District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	DATE FILED: July 13, 2020
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **LETECIA STAUCH,** Defendant	σ COURT USE ONLY σ
MEGAN A. RING, Colorado State Public Defender Kathryn Strobel (No. 42850) Deputy State Public Defender 30 E Pikes Peak Ave Suite 200 Colorado Springs, Colorado 80903 C. Colette LeBeau (No. 43164) Deputy State Public Defender 132 W B St #200 Pueblo, CO 81003 Phone (720) 475-1235 Fax (719) 7475-1476 E-mail: Kathryn.strobel@coloradodefenders.us Colette.LeBeau@coloradodefenders.us	Case No. 20CR1358 Division 15S Ctrm: S403

[P-17 DEFENSE REPONSE]

DEFENSE MOTION TO QUASH THE PEOPLE'S SUBPOENA FOR PRODUCTION OF TREATMENT RECORDS FROM FORT CARSON

The Defense files this motion to quash the people's subpoena to Fort Carson that requests all records relating to Letecia Stauch because it is overbroad, oppressive, and unreasonable and violates State and Federal law and the warrant requirements.

I. <u>The prosecution issued a subpoena to an administrator at Fort Carson to produce any and all records relating to Letecia Stauch.</u>

1. On June 29, 2020, the people filed a subpoena on Colorado Courts e-filing system (ICCES) directing "Fort Carson PPMD Records Admin. Lead, Stephen Coutant, DES Fort Carson…" to produce "any and all records relating to Letecia Stauch (DOB 08/04/1983), to include but not be limited to Notes, Treatment Records, Testing Records, Raw Data, Progress Notes, Daily Logs of all treatment providers and staff."

II. The prosecution's request to obtain private, confidential, and privileged treatment records of Ms. Stauch through a subpoena is a violation of State and Federal law and the warrant requirements and is overbroad, unreasonable, and oppressive. This Court should quash the subpoena.

2. The prosecution's request for any and all records relating to Letecia Stauch including treatment records, notes, testing records, raw data, progress notes, and daily logs of all treatment providers and staff from Fort Carson is an overbroad, unreasonable, and oppressive subpoena. In the prosecution's third-party subpoena, they have not demonstrated their burden for the requested material set forth in People v. Spykstra, 234 P.3d 662, 669 (2010). In addition, the request for Ms. Stauch's private, confidential, and privileged treatment records through a subpoena violates State and Federal law. The subpoena for this protected information is in effect a search warrant and violates Ms. Stauch's constitutional right to be free from unreasonable searches and seizures by the government.

a. The prosecution's request for Ms. Stauch's treatment records from Fort Carson without her permission violates State and Federal law.

3. The court may quash or modify the subpoena if compliance would be unreasonable or oppressive. Colo. Crim. Pro. Rule 17(c), (2020).

4. The Defense has filed responses to the prosecution's motion P-08 and P-09 outlining the prosecution's misinterpretation of the competency statute C.R.S. §16-8.5-104(1). At this time, there has been no finding about whether Ms. Stauch is incompetent to proceed or competent to proceed. The Defense raising competency does not open the door to the prosecution obtaining the entirety of Ms. Stauch's medical records, mental health records, social history, and educational records.

5. Ms. Stauch's private, confidential, and privileged medical information, mental health information, and social history is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Code of Federal Regulations, and by Colorado statute. *See* 45 C.F.R. §164.502(a)("A covered entity or business associate may not use or disclose protected health information…"); 45 C.F.R. §164.508(a)("… a covered entity may not use or disclose protected health information without an authorization that is valid under this section…"; C.R.S. §13-90-107(1)(d),(g)(Who may not testify without consent); C.R.S. §18-4-412 (theft of medical records or medical information).

6. Colorado law makes it a crime for any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information. *See* §18-4-412, C.R.S. (2020).

7. In Colorado, a medical record is defined as "the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health care services…that are performed at the direction of a physician or other licensed health care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency medical service providers, mental health professionals, prehospital providers, or heath care personnel." § 18–4–411(2)(a), C.R.S. (2020).

8. In Colorado, medical information means "any information contained in the medical records or any information pertaining to the medical, mental health, and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician-patient privilege." § 18–4–411(2)(b), C.R.S. (2020).

9. Ms. Stauch's written consent is required to obtain her private, confidential, and privileged medical, mental health, and social history documents. C.R.S. §16-8.5-104(4). "Absent a waiver by the patient, the physician-patient privilege prohibits pretrial discovery of information within the scope of the privilege." People v. Palomo, 31 P.3d 879, 885 (2001) *citing* People v. Overton, 759 P.2d 772, 774 (Colo. App. 1988). In Palomo, 31 P.3d 879, investigators from the district attorney's office obtained the personnel files for the defendant and the victim from their employer, Excel, without permission from the defendant or the victim's representative. Id. at 881. The victim's personnel file contained medical tests and examinations performed upon her that the court determined could be medical information. Id. at 884. The Colorado Supreme Court noted that if criminal charges arose for the theft of medical records against the employer, the trial court may properly appoint a special prosecutor to prosecute the case. Id. at 885.

10. In the instant case, the prosecution's subpoena to Fort Carson to obtain Ms. Stauch's treatment records, notes, testing records, raw data, progress notes, and daily logs of all treatment providers and staff without authorization is an attempt to obtain protected medical records and medical information. This requests violates Federal and State law because the prosecution has no authority to obtain these protected documents. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA); 45 C.F.R. §164.502(a); 45 C.F.R. §164.508(a); C.R.S. §13-90-107(1)(d),(g); C.R.S. §18-4-412. This is an attempt to use the competency statute to access Ms. Stauch's private, confidential, and privileged records to prosecute her for the pending criminal charges.

b. The prosecution is using this subpoena as an investigatory tool and they have not met their burden set forth in Spykstra to require pre-trial production of Ms. Stauch's protected health information from Fort Carson.

11. When a criminal pretrial third-party subpoena is challenged, the prosecution must demonstrate:

> (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
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> (2) That the materials are evidentiary and relevant;
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> (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
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> (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
>
> (5) That the application is made in good faith and is not intended as a general fishing expedition.
>
> People v. Spykstra, 234 P.3d 662, 669 (2010).

12. Each of these requirements ensures that a Crim. P. 17(c) subpoena is not an investigatory tool. Id. at 669. "A Crim. P. 17(c) subpoena is limited to "evidence," and when a subpoena is returnable pretrial, the trial court, if called upon, must also consider the circumstances of the subpoena to determine whether it is unreasonable or oppressive." Id. In Spykstra, the defense issued subpoenas duces tecum (SDT) to the parents of an alleged child sex assault victim. Id. at 664. The SDT commanded the parents to produce every electronic device in their possession. The district attorney moved to quash the subpoena as unreasonable and oppressive and asserted that compliance with the subpoena would expose irrelevant personal information including personal medical information. Id.

13. In the instant case, the prosecution has failed to set forth a specific factual basis demonstrating a reasonable likelihood that the requested material from Fort Carson exist and contain material that is evidentiary and relevant. *See* Spykstra, 234 P.3d at 666. Any of Ms. Stauch's private treatment records, if they exist, are not procurable by the prosecution because these private records are protected by State and Federal law and the prosecution has no authority to obtain these documents. There has been no finding about whether Ms. Stauch is incompetent or competent to proceed to trial. Thus, the prosecution cannot assert that they cannot properly prepare for trial without the production of these documents. The request for any and all records pertaining to Ms. Stauch from Fort Carson police is a general fishing expedition. Spykstra, 234 P.3d at 669) *citing* Nixon 418 U.S. 683, 698 (1974)(explaining that Fed. R. Crim. P. 17(c) was "not intended to provide a means of discovery for criminal cases"). This Court should quash the prosecution's subpoena.

c. The prosecution's request for Ms. Stauch's treatment records through a subpoena converts the subpoena into a search warrant.

14. Recently, the United States Supreme Court explained that it has never held that the government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018). In Carpenter, the State obtained cell-site location information (CSLI) of the accused without a warrant but pursuant to a court order issued under the Stored Communications Act. The Court declined to grant the state unrestricted access to a wireless carrier's database of physical location information and held that the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the fact that this information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The government's acquisition of the cell-site records through a court order was a search under the Fourth Amendment. Id. at 2223.

15. In Carpenter, 138 S. Ct. 2206, Justice Alito argued that the warrant requirement did not apply when the government acquired records using compulsory process. Id. at 2221. The Court held that "Under Justice Alito's view, private letters, digital contents of a cell phone- any personal information reduced to document form, in fact- may be collected by subpoena for no reason other than "official curiosity."" Id. The Court declined to accept this view and held that a warrant is required when an individual has a legitimate privacy interest in records held by a third party. Id. at 2222.

16. An individual's private medical records, mental health records, social history, and educational records are even more personal and deeply revealing than one's physical location data contained in cell phone records. This is why there are State and Federal laws specifically protecting private, confidential, and privileged medical documents, mental health documents, social history documents, and educational documents. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA); 45 C.F.R. §164.502(a); 45 C.F.R. §164.508(a); C.R.S. §13-90-107(1)(g); C.R.S. §18-4-412; C.R.S. §22-1-123 and 20 U.S.C. 1232(g).

17. The Fourth Amendment to the United States Constitution, and article two, section seven of the Colorado Constitution protects an individual against unreasonable searches and seizures by the government. U.S. CONST. amend. IV; *See also* COLO. CONST. art. II § 7. The basic purpose of these amendments is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." Carpenter, 138 S.Ct. at 2213. The government is required to obtain a warrant supported by probable cause before acquiring records where the individual has a legitimate privacy interest in records held by a third party. Id. at 2221-22. *See also* People v. Mason, 989 P.2d 757, 760 (1999) *citing* Carlson v. Superior Court, 129 Cal. Rptr. 650, 655 (1976)("an accused's constitutional right to privacy in his papers and records is not diminished because law enforcement officials seek to obtain them by subpoena rather than by warrant). In the instant case, the prosecution is attempting to subvert the warrant requirements by subpoenaing third parties to produce Ms. Stauch's private medical records.

III. Conclusion

18. This Court should quash the subpoena to Fort Carson for any and all records pertaining to Ms. Stauch because this subpoena is overbroad, unreasonable, and oppressive. The prosecution has not demonstrated their burden for the requested materials as set forth in Spykstra, 234 P.3d 662. Ms. Stauch's medical and mental health records are protected by State and Federal law and the prosecution is not authorized to obtain this protected material. Raising competency does not open the door to the prosecution obtaining Ms. Stauch's entire social, medical, mental health, employment, or educational records. Such an overbroad and invasive disclosure requirement would include information that has nothing to do with competency or the pending charges against Ms.

Stauch. Circumventing the warrant requirement by issuing a subpoena to obtain personal information reduced to document form for official curiosity is not permitted under the law.

Wherefore, Ms. Stauch, through counsel, requests that this court quash the subpoena to Fort Carson to obtain any and all treatment records, notes, testing records, raw data, progress notes, or daily logs of all treatment providers and staff pertaining to Ms. Stauch because this is a groundless request for private, confidential, and privileged information medical records and medical information that is not supported by the law.

RESPECTFULLY SUBMITTED,

/_____

Kathryn Strobel (No. 42850)
Deputy State Public Defender

_____/

C. Colette LeBeau (No. 43164)
Deputy State Public Defender

Dated: July 16, 2020