District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **ROBERT LEWIS DEAR,** Defendant	DATE FILED: November 2, 2016 4:28 PM σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Chief Trial Deputy State Public Defender 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **15CR5795** Division 10

DEFENDANT'S RESPONSE TO THIRD-PARTY CIVIL PLAINTIFFS' "GAG ORDER POSITION PAPER"

Mr. Dear, through counsel, submits the following response to the "Gag Order Position Paper" filed by attorneys for Samantha Wagner, A.S., Mandy Davis, and Ammar Laskarwala:

I. Procedural History

1. The parties in *Wagner v. Planned Parenthood*, Civil Action No. 16CV31798 in Denver District Court, attempted to file a "limited entry of appearance" in this case on October 13, 2016, which was apparently rejected by ICCES. *See* Exhibit A, attached. The limited entry of appearance stated that the civil attorneys "wish to discuss with the Court, prosecuting counsel, and defense counsel, discovery issues in the Wagner Litigation, and in particular the need for access to information in this criminal proceeding that the Court has placed under seal." *Id.* The parties then corresponded with the Court's clerk via email and requested an opportunity to appear in court at a hearing in the above-captioned criminal case to discuss the release of certain information in the criminal case to the parties in the civil case.

2. Counsel for the civil plaintiffs as well as Planned Parenthood subsequently appeared in court on October 18, 2016, and informed the Court that they were seeking information from the criminal case to aid them in moving forward in the civil case, and that both parties had agreed to a protective order in the civil case, a copy of which they provided to the Court. *See* Exhibit B, attached.

3. It was somewhat unclear from the October 18, 2016 hearing exactly what information the civil parties were seeking. Both defense counsel and the prosecution objected to the Court ordering any release of information in the criminal case to the civil attorneys. Counsel for Planned Parenthood suggested that the civil parties have a further opportunity to talk with the defense "and see if there's any possible common ground that we can reach in terms of allowing

us to get some stuff, records, data, things. Then we can come back and let you know if we need something more formal in the next two, three weeks." *See* Exhibit C, attached, p. 26.

4. The Court suggested that both the prosecution and defense counsel file a "response to the motion," and stated, "I understand I have a copy of the motion, but I'm not going to enter that into the computer at this point." *Id.*

5. Defense counsel is unsure what motion the Court was referring to. The two pleadings the civil attorneys apparently attempted to file prior to October 18, 2016, which were provided to defense counsel at the hearing, were a "limited entry of appearance" and a copy of the protective order entered into in the civil case. So far as defense counsel can tell, there is no motion by the civil attorneys – either written or oral – currently pending before the Court.

6. Following that hearing, the plaintiffs' counsel in the civil case apparently filed a document with the Court entitled "Gag Order Position Paper," which plaintiffs' counsel's paralegal emailed to the parties in the criminal case. In that pleading, counsel for the plaintiffs state that they are seeking "information that is relevant to their claims and would ordinarily be subject to discovery, but the Gag Order prevents them from obtaining." Position Paper, p. 2.

7. Plaintiffs' counsel in the civil case then list the following categories of information: "(1) the video surveillance from the day of the shooting at the Colorado Springs Planned Parenthood building; (2) any video or still photos taken during the siege or after by CSPD or any other law enforcement agency; (3) any history that CSPD or other investigating agencies have regarding prior threats against the facility in question, and any history of CSPD responding to the facility due to threats; (4) law enforcement interviews of witnesses and victims of the shootings; (5) any emails or other evidence seized from Planned Parenthood that goes to notice on the part of Planned Parenthood; and (6) the autopsy of Ke'Arre Stewart." *Id.* at 2-3.

8. Plaintiffs' counsel take the position in this pleading that the Gag Order is a "prior restraint" that "impinges on the parties' rights to free speech, due process of law and entitlement to a speedy remedy for injuries to persons and property under the United States Constitution and the Colorado Constitution." *Id.* at 3.

9. Plaintiffs' counsel then state, "As an alternative to continued enforcement of the Gag Order on information possessed by law enforcement agencies, the parties to the Civil Action have obtained a Protective Order commensurate with the protections afforded by the Gag Order." *Id.* at 4.

10. The Position Paper again does not make a specific request of the Court. It is not a motion, and it is unclear exactly what relief the civil attorneys are requesting from this Court.

11. On Tuesday, November 1, 2016, defense counsel had a telephone conversation with plaintiffs' counsel, discussed their confusion over whether any request was even pending before this Court, and informed them that even if some sort of request was pending, they would not agree to the release of information from the criminal case to the civil litigants. The defense informed the attorneys for Planned Parenthood of the same in a phone conversation on November 2, 2016.

12. The defense now files this pleading to make clear to the Court its position on these issues.

II. This Issue is Improperly Before the Court

13. The materials listed in the position paper to which the plaintiffs seek access are criminal justice records. The Colorado Criminal Justice Records Act defines criminal justice records as follows:

> (4) "Criminal justice records" means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including but not limited to the results of chemical biological substance testing to determine genetic markers conducted pursuant to sections 16-11-102.4 and 16-23-104, C.R.S.

Colo. Rev. Stat. Ann. § 24-72-302(4).

14. Under the act, a "custodian" is defined as "the official custodian or any authorized person having personal custody and control of the criminal justice records in question." C.R.S. § 24-72-302(5).

15. The Act further provides that except for records of official actions, all criminal justice records "at the discretion of the official custodian, may be open for inspection by any person at reasonable times." C.R.S. § 24-72-304(1).

16. Furthermore, the custodian of records may deny a request for inspection if such inspection would be contrary to any state statute, or if "such inspection is prohibited by rules promulgated by the supreme court or by the order of any court." C.R.S. § 24-72-305(1)(a)&(b).

17. In addition, or "[o]n the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose." C.R.S. §24-72-305(5).

18. None of the categories of information listed in the "Gag Order Position Paper" are in this Court's possession or are a part of the court file. To defense counsel's knowledge, this Court does not have actual possession of video surveillance from Planned Parenthood, video or still photos taken by CSPD or any other law enforcement agency, any history that CSPD or other investigating agencies have regarding prior threats against the facility in question, law enforcement interviews of witnesses and victims of the shootings, any emails or other evidence seized from Planned Parenthood that goes to notice on the part of Planned Parenthood, or the autopsy of Ke'Arre Stewart. These materials are in the possession of other law enforcement

agencies.

19. Because the Court is not the custodian of these records, the Court does not have jurisdiction or authority to grant or deny the civil parties access to this material. If the civil parties seek access to these materials, then they must make a request to the actual custodian of records at the agency that is in possession of this information. It is unclear whether the civil parties have even made any such requests to the relevant custodian of records for each category of information that they seek.

20. Even if such requests have been made and denied, which is far from clear based on the record, this matter is still improperly before the Court. Pursuant to C.R.S. § 24-72-305(6) & (7),

> (6) If the custodian denies access to any criminal justice record, the applicant may request a written statement of the grounds for the denial, which statement shall be provided to the applicant within seventy-two hours, shall cite the law or regulation under which access is denied or the general nature of the public interest to be protected by the denial, and shall be furnished forthwith to the applicant.
>
> (7) Any person denied access to inspect any criminal justice record covered by this part 3 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why said custodian should not permit the inspection of such record. A hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of inspection was proper, it shall order the custodian to permit such inspection and, upon a finding that the denial was arbitrary or capricious, it may order the custodian to pay the applicant's court costs and attorney fees in an amount to be determined by the court. Upon a finding that the denial of inspection of a record of an official action was arbitrary or capricious, the court may also order the custodian personally to pay to the applicant a penalty in an amount not to exceed twenty-five dollars for each day that access was improperly denied.

Id.

21. Thus, even if the custodian of records for the agencies in possession of this material were to deny the civil parties' requests, then the civil parties would need to "apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why said custodian should not permit the inspection of such record." *Id.*

22. However, the CCJRA does not authorize such an application to be made by a third party *within an ongoing criminal case*. Rather, such an application would be made through

a separate proceeding altogether. In this case, such an application would likely be made to the El Paso County District Court, and may or may not be assigned to this Court. However, it is improper for such an application to be considered or evaluated *within a pre-existing and ongoing criminal case.*

23. In other words, even if the civil parties had complied with the requirements of the CCJRA, which there is no evidence of, they cannot intervene in the above-captioned case for the purpose of asking this Court to review the decisions of the custodians of records of the agencies in actual possession of the material they seek. The law does not allow intervention in a criminal case for this purpose.

24. The Colorado Supreme Court addressed the issue of intervention in a criminal case in depth in *People v. Ham,* 734 P.2d 623, 625 (Colo. 1987). The Court defined intervention as "a procedural device whereby an outsider or stranger to litigation may enter the case as a party for the purpose of presenting a claim or defense." 734 P.2d at 625. It first noted that "the Colorado Rules of Criminal Procedure make no provision for intervention by a third party in a criminal prosecution," and that the intervention standards of Colorado Rule of Civil Procedure 24 "were neither designed for nor should be applied to a criminal case." *Id.*

25. The Court further explained that issues extraneous to "the guilt or nonguilt of the accused and the appropriate sentence to be imposed in the event of a conviction" should "not be permitted to encumber the criminal process, which is fashioned to provide a speedy and just resolution of [the] issues . . . ."[1] *Id.* at 626. It concluded, "[I]n the absence of truly exceptional circumstances . . . the request of a third party to intervene in a criminal case should not be countenanced." *Id.* at 627.

26. The civil parties cannot intervene in this criminal case pursuant to *Ham* because their desire to intervene does not relate to the presentation of a claim or defense in this criminal case, and is wholly unrelated to the guilt or nonguilt of Mr. Dear. Indeed, even if Rule 24 of the Colorado Rules of Civil Procedure *did* apply to criminal cases, it is doubtful that this request to intervene would be allowed.[2] Nor does the Victims' Rights Act authorize the intervention of a victim in a criminal case for the purpose of obtaining documents for use in an unrelated civil suit against a third party. *See* C.R.S. § 24-4.1-301 *et seq.*

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[1] In *Ham,* the Department of Corrections moved to intervene to file a Rule 35(a) motion in the defendant's criminal case, alleging that the court acted illegally in sentencing a misdemeanor offender over the age of twenty-one to the department of corrections, and expressing "the claim that the sentence imposed on the defendant will adversely affect the department's allocation of resources in carrying out its statutory responsibilities." *Id.* at 625.

[2] Rule 24(a) of the Colorado Rules of Civil Procedure permits intervention of right "[w]hen a statute confers an unconditional right to intervene" or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . ." and "Permissive Intervention." Rule 24(b) allows permissive intervention when "a statute confers a conditional right to intervene" or "when an applicant's claim or defense and the main action have a question of law or fact in common."

III. Even if this Issue Were Properly before the Court, Material that is not Already in the Public Domain Cannot be Released to the Civil Parties While the Criminal Case is Ongoing.

27. Even if the civil parties' request to access the documents described in the "Gag Order Position Paper" was procedurally proper, Mr. Dear objects. Because of the sensitive nature of the information involved and the intense public scrutiny this case has received, there is a high likelihood that the release of this information at this early stage in the proceedings would jeopardize Mr. Dear's right to a fair trial by an impartial jury, as protected by the Colorado and federal constitutions. *See Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *United States v. McVeigh*, 119 F.3d 806, 815 (10th Cir. 1997); U.S. Const. Amends. V, VI, and XIV; Colo. Const. Art. II, secs. 16 and 25.

28. The protective order signed by the civil parties does not provide adequate protection to these important constitutional rights. Even if the civil attorneys abide by the protective order, these materials and documents could be made public when the civil case proceeds to trial. If the civil case proceeds to trial before the criminal case (which is highly possible given Mr. Dear's incompetency to proceed) and this material were to be made public, Mr. Dear's constitutional rights and the integrity of this criminal proceeding would be irreparably compromised, especially given the media attention such a civil trial would likely attract.

29. Mr. Dear's rights and the integrity of this criminal proceeding must be the Court's paramount concern at this stage in the criminal case.

30. Finally, to the extent the civil parties are requesting the Court to amend its gag order (again, it is unclear from the record exactly what, if anything, the civil parties are asking this Court to do), such a request is improper and unwarranted.

31. First, the gag order is necessary in this high-profile case to protect Mr. Dear's constitutional rights and the integrity of these criminal proceedings. The civil litigants' desire to proceed with their case is not a sufficient basis to reconsider the scope of the order. The civil litigants' argument that the gag order is somehow a prior restraint that is restricting their free speech rights under the First Amendment does not make sense. The prior restraint doctrine involves a court placing restrictions on the freedom of the press, which is not at issue here. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (the Court has interpreted the First Amendment's guarantees to afford "special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech."); *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

32. Moreover, it is unclear from the record whether – or to what extent – the gag order is actually restricting the parties' access to the information they seek. Again, it is unclear whether the civil litigants have made appropriate requests to the proper custodians of records, much less whether the custodians of records have relied upon the gag order to deny the civil parties access to this information. Even if this were the case (and there is no documentation that the civil litigants have exhausted this process), it would be up to the reviewing court to whom the application for an order to show cause is made to determine whether the custodian of records'

interpretation of this Court's gag order is correct and whether the gag order actually prohibits the release of the information the civil litigants seek.

IV. Conclusion

33. For the reasons stated above, Mr. Dear respectfully requests that this Court deny any request on the part of the civil litigants to access information in this case that is not publicly available.

Mr. Dear files this response, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

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Dated: November 2, 2016

I hereby certify that on November 2, 2016, I electronically served a true and correct copy of the above and foregoing document to:

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