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COURT OF APPEALS,
STATE OF COLORADO

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

Appeal; Lake District Court;
Honorable Catherine Cheroutes;
Case Number 2015CR26

Plaintiff-Appellee
THE PEOPLE OF THE
STATE OF COLORADO

v.

Defendant-Appellant
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Case Number: 2020CA1717

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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

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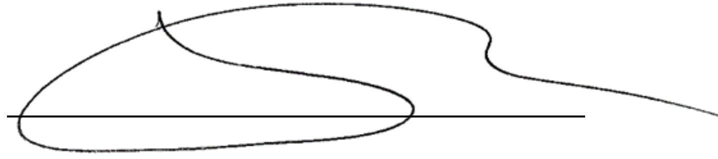

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ARGUMENT

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

Because the facts are protracted, Day provides the following summary, describing the relevant events and myriad ways that the state hospital, CMHIP, repeatedly failed to comply with court orders:

- 1/7/16: The defense provided notice of their intent to introduce expert mental condition evidence. (CF, p142)
- 2/1/16: The court ordered CMHIP to conduct an inpatient evaluation of Day regarding her mental condition on the day of the charged offense. (CF, p230) Per the order, CMHIP was to complete the evaluation and provide their report to the court by April 29, 2016. (*Id*.)
- 5/12/16: CMHIP reported it had not transferred Day to the hospital and therefore had not completed any evaluation. (CF, p258)
- 8/22/16: CMHIP reported it still had not transferred Day for an evaluation. (*Id.*, p328)
- 10/12/16: Day was finally transported to CMHIP and available for inpatient evaluation. However, the CMHIP evaluator, Dr. Pounds, reported that he could not complete an examination of Day because he didn't have adequate "video recording capabilities" and the prosecutor had failed to give him 1100 pages of the discovery. (CF, p360-61)
- 10/13/16: The court ordered CMHIP to proceed with the evaluation without recording it. (CF, p355)

- 12/28/16: Dr. Pounds summarily reported that Day refused to complete the examination twice. (*Id.,* p370) He provided no details regarding the circumstances. (*Id.*)

- **<u>2/9/17</u>**: Dr Pounds interviewed Day as part of the evaluation process. (CF, p377-79) **She was cooperative and answered his questions**, but he had concerns about her competency. (*Id.*) He reported that he "terminated the examination due to ethical concerns." (*Id.*, p378) He further explained, "I do not know if a just determination/Hendricks examination is indicated. The only experiences I have involved NGRI pleas. I will await further instructions." (*Id.*, p379) Thus, **Day cooperated to her fullest, but Dr. Pounds chose to end the evaluation because he was confused.**

- 2/24/17: The defense drafted a more specific court order, providing additional details to CMHIP regarding the nature of the evaluation needed. (CF, p380-82; TR 2/10/17, p6-7,9-11) However, the order contained an incorrect statutory cite. (*Id.*)

- 3/16/17: After correcting the statutory citation, the court ordered CMHIP to conduct a two part evaluation regarding "(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)

- 4/18/17: Despite the pending court orders requiring inpatient evaluation of Day, the State transferred her back to county jail without completing the ordered evaluations. (CF, p398)

- 7/20/17: While Day waited in county jail to be transferred to CMHIP and evaluated there, her mental condition deteriorated. Her trial counsel moved for an out-of-custody competency evaluation. (CF, p404-408)

- 8/16/17: The court ordered CMHIP to complete a competency evaluation of Day. (CF, p420-21)

- 9/27/17: CMHIP reported that they had not admitted Day yet and needed additional time. (CF, p425)

- <u>**12/5/17**</u>: **Day was fully cooperative** during the CMHIP evaluator, Dr. Gray's examination. (CF, p430-38) He concluded he was competent. Despite the outstanding court orders from February 1, 2017 and March 16, 2017, directing CMHIP to evaluate Day's mental condition on the day of the offenses, **Dr. Gray only addressed competency and did not address Day's mental condition**. (*Id.*) Despite the fact that defense counsel had reminded Dr. Gray that he needed to complete both a competency and a mental condition evaluation, he only addressed competency and not mental condition. (TR 12/7/17, p3-4,6-8) Despite the fact that the clerk had resent the older orders, **Dr. Gray (and CMHIP) failed to complete the mental condition evaluation.** (*Id.*)

- 12/7/17: The court issued 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." (CF, p440-41) The order states: "The court expects to have the report by January 31, 2018, as this evaluation was ordered back on March 16, 2017." (*Id.*)

- 2/5/18: CMHIP reported that Day had not been admitted back into the hospital yet. (CF, p443)

- 3/19/18: While Day once again waited in the county jail for CMHIP to admit and evaluate her, her mental health worsened and her counsel moved to stay the proceedings due to her incompetency. (CF, p445-46)

- 4/6/18: The court ordered that Ms. Day be evaluated for competency and mental condition. (CF, p452-53)

- 6/20/18: CMHIP evaluator, Dr. Hatfield, found Day incompetent. (CF, p458-62) At the beginning of the evaluation, Day asked for a copy of the order regarding the evaluation. (*Id.*, p460) When Dr. Hatfield left the room to get the order, Day talked incoherently to the empty room, responding to internal stimuli. (*Id.*) Day indicated that she couldn't continue without the most updated order. (*Id.*) Dr. Hatfield found she met the criteria for "unspecified schizophrenia spectrum." (*Id.*, p461-62) He described her as lacking "insight" and noted her repeated history of denying "symptoms of psychosis" with

previous evaluators. (*Id.*, p459-61) He couldn't provide a mental condition opinion.

- 8/21/18: CMHIP admitted Day for restoration treatment; at intake, she was "delusional with apparent auditory hallucinations." (CF, p465,470)

- 10/5/18: CMHIP reported that Day was still incompetent. (CF, p467-71)

- 12/30/18: CMHIP reported that Day remained incompetent. (CF, p474-84)

- **3/20/19**: **Day met with Dr. Wiggett and fully cooperative** for the entire competency evaluation. (CF, p500-06) He found her competent. **Despite the outstanding orders and her restored competency, Dr. Wiggett completed the process without conducting a mental condition evaluation**.

As this timeline reflects, the parties spent years waiting for CMHIP to comply with the district court's repeated orders for a mental condition evaluation. The district court issued no less than four orders, requiring CMHIP to complete a mental condition evaluation but CMHIP never fully complied. At various points, including on February 9, 2017, December 5, 2017, and March 20, 2019, Day was both competent and cooperative during the examinations and interviews, but the CMHIP didn't complete the mental condition evaluation.

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

Without citing any dates or record cites to clarify the times frames, the Attorney General contends that "Defendant's behavior precluded an examination on at least three separate occasions." (AB, p24) The Attorney General admits that

during the third purported examination, she was incompetent and therefore it "would appear harsh" to construe her incompetency as a noncooperation. (*Id.*) Apparently, the Attorney General agrees that Day could not be evaluated during any periods of incompetency.

As a legal matter, under section 16-8.5-102(1), C.R.S., incompetency stays pretrial matters that require a defendant's personal participation. As a practical matter, Day's incompetency necessarily hindered her ability to participate in a meaningful way. Once Dr. Hatfield realized she was incompetent in June 2018, he should not have tried to pursue the mental condition evaluation until she was competent. He should have realized she was not capable of participating when she was incompetent. Her confusion and hostility towards Dr. Hatfield was very likely a manifestation of her mental illness and incompetence. *See* § 16-8.5-105(2)(recognizing "lack of cooperation" may be the result of mental disability; only allowing use of "lack of cooperation" evidence where it isn't the result of a developmental or mental disability). Thus, the district court erred in finding her non-cooperative when she was incompetent during Dr. Hatfield's June 2018 examination.

Further, the record reflects that CMHIP had multiple opportunities to evaluate her when she was competent, including on February 9, 2017, December 5, 2017, and

March 20, 2019. Day was fully cooperative during those examinations, but the CMHIP dropped the ball and didn't complete the mental condition evaluation. This failure cannot be attributed to Day.

Contrary to the Attorney General's contentions, Day doesn't attribute the lack of a State-prepared report regarding her mental condition to the court, or even the prosecution. No, the fault lies primarily with CMHIP. The court issued four separate orders, demanding that they prepare a mental condition evaluation, but they never complied. And if the district court couldn't compel CMHIP to fulfill its obligations, then defense counsel certainly could not.

Day's fundamental right to present a defense should not have been limited because CMHIP repeatedly failed to comply with court orders.

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).

The Attorney General argues that the defense's proffered evidence was probative of insanity, and therefore properly excluded because Day didn't plead not guilty by reason of insanity (NGRI). As discussed in the Opening Brief, insanity is limited to an extremely narrow class of very severe mental diseases or defects that "grossly and demonstrably impair [the defendant's] perception or understanding of reality" and render the defendant (1) incapable of distinguishing right from wrong

or (2) unable to form the mental state. §§ 16-8-101.5(1),(2)(c); 102(4.7); *People v. Moore*, 485 P.3d 1088, 1098-99 (Colo. 2021).

Our caselaw reflects that many mental defects and psychiatric disorders fall short of insanity. *See Moore*, 485 P.3d at 1100 (bipolar disorder diagnosis, "trauma-related disorder," and "paranoid ideation" not probative of insanity); *People v. Bondurant*, 296 P.3d 200, 205 (Colo. App. 2012)(clinical depression and panic attacks not evidence of insanity); *People v. Requejo*, 919 P.2d 874, 878 (Colo. App. 1996)("mild mental retardation" not evidence of insanity); *People v. Anderson*, 70 P.3d 485, 488 (Colo. App. 2002)("history of mental illness" and "erratic behaviors" didn't support insanity).

In *People v. Roadcap*, 78 P.3d 1108, 1112 (Colo. App. 2003), 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). Similar to *Roadcap*, Day's proffered expert evidence from Dr. Fukutaki constituted mental condition evidence.

The Attorney General makes several incorrect assertions regarding Dr. Fukutaki's report. First, the Attorney General contends that "the private neurologist's evaluation was based almost entirely on the defendant's self-reporting." (AB, p16) In fact, Dr. Fukutaki reviewed relevant portions of the

discovery and Day's medical records from CMHIP. (CF, p231,236-37) Dr. Fukutaki also administered the Montreal Cognitive Assessment test, which indicated that Day suffered from mild neurocognitive impairment. (*Id.*, p234)

Day reported that she was not suffering from any mental health issues on the day of the incident but did admit she had not taken her "depression" medication in the preceding days. (*Id.*, p240) Relying on the CMHIP's records, Dr. Fukutaki questioned Day's ability to assess her own mental condition and concluded that Day did not have "insight into her mental illness and need for medications." (*Id.*, p240-41) Dr. Fukutaki stated, "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." (*Id.*) Thus, Dr. Fukutaki would have rendered opinions based on Ms. Day's medical history, Day's report, and her own professional assessment.

Second, the Attorney General contends that Dr. Fukutaki's testimony was probative of insanity because it would have supported the inference that Day suffered from "an abnormal mental condition rendered severe" by her lack of medication that "impaired her perception or understanding of reality at the time of the offense."(AB, p28) However, in *Moore*, the Supreme Court emphasized that "insanity requires more than just a showing that the defendant's mental condition

was 'severely abnormal' — the condition must also *grossly* and demonstrably impair the defendant's perception or understanding of reality." 485 P.3d at 1099 (emphasis added). To be probative of insanity as statutorily defined, the evidence must prove that defendant suffered from a severe mental condition that grossly impaired the defendant's understanding of right or wrong or ability to form the mental state. *Id.* at 1098.

Here, Dr. Fukutaki's opinion doesn't approach insanity. She would have testified that Day's failure to take medication likely caused "thought disorganization that impaired her judgment and problem-solving abilities" and she may have failed to understand the severity of the situation in light of her confused thinking, anxiety, and low mental cognition. (CF, p240) This evidence would have rebutted the State's evidence concerning Day's atypical response to the events of this case.

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

The Attorney General agrees with Day that *Moore* requires courts to closely review and parse through expert testimony line by line to ascertain the admissibility of the evidence. Here, the district court failed to properly exercise its discretion in the manner described by *Moore*. Contrary to the Attorney General's incorrect assertion (AB, p29), Day is not asking for a remand. Rather, the district court's

wholesale exclusion of the defense's evidence constituted an abuse of discretion requiring reversal.

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

The Attorney General also contends that the evidence should have been excluded under CRE 403 because it pertained to Day's behavior after the incident and could have been confusing to the jury. However, this evidence was directly relevant to rebut the State's extensive evidence concerning Day's behavior after the incident.

The State relied heavily on Day's lack of emotion and atypical 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 Day's calm, emotionless 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." (*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 continued to highlight that when the police contacted Day, she was "[v]ery calm," "just hanging out" "[d]rinking a bottle of Gatorade," and at the hospital, she was "lucid and calm" and referred to her boyfriend as "that guy" instead of by his name. (TR 2/6/20, p57,64,134-35) 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.*)

Had the defense been allowed to present Day's mental condition evidence, they could have answered this question or provide a rationale as to why Day exhibited a flat affect; she's not a neurotypical person. But the jury never heard any evidence that would have explained Day's odd reaction.

"Fundamental fairness requires 'that criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Rios-Vargas v. People*, 2023 CO 35, ¶59, *quoting California v. Trombetta*, 467 U.S. 479, 485 (1984). Here,

the exclusion of this important evidence, which would have rebutted the State's evidence regarding Day's mental state, prevented Day from presenting a complete defense and cannot be harmless beyond a reasonable doubt.

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.

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

The Attorney General agrees that the district court entered restitution more than 91 days after sentencing without making any good cause findings. (AB, p37) The Attorney General agrees this "[u]ndoubtedly…implicates *Weeks*." (*Id.*) Nevertheless, the Attorney General suggests this Court can circumvent the plain language of *People v. Weeks*, 2021 CO 75. The Attorney General's arguments are not persuasive.

The Attorney General first argues that the restitution's statutory deadlines are non-jurisdictional. The Attorney General specifically argues that the language in the restitution statute doesn't "indicate that time was of the essence" and "did not use

negative language to deny express authority beyond the statutory timeframe." (AB, p40)

However, the language in the restitution statute is mandatory. The legislature stated, "[T]he specific amount of restitution ***shall*** be determined within the ninety-one days immediately following the order of conviction…" § 18-1.3-603(1)(b), C.R.S. (emphasis added). As our Supreme Court recognized, "the legislature was clearly concerned with the length of time it was taking trial courts to finalize restitution orders" when it enacted the ninety-one-day deadline. *Weeks*, ¶43.

Further, *Weeks* made clear that the restitution scheme's statutory requirements and deadlines are non-negotiable:

> neither a request for more time to determine the proposed amount of restitution nor an order granting such a request justifies extending the prosecution's deadline in subsection (2) or the court's deadline in subsection (1)(b). Rather, each deadline requires an express finding—one relating to extenuating circumstances affecting the prosecution's ability to determine the proposed amount of restitution and the other relating to good cause for extending the court's deadline to determine the amount of restitution the defendant must pay. It also follows that neither a belated request for more time to determine the proposed amount of restitution nor an order granting such a request may act as a defibrillator to resuscitate an expired deadline.

2021 CO 75, ¶7. Under *Weeks,* if the court fails to comply with the firm deadline or make the requisite specific findings, the court lacks authority, i.e., jurisdiction, to

issue restitution. *See id*. at ¶45; *see also Meza v. Peopl*e, 2018 CO 23, ¶15 (absent "specific statutory authorization" under sections 18-1.3-603(1)(b) or (c), "the statute does not purport to empower the sentencing court to set an amount of restitution following entry of the judgment of conviction in question").

Challenging the timeliness of a restitution order under § 18-1.3-603(1)(b) and *Weeks* is akin to challenging "the timeliness of a 35(b) motion," which "calls into question a trial court's continued subject matter jurisdiction over a given case." *People v. Herr*, 198 P.3d 108, 112 (Colo. 2008). Such jurisdictional claims cannot be waived and can be raised at any time. *Id.* at 111.

To the extent another division of this Court recently found that the 91-day deadline was not jurisdictional, that division erroneously relied *on People v. Turecek*, 2012 COA 59, which was overruled by *Weeks*. *See People v. Babcock*, 2023 COA 49, ¶7-11. Further, that division did not conduct any legislative analysis of the statute to reach its conclusion. This Court should not follow *Babcock*, as it deviates from *Weeks* without sufficient support.

Second, the Attorney General argues that defense counsel waived the present claim by agreeing to a hearing date more than 91 days after sentencing. However, the defense does not have an obligation to ensure restitution is determined in a timely fashion. Restitution affords a remedy to the victims. If the State wants this relief for

victims, the State needs to ensure that the court follows the procedures outlined in the statute. *Weeks* was very clear that the restitution statute imposes obligations upon the prosecutor and the trial court – not the defense. § 18-1.3-603, C.R.S.; *see Weeks*, (absent an agreement regarding the amount of restitution, the defense may "take a wait-and-see posture pending the submission of the proposed amount of restitution").

Further, the State's burden to establish waiver is a high one: it must prove the intentional relinquishment of a known right, and this Court must adopt every reasonable presumption against waiver. *People v. Rediger*, 2018 CO 32, ¶39. The State has not met its burden, and this Court should address this claim on its merits and vacate the restitution order. By exercising her right to contest her sentence in a hearing and hold the prosecution to its burden of proof, Day didn't waive her right to have the court determine the restitution amount within the ninety-one-day deadline. *Cf. People v. Roddy,* 2021 CO 74, ¶20 (reviewing the defendant's restitution claim on appeal where the prosecution requested restitution ninety-days after sentencing, and "the parties actively litigated the amount" of restitution for nearly fifteen months).

Again, to the extent that the *Babcock* division reached a different conclusion, that decision is wrong. In *Babcock*, the division found waiver from the defendant's

affirmative objection and request for a hearing. 2023 COA 49, ¶13. Had his counsel remained silent and not objected, Babcock would have prevailed in vacating his restitution order on appeal under *Weeks*. This is a very perverse, absurd result, which makes little sense. This Court is bound to follow *Weeks*, not the contorted logic of another division. *See People v. Smith*, 183 P.3d 726 (Colo. App. 2008)(Colorado Supreme Court decisions are binding on the Colorado Court of Appeals).

Finally, the Attorney General argues any error is harmless. This argument fails. Day raises her claim on direct appeal like the defendant in *Weeks*, and the *Weeks*' holding is clear and unequivocal: if courts do not follow the procedures and timelines set forth in the restitution statute, they lack authority to subsequently enter restitution, and any such order must be vacated. 2021 CO 75, ¶47. *Weeks* did not proceed under a harm analysis, and any other construction renders restitution deadlines superfluous. *Weeks*, *supra* (observing that it would have been pointless for the legislature to enact restitution deadlines if such deadlines could be deemed "impliedly extended").

Further, restitution imposed without authority is invariably harmful. "In both our own jurisprudence and in case law nationally, courts have invariably concluded that when a defendant's double jeopardy rights are violated, such a violation requires

a remedy." *People v. Jackson*, 472 P.3d 553, 556 (Colo. 2020) (internal alterations omitted).

Accordingly, under *Weeks*, the restitution order here must be vacated.

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

As discussed in the Opening Brief, in order for the prosecution to rely on the presumption that Crime Victim Compensation (CVC) payout was the direct result of the defendant's conduct, the State must present specific information, including: (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 State only submitted the summary data reports described in the second method, but 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. The Attorney General contends that the summary data, combined with the administrator's testimony, created a sufficient record to support the payments. However, the administrator's testimony did not provide any information about specific providers who were paid or when they were paid. Thus, the State still failed

to not comply with the statutory provisions of section 18-1.3-603(10)(b)(II), and should not have been afforded any presumption regarding the burden of proof at the hearing.

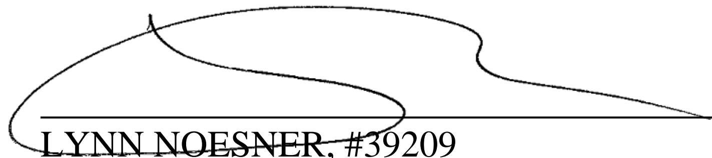
Accordingly, the restitution order should be vacated because the State did not meet their burden.

CONCLUSION

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

Based on the arguments and authorities presented in Issue II of the Opening Brief and above, 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 June 23, 2023, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Frank R. Lawson of the Attorney General's office.