APPENDIX A

SUPREME COURT OF COLORADO

No. 19SC587

ROBERT ANGEL PEREZ,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

February 24, 2020

Court of Appeals Case No. 16CA1180

En Banc.

Opinion.

Petition for Writ of Certiorari DENIED.

CHIEF JUSTICE COATS does not participate.

APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 16CA1180

City and County of Denver District Court No. 14CR4593

Honorable Martin F. Egelhoff, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert A. Perez,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE RICHMAN
Harris and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 13, 2019

Philip J. Weiser, Attorney General, Brittany L. Limes, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Ned R. Jaeckle, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Appellant, Robert A. Perez, appeals a judgment of conviction entered on a jury verdict finding him guilty of first degree murder of his wife. We affirm the judgment.

I. Background

¶ 2 Perez met his wife, Dennielle Perez, while they were both working for the same employer. They were married for sixteen years. At trial, the prosecution presented evidence that Perez emotionally abused Dennielle during the marriage, and that the couple's lifestyle included holding parties in their basement at which Dennielle performed sexual acts with other men while Perez took photos and videos. Both the prosecution and defense presented evidence that Dennielle, at times, appeared sad or depressed to her family and friends. The defense presented further evidence that her sadness or depression stemmed from the couple's lifestyle and marital difficulties, including their inability to have children and Dennielle's dissatisfaction with her career.[1] The defense also presented evidence that she had taken a handful of sleeping pills several days before her death.

¶ 3 On August 17, 2014, Perez discovered that Dennielle was having an affair with an African-American man without his knowledge or consent. Aside from his sense of betrayal, Perez was upset

[1] Dennielle had apparently dreamed of working in law enforcement. However, she had been unable to accomplish that goal and instead worked the night shift at Chubby's, a Denver restaurant owned by her family.

that his wife's paramour was African-American. As a result of this discovery and Perez's distress and anger, Dennielle went to stay with her parents that night. She stayed there for the next two days. During that time, Perez contacted Dennielle repeatedly and sent her numerous Facebook messages in which he threatened to expose sexually explicit photos of her if she did not submit to his demands. On the afternoon of August 19, 2014, Dennielle asked her brother to take her to meet Perez at his place of work and her brother did so. This was the last time she was seen alive by members of her family.

¶ 4 On August 20, 2014, Perez called the police, telling them that he had just found his wife dead in the basement. When police arrived, they found Dennielle's body lying in the basement next to a shotgun. She was covered in bruises and had a gunshot wound under her left armpit.

¶ 5 Perez was charged with Dennielle's murder. At trial, the prosecution argued that Perez shot Dennielle because he was distraught and angry over Dennielle's affair with an African-American man. In his defense, Perez argued that Dennielle committed suicide because she was afraid that he would release details of their sexual exploits, bringing shame upon her and her family.

¶ 6 After his first day of trial, Perez was incarcerated in the Denver County Jail with another inmate, D.P. The two were able to speak in the common area of the jail once Perez returned from jury selection. Due to circumstances unrelated to this case, D.P. was thereafter interviewed by police.

During the interview, he told police that Perez had confessed, in detail, to killing Dennielle. He also asserted that Perez had offered him $25,000 to testify falsely that he had met Dennielle at a club catering to sadomasochists, that he and Dennielle had slept together, and that she had committed suicide because she had been stealing from her family's restaurant and living a sadomasochistic lifestyle.

¶ 7 At trial, D.P. was permitted to testify to Perez's alleged statements. The defense impeached his testimony by questioning him regarding his extensive felony history and pending charges. However, the trial court limited defense counsel's questions with respect to the facts underlying his convictions and pending charges, over counsel's objections.

¶ 8 At the close of the trial, the jury convicted Perez of first degree murder. Perez now appeals his conviction on two grounds. First, Perez contends that the trial court erred when it quashed a subpoena seeking Dennielle's mental health records. Second, Perez contends that the trial court erred in imposing limitations on defense counsel's cross-examination of D.P. We address each contention in turn.

II. Medical Records

¶ 9 Seeking evidence to buttress its theory that Dennielle was depressed and committed suicide, the defense served a pretrial subpoena on Kaiser Permanente. The prosecution made a motion to quash the subpoena, arguing that Dennielle's mental health records were protected by the psychologist-

patient privilege and that the personal representative of her estate had not waived the privilege.[2] *See* § 13-90-107(1)(g), C.R.S. 2018. On the subpoena's return date, the defense argued that it needed Dennielle's mental health records to support Perez's allegation that she was depressed and took her own life.

¶ 10 In a thorough, written order, the trial court concluded that mental health records are subject to the psychologist-patient privilege, that this privilege prohibits pretrial discovery of information within its scope, and that the only basis for authorizing disclosure of such records is an express or implied waiver. Because Dennielle's personal representative refused to waive the privilege, the court quashed the subpoena.

¶ 11 Perez now contends that the trial court should not have quashed the subpoena without an in camera review of the requested mental health records, and that doing so violated his constitutional rights under the Due Process Clause, the Compulsory Process Clause, and the Confrontation Clause of the United States and Colorado Constitutions. U.S. Const. amends.VI, XIV; Colo. Const. art. II, §§ 16, 25.

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[2] Dennielle's mother was her personal representative. She appeared on the return date and told the trial court that she would not waive the privilege on behalf of the estate. In its written order, the trial court held that because medical privilege is personal to the patient or her estate under Colorado law, Dennielle's mother had the power to waive the privilege or choose not to do so. *People v. Palomo*, 31 P.3d 879, 885 (Colo. 2001).

A. Standard of Review

¶ 12 We review a trial court's resolution of discovery issues, including whether the court should have conducted an in camera review of subpoenaed documents, for an abuse of discretion. *People v. Zapata*, 2016 COA 75M, ¶ 20, *aff'd*, 2018 CO 82, ¶ 69. A court abuses its discretion if its ruling stems from a misapplication of the law or is manifestly arbitrary, unreasonable, or unfair. *Id.*

¶ 13 Insofar as this case also presents issues of statutory interpretation, including the scope of the psychologist-patient privilege in light of federal and state constitutional constraints, we review these legal questions de novo. *Id.* at ¶ 21.

B. The Law of Privilege

¶ 14 Colorado's psychologist-patient privilege statute protects a patient's privacy regarding statements made during treatment. § 13-90-107(1)(g). The statute states that a psychologist "shall not be examined without the consent of [the patient] as to any communication made by the client to the [psychologist] . . . ." *Id.* Its purpose is to secure an "atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears," an essential component of effective treatment. *L.A.N. v. L.M.B.*, 2013 CO 6, ¶ 14 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)). This same policy underlies the physician-patient privilege, § 13-90-107(1)(d), but the supreme court has noted that the policy justification for the statute is "even more compelling"

with respect to the psychologist-patient relationship, *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

¶ 15 Once the privilege attaches, an undisputed fact in this case, it protects both testimonial disclosures and pretrial discovery of mental health records. *Id.* The statute's plain language appears to preclude the compelled production of mental health records unless the privilege is waived. *Id.* (citing *Clark v. Dist. Court*, 668 P.2d 3, 9 (Colo. 1983), for the proposition that the statutory language "without the consent" of the patient means waiver is the only basis for permitting disclosure of privileged information); *see also People v. Tauer*, 847 P.2d 259, 261 (Colo. App. 1993). This limitation on a court's power to compel discovery encompasses not only disclosure to third parties, but also production of the records for in camera review by the court. *Sisneros*, 55 P.3d at 800.

¶ 16 In *People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986), the supreme court considered whether, in the absence of a waiver, a defendant might nonetheless be allowed some access to the victim's mental health records based on his rights under the Confrontation Clauses of the State and Federal Constitutions. The court concluded that because there was no waiver or "particularized factual showing" that the defendant needed the records to effectively protect his confrontation rights, an in camera review was improper. *Id.* at 727. Thus, the court acknowledged that a "particularized factual

showing" might overcome the protections of the psychologist-patient privilege in order to protect a defendant's constitutional rights. *Id.*

C. Constitutional Limitations on Privilege

¶ 17 Similarly, Perez argues here that although the *language* of the privilege statute is absolute and Colorado courts have largely interpreted it as such, where a patient's privilege claim conflicts with a defendant's constitutional right to present a complete defense, the statutory privilege must yield to the constitutional right.

¶ 18 Indeed, the United States Supreme Court has recognized a constitutional right to present a complete defense. In *Crane v. Kentucky*, 476 U.S. 683 (1983), the Supreme Court stated that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Id.* at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Moreover, the Supreme Court has, in fact, held that a victim's statutory right may yield to a defendant's right to present a complete defense under particular circumstances. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987).

¶ 19 In *Ritchie*, relying on a due process framework, the Court concluded that Pennsylvania's privilege statute did not prevent a trial court's in camera review of child abuse records gathered by a state investigative agency. The Court's reasoning relied

on the fact that the statute, by its terms, allowed disclosure of privileged information upon order of the trial court. *Id.* Therefore, the Court held that the privilege was not absolute, and the statute's language contemplated at least an in camera review by the trial court. *Id.*

¶ 20 Subsequent to *Ritchie*, our supreme court has not recognized any per se exception to the psychologist-patient privilege based on a defendant's due process or confrontation rights.[3] In *Dill v. People*, 927 P.2d 1315, 1325 (Colo. 1996), the court reaffirmed its holding in *District Court*, explicitly rejecting a defendant's contention that, in light of the holding in *Ritchie*, his due process rights entitled him to all of the victim's mental health records despite the psychologist-patient privilege. The *Dill* court distinguished the language of Colorado's psychologist-patient privilege statute from the statutory language at issue in *Ritchie*, noting that section 13-90-107(1)(g) contains no provision allowing for disclosure based on an order of the court. *Id.* at 1324. The court again concluded that Colorado does not permit in camera review of mental health records where defendant has no particular reason to

[3] It is doubtful the Perez's confrontation rights are implicated with respect to the subpoena in this case. Those rights are trial rights, and do not support a defendant's attempt to compel pretrial discovery. *Zapata v. People*, 2018 CO 82, ¶ 48. Furthermore, there is no indication in the record that Dennielle's psychologist intended to testify against Perez and obviously Dennielle was unavailable to testify.

believe that such records contain exculpatory information necessary for his defense. *Id.* at 1324-25.

¶ 21 Later, in *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009), a defendant again challenged a victim's right to keep her mental health records confidential under the psychologist-patient privilege. The court decided *Wittrein* on non-constitutional grounds, concluding only that the victim had not placed her mental health at issue and therefore had not waived the privilege. *Id.* at 1083-84. Nonetheless, in response to the defendant's argument that the trial court should still conduct an in camera review, the supreme court stated that the privilege "may not yield to [defendant's] bare request for the records, hoping that they may contain exculpatory information." *Id.* at 1084 n.7. In his concurrence, Justice Martinez noted, "the primary issue raised by the defense is that due process rights trump the privileges associated with a victim's mental health records." *Id.* at 1086 (Martinez, J., concurring in judgment only). He concluded that

> without eliminating the possibility that there may be times when the due process clause requires that the trial court conduct an in camera review of privileged records . . . in the absence of a particularized showing that the records contain exculpatory information not otherwise available to the defendant, in camera review is not required.

Id. at 1088.

¶ 22 Thus, in the absence of a particularized showing that mental health records contain statements

or information necessary to vindicate a defendant's right to present a complete defense, Colorado's psychologist-patient privilege does not allow trial courts to conduct an in camera review of mental health records unless a patient has waived the privilege. *Zapata*, 2018 CO 82, ¶ 52 (stating that for a court to review material protected by a statutory privilege, the initial offer of proof must be more than an assertion that the victim may have made exculpatory statements).

D. Analysis

¶ 23 In this case, on the subpoena's return date, defense counsel made the following showing in support of the subpoena:

> Mr. Perez indicated in his interviews that there were issues with [Dennielle's] mental health state and that she was – in fact, due to depression . . . seeking medical attention in the form of psychotherapy from Kaiser Permanente. . . . That would tend to support that she was depressed, and because she was depressed, she may have taken her own life.

¶ 24 Thus, the basis for the defense request was Perez's bare assertion that Dennielle was depressed, that she had sought therapy from the subpoenaed provider, and that depression may have led to suicide.

¶ 25 Although we recognize that a particularized showing may be able to overcome limitations on discovery created by the psychologist-patient privilege

under extraordinarily narrow circumstances in Colorado, we conclude that the trial court did not abuse its discretion in finding that Perez's constitutional right to present a defense should not overcome Dennielle's claim of privilege.

¶ 26 Perez's simple assertion that Dennielle may have been depressed and may have discussed her depression with her mental health provider does not constitute a particularized showing that her records are likely to contain exculpatory information necessary for Perez's defense that the victim committed suicide. The defendant made no showing regarding when Dennielle saw the mental health provider, or if it was temporally close to the date of her death. The subpoena to the mental health provider contained no time frame for the period of records requested. Perez was essentially asking the trial court to make an evidentiary leap without factual support when he asserted that any diagnosis of depression would mean that the records likely contain evidence Dennielle was suicidal. These broad assertions are insufficient to overcome Colorado's strong public policy interest in securing the privacy of mental health records. *Dist. Court*, 719 P.2d at 727 (noting the paramount importance of keeping such records confidential).

¶ 27 Further, the record shows that Perez was not, in fact, prevented from presenting substantial evidence that Dennielle was suicidal. In addition to Perez's initial assertions to police regarding Dennielle's suicidal ideations, the jury heard Dennielle's friends and family testify that she had bouts of intense sadness and that she had, on occasion,

discussed suicide while vowing never to do it. Dennielle's brother testified that she told him she took sleeping pills the Sunday before her death and wandered away from the house. The jury also saw Facebook posts from Dennielle indicating that she felt hopeless and lonely. Perez's mother testified that Dennielle had shown symptoms of depression. The county medical examiner, testifying as an expert for the prosecution, stated that he could not rule out suicide. And perhaps most tellingly, Perez presented an expert witness in blood pattern analysis and crime scene reconstruction who testified to his opinion that Dennielle died from a self-inflicted gunshot wound.

¶ 28 Referring to all this evidence, counsel for Perez argued in closing that Dennielle did not die at his hands.

¶ 29 We therefore perceive no error in the trial court's ruling.

III. Limitations on Cross-Examination

¶ 30 Perez next contends that the trial court erred when it placed limitations on his right, under the Confrontation Clauses of the United States and Colorado Constitutions, to cross-examine D.P., to whom Perez allegedly confessed regarding (1) D.P.'s motives for testifying; and (2) specific instances of conduct that demonstrated D.P.'s dishonest character. U.S. Const. amend. VI; Colo. Const. art. II, § 16; CRE 608(b).

A. Standard of Review

¶ 31 A trial court has substantial discretion with respect to the admissibility of evidence, including limitations on a defendant's cross-examination of a witness. *Merritt v. People*, 842 P.2d 162, 166-67 (Colo. 1992). A trial court may control the scope and duration of cross-examination to "assist the truth-finding process; to avoid wasting time; and to protect witnesses from harassment, undue embarrassment, or danger to his or her personal safety." *Id.* at 166. In addition, a trial court may exclude evidence that is irrelevant or unduly prejudicial. CRE 402, 403.

¶ 32 Where a defendant's confrontation rights may have been violated as a result of a trial court's limitation on cross-examination, we review these possible violations de novo. *People v. Houser*, 2013 COA 11, ¶ 57.

B. Law

¶ 33 A defendant's constitutional right to confront the witnesses against him implicates two different elements of trial. First, a defendant has a right to have adverse witnesses physically present in court. *Merritt*, 842 P.2d at 165-66. Second, a defendant must be allowed to effectively cross-examine witnesses. *Id.*

¶ 34 To avoid violating a defendant's confrontation rights, a court must not prohibit a defendant "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," which leaves the jury with

a "significantly different impression of the witness's credibility." *Houser*, ¶ 59 (quoting *Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008)). In other words, the defendant must be allowed to present the jury with facts sufficient to permit it to draw inferences regarding a witness's bias and motive. *Id.* at ¶ 60.

C. Analysis

1. Bias or Motive for Testimony

¶ 35 At the time of trial, D.P. was in jail awaiting the outcome of a potential probation revocation. This revocation was pending in Jefferson County at the time that he spoke to police regarding Perez's alleged offer and confession. However, his probation was thereafter revoked, and he was sentenced to confinement in the custody of the Department of Corrections with respect to that case just before he testified at trial. D.P. also had at least seven other pending criminal cases when he testified, two of which were pending in Denver County, the same county in which this case was being tried.

¶ 36 Defense counsel attempted to impeach D.P.'s testimony at trial by eliciting the fact that at the time he spoke to police about Perez, his probation revocation was pending. The People objected on grounds of relevance and the trial court sustained the objection. At a sidebar, defense counsel explained, "I'm attempting to establish that he was on probation at the time of his pending cases, which I'll be going into in a minute, and at the time of which he made his statement [to police]." The People replied that because D.P. had already been sentenced on that charge, and it was no longer pending at the

time of trial, it was not relevant to his motive for testifying. The trial judge stated, "I don't find this to be probative with respect to his motivation if there's been a sentence on any priors at this point in time." Therefore, defense counsel was unable to elicit any further testimony regarding the fact that a probation revocation was pending when D.P. talked to police.

¶ 37 Evidence that a witness has charges pending against him may not be admitted to challenge that witness's general credibility. However, this evidence is admissible to show a witness's bias, motive, prejudice, or interest in the trial's outcome. *Kinney*, 187 P.3d at 559. We have found no Colorado case specifically addressing whether a pending probation revocation becomes irrelevant when it is resolved before a witness testifies under oath at trial.[4] While it remains possible that the pending probation revocation influenced D.P.'s willingness to testify, we do not conclude that the trial court violated Perez's confrontation rights or abused its discretion when it

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[4] Other courts have analyzed the issue both ways. *State v. Bass*, 132 A.3d 1207, 1218 (N.J. 2016) ("[A] charge need not be pending at the time of trial to support an inference of bias. In a given case, a charge against a witness that has been resolved . . . may be an appropriate subject for cross-examination."). *But see Wasko v. Singletary*, 966 F.2d 1377, 1381-82 (11th Cir. 1992) (assuming that defendant's Sixth Amendment right was violated by the trial court's limitation on cross-examination but noting, inter alia, that where the witness had already been sentenced, "cross-examination of [the witness] regarding his plea arrangement with the state, if relevant to his motive, was only marginally so").

excluded specific testimony regarding the status of D.P.'s probation.

¶ 38 Perez's confrontation rights were not violated because the jury was not given a "significantly different impression of the witness's credibility" due to this limitation. *Houser*, ¶ 59. The defense was able to demonstrate that D.P. had several pending cases at the time of trial, including pending cases in Denver County. Therefore, if Perez wanted to argue that D.P. was testifying against Perez out of a motive to aid law enforcement, Perez had the opportunity to make that argument. In fact, during her closing argument, defense counsel noted D.P.'s multiple prior felonies and pending cases. She stated, "He's always looking for something. You heard about the proffer he's trying to work out [in another case]. . . . Yes he wasn't promised anything, but he sure has some expectations."

¶ 39 In addition, the defense elicited compelling testimony that at the time he spoke to police, D.P. was concerned that he might have criminal liability due to his initial agreement to cooperate with Perez and give false testimony. D.P. further testified that he had been sentenced to the custody of the Department of Corrections on his Jefferson County case and that, when he was interviewed about this case, he told police that he didn't want to go there and wanted to stay in Denver. Finally, D.P. was extensively questioned regarding the three prior occasions on which he had offered to help law enforcement with pending cases, showing that he was willing to testify against others to help himself. The trial court did not abuse its discretion in excluding

the testimony as insufficiently relevant. *People v. Saiz*, 32 P.3d 441, 448 (Colo. 2001) ("A trial court also cannot be considered to have abused its discretion in excluding logically relevant evidence as needlessly cumulative unless its decision, under the circumstances, was manifestly arbitrary, unreasonable, or unfair.").

¶ 40 Even if we were to conclude that the exclusion of evidence was erroneous, Perez was still free to argue that D.P. could have been motivated by an interest in procuring lenient treatment from the state, and any conviction on which D.P. was already sentenced was not per se relevant to that motive. We cannot say the exclusion of this evidence "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos v. People*, 2012 CO 63, ¶ 12 (quoting *Tevlin v. People*, 715 P.2d 338, 341-42 (Colo. 1986)).

2. CRE 608(b)

¶ 41 Perez next argues that the trial court erred when it did not permit his counsel to cross-examine D.P. regarding the specific facts underlying his Jefferson County conviction. This conviction concerned an attempt to influence a public servant.

¶ 42 At trial, D.P. testified with respect to this conviction and admitted that he had sent a letter to a judge informing the judge that his life was at risk. Defense counsel then tried to elicit testimony that when the charge was investigated, D.P. admitted that he had fabricated the death threat and falsely accused someone else of the crime. The court excluded this testimony, stating, "If this is a felony

conviction, you can impeach him with respect to the fact that he's been convicted, the name of the charge, what the charge is, [and] whether it was by plea or by trial. We're not going to go into the facts of these cases."

¶ 43 Perez argues that the trial court erred because under CRE 608(b) a trial court has discretion to allow a party to cross-examine a witness about "[s]pecific instances of conduct" if they concern "the witness'[s] character for truthfulness or untruthfulness." Perez asserts that he should have been allowed to inquire about the fact that D.P. had previously falsely accused another person of a crime, because it was probative of D.P.'s dishonest character.

¶ 44 As an initial matter, we note that defense counsel never specifically identified Rule 608(b) as grounds for admission of this evidence. Nonetheless, the record demonstrates that defense counsel asserted two distinct bases for admission. She first noted that the trial court had discretion to allow counsel to cross-examine the witness regarding the nature of the felony conviction under *People v. Renstrom*, 657 P.2d 461, 463 (Colo. App. 1982). She then separately asserted that during the investigation of this crime D.P. admitted that he initially falsely accused another inmate of writing the letter and that "there are many [other felonies] in which he has falsely accused others and admitted that." We treat these references to the dishonesty of D.P.'s conduct as sufficient to preserve Perez's CRE 608(b) argument.

¶ 45 However, we perceive no error here. While we agree that D.P.'s previous conduct is likely probative of his character for truthfulness or untruthfulness because it demonstrates a willingness make false accusations, we do not conclude that the trial court's ruling was an abuse of discretion or that it violated Perez's confrontation rights.

¶ 46 For this limitation to have violated Perez's right to confront witnesses against him, the trial court would have had to deny "virtually his only means of effectively testing significant prosecution evidence." *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009). Furthermore, to constitute an abuse of discretion, a trial court's exclusion of relevant evidence must effectively deny a defendant his right to cross-examine the witness concerning the disputed issue. *People v. Raffaelli*, 647 P.2d 230, 234 (Colo. 1982); *People v. Conyac*, 2014 COA 8M, ¶¶ 97, 103 (noting that, because the witness had testified extensively regarding the issue on which the court limited defense counsel's cross-examination, the trial court did not err).

¶ 47 As discussed above, D.P. was extensively cross-examined about his habitual criminality, including multiple convictions and charges related to fraud. During closing, defense counsel noted that the evidence demonstrated his dishonesty. She stated: "[h]e's got 12, count them 12, prior felony convictions for dishonesty. He's got eight pending cases throughout the state for dishonesty." D.P. also admitted that he initially considered perjuring himself on Perez's behalf, thereby indicating a willingness to falsely defame the deceased victim in this

case for profit. Any claim that D.P. was a person of honest character did not go unchallenged. We do not perceive that Perez was unable to effectively cross-examine D.P. regarding his dishonest character.

IV. Conclusion

¶ 48 We affirm the trial court's judgment.

JUDGE HARRIS and JUDGE TOW concur.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 520 West Colfax Denver, CO 80204	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ROBERT PEREZ, Defendant	▲COURT USE ONLY ▲ Case Number: 14CR4593 Ctrm: 5D
ORDER	

THIS MATTER is before the Court on a subpoena duces tecum issued on behalf of Defendant that seeks medical and psychological treatment records for the victim, Dennielle Perez. A hearing was held on April 7, 2016, at which the prosecution orally moved to quash the subpoena. The Court heard arguments from both the prosecution and the defense, and thereafter ordered both parties to submit authorities regarding privilege issues and who is authorized on behalf of the victim to invoke or waive the privilege. Based upon the Court's independent review of the authorities, however, the

Court finds that further supplementation is not necessary. Therefore, and upon consideration of the motion, and having reviewed the Court's file and being advised in the premises, the Court finds and orders as follows.

Defendant is charged with murder in the first degree in connection with the shooting death of Dennielle Perez on August 20, 2014. Ms. Perez was married to Defendant at the time of her death. Defendant denies involvement in the shooting and asserts that Ms. Perez was experiencing emotional issues, including depression, in the days and weeks prior to the shooting. Defendant asserts that her death was the result of suicide and not murder, and seeks her medical and psychological treatment records in support of his theory of defense. Pursuant to the subpoena issued by Defendant, a representative from Kaiser appeared on April 7, 2016 with records identified in the subpoena. Diane Liko, who was appointed as Ms. Perez' representative in the probate court, appeared at the hearing and objected to disclosure of the documents and stated on the record that she refused to waive any statutory privilege with respect to the production of the medical and psychological records. The Court received the documents under seal, pending resolution of the prosecution's motion to quash.

There is no dispute that the records produced pursuant to the subpoena and retained under seal are subject to the statutory physician-patient and psychologist-client privilege. C.R.S 13-90-107(1)(d) & (1)(g). The privileges prohibit not only testimonial disclosures in court, but also pretrial discovery of

information within the scope of the privileges. *Clark v. District Court,* 668 P.2d 3 (Colo. 1983). In *Clark,* the supreme court rejected the assertion that the privileges are merely qualified in nature such as to permit a court to resolve a claim of privilege by balancing a party's need to obtain information essential to a claim or defense with the privilege holder's interest in preserving the confidentiality of the information requested. "There being no statutory language conditioning the applicability of the physician-patient and psychologist-client privileges to a judicial balancing of interests, we decline to engraft one onto the statute. Once these privileges attach, therefore, the only basis for authorizing a disclosure of the confidential information is an express or implied waiver." *Id.,* 668 P.2d at 9; *see also People v. District Court,* 719 P.2d 722, 727 n. 3 (Colo. 1986) (specifically rejecting application of balancing test); *People v. Overton,* 759 P.2d 772 (Colo.App. 1988) (trial court is neither authorized nor required to balance defendant's need for information with patient's interest in preserving confidentiality of records).

Defendant asserted at the hearing that, as the surviving spouse of Ms. Perez, he has standing to waive the privileges applicable to the subpoenaed records. However, the Colorado Supreme Court has held that the physician-patient privilege (and by implication the psychologist-client privilege) "is personal to the patient *or her estate*." *People v. Palomo,* 31 P.3d 879 (Colo. 200l) [emphasis supplied; citing *Knight v. State,* 207 Ga.App. 846, 429 S.E. 2d 326 (1993) (holding defendant had no standing to assert

his wife's privacy right pertaining to medical records introduced into evidence at trial); *People v. Wood,* 447 Mich. 80, 523 N.W. 2d 477 (1994) (stating that a defendant has no standing to invoke a third party's privilege in either a criminal or civil action); *State v. Evans,* 802 S.W. 2d 507 (Mo. 1991) (stating that "the physician-patient privilege is personal to the patient, and generally no person . . . other than the patient may so object")]; *see also Stauffer v. Karabin,* 30 Colo. App. 357, 492 P.2d 862 (1971).

Moreover, federal law requires persons or entities to treat personal representatives of deceased individuals as the individual for purposes of releasing medical records to a person other than the patient. *See* 45 C.F.R. § 164.502(g)(1). Accordingly, even if an order appointing personal representative does not explicitly address the privilege issue, the representative's authority to assert (or waive) the privilege becomes operative as a matter of law.

The Court accordingly concludes that Defendant lacks standing to waive the statutory privileges attendant to the records produced pursuant to his subpoena. Furthermore, in light of the estate's express objection to the disclosure of the documents, the Court finds no express or implied waiver that would permit disclosure of the records. The motion to quash is therefore granted. The Court will return the sealed documents to the prosecution, with directions to return the records, under seal, to the appropriate custodian.

APPENDIX D

DISTRICT COURT DENVER COUNTY, COLORADO Lindsey-Flanigan Courthouse 520 West Colfax Ave. Denver, Colorado 80204	▲COURT USE ONLY ▲
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO Defendant: ROBERT ANGEL PEREZ	Case Number: 14 CR 4593 Courtroom 5-D

The matter came on for SDT return on Thursday, April 7, 2016, before the Honorable Martin F. Egelhoff, Judge of the District Court, and the following proceedings were had. (These proceedings were recorded on FTR.)

A P P E A R A N C E S

For the Plaintiff:

Christine Washburn, District Attorney's Office
Steve Abraham, District Attorney's Office

For the Defendant:

Holly Lucas, Colorado State Public Defender
Melissa Roth, Colorado State Public Defender

The Defendant appeared in custody.

[2] DENVER, COLORADO; THURSDAY, 1 APRIL 7, 2016

(The matter commenced at 11:34 a.m.)

THE COURT: Okay. Calling 14 CR 4593, People versus Robert Perez.

MS. WASHBURN: Christine Washburn and Steve Abraham for the People.

MS. LUCAS: Holly Lucas and Melissa Roth appearing with Mr. Perez who appears in custody.

THE COURT: Okay. And today's a subpoena return date. And is it my imagination or have these things multiplied?

MS. WASHBURN: They -- they had issued subpoenas for our last court date and they re-issued. So you probably have two copies of each.

MS. LUCAS: Of the -- Probably of the exact same thing. Yes, that's accurate.

THE COURT: Okay. So what do I need to do, if anything?

MS. WASHBURN: Your Honor, I believe a representative from Kaiser is or was present with records.

The People do have a -- a motion to quash. I'm not sure if the Court would like to accept their records for purpose of the record and -- and subsequent to our argument whether they should be disclosed so that she can be excused or how the Court wants to deal with that. She has been here all morning.

THE COURT: So we have records from Kaiser Permanente? Is that correct? And these are victim's records?

MS. LUCAS: Yes.

[3] THE COURT: Okay. What else do we have? Do we have like phone records that would --

MS. LUCAS: I don't believe anyone's come today from the phone company, Your Honor.

THE COURT: Okay. But you subpoenaed phone records.

MS. LUCAS: Correct.

THE COURT: And what else did you subpoena?

MS. LUCAS: That's it.

THE COURT: Okay. Let's talk about the records that are here first.

I don't know a whole lot, but it strikes me that there might be a privilege involved, so --

MS. WASHBURN: I agree with that, yeah.

MS. LUCAS: Your Honor, we don't disagree that there was a privilege involved. I think the issue -- And I'll tell you why we actually put this before the Court.

I think under most circumstances we would have been able to obtain them via a release from Mr. Perez since they were a married couple, and under 25-1-802, which is discussed -- is the section that talks about when hospitals have to turn over records and medical providers, et cetera.

That section indicates that they could be available to a number of different people -- obviously the patient themself (sic). But in this circumstance, it'd be available to the patient's personal representative which could be a spouse, which could be a number of different people.

We brought this before the Court because I think the Court has to [4] make some determinations about who actually at this moment holds that privilege.

There's a probate matter that's going on as well. In that probate matter, there is a personal representative who's been appointed, that would be Ms. Diane Liedle (phonetic spelling).

So I think the Court needs to decide who actually holds that privilege. It is our position that Mr. Perez still holds that position. And the reason is -- that that is our position, is because the probate court has not given Ms. Liedle powers over the medical records. She's been given powers over carrying out the funeral arrangements which were done, disposing of property that is involved with the estate, and that's an ongoing power that she has because the probate case has not been closed. There's been no final -- final determination made about how the estate is to be settled because of the criminal case here.

The probate court has not yet made a determination whether Mr. Perez lost all of his rights under probate law under the Colorado slayer statute. So because that determination hasn't been made, all of his rights remain intact.

It's my position because the probate court has not given Ms. Liedle specific powers that allow her to access these medical records or other records, like bank records, et cetera, that those rights still remain with Mr. Perez and Mr. Perez should be entitled to receive these records and frankly should have been able to do that through a release of information.

We elected not to do that because I think there's an issue here that is better resolved by the Court than -- than by myself. So that is why [5] we brought that to this Court.

In terms of our Spykstra showing, these records that we sought, we did narrowly terror (sic) (indistinguishable) --

THE COURT: Tailor.

MS. LUCAS: -- tailor -- Thank you. -- our request. We did not request all of her medical records. We requested records that had to do with pregnancies and miscarriages and then mental health records.

The reason we are requesting those particular records -- Mr. Perez indicated in his interviews that there were issues with Ms. Perez's mental health state and that she was -- in fact, due to depression surrounding miscarriages and other issues, was in fact seeking medical attention in form of psychotherapy from Kaiser Permanente.

I think the Court knows enough about this case to know that the defense's theory is that Ms. Perez committed suicide, and these records would tend to

support that conclusion if she was seeking mental health treatment and discussed her feelings and what was going on with her in sessions with the provider. That would tend to support that she was depressed, and because she was depressed, she may have taken her own life.

The medical records relating to pregnancies and gynecological exams, those tend to support why she was depressed.

I think there will be other witnesses presented who will talk about her wanting to be a mother and her inability to do that and how that took an emotional toll on her. This medical evidence would be corroborating in that sense.

So I think we can make our showing under Spykstra.

[6] The only other thing I want to add, Your Honor, is that even if the Court were to find that the power to release -- to give a waiver lies with Ms. Liedle, I think the Court still needs to engage in a balancing test here and balance the rights of the two parties here: the right to privacy on the part of Danielle (phonetic spelling) Perez, and the right to present a defense on the part of Mr. Robert Perez. It is our position that that balancing test should be in favor of Mr. Perez.

The privacy that we're talking about here again is fairly limited. We did not attempt to subpoena any other sorts of records.

I think the Court's also aware through motions hearings that there's going to be a number of very

sensitive and embarrassing issues that are going to come out -- the information about the parties' sexual behaviors. The -- the People have indicated that they are seeking to admit that evidence, and so in -- in light of that, the privacy interests here I -- I think is somewhat diminished since even if that's what she's talking about in these sessions through other means, their life as swingers is going to be coming in.

Mr. Perez needs this information to present an adequate defense and to be able to support his conclusion that this is a suicide.

THE COURT: Okay. Ms. Washburn.

MS. WASHBURN: Your Honor, it's our position that the Court should quash this subpoena.

With regard to the -- Well, first of all, the People would cite Twenty-four point -- 4.1-303, 14.5(a), which --

THE COURT: Maybe you should slow down a little bit.

[7] MS. WASHBURN: Sorry.

THE COURT: Twenty-five.

MS. WASHBURN: 24-4.1-303, 14.5 -- It's actually (b) -- subsection (b) under the victim's rights amendment.

And that particular section talks about hearings involving a subpoena for records of a victim. The Court shall ascertain whether the victim received a notice from the district attorney's office of the subpoena. After considering all evidence relevant to the

subpoena, the Court should deny a request for victim's records that are privileged, unless the Court makes a finding supported by facts -- specific facts -- that the victim has either expressly or impliedly waived the victim's statutory privilege.

I can represent to the Court if you -- And if you want to hear from Diane Liedle particularly, she is the personal representative that was appointed in probate court for Danielle Perez. That she does object to these records being released and does not waive any privilege that Ms. Perez has with respect to that issue.

With respect to the Spykstra analysis, Your Honor, I guess what I did not hear from the defense is a reasonable likelihood that the -- that the subpoenaed materials exist by setting forth a specific factual basis.

While I would agree that Mr. -- Well, what I can tell the Court is my recollection of what Mr. Perez said was that his wife was depressed. But what I don't recall him ever saying is that he was aware of her undergoing any treatment for her depression.

I remember him talking about the fact that she was unable to -- or they were unable to have children. I don't remember him talking about [8] having specific knowledge of where going to a doctor or whether or not that was just something they had continued to try and were unsuccessful at doing.

All I remember Mr. Perez saying -- and I know Ms. Lucas can correct me if I'm wrong -- is that she was depressed, that he had a -- that he was bipolar

and on medication, and that Ms. Perez took some of his medication and not that there was any indication that she was seeing a therapist, that she was on her own medication or anything of that nature.

So I don't know that they've established any reasonable likelihood that these documents exist. I also don't believe that they have established that they are evidentiary and relevant.

I understand the argument that perhaps the pregnancies and the miscarriages may have been a reason that Ms. Perez was depressed; however, I think the evidence that the Court has heard both at the preliminary hearing and during various motions hearings is that what was happening around this period of time are the problems that she and the defendant were having with their relationship versus whether she was depressed because of pregnancy or mis- -- or not being able to have children or anything of that nature, and so I -- I don't believe they're particularly relevant and I think they place Ms. Perez's mental health issues in front of the jury for reasons that aren't particularly probative in this particular case.

So it does appear to me that this is somewhat of a fishing expedition at least as it relates to the mental health records.

Third, I would argue that Spykstra requires that the Court find either an express or an implied waiver and there have been several cases where the courts have considered this issue, and I don't believe it's [9] sufficient that this Court find some sort of express or implied waiver, because the defendant,

in his own self-serving statement to the police, brought up the issue of Ms. Perez's mental health.

There are several cases which limit even cases where there is a mandatory recording requirement on behalf of say, a psychotherapist. Under Dill versus People, found at 927 P.2d 1315, a Colorado Supreme Court case from 1996, they found that to the extent there was a -- a requirement for that therapist to report sex abuse -- that was a sex-assault-on-a-child case -- that doesn't -- that didn't necessarily abrogate that victim's privilege with respect to later therapy in which the victim discussed the sexual abuse that was the -- the subject of the later case.

Also Clark versus District Court was a -- is found at 668 P.2d 3, a Colorado Supreme Court case from 1983. I believe that case again was one where just because the plaintiff filed something against the defendant and the defendant filed an answer, what was not interpreted as the defendant somehow putting a -- putting their own mental condition at issue in this case.

So I don't believe there's any record or any facts or any case that would support any finding of an express or an implied waiver in this case.

I also understand that there is language in Spykstra about the Court conducting a balancing test; however, I believe the language in Spykstra talks about doing that balancing test depending on the nature of the privilege. So when we are talking about things like school records or social service records or things of that nature, it may be appropriate for the Court [10] to do a balancing test.

But as far as I can tell, the supreme court's decisions in Dill versus People, in People (sic) versus District Court, when we're talking about records that are privileged, and specifically mental health records, those -- the Court must find some sort of express or implied waiver before you can even look at the records.

And so it's our position that the Court should quash the subpoena as it relates to the victim's medical and mental health records and find that there is no valid waiver.

Obviously I -- I haven't had an opportunity to look at 25-1-802, but a court has appointed Ms. Liedle as the personal representative for Ms. Perez.

I don't know, quite frankly, if probate courts specifically make determinations about whether that extends to medical privileges. Maybe they don't, because that's not necessarily something that would come up since the person is deceased.

But I think it makes logical sense and -- as just a matter of fairness. It doesn't seem fair that the defendant who is accused of murdering his wife, should have the ability to waive her privileges with respect to very private confidential records for his own benefit, and if a court has designated somebody different, somebody neutral, to hold that right, that is the person who this Court should accept either a waiver from or a -- or and accept a refusal to give a waiver.

THE COURT: Okay.

MS. LUCAS: And, Your Honor, if I can respond very briefly.

[11] THE COURT: Um-hum. Sure.

MS. LUCAS: First, I want to give you the citation that indicates what the powers of personal representative are in probate. That's 15-12-702. And there's -- It does not delineate that medical records are part of their powers unless there's a written order by the Court. And I don't believe Ms. Liedle, as Ms. Washburn has deemed her, is a neutral representative or a neutral party here.

And to say that it's not fair because Mr. Perez is accused, that he shouldn't be given these records I think violates his presumption of innocence is essentially what she's saying to you is because he -- he did this crime, he shouldn't have the right.

I think in fact the opposite is true. It's not fair to -- because he is accused of this crime -- to prohibit him from accessing what he'd otherwise be able to access.

And I will correct Ms. Washburn. Mr. Perez in his interview with Detective Dennison (phonetic spelling) which was on the twenty -- no, on the 1st of September, did tell Detective Dennison at that time that she had been seeking therapy. Those are his exact words. And I can tell you that Mr. Perez would represent that -- the Court -- to the Court today if he was allowed to speak to the Court. And I'm representing that on his behalf that she was seeking therapy and had been for some time.

THE COURT: Okay. All right. Here's -- here's my thinking at this juncture.

It strikes me first of all that -- that -- that the real issue is whether -- The -- the -- the real issue is who holds the privilege and has [12] there been a waiver of the privilege.

I can look at this again, but my understanding -- And we're talking about medical records and mental health records which in my understanding are absolutely privileged absent some either express or implied waiver, and so I'm -- I'm -- and I can be educated to the contrary if it's not accurate. But it's my belief that -- that -- that the Court doesn't do the balancing, doesn't do the -- the whole back-and-forth analysis. The Court doesn't even look at the records unless -- unless there's an express or implied waiver. That's my basic understanding. So for me the -- the real issue is who holds the privilege, and has the privilege been waived.

So my suggest -- And I need help with that issue obviously. So a couple of things.

First of all, there's someone here with records right now; is that correct?

MS. LUCAS: Yes.

THE COURT: I -- I would suggest we do the following.

Rather than either hold that person hostage forever or have that person come back, that she -- that she submit the records to the Court, that we just

hold them. We don't look at them, we don't do anything other than hang onto them. And then I can -- If I make a finding that there's been a waiver, then they can be disclosed. If there's not a waiver, they can be returned.

I would suggest that -- that -- that the documents be surrendered at this point in time to the Court just so that we have them here and she doesn't have to go back and forth and back and forth. That would be my first [13] suggestion.

Number two is -- is -- Ms. Liedle is present; is that correct?

MS. WASHBURN: That's correct.

THE COURT: My suggestion would be just to -- to find out or -- or have her -- have her state on the record her position -- thank you -- as the personal representative whether in that capacity there is either -- if there's a waiver or not so we have that information at least on the record.

And then a third thing I would -- I would like would be some help in terms of what the law is in -- in the area of determining in these circumstances, when someone's accused of a -- when one spouse is accused of killing another spouse, what that does if anything to any privilege that exists with respect to mental or medical records. I would be surprised if this is the only time in -- in the history of the country this has come up before, so I would -- I would like some help with respect to that or if there's other authorities the Court should look at, I'd like some help with respect to that issue.

Strikes me once I resolve that issue, that will say whether or not they're -- they may be disclosed or not.

Those are my thoughts. Anyone care to respond to that?

Ms. Lucas.

MS. LUCAS: Before we do that, Your Honor, Kaiser split up the records. What I've given you is medical and now I'll approach with the mental health.

THE COURT: Okay. Thank you.

So in terms of my -- my proposed procedure, Ms. Lucas, your [14] thoughts.

MS. LUCAS: Your Honor, I'm happy to do some further research in -- into the question that the Court has asked.

THE COURT: Ms. -- Ms. Washburn.

MS. WASHBURN: I agree with the -- with the Court's proposal.

THE COURT: Can we have the -- the -- the representative approach the podium and -- and make a statement with respect to her position and then I can decide whether it's a waiver or not and whether -- if it's -- whether she's entitled to assert it or not at some future point.

THE COURT: Good morning, ma'am.

MS. LIEDLE: Good morning.

THE COURT: Your name, please.

MS. LIEDLE: Diane Liedle.

THE COURT: Okay. And so you've been appointed as the personal representative in the probate case; is that correct?

MS. LIEDLE: Yes, sir.

THE COURT: All right. And have you been kind of following on what -- what we're talking about back and forth here at a distance?

MS. LIEDLE: Kind of, yes.

THE COURT: All right. I don't know at this point in time whether you exercise -- you hold the privilege with respect to this or whether Mr. Perez does. So that's the issue I have to decide.

But putting that aside for now, in your capacity as a personal representative, what is your position with respect to whether you'd waive the privilege on behalf of the victim in this case and disclose these records.

[15] MS. LIEDLE: I do have papers stating that I am the representative. I did get all that from the courts and I've taken care of everything down to -- everything.

THE COURT: Right. Right. And --

MS. LIEDLE: As -- I'm sorry.

THE COURT: So -- so I don't know if you're following my question.

MS. LIEDLE: Okay.

THE COURT: I just want to know whether or not you would -- are waving the privilege -- in other words, whether you would consent to having these

documents disclosed to Mr. Perez or whether you would not consent to that --

MS. LIEDLE: I --

THE COURT: -- as on behalf of --

MS. LIEDLE: I do not waive these -- No, I -- I don't want him to have rights to any of its --

THE COURT: Okay. So I think that's a fairly clear statement on the record that there would -- at least on the behalf of the personal representative, there's no waiver of the privilege.

She -- she has documentation as to the -- the appointment; is that correct?

MS. WASHBURN: Yes.

MS. LIEDLE: Yes.

THE COURT: That --

MS. LIEDLE: Yes, sir.

[16] THE COURT: -- certainly might be helpful for the Court to -- to see what the probate court is --

MS. LUCAS: And I can provide that, Your Honor. I have a full copy of the probate file.

THE COURT: That would certainly be helpful to understand that -- whatever parameters that the probate court has imposed. We're --

MS. LUCAS: This --

THE COURT: We don't do probate here in district court.

MS. LIEDLE: Right.

THE COURT: We have a special court that does that, so I don't know very much about it so I'll need to -- to -- to learn this.

So --

MS. LIEDLE: Does --

THE COURT: -- like I say, I'll -- I'll hold these records. They won't be opened; they won't be looked at -- they'll just be held, and then I'll issue a written order.

I would like some help with respect to these -- to the issues of like I say, who holds the privilege in this case and what effect, if any, does the accusation that Mr. Perez committed a homicide effect that -- who holds the privilege, okay?

We've got a trial date coming up pretty darn quick, May 2nd, and so I'll need this -- this -- this supplementation pretty darn quick as well.

How quickly can I expect that, Ms. Lucas?

MS. LUCAS: Probably by next week, Your Honor.

THE COURT: Okay. Ms. Washburn.

[17] MS. WASHBURN: Agreed.

THE COURT: So can I have it by next Friday?

MS. LUCAS: Sure.

THE COURT: All right. So let's -- let's have this by next Friday at noon here.

Whatever authorities you can give me with respect to this issue -- I'll, as promptly as possible, issue a written order and either find there's a waiver or not, okay?

MS. WASHBURN: Okay.

MS. LUCAS: And, Your Honor, do you want a -- a copy of the entire probate file, and I --

THE COURT: You know what I -- I need to know I think is just if there's any -- any documentation -- I presume there is -- with respect to what --

MS. LUCAS: There's an order of appointment of personal representative that is -- is contained in the -- the orders. There's only one order that has anything to do directly with the appointment of the personal representative. The other things are --

THE COURT: Okay.

MS. LUCAS: -- finance companies back-and-forth. Things like that.

THE COURT: I don't need any of that. I just -- Whatever -- If there's any documentation or any orders with respect to the -- the -- either the limits or the -- or the -- the powers or whatever else that the personal -- personal representative has in the probate matter. I think that would be [18] helpful to know, okay?

MS. LUCAS: I will get that. I will include that with the supplemental cases then.

THE COURT: Fair enough. Okay.

MS. LUCAS: Thank you.

THE COURT: That's issue number one.

Issue number two is phone records.

8 MS. WASHBURN: And I did -- I didn't have any objection or motion to quash those.

I know that we did provide those records, but I think Ms. Lucas was trying to make sure that she got them all, but with --

THE COURT: And she served a subpoena on somebody and somebody's --

MS. WASHBURN: Right.

THE COURT: -- not shown up.

MS. LUCAS: I did, Your Honor.

I need some time to think about what to do. I've been in this position with phone companies before, and sometimes even a contempt of court doesn't seem to have any effect on them, unfortunately.

THE COURT: What I'll do, Ms. Lucas, is this. I'll find that there's -- there's been a subpoena issued.

(Discussion between Judge Egelhoff and division clerk.)

THE COURT: Issued -- uh -- oh, on T-Mobile U.S.A. And there's a return. So it was served on --

Was this their -- Was there an agent?

[19] MS. LUCAS: Yes, Your Honor. And the reason there -- you probably see three subpoenas for T-Mobile -- the one we issued for two -- a week ago and then there were two for today. T-Mobile acknowledged receipt of that by contacting our investigator

and wouldn't accept our initial subpoena because it was under my name but signed by Ms. Roth, so they required us to redo that so that the signature and the name matched. We did that. They're in receipt it and have acknowledged.

THE COURT: Okay. So I can make a finding at this point in time, Ms. Lucas, that the subpoena's been served, that it was returnable this morning. There's been no response to the subpoena. So in the event that you choose to issue a show cause, those findings have been made and I can execute the order, okay?

MS. LUCAS: Thank you.

THE COURT: You can decide how you want to proceed, okay?

MS. LUCAS: Thank you.

THE COURT: Anything else?

MS. WASHBURN: I don't believe so.

MS. LUCAS: I think that's -- that's it.

THE COURT: Thank you.

(Whereupon the proceedings concluded at 12:00 noon.)

* * * * *

[20] C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

I further certify that the aforementioned transcript is a complete and accurate transcription of the digitally recorded proceedings recorded in this case on the above date, based upon the audio and my ability to understand it.

Dated September 15, 2016.

_____

K.S. Trostel

1888 WCR 19

Fort Lupton, CO 80621

303.659.3681

APPENDIX E

RELEVANT STATUTORY PROVISION

Colorado Revised Statute § 13-90-107. Who may not testify without consent - definitions.

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(a)(I) Except as otherwise provided in section 14-13-310(4), C.R.S., a husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent; nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage. However, this exception shall not attach if the otherwise privileged information is communicated after the marriage.

(II) The privilege described in this paragraph (a) does not apply to class 1, 2, or 3 felonies as described in section 18-1.3-401(1) (a)(IV) and (1)(a)(V), C.R.S., or to level 1 or 2 drug felonies as described in section 18-1.3-401.5(2)(a), C.R.S. In this instance, during the marriage or afterward, a husband shall not be examined for or against his wife as to any

communications intended to be made in confidence and made by one to the other during the marriage without his consent, and a wife shall not be examined for or against her husband as to any communications intended to be made in confidence and made by one to the other without her consent.

(III) Communications between a husband and wife are not privileged pursuant to this paragraph (a) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a marriage for the purposes of this paragraph (a) shall be on the party asserting the claim.

(V) Notice of the assertion of the marital privilege shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.

(a.5)(I) Except as otherwise provided in section 14-13-310(5), C.R.S., a partner in a civil union shall not be examined for or against the other partner in the civil union without the other partner's consent, nor during the civil union or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the civil union; except that this exception does not apply to a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both partners when the alleged offense occurred prior to the date of the parties' certification of the civil union. However, this exception shall not attach if the

otherwise privileged information is communicated after the certification of the civil union.

(II) The privilege described in this paragraph (a.5) does not apply to class 1, 2, or 3 felonies as described in section 18-1.3-401(1)(a)(IV) and (1)(a)(V), C.R.S., or to level 1 or 2 drug felonies as described in section 18-1.3-401.5(2)(a), C.R.S. In this instance, during the civil union or afterward, a partner in a civil union shall not be examined for or against the other partner in the civil union as to any communications intended to be made in confidence and made by one to the other during the civil union without the other partner's consent.

(III) Communications between partners in a civil union are not privileged pursuant to this paragraph (a.5) if such communications are made for the purpose of aiding the commission of a future crime or of a present continuing crime.

(IV) The burden of proving the existence of a civil union for the purposes of this paragraph (a.5) shall be on the party asserting the claim.

(V) Notice of the assertion of the privilege described in this paragraph (a.5) shall be given as soon as practicable but not less than ten days prior to assertion at any hearing.

(VI) For the purposes of this paragraph (a.5), "partner in a civil union" means a person who has entered into a civil union established in accordance with the requirements of article 15 of title 14, C.R.S.

(b) An attorney shall not be examined without the consent of his client as to any communication

made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

(c) A clergy member, minister, priest, or rabbi shall not be examined without both his or her consent and also the consent of the person making the confidential communication as to any confidential communication made to him or her in his or her professional capacity in the course of discipline expected by the religious body to which he or she belongs.

(d) A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient, but this paragraph (d) shall not apply to:

(I) A physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;

(II) A physician, surgeon, or registered professional nurse who was in consultation with a phy-

sician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises;

(III) A review of a physician's or registered professional nurse's services by any of the following:

(A) The governing board of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S., where said physician or registered professional nurse practices or the medical staff of such hospital if the medical staff operates pursuant to written bylaws approved by the governing board of such hospital;

(B) An organization authorized by federal or state law or contract to review physicians' or registered professional nurses' services or an organization which reviews the cost or quality of physicians' or registered professional nurses' services under a contract with the sponsor of a nongovernment group health care program;

(C) The Colorado medical board, the state board of nursing, or a person or group authorized by such board to make an investigation in its behalf;

(D) A peer review committee of a society or association of physicians or registered professional nurses whose membership includes not less than one-third of the medical doctors or doctors of osteopathy or registered professional nurses licensed to practice in this state and only if the physician or registered professional nurse whose services are the subject of review is a member of such society or as-

sociation and said physician or registered professional nurse has signed a release authorizing such review;

(E) A committee, board, agency, government official, or court to which appeal may be taken from any of the organizations or groups listed in this subparagraph (III);

(IV) A physician or any health care provider who was in consultation with the physician who may have acquired any information or records relating to the services performed by the physician specified in subparagraph (III) of this paragraph (d);

(V) A registered professional nurse who is subject to any claim or the nurse's employer subject to any claim therein based on a nurse's actions, which claims are required to be defended and indemnified by any insurance company or trust obligated by contract;

(VI) A physician, surgeon, or registered professional nurse who is being examined as a witness as a result of his consultation for medical care or genetic counseling or screening pursuant to section 13-64-502 in connection with a civil action to which section 13-64-502 applies.

(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure.

(f)(I) A certified public accountant shall not be examined without the consent of his or her client as to any communication made by the client to him or

her in person or through the media of books of account and financial records or his or her advice, reports, or working papers given or made thereon in the course of professional employment; nor shall a secretary, stenographer, clerk, or assistant of a certified public accountant be examined without the consent of the client concerned concerning any fact, the knowledge of which he or she has acquired in such capacity.

(II) No certified public accountant in the employ of the state auditor's office shall be examined as to any communication made in the course of professional service to the legislative audit committee either in person or through the media of books of account and financial records or advice, reports, or working papers given or made thereon; nor shall a secretary, clerk, or assistant of a certified public accountant who is in the employ of the state auditor's office be examined concerning any fact, the knowledge of which such secretary, clerk, or assistant acquired in such capacity, unless such information has been made open to public inspection by a majority vote of the members of the legislative audit committee.

(III)(A) **Subpoena powers for public entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports, working papers, or advice to a public entity that relate to audit or review accounting activities

of the certified public accountant or certified public accounting firm being investigated.

(B) For the purposes of this subparagraph (III), a "public entity" shall include a governmental agency or entity; quasigovernmental entity; nonprofit entity; or public company that is considered an "issuer", as defined in section 2 of the federal "Sarbanes-Oxley Act of 2002", 15 U.S.C. sec. 7201.

(IV)(A) **Subpoena powers for private entity audit and reviews.** Subparagraph (I) of this paragraph (f) shall not apply to the Colorado state board of accountancy, nor to a person or group authorized by the board to make an investigation on the board's behalf, concerning an accountant's reports or working papers of a private entity that is not publicly traded and relate to audit or review attest activities of the certified public accountant or certified public accounting firm being investigated. This subparagraph (IV) shall not be construed to authorize the Colorado state board of accountancy or its agent to subpoena or examine income tax returns.

(B) At the request of either the client of the certified public accountant or certified public accounting firm or the certified public accountant or certified public accounting firm subject to the subpoena pursuant to this subsection (1)(f)(IV), a second certified public accounting firm or certified public accountant with no interest in the matter may review the report or working papers for compliance with the provisions of article 100 of title 12. The sec-

ond certified public accounting firm or certified public accountant conducting the review must be approved by the board prior to beginning its review. The approval of the second certified public accounting firm or certified public accountant shall be in good faith. The written report issued by a second certified public accounting firm or certified public accountant shall be in lieu of a review by the board. Such report shall be limited to matters directly related to the work performed by the certified public accountant or certified public accounting firm being investigated and should exclude specific references to client financial information. The party requesting that a second certified public accounting firm or certified public accountant review the reports and working papers shall pay any additional expenses related to retaining the second certified public accounting firm or certified public accountant by the party who made the request. The written report of the second certified public accounting firm or certified public accountant shall be submitted to the board. The board may use the findings of the second certified public accounting firm or certified public accountant as grounds for discipline pursuant to article 100 of title 12.

(V) Disclosure of information under subsection (1)(f)(III) or (1)(f)(IV) of this section shall not waive or otherwise limit the confidentiality and privilege of such information nor relieve any certified public accountant, any certified public accounting firm, the Colorado state board of accountancy, or a person or group authorized by such board of the obligation of confidentiality. Disclosure that is not

in good faith of such information shall subject the board, a member thereof, or its agent to civil liability pursuant to section 12-100-104(4).

(VI) Any certified public accountant or certified public accounting firm that receives a subpoena for reports or accountant's working papers related to the audit or review attest activities of the accountant or accounting firm pursuant to subparagraph (III) or (IV) of this paragraph (f) shall notify his or her client of the subpoena within three business days after the date of service of the subpoena.

(VII) Subparagraph (III) or (IV) of this paragraph (f) shall not operate as a waiver, on behalf of any third party or the certified public accountant or certified public accounting firm, of due process remedies available under the "State Administrative Procedure Act", article 4 of title 24, C.R.S., the open records laws, article 72 of title 24, C.R.S., or any other provision of law.

(VIII) Prior to the disclosure of information pursuant to subparagraph (III) or (IV) of this paragraph (f), the certified public accountant, certified public accounting firm, or client thereof shall have the opportunity to designate reports or working papers related to the attest function under subpoena as privileged and confidential pursuant to this paragraph (f) or the open records laws, article 72 of title 24, C.R.S., in order to assure that the report or working papers shall not be disseminated or otherwise republished and shall only be reviewed pursuant to limited authority granted to the board under subparagraph (III) or (IV) of this paragraph (f).

(IX) No later than thirty days after the board of accountancy completes the investigation for which records or working papers are subpoenaed pursuant to subparagraph (III) or (IV) of this paragraph (f), the board shall return all original records, working papers, or copies thereof to the certified public accountant or certified public accounting firm.

(X) Nothing in subparagraphs (III) and (IV) of this paragraph (f) shall cause the accountant-client privilege to be waived as to customer financial and account information of depository institutions or to the regulatory examinations and other regulatory information relating to depository institutions.

(XI) For the purposes of subparagraphs (III) to (X) of this paragraph (f), "entity" shall have the same meaning as in section 7-90-102(20), C.R.S.

(g) A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to section 12-245-304(3), a marriage and family therapist candidate registered pursuant to section 12-245-504(4), a licensed professional counselor candidate registered pursuant to section 12-245-604(4), or a person described in section 12-245-217 shall not be examined without the consent of the licensee's, certificate holder's, registrant's, candidate's, or person's client as to any communication made by the client to the licensee, certificate holder, registrant, candidate, or person or

the licensee's, certificate holders, registrant's, candidate's, or person's advice given in the course of professional employment; nor shall any secretary, stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, a certified addiction counselor, a psychologist candidate registered pursuant to section 12-245-304(3), a marriage and family therapist candidate registered pursuant to section 12-245-504(4), a licensed professional counselor candidate registered pursuant to section 12-245-604(4), or a person described in section 12-245-217 be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.

(h) A qualified interpreter, pursuant to section 13-90-202, who is called upon to testify concerning the communications he interpreted between a hearing-impaired person and another person, one of whom holds a privilege pursuant to this subsection (1), shall not be examined without the written consent of the person who holds the privilege.

(i) A confidential intermediary, as defined in section 19-1-103(26), C.R.S., shall not be examined as

to communications made to him or her in official confidence when the public interests, in the judgment of the court, would suffer by the disclosure of such communications.

(j)(I)(A) If any person or entity performs a voluntary self-evaluation, the person, any officer or employee of the entity or person involved with the voluntary self-evaluation, if a specific responsibility of such employee was the performance of or participation in the voluntary self-evaluation or the preparation of the environmental audit report, or any consultant who is hired for the purpose of performing the voluntary self-evaluation for the person or entity may not be examined as to the voluntary self-evaluation or environmental audit report without the consent of the person or entity or unless ordered to do so by any court of record, or, pursuant to section 24-4-105, C.R.S., by an administrative law judge. For the purposes of this paragraph (j), "voluntary self-evaluation" and "environmental audit report" have the meanings provided for the terms in section 13-25-126.5(2).

(B) This paragraph (j) does not apply if the voluntary self-evaluation is subject to an exception allowing admission into evidence or discovery pursuant to the provisions of section 13-25-126.5(3) or (4).

(II) This paragraph (j) applies to voluntary self-evaluations that are performed on or after June 1, 1994.

(k)(I) A victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence, as defined in section 18-6-800.3(1), C.R.S., or a victim of sexual assault, as described in sections 18-3-401 to 18-3-405.5, 18-6-301, and 18-6-302, C.R.S., in person or through the media of written records or reports without the consent of the victim.

(II) For purposes of this paragraph (k), a "victim's advocate" means a person at a battered women's shelter or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault and does not include an advocate employed by any law enforcement agency:

(A) Whose primary function is to render advice, counsel, or assist victims of domestic or family violence or sexual assault; and

(B) Who has undergone not less than fifteen hours of training as a victim's advocate or, with respect to an advocate who assists victims of sexual assault, not less than thirty hours of training as a sexual assault victim's advocate; and

(C) Who supervises employees of the program, administers the program, or works under the direction of a supervisor of the program.

(l)(I) A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a

physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1). The exception may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded. This exception does not relieve any physician, mental health professional, or clergy member, minister, priest, or rabbi from any statutory reporting requirements.

(II) This exception does not apply to:

(A) Any civil action or proceeding by one parent against the other or by a parent or minor child against the other;

(B) Any proceeding to commit either the minor child or parent, pursuant to title 27, C.R.S., to whom the communication was made;

(C) Any guardianship or conservatorship action to place the person or property or both under the control of another because of an alleged mental or physical condition of the minor child or the minor child's parent;

(D) Any criminal action or proceeding in which a minor's parent is charged with a crime committed against the communicating minor child, the parent's spouse, the parent's partner in a civil union, or a minor child of either the parent or the parent's spouse or the parent's partner in a civil union;

(E) Any action or proceeding for termination of the parent-child legal relationship;

(F) Any action or proceeding for voluntary relinquishment of the parent-child legal relationship; or

(G) Any action or proceeding on a petition alleging child abuse, dependency or neglect, abandonment, or non-support by a parent.

(III) For purposes of this paragraph (l):

(A) "Minor child" means any person under the age of eighteen years.

(B) "Parent" includes the legal guardian or legal custodian of a minor child as well as adoptive parents.

(C) "Partner in a civil union" means a person who has entered into a civil union in accordance with the requirements of article 15 of title 14, C.R.S.

(m)(I) A law enforcement or firefighter peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1)(m)(III) of this section; nor shall a recipient of

peer support services be examined as to any such communication without the recipient's consent.

(I.5) An emergency medical service provider or rescue unit peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1)(m)(III) of this section; nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent.

(II) For purposes of this paragraph (m):

(A) "Communication" means an oral statement, written statement, note, record, report, or document made during, or arising out of, a meeting with a peer support team member.

(A.5) "Emergency medical service provider or rescue unit peer support team member" means an emergency medical service provider, as defined in section 25-3.5-103(8), C.R.S., a regular or volunteer member of a rescue unit, as defined in section 25-3.5-103(11), C.R.S., or other person who has been trained in peer support skills and who is officially designated by the supervisor of an emergency medical service agency as defined in section 25-3.5-103(11.5), C.R.S., or a chief of a rescue unit as a member of an emergency medical service provider's peer support team or rescue unit's peer support team.

(B) "Law enforcement or firefighter peer support team member" means a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills and who is officially designated by a police chief, the chief of the Colorado state patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

(III) The provisions of this subsection (1)(m) apply only to communications made during interactions conducted by a peer support team member:

(A) Acting in the person's official capacity as a law enforcement or firefighter peer support team member or an emergency medical service provider or rescue unit peer support team member; and

(B) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency, fire department, emergency medical service agency, or rescue unit.

(IV) This subsection (1)(m) does not apply in cases in which:

(A) A law enforcement or firefighter peer support team member or emergency medical service provider or rescue unit peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;

(B) Information received by a peer support team member is indicative of actual or suspected

child abuse, as described in section 18-6-401; actual or suspected child neglect, as described in section 19-3-102; or actual or suspected crimes against at-risk persons, as described in section 18-6.5-103;

(C) Due to alcohol or other substance intoxication or abuse, as described in sections 27-81-111 and 27-82-107, C.R.S., the person receiving peer support is a clear and immediate danger to the person's self or others;

(D) There is reasonable cause to believe that the person receiving peer support has a mental health disorder and, due to the mental health disorder, is an imminent threat to himself or herself or others or is gravely disabled as defined in section 27-65-102; or

(E) There is information indicative of any criminal conduct.

(2) The medical records produced for use in the review provided for in subparagraphs (III), (IV), and (V) of paragraph (d) of subsection (1) of this section shall not become public records by virtue of such use. The identity of any patient whose records are so reviewed shall not be disclosed to any person not directly involved in such review process, and procedures shall be adopted by the Colorado medical board or state board of nursing to ensure that the identity of the patient shall be concealed during the review process itself.

(3) The provisions of subsection (1)(d) of this section shall not apply to physicians required to make re-

ports in accordance with section 12-240-139. In addition, the provisions of subsections (1)(d) and (1)(g) of this section shall not apply to physicians or psychologists eligible to testify concerning a criminal defendant's mental condition pursuant to section 16-8-103.6. Physicians and psychologists testifying concerning a criminal defendant's mental condition pursuant to section 16-8-103.6 do not fall under the attorney-client privilege in subsection (1)(b) of this section.