Dr. Fukutaki (and potentially Dr. Hatfield) as part of Day's defense at trial. (TR 7/12/19, p37-39; CF, p563-64,596,619)

During voir dire on the second day of trial, however, the prosecution moved for a mistrial and to change the trial venue to Clear Creek County due to a shortage of jurors in Lake County. (TR 8/13/19, p187-90) Defense counsel picked dates for the next trial based on Dr. Fukutaki's availability, which the expectation that the defense would be able to call her in Day's defense. (*Id*.; TR 8/26/19, p4)

Prior to the second trial, the prosecution moved to exclude Day's mental condition evidence. (CF, p775-82) At the beginning of motion in their recitation of

the underlying facts, the prosecution described Day's conduct immediately after the car crash as follows:

> 8. …approximately 30 minutes after the Defendant intentionally struck the victim with her motor vehicle…the Defendant called 911 and reported she ran over the Defendant.
> 9. The Defendant's voice during that 911 telephone call to Lake County Emergency Dispatch reflect a calm demeanor. There was no indication of hysterics or delusional behavior when she reported as to what had occurred. She further remained calm and stated she was the victim's [girl]friend.

(*Id*.) The prosecution argued that Day's mental condition evidence would confuse the jury and should be excluded under CRE 403. (*Id*.) The prosecution also argued that Day's expert testimony constituted insanity evidence, not mental condition evidence, and she must plead not guilty by reason of insanity (NGRI) to present such evidence. (*Id*.)

Defense counsel responded that Day's sanity was not at issue or relevant for trial; counsel had no intention of arguing either prong of the insanity statute. (CF, p832-35; TR 10/10/19, p11; TR 11/7/19, p21-22) Day's defense would not be that she was incapable of distinguishing right from wrong or incapable of forming the culpable mental state. (*Id*.) Rather, "[w]hat is relevant is Dr. Fukutaki's opinion regarding Ms. Day's mental illness and how this would have impacted her post-event conduct" including her "processing of, and behavioral reaction to, the event upon

which the charges are based." (*Id*.) The defense argued this evidence was admissible under section 16-8-107(3)(b) to rebut the State's inferences that the jury could infer Day's guilt from her "calm" demeanor following the car accident. (*Id*.)

In their reply, the prosecution continued to argue this evidence would confuse the jury and that by presenting evidence of a "'mental illness' [Day] is moving directly into the realm of an insanity defense. (CF, p848-51)

At the subsequent hearing, the court found that the evidence was relevant and the defense complied with the mental condition statute by giving notice and having "evaluations done." (TR 11/7/19, p25-26) Nevertheless, the court expressed concern that most of the mental condition case law involved defendants with low IQ, not schizophrenia, and if the defense planned to say Day's mental condition impaired her perception, the defense needed to plead NGRI. (Id., p26-28) The court also feared that the jury would be confused and directed the defense to submit an offer of proof and draft limiting instruction, which the court would consider prior to make its ruling. (*Id*., p26,30-31)

Day's offer of proof specified that Dr. Fukutaki would discuss the following related topics:

- Day's psychotic thought disorder for which Day took "Abilify, an atypical anti-psychotic";

- how Day had not taken her medicine for two days prior to the incident;
- how psychotic thought disorders can generally impact "complex thought organization and problem-solving cognitive functions";
- the role that Day's missed medication "could play in her post-event appreciation of the result of her conduct" or specifically how her thought-disorganization may have impacted "her ability to recognize the severity of the situation and Mr. Martinez's need for immediate medical attention"; and
- how "[t]hought disorganization, impairment in problem-solving ability, and anxiety might have accounted for her having left the scene and having delayed contacting the police" and could explain why the police thought she was under the influence.

(CF, p853-54) Similarly, Day's proposed limiting instruction explained that evidence regarding Day's mental illness was being offered to provide context regarding her post-event conduct, actions on scene, and at the hospital. (CF, p855) The instruction advised the jury that Day was not asserting insanity and discussed the elements of that affirmative defense. (*Id*.) It clarified that Day was not asserting that her mental illness rendered insane or incapable of forming the mental rea, but rather she was generally denying that she acted knowingly. (*Id*.)

The prosecution interviewed the defense's proposed experts and filed a response to Day's offer of proof and limiting instruction. (CF, p856-67) The prosecution continued to assert its prior arguments and also pointed out that Day had not cooperated with Dr. Hatfield's evaluation. (*Id*.)

The court issued a written order, granting the prosecution's motion to exclude all of Day's mental condition evidence. (CF, p868-71) The court indicated that its ruling was based on two grounds: (1) the court agreed with the State that defense was trying to present an insanity defense without pleading NGRI and the jury would not be able to distinguish between "post-event conduct" and "Defendant's conduct during the offense"; and (2) "Defendant failed to cooperate in the CRS §16-8-107(3)(b) evaluation." (*Id*.)

Having lost all of their expert mental condition evidence, defense counsel had to shift gears and found an accident reconstruction expert right before trial. (TR 12/19/19, p6-7)

At trial, the State elicited testimony from four different witnesses regarding Day's demeanor after the car accident. (TR 1/29/20, p207,287; 1/30/20, p32-33,54; TR 2/3/20, p60-62,96,155) These witnesses repeatedly told the jury that Day acted "very calm," "very clear," "lucid," and "very emotionless"; they described Day drinking a Gatorade and acting as "if nothing had really happened," or "like she really didn't care what happened," or that this happened all the time. (*Id*.) There was at least one juror question about Day's lack of emotion at the hospital during the State's case. (CF, p984)

During closing argument, the State emphasized that when the police contacted Day, she was "[v]ery calm," "just hanging out" "[d]rinking a bottle of Gatorade." (TR 2/6/20, p57) The State also highlighted Day's demeanor at the hospital, including how she was "lucid and calm" and referred to her boyfriend as "that guy" instead of by his name. (*Id.*, p64,134-35) In rebuttal argument, the prosecution argued, "Ms. Day's behaviors and actions are what show us that she did this knowingly and that she had that plan to do that" and "[l]eaving somebody on the side of the road to die is not how you deal with trauma."(*Id.*, p136-37) Again, the prosecution emphasized her demeanor: "What was her demeanor through all this?... She was calm. No emotion, didn't cry, wasn't hysterical" and she had a "matter-of-fact conversation" at the hospital. (*Id.*, p137-38) The prosecution questioned, "Who has a matter-of-fact conversation about running over another person?" (*Id.*)

The answer to that question is: a person who suffers a flat affect due to mental illness, not a neurotypical person. But the jury never heard any evidence that would have explained her odd reaction.

During deliberations, the jury asked, "What is the timeframe of knowingly? Is it solely the incident or does it extend to an undetermined amount of time afterwards?" (CF, p1008; TR 2/6/20, p170-71) The court referred them back to the jury instructions. (*Id.*)

C. Relevant Law

Due process ensures that before a defendant may be found guilty, the jury must determine that each element of the charged offense, including mens rea, has been established beyond a reasonable doubt. U.S. Const. amends V,XIV; Colo. Const. art. II, § 25; *In re Winship*, 397 U.S. 358 (1970); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Montez v. People*, 269 P.3d 1228, 1232 (Colo. 2012); *Hendershott v. People*, 653 P.2d 385, 390–92 (Colo. 1982).

Due process also ensures a defendant's fundamental right to present a defense and elicit evidence that negates any elements of the charges or otherwise influences the determination of guilt. *Chambers*, 410 U.S. at 294; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989); *People v. Vanrees*, 125 P.3d 403, 409 (Colo. 2005).

Evidentiary rules should not be applied in an arbitrary, perfunctory way that undermines the truth-finding function or excludes evidence necessary for the defendant to defend against the charged offense. *Chambers*, 410 U.S. at 302; *see Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006)(because the Constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense," the Constitution "prohibits the exclusion of defense evidence under rules

that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote.").

A constitutional violation occurs where the error implicates the defendant's right to present a complete defense. *See United States v. Agurs,* 427 U.S. 97, 112 (1976)("if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed"); *Chambers,* 410 U.S. at 301 ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense"); *Washington,* 388 U.S. at 19 (right of an accused to present his version of the facts is fundamental component of due process). Reversal is required for exclusion of relevant defense evidence which "compromise[d] [the defendant's] ability to mount an effective defense." *Golob v. People,* 180 P.3d 1006, 1014 (Colo. 2008).

1. Insanity affirmative defense

"A defendant cannot be held criminally responsible for his or her actions if a mental illness or insanity at the time of the crime prevented formation of the requisite culpable mental state." *People v. Wylie*, 260 P.3d 57, 59 (Colo. App. 2010), *citing Hendershott*, 653 P.2d at 390–92.

The insanity defense has a long history in the English and American criminal justice system. *See M'Naghten's Case,* 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L.

1843). From *M'Naghten*, two "strains" of insanity defenses developed: (1) a "moral incapacity" test which surmised an individual is not responsible for their actions if they are unable to distinguish right from wrong, and (2) a "cognitive incapacity" test which surmised an individual is not responsible if a severe mental illness left the defendant unable to understand what he was doing when committing a crime. *Kahler v. Kansas*, 140 S.Ct. 1021, 1025 (2020); *Clark v. Arizona*, 548 U.S. 735, 749 (2006). Over time, states have developed other tests as well. *See Clark*, 548 U.S. at 749-52.

In Colorado, our statutory scheme generally tracks *M'Naghten*. *See* §16-8-101.5(1), C.R.S. Specifically, a person may be found NGRI if the person:

> (a) is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act… or
>
> (b) suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged

Id. The statute defines "mental disease or defect" as "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality" and are not attributable to the voluntary ingestion of drugs or alcohol. § 16-8-101.5(2)(c), C.R.S.

In order to present evidence relevant to insanity, a defendant must enter a NGRI plea and comply with various statutory requirements. § 16-8-103(1.5)(a),

C.R.S.; § 16-8-103.7(2)(a), C.R.S.; § 16-8-103(1.5)(a), C.R.S.; *see* § 16-8-107(3)(a), C.R.S. Insanity is an affirmative defense, also known as an excuse defense. Therefore, once the defense asserts either prong of the insanity statute, the prosecution has a burden to prove a defendant's sanity (or disprove defendant's insanity) at the time of the offense beyond a reasonable doubt; if the prosecution cannot meet this burden and the jury returns a NGRI verdict, the defendant will be committed. § 16-8-105.5, C.R.S.; *People v. Gilliland*, 769 P.2d 477, 480 (Colo. 1989).

To establish insanity (under either prong of the statute), a defendant must have suffered from (1) "a severely abnormal mental condition" that (2) "grossly and demonstrably" impaired them at the time of the offense. *People v. Moore*, 485 P.3d 1088, 1095 (Colo. 2021). Insanity, thus, only includes a very narrow set of serious mental diseases or defects that tangibly and severely impair defendants. *Id*.

2. Element-negating mental condition evidence

If a defendant has a mental condition that falls short of insanity, due process permits the defendant to present such evidence to rebut the State's proof concerning of the elements, including mens rea. U.S. Const. amend. V, XIV; Colo. Const. art. II, §§16, 25; *People v. Gilbert*, 490 P.3d 899, 904-05 (Colo. App. 2020), *cert. granted as to other issues*, 2021 WL 1030167; *Vanrees*, 125 P.3d at 409 ("the

defendant always possesses the constitutional right to present relevant evidence to contest whether he factually formed the culpable mental state of the crime charged").

"This means that evidence of less-severe mental illness remains admissible, absent an insanity plea, if it otherwise conforms to the statutory requirements and the rules of evidence." *Moore*, 485 P.3d at 1093; *Vanrees*, 125 P.3d at 405.

Specifically, under section 16-8-107(3)(b), C.R.S., a defendant may present expert mental condition evidence as long as the defendant gives notice and undergoes a state-ordered mental examination. The legislature has not defined "mental condition" for purposes of raising this defense under section 16-8-107(3)(b). However, Colorado courts have construed it broadly to encompass a broad range of mental illnesses, trauma disorders, and intellectual disabilities. Courts have even construed it to include abnormal mental defects and psychiatric disorders that fall short or outside the narrow definition of insanity. For example, courts have found that:

- Defendant's bipolar disorder diagnosis, "trauma-related disorder," and "paranoid ideation" were not, absent more, probative of insanity. *Moore*, ¶ 52;

- Defendant's clinical depression and panic attacks were not evidence of insanity. *People v. Bondurant*, 296 P.3d 200, 205 (Colo. App. 2012);

- Defendant's "mild mental retardation" was not evidence of insanity. *People v. Requejo*, 919 P.2d 874, 878 (Colo. App. 1996);

- Defendant's "dissociative fugue," resulting in the defendant's atypical post-event behavior, constituted mental condition evidence subject to section 16-8-107(3)(b). *People v. Roadcap*, 78 P.3d 1108, 1112 (Colo. App. 2003);

- Defendant's dyslexia or learning disability was not evidence of insanity but constituted mental condition evidence subject to section 16-8-107(3)(b). *People v. Wilburn*, 272 P.3d 1078, 1082-83 (Colo. 2012)[2];

- Defendants' intellectual disabilities constituted mental conditions subject to not evidence of insanity. *People v. Flippo*, 159 P.3d 100, 105 (Colo. 2007); *Vanrees*, 125 P.3d at 408-09; and

- Defendant's "history of mental illness;" "erratic behaviors while confined in mental health and correctional facilities;" and "erratic behavior before the crime" did not support an insanity plea and defense. *People v. Anderson*, 70 P.3d 485, 488 (Colo. App. 2002).

Similar to these cases, Day's proffered expert evidence constituted mental condition evidence, not evidence of insanity, and the district court erred in excluding the entirety of her evidence for multiple reasons.

[2] In *Moore*, the Colorado Supreme Court distinguished between insanity and mental condition defenses based on the severity of the mental illness and whether the mental illness met the statutory definition of insanity. 485 P.3d at 1092-93. in *Wilburn*, the Colorado Supreme Court also noted the difference between asserting a mental condition defense or factual denial of the mens rea ("on the occasion in question, he *did not* form the mens rea") vs. insanity (he *could not* form the mens rea because lacked the capacity or "ability to form the mens rea"). 272 P.3d at 1082-83.

D. Analysis

1. The court erred in excluding the relevant evidence based on a finding of Day's purported noncooperation.

In order to present a mental condition defense, in addition to notice requirements, a defendant must submit to a court-ordered exam and "cooperate" with any State examiners or personnel. § 16-8-106(2)(c), C.R.S. Under section 16-8-106(2)(c), if a defendant fails to cooperate, the defendant is precluded from presenting expert evidence at trial. However, the statute provides no definition of cooperation or non-cooperation. And the State examiners may still render an expert opinion regarding the defendant's mental condition based on the defendant's medical history, statements, and any other evidence concerning the commission of the offense. § 16-8-106(3)(b), C.R.S.

Here, the court excluded Day's expert evidence based on her alleged noncooperation. (CF, p868-71) However, there are several reasons why Day's conduct should not have been construed as noncooperation, which forfeits her right to present a defense.

First, the court relied on her purported noncooperation during her evaluation with Dr. Hatfield in June 2018 when she was ***incompetent***. (CF, p457-62,869) Her incompetence should have paused all the proceedings that required her "personal participation." *See* § 16-8.5-102(1) ("While a defendant is incompetent to proceed,

the defendant shall not be tried or sentenced, ***nor shall the court consider or decide pretrial matters that are not susceptible of fair determination without the personal participation of the defendant.***"). The reality is that her confusion and hostility to Dr. Hatfield was very likely a manifestation of her mental illness and incompetence. In the competency statutory scheme, the legislature has recognized that "lack of cooperation" may be the result of mental disability. *See* § 16-8.5-105(2)(only allowing an adverse inference to be drawn from "lack of cooperation" where it "is not the result of a developmental disability or a mental disability"). CMHIP should have evaluated her after she was restored competency and could actually participate (to the best of her ability).

Second, she submitted to multiple examinations. She was cooperative during many competency exams, including in November 2017, October 2018, December 2018, and March 2019. (CF, p430-38,467-71,474-82,499-506) Throughout the multiple years this case was pending, she was at CMHIP for long periods of time. Day should not be punished because the State examiners repeatedly failed to evaluate her when they had numerous opportunities. From 2016 to 2018, the court had to issue multiple orders, reminding CMHIP that they were supposed to conduct a mental condition evaluation. (CF, p230,348,393-96.440-41; TR 3/16/17 p2-3; TR

12/7/17, p3-4,6-8) CMHIP's delay and incompetence should not be held against the mentally ill prisoner.

Third, the State suffered no disadvantage due to the lack of official mental condition evaluation. The State was seemingly willing to waive the exam at an earlier point in time. (TR 12/7/17, p10-11) The State had access to the same experts that the defense intended to call. (CF, p856-67) The State examiners could have certainly rendered some kind of opinion based on her medical history and the multiple times that she was hospitalized and evaluated. In fact, it is questionable, given her history of minimizing her psychotic symptoms, whether she could have provided much clarification or insight. *See People v. Herrera*, 87 P.3d 240, 249 (Colo. App. 2003)("even if a defendant cooperates, he or she may not be able or willing to do so in a manner sufficient for a proper sanity assessment. The defendant may be unable to recall the events of the offense, or the information a defendant imparts could be inaccurate"). Her medical records may have been the best source for an evaluation. *Id*.

Fourth, the meaning of cooperation (or noncooperation) should be liberally construed in light of the constitutional rights at issue. Day lost her right to present a defense because the State only tried to conduct the correct evaluation after she had already decompensated to incompetence due in part to the poor medical care that she

received in county jail. This is not a fair or equitable result that comports with the state and federal constitutions. *See French v. District Court*, 153 Colo. 10, 14, 384 P.2d 268, 270 (1963); *Hendershott, supra*.

Accordingly, the court erred in narrowly construing her conduct as noncooperation that precludes her defense.

2. Day's evidence was not probative of insanity but rather was probative of her atypical response to the car accident, which is admissible under section 16-8-107(3)(b).

As discussed above, Colorado's insanity statutory scheme limits insanity to a very narrow type of "severely abnormal" mental disease or defects that "grossly and demonstrably impair[ed] [the defendant's] perception or understanding of reality" and render the defendant incapable or unable to form the mental state. §§ 16-8-101.5(1),(2)(c); 102(4.7); *Moore*, 485 P3d at 1098-99. However, raising a mental health defense is not "all or nothing" proposition. *Vanrees*, 125 P.3d at 408; *accord, Moore*, 485 P.3d at 1097. Rather, due process (and the legislature) allow defendants to present evidence, that falls short of insanity, but still bears on the prosecution's burden. *Vanrees*, 125 P.3d at 408; *accord, Moore*, 485 P.3d at 1097; *Hendershott*, 653 P.2d at 388 ("We conclude that the trial court's ruling, which precludes the defendant from presenting any mental impairment evidence to negate the requisite

culpability for the crime charged against him, violates due process of law under the United States and Colorado Constitutions.").

In *Moore*, the Colorado Supreme Court recently reaffirmed the validity of its prior holdings in *Vanrees* and *Wilburn*. 485 P.3d at 1096-97. The *Moore* Court further clarified that the trial court's inquiry does not turn on a defendant's stated purpose for introducing the mental condition evidence: "the probative effect of the mental condition evidence is what governs, not the purpose for which it is offered." *Id*. at ¶ 34 (emphases added). Therefore, even if the defendant inaptly proffers the evidence as relevant to her capacity to form the requisite mental state, that is not determinative of whether the evidence is admissible. The primary inquiry is whether the proffered evidence is relevant or probative of insanity as statutorily-defined. *Id*.

Here, the proffered evidence was that Day had not taken her medication in the prior days to the incident, and as a result, her thoughts were likely disorganized and she may failed to understand the seriousness of the situation due to a combination of her thought disorganization, anxiety, and low mental cognition. Her mental illness was probative to explain her lack of a "normal" response to the situation, similar to the defendants in *Roadcap*, 78 P.3d at 1112, and *Anderson*, 70 P.3d at 488.

The district court mistakenly indicated that mental condition defenses under section 16-8-107(3)(b) were limited to intellectual disabilities. (CF, p870) This is

legally incorrect. As discussed above, any mental disorder, falling short of insanity, can be used to negate the State's case pursuant to 16-8-107(3)(b).

The district court also focused on the fact that Dr. Fukutaki indicated that Day's disorganized thought could have impacted "her perception." (CF, p871) However, this language only implicates one word from the insanity definition. The court erred if failing to consider the relevance of the evidence in terms of the *entire* statutory definition of insanity. Dr. Fukutaki's general thoughts concerning Day's impaired judgement due to lack of medication and potential disorganized thinking did not tend to prove that Day had a *severely abnormal mental disease* that *grossly and demonstrably impaired her perception of reality* such that she could no longer distinguish between right or wrong or form the mental state. Dr. Fukutaki did not diagnose Day with a severely abnormal mental disease, and her proposed testimony did not establish Day suffered a psychotic break from reality. All of the trial evidence reflected that Day was oriented to time and place; she was just behaving oddly and without typical emotions that the jury might expect. Dr. Fukutaki's general information about Day's atypical brain and lack of medication did not rise to the level of insanity evidence.

Accordingly, the court erred in excluding this evidence.

3. The court failed to consider each aspect of the proffered evidence.

Assuming *arguendo* that some of the proffered evidence was probative of insanity, the court nevertheless erred in excluding the *entirety* of Day's mental condition evidence. In *Moore*, the Supreme Court made clear that a "court must parse any proffered mental condition evidence, line by line if necessary, to distinguish what is probative of insanity under this exacting definition from what is not." 485 P.3d at 1093.

Here, the court did not perform this critical analysis. Rather, the court excluded all of the evidence without addressing or making the requisite findings regarding whether portions of the expert testimony could be admissible without an insanity plea. The court's "failure to exercise discretion is itself an abuse of discretion." *DeBella v. People*, 233 P.3d 664, 668 (Colo. 2010) (citation omitted); *see also People v. Cardenas*, 411 P.3d 956, 961 (Colo. App. 2015)("Because the record is devoid of [the required] analysis . . . the court abused its discretion.").

4. The court's error in excluding Day's mental condition evidence cannot be harmless beyond a reasonable doubt.

The State cannot prove the error here was harmless beyond a reasonable doubt. *James*, 2018 CO 72, ¶19. The court's ruling effectively prohibited Day from running any type of mental health defense in violation of Day's constitutional and

statutory rights to present a complete defense and to a fair jury trial. U.S. Const. amends. V, VI; Colo. Const. art. II, §§ 16, 25.

First, the State relied heavily on Day's lack of emotion and strange behavior after the incident to argue that this was not an accident but rather a purposeful act of murder. The State elicited testimony from four different witnesses about her calm, emotionless demeanor and repeatedly emphasized this evidence during closing and rebuttal argument. (TR 1/29/20, p207,287; 1/30/20, p32-33,54; TR 2/3/20, p60-62,96,155; TR 2/6/20, p57,64,134-38)

Second, because the court excluded all of Day's mental condition evidence, the jury did not receive a complete picture of the events in this case. If the jury had heard about Day's atypical mental condition, lack of medication, anxiety, and impaired judgment and cognitive function, they would have better understood why she acted so strangely following the accident. In light of the prosecution's repeated emphasis on her odd affect, the mental condition evidence was very important to Day's defense. Without this evidence, the defense had to scramble to come up with a new defense strategy, as well as a way to explain her conduct.

The central dispute in this case concerned whether Day acted knowingly or whether this was an accident stemming from Martinez being drunk and Day being unaware or negligent. Day's mental condition evidence would have supported her

theory and rebutted this idea that the jury could infer her culpable mental state from her strange post-conduct behavior.

During deliberations, the jury asked a question about the definition and timeframe for knowingly, which reflects the importance of this evidence. (CF, p1008; TR 2/6/20, p170-71) Given these circumstances, the exclusion of Day's defense evidence, concerning the central dispute in the case, requires reversal. *See Hendershott*, 653 P.2d at 393, 397.

II. THE RESTITUTION ORDER MUST BE VACATED BECAUSE (1) THE COURT LACKED AUTHORITY UNDER SECTION 18-1.3-603, C.R.S., TO ORDER RESTITUTION MORE THAN NINETY-ONE DAYS AFTER ENTRY OF THE CONVICTION WITHOUT A SHOWING OF GOOD CAUSE; AND (2) THE STATE FAILED TO ESTABLISH THAT DAY WAS LIABLE FOR THE MONEY DISBURSED BY THE CRIME VICTIM COMPENSATION BOARD.

A. Standard of Review

The district court's authority to impose restitution is limited by the restitution statute. *Meza v. People*, 415 P.3d 303, 308 (Colo. 2018); *People v. Belibi*, 415 P.3d 301, 303-04 (Colo. 2018)(restitution orders are governed by statute and rule, and court lacks power to order restitution in the absence of statutory authorization). Statutory interpretation of section 18-1.3-603 is a question of law that the court reviews de novo. *See People v. Weeks*, 498 P.3d 142, 151 (Colo. 2021); *People v. Turecek*, 280 P.3d 73, 75 (Colo. App. 2012).

This Court also reviews the sufficiency of the evidence to support a restitution award de novo. *People v. Barbre,* 429 P.3d 95, 99 (Colo. App. 2018).

Counsel objected to the court ordering Day to pay restitution without the defense having access to the records or information underlying the Crime Victim Compensation (CVC) Board's payout to the alleged victims. (CF, p1092,1163-68; TR 1/8/21, p48-51) Counsel did not object to the court issuing a restitution order over 91 days after sentencing in violation of section 18-1.3-603(1)(b). However, a sentence that is not authorized by law may be corrected at any time. Crim. P. 35(a); *Turecek,* 280 P.3d at 76-77 (court lacks authority to order belated restitution in the same sense that court lacks authority to impose sentence above statutory maximum); *see Fransua v. People,* 451 P.3d 1208, 1211 (Colo. 2019).

B. Facts

On April 8, 2020, the prosecution filed a restitution motion, asking for $13,305.50 that the CVC had paid for "Burial, lost wages, therapy, out of pocket expense." (CF, p1068-71) The motion attached two summary CVC reports showing that (1) they paid Beverly Anderson a total of $2,643.50 for "ECONOMIC SUPPORT – WAGES" and "THERAPY – MENTAL HEALTH"; and (2) they paid John Martinez a total of $10,662.00 for "BURIAL," "ECONOMIC SUPPORT – WAGES," and "OTHER – NOT LISTED." (*Id*.)

On April 23, 2020, the defense requested the prosecution provide additional documentation to support the CVC's payout of these expenses. (CF, p1092) The defense argued that without further information, they had no way of determining whether the CVC payouts were appropriate under the restitution statute. (*Id*.) The prosecution subsequently argued that the defense was not entitled to an in-camera review of confidential CVC documents. (CF, p1120-21)

The defense filed a response, asserting Day was entitled to an in-camera review. (CF, p1163-68) The defense asked for records and documentation of the dates of therapy and alleged missed work so the defense could verify that the payouts actually correlated to events involving this case. (*Id*.) The defense also asked for more information related to the Day's automobile insurance's award of $25,000 to the victim's son. (*Id*.)

At sentencing on August 19, 2020, the prosecution asked the court to set out the restitution order for 90 days, so the prosecution could gather final bills. (TR 8/19/20, p19) Although the prosecution filed additional request for costs of prosecution, the prosecution filed no further requests for restitution or restitution bills between sentencing and the restitution hearing.

The court subsequently held a restitution hearing on January 8, 2021. (TR 1/8/21) At the hearing, the prosecution called Wendy Rolls, the CVC administrator.

During her testimony, she generally explained how the CVC verifies bills and asserted that those procedures were followed in this case. (*Id*., p23-26) The State admitted the two restitution summary reports, which the prosecution previously attached to their motion for restitution in April 2020. notices, both generated by the CVC program for the District Attorney's Office. (*Id.*, p29; CF, p1068-71) Aside from those two summary exhibits, the State provided no other evidence supporting or clarifying the details of the CVC payouts. The defense again asked for an in-camera review of the documents that the CVC board relied on. (TR 1/8/21, p51)

The court issued a written ruling on January 25, 2021, which ordered Day to pay $13,096.50 in restitution. (CF, p1298-03) The court found Day was liable for all of the amounts that the CVC paid the victim's siblings, except the $209 for "other-not listed." (*Id*., p1301-02)

C. Law and Analysis

1. The restitution order is invalid because the court entered it more than 91 days after sentencing without making any express good cause findings.

"Every order of conviction of a felony . . . shall include consideration of restitution." § 18-1.3-603(1), C.R.S. "[T]he specific amount of restitution shall be determined within the ninety-one days immediately following the order of conviction, unless good cause is shown for extending the time period by which the

restitution amount shall be determined." § 18-1.3-603(1)(b), C.R.S.; *accord, Weeks*, ¶34. The language of section 18-1.3-603(1)(b) is clear and unambiguous. *Turecek*, 280 P.3d at 76.

Further, the Colorado Supreme Court recently reaffirmed that this unambiguous language means (1) the district court must determine the amount of restitution within 91 days of the judgment of conviction; and (2) the court may extend that deadline only if, *before the deadline expires*, the court *expressly finds good cause*. *Weeks*, ¶¶ 4-5, 39-40.

Here, the court sentenced Day on August 19, 2020. (TR 8/19/20) Thus, the court's deadline to impose restitution (or make an express finding of good cause) was November 18, 2020. But the court did not order restitution until January 25, 2021, which was 159 days after sentencing, and it never made any express findings of good cause to extend the deadline. Accordingly, the court lacked authority to enter the restitution order and it must be vacated. *See Weeks*, ¶45; *Turecek*, 280 P.3d at 78 (vacating restitution because it was awarded after the ninety-one day deadline with no showing of good cause).

2. The State failed to prove Day was liable for the money the CVC disbursed.

A defendant convicted of a crime must pay restitution to compensate the victim for "any pecuniary loss suffered by the victim" that was "proximately caused"

by the defendant's conduct. § 18-1.3-602(3)(a), C.R.S.; § 18-1.3-603(1), C.R.S. Therefore, the prosecution must prove, by a preponderance of the evidence, that the victim suffered a loss covered by the restitution statute that was proximately caused by the defendant's conduct. *People v. Martinez*, 378 P.3d 761, 768 (Colo. App. 2015). "Proximate cause" for restitution purposes is "a cause which in natural and probable sequence produced the claimed injury" and "without which the injury would not have been sustained." *Id.*

Under some circumstances, the "amount of assistance provided" by a CVC board is statutorily "presumed to be a direct result of the defendant's criminal conduct …" § 18-1.3-603(10), C.R.S. The statute "did not create an exception to the rule … that the prosecution must prove that the defendant's conduct was the proximate cause of the victim's loss." *People v. Henry*, 439 P.3d 33, 36 (Colo. App. 2018). "Rather, it simply created a rebuttable presumption that the prosecution had satisfied its burden." *Id*. The rebuttable presumption includes requirements for what evidence the State must present; specifically, the prosecution can either provide: (1) "[a] list of the amount of money paid to each provider"; or (2) "summary data reflecting what total payments were made for" each type of expense, ***if*** "the identity or location of a provider would pose a threat to the safety or welfare of the victim."

§ 18-1.3-603(10)(b)(II), C.R.S.; *People v. Martinez-Chavez*, 463 P.3d 339, 343 (Colo. App. 2020).

Here, the prosecution only submitted the summary data reports described in second method. The prosecution did not provide any information about specific providers who were paid or when they were paid. And the prosecution did not assert that providing the location or identity of the providers would pose a threat to any of the victim's family members. Therefore, the payment summaries did not trigger the statutory presumption in favor of the CVC. *See Martinez-Chavez*, 463 P.3d at 343.

The court also erred in failing to conduct an in-camera review of the records, as the defense made a sufficient non-speculative, evidentiary request warranting review. *See* § 24-4.1-107.5(3).

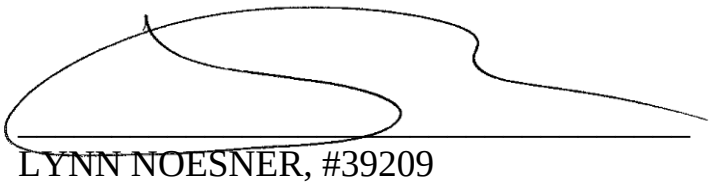
For all of the above reasons, the restitution order should be vacated.

CONCLUSION

Based on the arguments and authorities presented in Issue I, Day respectfully requests this Court reverse her conviction.

Based on the arguments and authorities presented in Issue II, Day respectfully requests this Court vacate the restitution order.

MEGAN A. RING
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on April 27, 2022, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.