DISTRICT Court, El Paso County, Colorado 270 S. Tejon Street Colorado Springs, Colorado 80903	DATE FILED: August 24, 2016 10:15 AM
People of the State of Colorado vs. Robert Dear, Jr., Defendant	▲ COURT USE ONLY ▲
District Attorneys: Daniel H. May, #11379, Jeffrey Lindsay, #24664, Donna Billek, #30721 105 E. Vermijo, Colorado Springs, CO 80903 Phone Number: 719-520-6000 District Attorney: Daniel H. May, #11379	Case #: 15CR5795 Division #: 10

D-027
PEOPLE'S RESPONSE TO DEFENDANT'S
MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW, DANIEL H. MAY, District Attorney, by and through his duly appointed deputy and hereby submits the People's Response. The Defendant argues that the subpoena duces tecum served on the Colorado Mental Health Institute at Pueblo should be quashed. The subpoena is not overbroad because it complies with the statute in permitting the People to obtain reports of competency evaluations and "information and documents relating to the competency evaluation," C.R.S. 16-8.5-105(1)(a)(b). C.R.S. 16-8.5-108(2) permits the parties to obtain the information authorized by C.R.S. 16-8.5-104 "prior to the hearing." Audio and video recordings are part of the "information" permitted to be disclosed by the statute. The issue of privilege, re-raised by the Defendant, has been previously considered and denied by this Court. The People object to the Court granting the Defendant's request to quash.

1. The Defendant first complains that the subpoena is overbroad. D-027 ¶¶ 1-8. The Defendant correctly quotes the subpoena requests "include any and all report on competency." This limiting clause, limiting the request to matters that pertain to competency, is totally ignored by the Defendant in alleging that the People are seeking information and documents outside what is permitted by the statute.

2. When reviewing statutes, the Court must ascertain and give effective to the General Assembly's intent. *People v. Hunter*, 307 P.3d 1083, 1086 (Colo. 2013). The Court must look to and rely on the plain language of the statute. *People v. Sexton*, 296 P.3d 1 57, 161 (Colo. App. 2012). A consistent, harmonious, and sensible effect to all of the statute's parts must be given to avoid an interpretation or construction that essentially

renders a statute meaningless. *People v. Perez-Hernandez*, 348 P.3d 451,457 (Colo. App. 2013). If a statute is unambiguous, there is no need for the Court to do further inquiry. *People v. Cito*, 310 P.3d 256, 259 (Colo.App. 2012).

3. The entire statute must be reviewed to determine the General Assembly's intent. The statute, C.R.S. §16-8.5-104 in pertinent part reads:

> (1) When a defendant raises the issue of competency to proceed, or when the court determines that the defendant is incompetent to proceed and orders that the defendant undergo restoration treatment, any claim by the defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:
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> (a) Reports of competency evaluations, including second evaluations;
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> (b) Information and documents relating to the competency evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation; and
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> (c) The evaluator, for the purpose of discussing the competency evaluation.
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> (2) Upon a request by either party or the court for the information described in subsection (1) of this section, the evaluator or treatment provider shall provide the information for use in preparing for a hearing on competency or restoration and for use during such a hearing.
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> (3) An evaluator or a facility providing competency evaluation or restoration treatment services pursuant to a court order issued pursuant to this article is authorized to provide, and shall provide, procedural information to the court, district attorney, or defense counsel, concerning the defendant's location, the defendant's hospital or facility admission status, the status of evaluation procedures, and other procedural information relevant to the case.
>
> (4) Nothing in this section limits the court's ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator, or to either party to the case, nor does it limit the information that is available after the written consent of the defendant.

4. Paragraph (2) clearly states that "upon request by either party" the information described in subsection (1) "shall" be provided. Paragraph 2 also indicates the reason for access to the information: "for use in preparing for a hearing.

5. Paragraph (4) is all encompassing permitting not only evidence that is described in subsection (1) and (3) but any other evidence relevant to the issue to be "provided to the evaluator, or to either party to the case .. . ."

6. Furthermore, there is a reference to another statute in subsection (6), namely C.R.S. 16-8.5-108. That other statute provides protections for the Defendant, This statute limits the potential use of the defendant's statements made during competency evaluations. The statements are "not admissible" at the substantive trial, except they may be admissible to rebut evidence concerning the defendant's mental state. The statements are not admissible at any death penalty sentencing except to rebut any mitigating factor presented by the defendant.

7. The primary importance is the second sentence of subsection (2) that states that there is no prohibition that "prevents the parties from obtaining the information authorized by section 16-8.5-104 prior to the hearing." Thus, this subsection permits access to competency information by the prosecution.

8. There would be no need to provide protections on the use of the privilege if the People had no access to the reports and information as a matter of psychologist-patient privilege. The People would never have the information so that the prosecution would be unaware of and would necessarily not be able to use the information. The limitation on the use demonstrates the information would be provided to the prosecution.

9. The Defendant complains that the subpoena requests information "from any evaluator." D-027 ¶ 7. The subpoena was issued to CMHIP. If CMHIP has information from other evaluators not from CMHIP concerning competency, that information must be provided as well. Certainly if CMHIP has information from other evaluators, CMHIP evaluators would have taken that information in consideration. Thus, this requirement of the subpoena is not overbroad.

10. The Defendant complains that "information and documents" does not include "video and audio" recordings. D-027 ¶ 9. In interpreting statutes the first rule is to look to the plain meaning of the statutory language. *People v. Johnson*, 363 P.3d 169, 175 ¶ 11 (Colo. 2015). When determining the plain meaning of a statute, courts "read words and phrases in context and construe them according to common usage." *Id.* citing *Bostelman v. People*, 162 P.3d 686, 690 (Colo. 2007). Session law of 2016 amending 16-8-106(b) and other mental condition statutes, although not effective until January 1, 2017, requires the video and audio recording concerning sanity and mental condition in class 1 and 2 felonies. Because the Defendant is charged with such offenses, CMHIP may well be recording interviews. "Information" is a broad term that includes "the communication or reception of knowledge or intelligence;" "knowledge obtained from investigation, study, or instructions;" "intelligence, news;" or "facts, data." Merriam-Webster, http://www.merriam-webster.com/dictionary/information. Video and audio recordings are within "information" required to be disclosed by the statute.

11. The argument that privilege continues to apply and has not been waived has been previously made by the Defendant in D-016, responded to by the People, and rejected by this Court.

WHEREFORE, the People ask this Court to deny the motion and that this Court deny the Defendant's motion without a hearing.

Respectfully submitted this 24th day of August, 2016.

DANIEL H. MAY, #11379
DISTRICT ATTORNEY

By: /s/
Daniel H. May, #11379
Jeffrey Lindsay, #24664
Donna Billek, #30721