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SUPERIOR COURT CLERK

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MOHAVE**

9 **STATE OF ARIZONA,**

10 Plaintiff,

11 vs.

12 **JUSTIN JAMES RECTOR**

13 Defendant.

NO: CR 2014-01193

DEFENDANT'S REPLY TO STATE'S
RESPONSE TO DEFENDANT'S MOTION
TO DELAY ANY MENTAL HEALTH, I.Q.
OR RELATED TESTING

(ASSIGNED TO THE HON. LEE JANTZEN)

16 Defendant Justin James Rector, by and through undersigned counsel, replies to
17 the States Response to Defendant's Motion to Defendant's Motion to Delay Any Mental
18 Health, I.Q. or Related Testing, and reasserts his privacy protections guaranteed by the
19 1st, 4th, 5th, 9th, and 14th Amendments of the Constitution of the United States, and
20 Arizona Constitution Article 2 §§ 4 and 8, for the reasons contained in the Memorandum
21 attached hereto and incorporated herein.
22

23 **RESPECTFULLY SUBMITTED** This 11th day of JUNE, 2015.

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27 **GERALD T. GAVIN**
Co-Counsel for Mr. Rector

RON GILLES
Co-Counsel for Mr. Rector



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MEMORANDUM

“The Bottom Line”

Mr. Rector is in receipt of the State’s Response to his motion. The bottom line, as stated in the States “Conclusion” section, is “ The State does not object to a defense continuance of the exam to gather defendant’s prior mental health records”. As such, it appears the State is agreeing to allow an exam to be continued until Mr. Rector’s mental health records have been gathered.

As to any I.Q. testing already permitted without benefit of such records, the defendant requests all results and conclusions be sealed, made a part of the record, and performed again once an accurate medical and mental health history has been established. Previous defense counsel may have permitted it; present defense counsel would never have agreed to that and it would have happened over his standing, ongoing objection.

“Update for the State on Status of Gathering Medical Records”

The State also indicated that “the State would like an update on where we are in this process of obtaining defendant’s prior mental health records. The update is this: present counsel for the defense was appointed on this case March 9th, 2009. The defense immediately filed a Motion (under seal) for Appointment of a Mitigation Expert to assist in, among other things, gathering such records. The defense waited for the courts ruling on the motion; the Court apparently signed the order for such an expert, but the dissemination of that order by the Court was not made until the next Court Hearing.

Ms. Rennee DeSaye, the Mitigation Expert for the defense, was able to speak to Mr. Rector in person for the first time at the Court Hearing of May 12th, 2015. The

1 Defense has requested, and been denied, weekly in-person contact with our client; that
2 court date was her first opportunity to hand Mr. Rector a pen and have him sign the
3 necessary HIPPA- compliant waivers to obtain his records.

4 The Defense is in the infancy of gathering a complete medical and mental health
5 record on Mr. Rector. The State can greatly expedite the process by allowing the
6 defense attorneys and Mitigation Expert weekly access, not over a recorded
7 videophone, but in a private room at the jail so counsel can expedite showing Mr.
8 Rector materials, and quickly obtaining his signature on documents as needed.

9 *This motion* is not a motion to obtain that basic privilege; counsel has agreed to work
10 with Director Bischoff at the jail and do the majority of visits over videophone. That
11 issue is not litigated now; it may be subject to future motion if the process continues to
12 slow the defense investigation of this case.

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15 ***“The States Attempts to Gather Private Medical Records of Mr. Rector”***

16 The State, in its Response to Defendant’s Motion, indicates on the second page
17 of its Response:

18 Dr Harvancik’s Rule 11 report identified three facilities that may
19 Possess defendant’s prior mental health records. Those facilities
20 are: 1) Mohave Mental Health (records were transferred to the
21 Kingman Office in 2014), 2) Mohave County Juvenile Detention
22 Center, and 3) Adobe Mountain, Eagle Point. ***Adobe Mountain
Eagle point reported to undersigned prosecutor that
Defendant’s records were purged due to his current age.***

23 It is patently clear, from the Prosecutors own statement about his activities, that
24 he has been actively attempting to obtain Mr. Rector’s private, personal Medical and
25 Mental health records without Mr. Rector’s permission.

26 The defense cautions the State from any further attempts to circumvent the law.
27 In the instant case, the State lacked any probable cause to attempt to seize and search
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1 Mr. Rector's medical records. A search without probable cause is per se unreasonable.
2 State v. Broom, 113 Ariz. 495, 497, 557 P.2d 1052, 1054 (Ariz. 1976).

3 4 **Warrantless Search**

5 The Fourth Amendment to the United States Constitution guarantees "[t]he right
6 of the people to be secure in their persons, houses, papers and effects, against
7 unreasonable searches and seizures." U.S. Const. Amend IV. A search can be
8 conducted only after a warrant has been issued by a neutral magistrate upon a showing
9 of probable cause. Illinois v. McArthur, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d
10 838 (2001). A warrantless search is per se illegal unless justified under one of the few
11 "jealously and carefully drawn" exceptions to the warrant requirement. Jones v. United
12 States, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958). Generally, probably
13 cause, without more, is insufficient to justify a warrantless search. *Id.* at 497, 78 S.Ct.
14 1253. In the instant case, the State lacked not only a warrant but also probable cause
15 to search and seize Mr. Rector's medical records.
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17 18 **Physician Patient Privilege**

19 The records at issue were attempted to be obtained by the Prosecutor in violation
20 of Mr. Rector's physician-patient privilege. A.R.S. § 13-4062. The privilege is primarily
21 intended to protect communications made by the patient to his physician for purposes of
22 treatment. State v. Wilson, 200 Ariz. 390, 26 P.3d 1161 at ¶5 (App. Div 2, 2001). ***The***
23 ***fact the State has charged the defendant with a crime does not abrogate his***
24 ***patient-physician privilege. Id.*** at ¶12 (emphasis/italics added)
25

26 27 **Health Information Portability and Accountability Act** 28

1 In 1996, the United States Congress enacted The Health Insurance Portability
2 and Accountability Act (HIPPA), 42 U.S.C.A. sec. 1320(d) *et seq.* HIPPA governs
3 under what circumstances confidential medical records may be disclosed. The HIPPA
4 standards are part of the regulations adopted and implemented by the Department of
5 Health and Human Services at 45 C.F.R. sec. 160. These standards are otherwise
6 known as "the Privacy Rule". All states are required to comply with HIPPA as of April
7 14, 2003. These regulations severely restrict the permissible means of disclosing
8 medical information by any person involved in medical treatment of a patient.

9 Under HIPPA, no medical provider may disclose confidential health care
10 information to police unless such disclosure is either court ordered or made pursuant to
11 consent by the patient. The passage of HIPPA thus marks a dramatic departure from
12 the recent state of medical practice. Medical care professionals have a duty under
13 HIPPA to safeguard a patient's medical information by preventing law enforcement from
14 standards. See: 45 C.F.R. sec. 306-318.

15
16 Mr. Rector did not consent to any disclosure of his private medical information. IF
17 prior defense counsel provided such HIPPA waivers, signed by Mr. Rector to the
18 Prosecution, current counsel apologizes and withdraws his objection. If no such signed
19 HIPPA – compliant waivers were obtained, and no court ordered disclosure of such
20 information in compliance therewith, the objection stands: the State has no right to
21 attempt to obtain these records in the apparent manner it tried.

22 Such information is highly personal. Evidence obtained in violation of a federal
23 law which is binding on the states is subject to the remedy of suppression. See State v.
24 Fratello, 835 So.2d 313 (Fla. 4th Dist. Ct. App. 2003); State v. Trotter, 230 A.2d 618
25 (Conn. Cir Ct. 1967); Cruz v. Alexander, 477 Fed. Supp. 516 (U.S. D. Ct. S.D. N.Y.
26 1979); *see also* Tapp v. Texas, 108 S.W.3d 459 (Ct. App. TX, 14th Dist. 2003) (holding
27 that suppression due to disclosure of treatment records was not required when such
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1 disclosure was made prior to April 14, 2003, when states were expected to be in
2 compliance with HIPPA.

3 There is a 9th and 14th Amendment Constitutional right to privacy in one's medical
4 records that is separate from any medical evidentiary privilege created by State law.
5 Whalen v. Roe, 97 S.Ct. 869, 876-77. The Arizona Constitution Article 2, §8 also
6 expressly provides a right to privacy: "No person shall be disturbed in his private
7 affairs, or his home invaded, without the authority of law." Establishing that Art. 2, §8
8 Protects medical privacy, the Arizona Supreme Court in Rasmussen by Mitchell v.
9 Fleming, 154 Ariz. 207, 741 P.2d 674 (1987), explicitly stated that "[a]n individual's right
10 to chart his or her own plan of medical treatment deserves as much, if not more,
11 constitutionally-protected privacy than does and individual's home or automobile." *Id.* at
12 215, 741 P.2d at 682.

13 **Warrantless Search**

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16 The United States Supreme Court of Appeals for the 9th circuit determined that
17 medical records were protected by a constitutionally recognized right of confidentiality
18 and privacy that could not be invaded without a warrant. See Tucson's Woman's Clinic
19 v. Eden, 379 F.3d 531, (9th Cir. 2004). In Tucson's Woman's Clinic, the court reviewed
20 an Arizona statutory and regulatory scheme that permitted the Arizona Department of
21 Health Services (DHS) to conduct warrantless, unbounded inspections of the offices
22 and patient records of physicians who provided abortion services. *Id.* at 537. The
23 Statute, A.R.S. §36-424 and the regulations, were challenged as violating the patients'
24 privacy rights by requiring DHS access to unredacted patient records, unannounced
25 searches by DHS and requiring physicians to release sensitive patient information when
26 there is an incident involving the patient. *Id.* The 9th Circuit found that the statute and
27 regulations violated the patients' rights to informational privacy by permitting DHS in its
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1 absolute discretion to obtain upon request unredacted patient files containing personally
2 identifying information. The statute and regulations that permitted the warrantless
3 search of patient records and the concomitant invasion of the patients' right to privacy in
4 those records were declared to be unconstitutional. *Id.* at 549.

5 Mr. Rector has given his defense team permission to obtain all his medical and
6 mental health records; the defense team is in the beginning stages of obtaining every
7 record available for Mr. Rector. *That said...even his own defense team, acting in his*
8 *interest and operating under his authority and blessing, must comply with Federal Law*
9 *and utilize HIPPA compliant releases, releases signed by Mr. Rector after an*
10 *explanation to him about what it entailed and why his team needed it. Any Medical or*
11 *Mental Health Provider, having private records on Mr. Rector, have an independent duty*
12 *to assure his privacy is protected, and such records are released only after proper*
13 *authorization and documentation has been provided.*

14
15 The defense is making concerted efforts to obtain these records; the defense
16 requests they be allowed to do so, and make a thorough and adequate disclosure to
17 reviewing medical providers in this litigation, without shortcuts being taken that
18 circumnavigate the protections insured Mr. Rector.

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1 ORIGINAL of the foregoing filed
2 this 11th day of June, 2015 with:

3 Clerk of Court
4 401 E Spring Street
5 Kingman Arizona 86401

6
7 COPY of the forgoing
8 Delivered this 11th day
9 Of June, 2015, to:

10 Honorable Lee Jantzen
11 Judge of the Superior Court
12 Mohave County Courthouse
13 2nd floor
14 Kingman Arizona 86401

15 Greg McPhillips
16 Assigned Deputy County Attorney
17 PO Box 7000
18 Kingman Arizona 86401

19 Ron Gilleo
20 Mohave County Legal Defender
21 Co-Counsel for Justin James Rector
22 313 Pine Street
23 PO Box 7000
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25 Client Justin James Rector
26 Mohave County Jail

27 File

28 IDS

BY: 