DATE FILED: August 13, 2019 4:09 PM
FILING ID: D9ACA9FD4EDE7
CASE NUMBER: 2018CA2015

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Pueblo District Court; The Honorable William Alexander; Case Number 1991CR29	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JOHN S. CRUZ	
Megan A. Ring, Colorado State Public Defender MEREDITH E. O'HARRIS 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50469	Case Number: 2018CA2015
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,417 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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INTRODUCTION

Nearly thirty years ago, a jury found John Cruz not guilty by reason of insanity (NGRI) for a homicide. Under Colorado law, the NGRI verdict required that Mr. Cruz be automatically committed to the Colorado Mental Health Institute in Pueblo (CMHIP), even though he was innocent of any crime. The obvious reason for automatic commitment in such circumstances is to ensure the acquittee doesn't pose a further danger to the community as a result of his mental illness. However, as a matter of due process, when an acquittee is no longer dangerous or mentally ill, he must be released.

In Colorado, there is a four-stage process to regaining one's freedom after an NGRI verdict: (1) automatic commitment following the verdict, (2) temporary physical removal from the hospital, (3) conditional release from the hospital, and (4) unconditional release.

In 2004, CMHIP granted Mr. Cruz "temporary physical removal" (TPR) status because he "made substantial progress around all of his dynamic risk factors." TPR status allowed Mr. Cruz to live "on his own" in the community. Two years later, CMHIP concluded that Mr. Cruz was neither mentally ill nor dangerous, and asked the district court to grant him conditional release ("CR") status, triggering numerous additional rights and protections for Mr. Cruz, while

still permitting CMHIP to extensively monitor his life through the "CR Order," which contained individualized conditions of Mr. Cruz's release.

For the next ten years, Mr. Cruz successfully and independently lived in the community under CMHIP's daily oversight. Last year, however, the court found that Mr. Cruz was "uncooperative" with a court-ordered mental health examination and revoked his release under section 16-8-115.5(5), C.R.S., which requires automatic revocation if an inanity acquittee "fail[s] to submit to and cooperate with" a mental health exam. By failing to answer the examiner's questions, the court found that Mr. Cruz was "uncooperative" and recommitted him to CMHIP—possibly forever—without any finding that Mr. Cruz was mentally ill or dangerous, or that he violated a single condition of his CR Order.

In Orwellian fashion, numerous procedural protections and safeguards were overlooked—and directly flouted—in the process of recommitting Mr. Cruz to CMHIP in this case. Despite years of daily compliance with the extensive conditions of his release, Mr. Cruz once again finds himself trapped at CMHIP without any finding that he violated his CR Order, is mentally ill, or poses a danger to the community. This is outrageous, unconstitutional, and illegal.

Admittedly, there is virtually no case law addressing the arguments presented below; there are only a handful of applicable statutes and even less

jurisprudence. Nevertheless, it is clear that due process required more in this case, and remand for that proper process is required.

STATEMENT OF THE ISSUES PRESENTED

I. Whether Mr. Cruz was entitled to an initial advisement hearing once revocation proceedings began and whether, during that initial hearing, the district court was required to provide certain, essential advisements.

II. Whether the automatic revocation provision of section 16-8-115.5(5) is unconstitutional.

III. Whether the district court erred in revoking Mr. Cruz's conditional release because the court, CMHIP, and prosecution violated numerous mandatory procedural requirements during the revocation process.

STATEMENT OF THE FACTS & CASE

On May 22, 1992, a jury found Mr. Cruz not guilty of a homicide by reason of insanity. CF, p 583. After the verdict, Mr. Cruz was committed to the Colorado Mental Hospital in Pueblo (CMHIP). CF, p 585.

On August 21, 2004, Mr. Cruz was granted temporary physical removal (TPR) status—the first step towards regaining his freedom. CF, p 641. He reentered the community and was very successful. CF, pp 645-49.

On October 10, 2006,[1] Mr. Cruz was granted conditional release (CR), giving him further rights and freedoms. CF, pp 651-56, p 778. For the next decade, he had his own apartment and life, including a long-term relationship with his girlfriend; he went to church and voluntarily attended a community support group for substance abuse, and followed the myriad conditions imposed by CMHIP under his CR Order. CF, pp 678-82. According to CMHIP, Mr. Cruz was "stable and consistent." CF, p 680.

He was not mentally ill, and he was not a danger to anyone. *Id.*

[1] In various filings, CMHIP states that conditional release was granted October 24, 2006. *See*, *e.g.*, CF, p 796. The date makes no difference to this appeal.

The CR Order

In January 2016, CMHIP concluded that certain conditions of Mr. Cruz's original CR Order were no longer necessary and new terms were issued by the district court. CF, pp 698-99, pp 743-58. The new terms included the following:

> 8. **Approved Employment and Activities**: Mr. Cruz shall not . . . be involved in activities . . . detrimental to his treatment or to his progress toward full release[.]
>
> 10. **Free Exchange of Information**: . . . [I]nformation about Mr. Cruz's medical and psychiatric condition and treatment, living circumstances, and compliance with this Order, be freely exchanged between [CMHIP], the Health Solutions Mental Health Center, the Pueblo County District Attorney, law enforcement, court personnel, the defendant's attorney, his primary care physician, any other health care providers, any landlord or supervised residence such as an assisted living center and any employer or educational instructor. . . .

CF, p 756.

Notably, the new CR Order failed to contain an advisement that release could be revoked under section 16-8-115.5, which was required. § 16-8-115(3)(a), C.R.S.; CF, pp 743-58. Nor did the CR Order contain any advisement of Mr. Cruz's rights under sections 16-8-106, C.R.S., 16-8-108, C.R.S., and 16-8-117, C.R.S., should revocation proceedings commence.

Alleged Violations of the CR Order

In January 2017, CMHIP learned that Mr. Cruz received large settlement from a traffic accident, which was the catalyst for the revocation proceedings in this case. CF, p 792. CMHIP became increasingly concerned that if Mr. Cruz received the settlement, he would no longer be eligible to receive welfare benefits, which would impede CMHIP's ability to get paid for Mr. Cruz's care. CF, pp 792-93. CMHIP ordered Mr. Cruz to put the money into an irrevocable trust, but Mr. Cruz's civil lawyer gave him the money anyway. *Id.* CMHIP claimed this violated Condition 8 of the CR Order, but didn't explain how. *Id.*

After he received the settlement, Mr. Cruz spent his money quickly—he bought his girlfriend a car and himself a house, he also quickly assumed some credit card debt. *Id.* CMHIP construed this debt as a further violation of Condition 8. *Id.* Moreover, in subsequent conversations between a treatment staff person and Mr. Cruz regarding his finances, three other concerns arose: Mr. Cruz allegedly said he was afraid of his girlfriend, who demanded money from him, but contacted her to drop off a car even after CMHIP ordered him not to; Mr. Cruz allegedly refused to turn over his full credit report to CMHIP; and Mr. Cruz allegedly told a CMHIP staff member that he was abusing his medications to feel high. *Id.* CMHIP construed these discoveries as additional violations of

Conditions 8 and 10, but, as evidenced by the affidavit, was really just concerned about Mr. Cruz's receipt of welfare benefits. CF, pp 792-94.

Revocation Proceedings

As a result, on March 30, 2018, CMHIP requested a warrant for Mr. Cruz's arrest. CF, p 799. A few days later, on April 2, 2018, CMHIP also officially petitioned to revoke Mr. Cruz's release and requested a court-ordered mental health exam. CF, pp 791-94.

The court ordered Mr. Cruz's arrest and ordered an exam, but did not specify its date, time, or duration. CF, p 791. Despite the commencement of revocation proceedings, the court also never held a probable cause or advisement hearing.

On April 10, 2018, the prosecution also commenced revocation proceedings, relying on CMHIP's affidavit for arrest. CF, p 810-34.

On April 18, 2018, defense counsel entered an appearance. CF, p 830.

The Mental Health Exam

On May 14, 2018, forty two days after Mr. Cruz's arrest, Dr. Lennart Abel approached Mr. Cruz at CMHIP and briefly interviewed him before Mr. Cruz cut the exam short. CF, pp 835-43; TR 9/5/18 pp 6:18-7:15, p 8:17. Of the interview, Dr. Abel wrote:

> Mr. Cruz is an older man, who was dressed in casual clothes. He was awake, alert and responsive throughout

> the interview. His affective expressions were limited to mild irritability. He sat on his walker. He had a noticeable tremor in his hand. His speech was of normal rate and volume. His talk form was brief, goal directed, and logical. He refused to engage in a full interview. . . .

CF, p 842.

Dr. Abel did not audio or visually record this interview, as brief as it was. TR 9/5/18 p 9:1-8. The district court also failed to notify Mr. Cruz's defense attorney or Mr. Cruz of the exam in advance—in fact, Dr. Abel indicated Mr. Cruz was caught off guard by the encounter. CF, p 842. Further, although Dr. Abel gave Mr. Cruz a vague warning that a failure to cooperate with the exam could have negative consequences, Mr. Cruz was never advised about his constitutional and statutory rights during the exam, such as his right against self-incrimination, his right to counsel, or that his failure to cooperate would result in automatic revocation.

Ultimately, Dr. Abel concluded that Mr. Cruz's conditional release should be revoked because he allegedly violated several conditions of the CR Order, either as a result of early dementia or a personality disorder. CF, p 842. If it was the latter, Dr. Abel claimed that Mr. Cruz posed a danger to the community and, for that reason, would no longer be eligible for conditional release. CF, p 843.

Revocation Hearing

The district court held a revocation hearing on September 5, 2018. The hearing was very short, during which the prosecution failed to present *any* evidence that Mr. Cruz violated his CR Order. Instead, the prosecution asserted that revocation was automatically required under section 16-8-115.5 because Mr. Cruz refused to cooperate with Dr. Abel's evaluation. TR 9/5/18 pp 11:24-12:6.

In response to Dr. Abel's violation of section 16-8-106, C.R.S.—which, defense counsel noted, mandates that exams be audio and visually recorded—the prosecution maintained that it was sufficient for CMHIP to substantially, but not strictly, comply with that statute. TR 9/5/18 pp 11:24-12:6. The district court agreed with the prosecution and revoked Mr. Cruz's conditional release because he "didn't cooperate with the examination." TR 9/5/18 p 13:4-7; CF, p 871. The court appeared to conclude that, by failing to answer Dr. Abel's questions, Mr. Cruz was uncooperative. *See id.* Notably, the court never found that Mr. Cruz actually violated the terms of his CR Order, was mentally ill, or that he posed a danger to the community. *See id.*

Ultimately, after many years of successful, independent living in the community, Mr. Cruz was recommitted to CMHIP without any determination he violated the conditions of his release, posed a danger to the community, or suffered

from any mental illness. *See id.* Instead, his freedom was revoked simply by failing to answer Dr. Abel's questions. TR 9/5/18 p 13:4-7.

SUMMARY OF THE ARGUMENT

I. Due Process Requires an Initial Hearing and Certain Advisements

The U.S. Supreme Court holds that when an individual has a liberty interest in their freedom—even abridged freedoms—the Due Process Clause is triggered by the State's attempt to revoke it. Here, it is clear Mr. Cruz had a liberty interest in his conditional release, the only question is "what process was due" when the State sought revocation. This involves an issue of first impression.

Under U.S. Supreme Court jurisprudence, at minimum, the district court was required to hold an initial hearing—akin to a preliminary hearing under Crim. P. Rule 5—and, during this hearing, was required to advise Mr. Cruz (1) of the allegations against him, (2) that he had a right to appointed counsel during the revocation proceedings and to confer with counsel before the mental health exam, (3) that a mental evaluation was required and would be video and audio recorded, (4) that he had a right to his own, independent mental health exam, (5) that he had a constitutional and statutory right against self-incrimination during any court-ordered mental health exam, but that (6) a failure to "cooperate" with the court-ordered exam would result in automatic revocation of his release.

Here, because no hearing occurred, let alone one including these essential advisements, reversal of the revocation order is required as a matter of due process.

II. The Automatic Revocation Provision is Illegal and Unconstitutional

The U.S. Supreme Court holds that the only constitutionally-permissible bases for committing an insanity acquittee to a state hospital are (1) the possibility of dangerousness (to himself or the community) *and* (2) mental illness. Both conditions are required as a matter of due process before commitment is permissible. Consistent with due process, section 16-8-102(4.5) permits revocation of an insanity acquittee's conditional release only when he is (1) mentally ill and dangerous, or (2) he violates a condition of the CR Order directly and substantially related to managing his mental illness and dangerousness.

In this case, Mr. Cruz's release was automatically revoked under section 16-8-115.5(5) because he was "uncooperative" with the mental health examination—not because he was mentally ill or dangerous, or because he violated a condition of the CR Order designed to manage his mental illness or dangerousness. For this reason, section 16-8-115.5(5) is arbitrary, and violates due process and section 16-8-102(4.5), facially and as-applied.

Additionally, revocation for "noncooperation" is unconstitutionally vague and didn't give Mr. Cruz proper notice of what "cooperation" requires, as mandated by due process. This is particularly problematic because, here, the

district court found that Mr. Cruz was uncooperative by failing to answer Dr. Abel's questions, which Mr. Cruz had a statutory and constitutional right to do.

For these reasons, revoking Mr. Cruz's release for "noncooperation" was constitutionally and statutorily impermissible and reversal is required.

III. The Revocation Process was Illegal

The statutory framework governing conditional release in Colorado has several mandatory requirements. First, the CR Order must contain an express warning that revocation proceedings will follow the process set forth in section 16-8-115.5. Second, once the defendant is arrested and revocation proceedings begin, (1) the district court must order a mental health examination within twenty-one days; (2) the court must list the time, place, and duration of the examination; and (3) CMHIP must audio and visually record the exam and preserve that recording.

None of these procedures were followed here. The CR Order never even stated that revocation would follow the procedure set forth in section 16-8-115.5. And, once revocation was sought, the subsequent mental health exam occurred over forty days after Mr. Cruz's arrest—double the length allowed by statute; the duration of the examination was not determined, nor was it recorded.

Despite these violations, the district court concluded that CMHIP's "substantial compliance" with the mandatory statutes was sufficient. This was

plainly improper and, because these violations undermined the fundamental fairness and justice of the revocation process, reversal of the revocation order is required.

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO ADVISE MR. CRUZ OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS AND PRIVILEGES REQUIRES REVERSAL OF THE REVOCATION ORDER.

A. Standard of Review and Preservation

This issue is not preserved.

Questions of law—such as whether due process was violated by Colorado's conditional release statutory scheme—are reviewed de novo. *See People v. Griego*, 2018 CO 5, ¶ 25; *see also People v. Garlotte*, 958 P.2d 469, 476 (Colo. App. 1997). When a defendant's release is revoked in violation of due process, reversal is required. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

B. Law and Analysis

The Fifth and Fourteenth Amendments of the United States Constitution bar the government from depriving any person of their interest in "life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV, § 1. As for Colorado, "the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972); *see* Colo. Const. art. II, § 25. Therefore, under the Colorado Constitution, there must be a liberty interest recognized by the federal Constitution before a person is denied

procedural due process. *See id.*; *People v. Perez-Hernandez*, 2013 COA 160, ¶ 13. However, in addition to liberty interests protected by the state and federal constitutions, a liberty interest created by state statute can also trigger due process protections. *M.S. v. People*, 2013 CO 35, ¶ 11 (citing cases).

1. There is a constitutional and statutory liberty interest in conditional release.

Here, Mr. Cruz had a liberty interest in his conditional release under the Due Process Clause because he is entitled to conditional release unless and until he has

> violated one or more conditions in his release, or [suffers] from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future, . . . he is permitted to remain on conditional release.

§ 16-8-102(4.5), C.R.S.

In *Foucha v. Louisiana*, the U.S. Supreme Court concluded that, for insanity acquittees, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed" and that, at minimum, before an individual's conditional release can be revoked, certain constitutionally requirements must be satisfied. 504 U.S. 71, 75-76, 79 (1992); *see also Garlotte*, 958 P.2d at 474 (holding same).

The statutory framework also gave Mr. Cruz a liberty interest in his conditional release. In *M.S.*, ¶ 11, the Colorado Supreme Court held that state

statutes create liberty interests when they (1) establish a fixed procedural process and (2) mandate a specific outcome when relevant criteria are established. Here, that standard is met by sections 16-8-102(4.5) and 16-8-115.5. These primary statutes—in conjunction with other procedural rules within Title 16, Article 8—lay forth the liberty interest in conditional release, the process for obtaining that release, and a strict revocation process when certain criteria are established.

Thus, there is a liberty interest in conditional release and due process is, in turn, implicated. The only remaining question is "what process was due" before the district court could revoke Mr. Cruz's conditional release. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

2. Due process requires an initial advisement hearing.

In *Garlotte*, this Court held that due process required "notice and a fair opportunity to be heard" before a district court could revoke an insanity acquittee's conditional release, but did not list any specific requirements. 958 P.2d at 474. Thankfully, *Morrissey*, 408 U.S. 471, provides us with some guidance.

In *Morrissey*, the Supreme Court held that individuals have a liberty interest in their release on parole. 408 U.S. at 480. Therefore, the Court held that before depriving parolees of that liberty interest, at minimum, due process requires:

1. **An initial hearing**, akin to a preliminary hearing, soon after the parolee's arrest where n**otice** of the alleged parole violations is given.

2. **A final revocation hearing** for the prosecution and parolee to present evidence, cross-examine witnesses, present arguments, etc.

3. **A written order** by the court explaining its findings and basis for parole revocation.

408 U.S. at 485-89; *see also People in Interest of T.M.H.*, 821 P.2d 895, 896 (Colo. App. 1991) (holding that *Morrissey* applies to probation revocation).

The Court reasoned this procedure was required by the Due Process Clause because a parolee "is entitled to retain his liberty as long as he substantially abides by the conditions of his parole" and it would be a "grievous loss" of liberty to revoke parole without these safeguards. *Id.* at 480-81.[2] Here, the same liberty interests apply to individuals on conditional release—perhaps even more so than parolees, who have actually been convicted of a crime.

[2] Notably, after *Morrissey*, our legislature created some procedural guidelines to enforce the due process protections at issue in that case (parole revocation). *See* § 16-11-206, C.R.S. However, the Colorado Supreme Court made clear that "where the deprivation of liberty resembles the 'grievous loss' described in *Morrissey* . . . , the protections of due process apply independently of state law." *Lawson v. Zavaras*, 966 P.2d 581, 585 (Colo. 1998). That is, although a statute can give rise to a liberty interest triggering due process protections, the fundamental requirements of due process exist independently of any statutory safeguards. *Id.*

As already noted, insanity acquittees have a liberty interest in their conditional release. *See id.*; *M.S.*, ¶ 11; *see also* § 16-8-102(4.5). Thus, before revoking conditional release, the Due Process Clause requires:

1. **An initial hearing**, held soon after the insanity acquittee's arrest where **notice** of rights and the CMHIP's allegations is given.

2. **A revocation hearing** for the presentation evidence on the alleged violations of the conditional release.

3. **A written order** by the court explaining the basis for revocation of the conditional release.

Here, Mr. Cruz never had an initial hearing, let alone a hearing analogous to a preliminary hearing where the district court provided him with an overview of his essential constitutional and statutory rights. And, because that hearing never happened, the district court also failed to ensure Mr. Cruz was informed of, and understood, the allegations against him so he and lawyer could adequately defend against those allegations. Put simply, the Due Process Clauses required more. For this reason alone, the revocation order must be reversed. *Morrissey*, 408 U.S. at 485-89; *Garlotte*, 958 P.2d at 474 (due process requires "notice" before revoking conditional release).

3. Colorado law further requires several specific advisements at the initial advisement hearing.

Revocation of conditional release occurs in the criminal context, with quasi-criminal consequences. As such, Crim. P. Rule 5 and section 16-7-207, C.R.S., required certain mandatory advisements at the insanity acquittee's first appearance. But even assuming neither of these applied, section 16-8-117 specifically states:

> When a determination is to be made as to a defendant's eligibility for [conditional] release, the court shall explain to the defendant the nature and consequences of the proceeding and the rights of the defendant under this section, including his or her right to a jury trial upon the question of eligibility for release. The defendant, if he or she wishes to contest the question, may request a hearing which shall then be granted as a matter of right. . . .

Id. (emphasis added).[3]

The required advisements under section 16-8-117 are "necessary to safeguard the defendant's Fifth and Sixth Amendment rights." *People v. Karpierz*, 165 P.3d 753, 755 (Colo. App. 2006). Thus, to comport with the "notice" requirement of the Due Process Clauses, section 16-8-117

> requires a trial court to advise a defendant that he has the right not to say anything to the psychiatrist during the [mental health] examination; that his statements to the psychiatrist can be used against him . . . that he has the

[3] "Eligibility" is not limited to only the initial determination of eligibility for release and, therefore, the statute also applies when an individual has been released but may no longer be eligible to *remain* released. *See* § 16-8-117, C.RS.

> right to confer with counsel before submitting to the [mental health] examination; and that the court will appoint an attorney for the defendant at state expense if the defendant is unable to retain counsel prior to the [mental health] examination.

Id. (emphasis added).

With these various advisement statutes in mind, at an initial hearing in any conditional release revocation case, a district court must give the following information and advisements to the insanity acquittee.

Notice of the Allegations

Under *Morrissey*, 408 U.S. 471 and *Garlotte*, 958 P.2d at 474, due process requires a district court to inform the defendant of the specific allegations supporting the CMHIP and/or prosecutions petition for revocation. Section 16-8-115.5(3) also requires CMHIP and district attorney to submit "supporting documentation showing that defendant has become ineligible to remain on conditional release" when either seeks revocation.

Only with such notice can the defendant defend against the allegations against him at the revocation hearing, safeguarding his right to notice and an opportunity to be heard under the Due Process Clauses and sections 16-8-117 and 16-8-115.5(8) (at the revocation hearing, "the defendant shall be permitted to offer testimony and to call, confront, and cross-examine witnesses").

Notice of the Right to Appointed Counsel

Under section 16-8-119, C.R.S., an insanity acquittee facing revocation proceedings is entitled to appointed counsel:

> In all proceedings under this article, upon motion of the defendant and proof that he is indigent and without funds to employ physicians, psychologists, or attorneys to which he is entitled under this article, the court shall appoint such physicians, psychologists, or attorneys for him at state expense.

To protect the insanity acquittee's Sixth Amendment rights, a district court must advise him that he has a right to counsel during the revocation process, "that he has the right to confer with counsel *before* submitting to the [court-ordered mental health] examination," and "that the court will appoint an attorney for [him] at state expense if [he] is unable to retain counsel prior to the [mental health] examination." *Karpierz*, 165 P.3d at 755 (emphasis added).

This advisement did not happen in this case and, thus, Mr. Cruz was never told that he had a right to appointed counsel throughout the revocation process. Nor is there evidence that Mr. Cruz knew he was allowed to confer with counsel—*any* counsel, not just appointed counsel—before Dr. Abel approached him at CHMIP. Due process and the applicable statutes required more.

Notice of Video/Audio Recording of the Exam

Section 16-8-106(1)(a) requires that court-ordered mental health exams in a cases involving a class 1 or 2 felony (including court-ordered mental health exams pursuant to revocation proceedings under 16-8-115.5(5)) must be video and audio recorded and preserved. Under section 16-8-106(1)(b), "[t]he court shall advise the defendant that any examination with a psychiatrist or forensic psychologist may be video and audio recorded."

This advisement didn't happen in this case, but, in future cases (including this one), it should happen at the initial hearing after the defendant's arrest. This is partially because, under section 16-8-115.5(5), when an individual is arrested for violating the conditions of his CR Order, the district court "shall" order a mental health examination to "be completed within twenty-one days." § 16-8-115.5(5). It's logical, then, that the advisement occurs at the initial hearing.

Notice of the Right to an Independent Exam

Under sections 16-8-106(1)(a), 16-8-108(1)(a), and 16-8-115.5(5), a defendant is entitled to an independent mental health examination and nothing "shall abridge [that] right," § 16-8-106(1)(a). The only limitation is that the court must notify the defendant that the independent exam "may be audio and video recorded." § 16-8-108(1)(a). And, because the defendant's request must be

"timely," *id.*, it also makes sense that these mandatory advisements occur at the initial advisement hearing. No such advisement happened in this case.

Notice of the Right against Self-Incrimination

Next, to properly safeguard the constitutional rights embedded within section 16-8-117, the district court must notify the defendant that he "shall have a privilege against self-incrimination during the course of [a mental health] examination." § 16-8-106(2)(a), C.R.S.; *see also* U.S. Const. amend. V; Colo. Const. art. II, § 18. Given the significance of this constitutional and statutory privilege, a court "is required to advise the defendant" he has this right. *People v. Mozee*, 723 P.2d 117, 123 (Colo. 1986).

Here, the district court should have advised Mr. Cruz of his right against self-incrimination under sections 16-8-117 and 16-8-106(2)(a), as well as the state and federal constitutions. This advisement would ensure insanity acquittees, including Mr. Cruz, actually know of this privilege so they may exercise it during a court-ordered evaluation—which, again, must occur soon after the defendant's arrest, necessitating an initial advisement hearing shortly after revocation proceedings commence. § 16-8-115.5(5).

Notice of the Automatic Revocation Provision

Finally, during conditional release revocation proceedings, the district court must notify defendants that if they "refuse[] to submit to and cooperate with" a mental health examination ordered as a part of the revocation process, revocation will be automatic. § 16-8-115.5(5).

Only through this explicit advisement can an insanity acquittee understand the "nature and consequences" of his refusal; that is, that his refusal automatically renders him ineligible for release. § 16-8-117 ("When a determination is to be made as to a defendant's eligibility for release, the court shall explain to the defendant the nature and consequences of the proceeding and [his] rights . . . .").

Subsection 16-8-115(3)(a) also makes clear that this "noncooperation advisement" is required. It states: "The court's order placing the defendant on [conditional release] shall include notice that the defendant's [conditional release] may be revoked pursuant to the provisions of section 16-8-115.5." § 16-8-115(3)(a). Such notice would necessarily include a warning about automatic revocation for "noncooperation" under 16-8-115.5(5).

C. Reversal is Required

In sum, given the gravity of revocation, these advisements are essential to the conditional release revocation proceedings. Again, as this Court stated in

Karpierz, section 16-8-117 is designed to safeguard an individual's Fifth and Sixth Amendment liberties. *Karpierz*, 165 P.3d at 755. When such fundamental rights are implicated, a defendant must know what those rights are in order to exercise them. *See, e.g.*, *Roelker v. People*, 804 P.2d 1336, 1338 (Colo. 1991) ("In order for a defendant to make a voluntary, knowing, and intelligent decision, he must be aware of" the fundamental right at issue, which "requires that the [district] court advise the defendant" of that right.). Here, the court's failure to inform Mr. Cruz of the allegations against him and his attendant rights had significant consequences. For instance, during the revocation hearing, Dr. Abel said he believed that Mr. Cruz was entitled to have his lawyer present, TR 9/5/18 p 9:23-24, but the district court never told defense counsel or Mr. Cruz about that right. There. *See People v. Blackburn*, 354 P.3d 268, 277 (Cal. 2015) ("The purpose of an advisement is to inform the defendant of a particular right so that he or she can make an informed choice about whether to waive that right.").

In any event, none of the above advisements were given at any point in this case, and Mr. Cruz was left totally in the dark. Put simply, the procedure mandated by the Due Process Clause under *Morrissey* was not followed; the district court never advised Mr. Cruz of the CMHIP's allegations; the court never advised Mr. Cruz of his rights; finally, the court never advised him of the meaning

and consequences of "noncooperation" under section 16-5-115.5(5), which ultimately was the basis for revoking Mr. Cruz's release.

Given the nature of Mr. Cruz's liberty interest in his conditional release—and the statutes designed to protect that interest through specific procedural safeguards—the failure to hold an initial hearing and provide certain information and advisements to Mr. Cruz requires reversal of the revocation order as a matter of due process. U.S. Const. amend. XIV; Colo. Const. art. II, § 25; *Morrissey*, 408 U.S. at 490 (requiring reversal because the revocation procedure violated due process).

II. THE AUTOMATIC REVOCATION PROVISION IN SECTION 16-8-115.5(5) IS UNCONSTITUTIONAL AND ILLEGAL, REQUIRING REVERSAL OF THE REVOCATION ORDER.

A. Standard of Review and Preservation

This issue is not preserved.

Whether a provision within Colorado's conditional release statutes is unconstitutional or conflicts with other controlling statutes is a question of law reviewed de novo. *See People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005) ("Because statutory interpretation is a question of law, we conduct a de novo standard of review."); *Garlotte*, 958 P.2d at 476. When a revocation violates due process, reversal is required. *Morrissey*, 408 U.S. at 481.

B. Law and Analysis

As relevant here, section 16-8-115.5(5) states that, once revocation is sought, the CMHIP "shall examine the defendant to evaluate [his] ability to remain on conditional release. . . . If the defendant refuses to submit to and cooperate with the examination, the committing court shall revoke the conditional release." *Id.*

This automatic revocation provision is unconstitutional and illegal because it conflicts with other, controlling statutes.

1. The automatic revocation provision is arbitrary and, thus, violates due process.

In *Foucha v. Louisiana*, the U.S. Supreme Court held that, for those committed to state mental hospitals after an NGRI acquittal, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." 504 U.S. at 75-76, 79.

In *Foucha*, the defendant was committed to the state mental hospital after an NGRI verdict and the state continued to confine him because, although he was no longer mentally ill, he allegedly still posed a danger to the community. *Id.* The Supreme Court held that the defendant's continued commitment violated due process because only when an individual is both mentally ill and dangerous can the state deny his release. Anything less is unconstitutional. *Id.* at 79.

In Colorado, an individual must be released unless and until he

> violate[s] one or more conditions in his release, or [suffers] from a mental disease or defect which is likely to cause him to be dangerous to himself, to others, or to the community in the reasonably foreseeable future, . . . he is permitted to remain on conditional release.

§ 16-8-102(4.5), C.R.S. Thus, under the plain language of the statute, revoking conditional release is permitted only if:

1. The defendant violated a condition of CR Order, or

2. The defendant is mentally ill *and* dangerous.

However, as just explained, *Foucha* holds that only mental illness **and** dangerousness can constitutionally justify commitment. Accordingly, in *People v. Garlotte*, the defendant argued that revoking his conditional release for a *technical* violation of his CR Order was unconstitutional under *Foucha*, because technical violations are not related to mental illness and dangerousness. 956 P.2d at 474-78.

The *Garlotte* division rejected the defendant's argument, relying on a very narrow reading of section 16-8-102(4.5). Essentially, the division reasoned that before revoking a defendant's release based on a technical violation of his CR Order, the prosecution must prove the condition was directly related to managing the defendant's "mental condition and dangerousness." *Id.*, 956 P.2d at 474-78. That is, to comply with due process, the division held:

> The People have the burden of proving that the condition violated, and on which revocation of the conditional release is based, is substantially related to the abnormal and dangerous behavior which resulted in the initial commitment; that such condition bears a substantial relation to the defendant's abnormal mental condition and propensity towards dangerousness; and that it is tailored to serve the best interests of both the defendant and the community.

Id. at 478.

Put differently, the division concluded that the only reason section 16-8-102(4.5) doesn't violate due process under *Foucha* is because it allows revocation for a technical violation *only* if the prosecution proves the condition was substantially related to managing a specific individual's dangerousness and mental illness. *Id.* Other violations of a CR Order, having nothing to do with managing dangerousness and mental illness, do not permit revocation.

Under *Garlotte*, then, revoking conditional release is permitted as a matter of due process only if:

> 1. The individual violated a narrowly tailored condition of his CR Order that was substantially related to managing his mental illness and dangerousness, or
>
> 2. The individual is mentally ill *and* dangerous.

See id.

Here, for the following reasons, the automatic revocation provision of section 16-8-115.5(5) for "noncooperation" with a mental health exam, violates due process under *Foucha* and *Garlotte*.

First, "noncooperation" with a mental health exam has no bearing on—let alone a substantial and individualized nexus to—an individual's dangerousness *and* mental illness. Obviously, an uncooperative individual can be mentally stable and safe for release. In turn, noncooperation cannot be an **automatic** basis for revocation as a matter of due process. Indeed, given the consequences of (possibly permanent) psychiatric commitment, the Supreme Court and this Court require more than the arbitrary basis for revocation permitted by section 16-8-115.5(5).

Second, under *Garlotte*, section 16-8-102(4.5) would only permit revocation for "noncooperation" if the prosecution proved (1) it was a term of an individual's CR Order and (2) that term was substantially related to managing the individual's particularly mental illness and dangerousness. *See Garlotte*, 958 P.2d at 477-78. Here, the prosecution did not argue, let alone prove, either requirement. "Submitting to a mental health exam" as part of revocation is not a term of Mr. Cruz's CR Order, and even if it was, the prosecution did not prove such a term was narrowly tailored to managing Mr. Cruz's specific needs. Again, under *Garlotte*, the only reason that section 16-8-102(4.5) does not violate due process under

Foucha is because it requires the prosecution to prove a technical violation "bears a substantial relation" to mental illness and dangerousness, which are the only constitutional bases for committing individuals to the mental hospital.

Finally, as a practical matter, because Mr. Cruz was in living in the community for nearly fifteen years, there are numerous mental health evaluations from which CMHIP could rely on (and, in fact, did rely on in this case) to diagnose Mr. Cruz's mental illness and dangerousness. CF, pp 645-49, pp 678-82, pp 700-07, pp 717-27, pp 781-82, pp 836-43. Given that extensive and regular evaluations are conducted as part of any conditional release, the automatic revocation provision for "noncooperation" with just a single evaluation—again, a provision that has no substantial and individualized nexus to managing an individual's mental illness and dangerousness—is unjustified as a practical matter. *See Garlotte*, 958 P.2d at 477-78.

Here, because section 16-8-115.5(5) requires automatic revocation for "failure to submit to and cooperate with" a mental health exam, without requiring the prosecution to prove that cooperation was a narrowly tailored condition of an individual's CR Order and an essential aspect of managing that individual's mental health and dangerousness, that provision of section 16-8-115.5(5) violates due process. In turn, the district court erred in revoking Mr. Cruz's conditional release

without (1) defining "cooperation" and (2) finding the exam was substantially related to managing Mr. Cruz's mental illness *and* dangerousness.

2. The noncooperation provision is vague, facially and as applied, in violation of due process.

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 588 U. S. ____ (2019); *see also Kruse v. Town of Castle Rock*, 192 P.3d 591, 597 (Colo. App. 2008) ("A statute or ordinance which is unconstitutionally vague constitutes a denial of due process of law under the United States and Colorado Constitutions." (citation omitted)).

Only the Colorado Legislature has the power to draft our state criminal laws, and when the Legislature "exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements." *Davis*, 588 U.S. at ____. That is, vague laws "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.*; *see also Kruse*, 192 P.3d at 597 (noting that a statute must give "fair notice and set forth sufficiently definite standards to ensure uniform, nondiscriminatory enforcement"). "When Congress passes a vague law, the role of courts under our Constitution is

not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Davis*, 588 U.S. at ____.

Here, Mr. Cruz was statutorily and constitutionally entitled to notice that his conditional release could be revoked for "noncooperation," and part and parcel of such notice requires a clear explanation of what "cooperation" means. *See Garlotte*, 958 P.2d at 474 (holding that defendants must have fair notice before their conditional release is revoked). As explained above, the district court never advised Mr. Cruz that noncooperation would require automatic revocation, let alone explained what "cooperation" requires—one can only guess at its meaning in this particular circumstance, especially when the ordinary meaning of the term is inapplicable in this context.

Other courts recognize that a requirement of cooperation is vague. *Cf. Flores-Guerrero v. Sessions*, 715 F. App'x 733, 734 (9th Cir. 2018) (concluding that the concept of "cooperation with law enforcement" was "a vague and amorphous concept"); *Bright v. Ohio Nat'l Life Assurance Corp.*, 2011 WL 13130908, at *3 (N.D. Okla. Oct. 20, 2011) (suggesting that because the "the term 'failure to cooperate' is not defined," it is vague); *Simon v. Gonzales*, 2006 WL 2434916, at *2 (N.D. Fla. Aug. 21, 2006) (noting that a mere allegation of "failure to cooperate" was vague); *People v. Lozovsky*, 267 A.D.2d 774, 775 (N.Y. 1999)

(noting that the requirement of "cooperation" required by the prosecution in exchange for compensation was "vague and ambiguous"); *Home Indem. Co. v. Reed Equip. Co.*, 381 So. 2d 45, 49 (Ala. 1980) (noting that in the civil context, "'cooperation clauses' as conditions precedent to the insurer's obligations impose broad, vague requirements, which, in the absence of legally applied standards, would put into doubt the contractual obligations between insurer and insured in nearly every case."). Although in different contexts, this acknowledgment matters.

Finally, to the extent *People v. Bondurant*, 2012 COA 50, ¶¶ 38-40—which holds that "cooperation" in the context of insanity defenses at trial is not facially unconstitutionally vague—is relevant, that decision is wrongly decided and also does not decide Mr. Cruz's as-applied challenge. Indeed, the most problematic issue with *Bondurant* is that the division **never** explains what "cooperation" means.[4] The circular and evasive explanation of cooperation has to end—this Court should answer once and for all what "cooperation" requires in these mental health cases, so that insanity acquittees receive proper notice.

[4] Notably, however, *People v. Bondurant* implies that defendants must know their cooperation is required. 2012 COA 50, ¶ 40 ("Nor has he alleged that the term was incomprehensible to him before or during his court-ordered examination."). This suggestion directly relates to Argument I above, regarding essential advisements.

3. The noncooperation provision violates the constitutional and statutory rights against self-incrimination, facially and as-applied.

Under the Due Process Clauses and section 16-8-102(4.5), an individual is constitutionally and statutorily entitled to release unless they are mentally ill and dangerous, or until they violate a condition of their CR Order that is substantially related to managing their mental illness and dangerousness. *Foucha*, 504 U.S. at 75-76; *Garlotte*, 958 P.2d at 474. Moreover, under sections 16-8-117 and 16-8-106(2)(a), defendants facing revocation have a privilege against self-incrimination during any compulsory mental health examination.

Notwithstanding these rules, section 16-8-115.5(5) requires a court to automatically revoke an individual's conditional release for "failure to . . . cooperate with" a mental health examination. Here, the district court revoked Mr. Cruz's release for noncooperation. TR 9/5/18 pp 12:20-13:3. What does "cooperate with" mean, exactly? The statutes don't say and the district court never explained it. This is a problem.

Merriam-Webster and Black's Law Dictionary both define "cooperate" as working together with others for a common or mutual benefit. *See* Merriam-Webster Online Dictionary, cooperate (retrieved May 15, 2019), *available at* merriam-webster.com/dictionary/cooperate; *see also* Black's Law Dictionary,

cooperation (10th ed. 2014). However, in this case, the district court effectively construed cooperation to mean that Mr. Cruz was compelled to answer Dr. Abel's questions in order to remain on conditional release. TR 9/5/18 pp 12:20-13:3. Yet, as noted above, Mr. Cruz had a constitutional and statutory right against self-incrimination during the compulsory examination, so cooperation can't mean that. U.S. Const. amend. V; Colo. Const. art. II, § 18; §16-8-117; § 16-8-106(2)(a).

It is well settled and fundamental that a defendant may not be penalized for the exercise of his Fifth Amendment right to remain silent. *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 429, 434-435 (1984); *Apodaca v. People*, 712 P.2d 467, 473 (Colo. 1985) ("A constitutional right may be said to be impermissibly burdened when there is some penalty imposed for exercising the right."). Here, because "cooperation" under section 16-8-115.5(5) can be (and, in this case, was) construed to require self-incrimination during a compulsory process, the provision violates sections 16-8-106(2)(a) and 16-8-117, as well as the state and federal constitutions, facially and as-applied. U.S. Const. amend. V; Colo. Const. art. II, § 18. On either basis, reversal would be required.

Finally, again, to the extent that *Bondurant*, ¶ 41, holds that "cooperation" doesn't facially violate any privilege against self-incrimination, it is limited to its context—mental condition evidence at trial, raised by the defendant. Furthermore,

in that case, the division specifically stated that "the privilege against self-incrimination is not implicated by a court-ordered mental examination when the information obtained therefrom is admitted *only* on the issue of mental condition." *Id.* at ¶ 44. Here, that is not what the noncooperation provision of section 16-8-115.5(5) does; instead, it automatically sends an innocent man back to CMHIP—possibly forever—without any consideration as to his mental illness or dangerousness, in violation of due process. Third, unlike the provisions in *Bondurant***,** section 16-8-115.5(5) is not about fundamental fairness. Finally, here, we have an independent, as-applied challenge. These are critical distinctions rendering *Bondurant* inapplicable in this case.

4. The noncooperation provision conflicts with other, controlling statutes.

Finally, because "cooperation" can be construed to require self-incrimination, it conflicts with sections 16-8-106(2)(a) and 16-8-117, facially and as-applied . When a court cannot reconcile inconsistent statutes, the more concrete and specific statute controls unless there is a "manifest" indication from the legislature to the contrary. § 2-4-205, C.R.S. Here, section 16-8-102(4.5) is crystal clear that an individual must be released if (1) he is not both mentally ill and dangerous and (2) he complies with the conditions of his CR Order. *See also Foucha*, 504 U.S. at 75-76; *Garlotte*, 956 P.2d at 474-78. By contrast, section 16-

8-155.5(5) prohibits release if the individual fails to "cooperate with" a mental health exam as part of the revocation process.

By providing less guidance than section 16-8-102(4.5), section 16-8-155.5(5) is the less specific statute. Furthermore, there is no manifest indication that section 16-8-115.5(5) trumps section 16-8-102(4.5) when it comes to an individual's eligibility for release—nor could it, because only mental illness *and* dangerousness permit commitment. *Foucha*, 504 U.S. at 75-76.

C. Reversal is Required

For all of the reasons above, the automatic revocation provision of section 16-8-115.5(5), requiring cooperation with a mental health exam ordered as part of the revocation process, is unconstitutional and trumped by other, controlling statutes. Accordingly, the district court erred in relying on that provision to revoke Mr. Cruz's conditional release and reversal of the revocation order is required.

III. THE NUMEROUS VIOLATIONS OF MANDATORY PROCEDURAL SAFEGUARDS REQUIRE REVERSAL.

A. Standard of Review and Preservation

This issue is partially preserved. TR 9/5/18 p 10:14-24.

The requirements and meaning of the requirements within Title 16, Article 8 involve questions of law reviewed de novo. *See Garlotte*, 958 P.2d at 474-79. In construing a statute, courts "interpret the plain language of the statute to give full

effect to the intent of the General Assembly." *Griego*, ¶ 25. "When the statutory language is clear," courts "apply the plain and ordinary meaning of the provision," giving "consistent, harmonious, and sensible effect to each part of the statute" and "rendering no words or phrases superfluous and construing undefined words and phrases according to their common usage." *Id.*

A failure to follow strict procedural processes designed to ensure confidence in the fairness and outcome of the proceedings requires reversal. *See, e.g.*, *Gilford v. People*, 2 P.3d 120, 124 (Colo. 2000) ("Deviations from the statutory process governing civil commitment proceedings, however minor, are subject to exacting appellate review, for even the slightest departure from these codified procedures can raise profound constitutional concerns."). Here, because the preserved errors are of constitutional dimension, since they directly implicate Mr. Cruz's right to substantive and procedural due process, they are reviewed for constitutional harmlessness. *See Hagos v. People*, 2012 CO 63, ¶ 11. The remaining violations are reviewed for plain error. *Id.*, ¶ 14.

B. Law and Analysis

The framework governing conditional release is located in Title 16, Article 8. Although framework is relatively limited, the procedural requirements therein

make clear that the district court, state, and CMHIP violated numerous mandatory safeguards in the process of revoking Mr. Cruz's conditional release.

1. The CR Order did not contain notice that revocation would follow the procedures of section 16-8-115.5.

Under section 16-8-115, the district "court's order placing the defendant on conditional release shall include notice that the defendant's conditional release may be revoked pursuant to the provisions of section 16-8-115.5." Here, the only condition of Mr. Cruz's CR Order involving revocation stated:

> 20. **Revocation of Release/Return to Hospital.** In any report to the Court of any violations of this Order, CMHIP shall include a recommendation whether Mr. Cruz's Conditional Release should be continued, modified or revoked. The FCBS staff has the authority under Paragraph 9 of this Order to direct Mr. Cruz to return to CMHIP inpatient care, without an Order of the Court.

CF, p 818.

Clearly, this provision does not contain any warning that revocation will follow the process set forth in section 16-8-115.5(5), let alone anything about automatic revocation for "failure to submit to and cooperate with [an] examination," § 16-8-115.5(5). Thus, the CR Order violates section 16-8-115 and, as such, is illegal. *See Gilford*, 2 P.3d at 125 ("failure to comply with essential statutory requirements . . . involves a deprivation of essential procedural rights

that substantially impairs the fundamental fairness of the certification proceedings").

2. The court didn't determine the duration of the mental health examination.

Under section 16-8-115.5(5), any mental health examination ordered by the court must comply with section 16-8-106. As pertinent here, section 16-8-106(1)(a) states that the district court "shall" specify the location of the exam and "the period of time allocated for such examination."

Here, the district court's order for a mental health examination listed the place (CMHIP), but did not determine "the period of time allocated for such examination." *See* CF, p 791. This was illegal under section 16-8-106(1)(a).

3. The mental health examination didn't occur within twenty-one days of Mr. Cruz's arrest.

Under section 16-8-115.5(5), when an individual is arrested for allegedly violating the conditions of his CR Order, the district court "shall" order a mental health examination to "be completed within twenty-one days." § 16-8-115.5(5).

In this case, the court ordered for Mr. Cruz's arrest on April 2, 2018. CF, p 791. According to section 16-8-115.5(5), the mental health examination had to take place within twenty-one days of that date—so, no later than April 23, 2018.

However, the exam ultimately took place on May 14, 2018—over 40 days after Mr. Cruz's arrest and the court's order for such an exam. CF, pp 836-43.

Notwithstanding the clear commandment in section 16-8-115.5(5), the district court ignored the twenty-one day rule. This was not the result of mere oversight. At a previous November hearing in this case, long before formal revocation proceedings began, the prosecution, a CMHIP representative, and the district court discussed the fact that, when revocation is sought, a mental health examination *must* occur within twenty-one days. The prosecutor told the court:

> I guess the concern is . . . since a warrant was issued, there is to be an examination within 21 days pursuant to [16]-8-115(5) . . . . I don't know how we could get around that statute since the arrest warrant is active and he is there at CMHIP, it's a law enforcement agency.

TR 11/8/17 p 5:4-12.

A few months later, however, the court did not abide by this rule when revocation was formally sought and Mr. Cruz was arrested. This was illegal. *See* § 16-8-115.5(5).

4. The mental health exam wasn't recorded.

In addition to section 16-8-115.5(5)'s timing requirement, it also mandates that any court-ordered mental health examination "shall be consistent with the procedure . . . in section 16-8-106." As relevant here, section 16-8-106(1)(e)

requires that all mental health exams for cases involving a class 1 or 2 felony—as in this case—"must be video and audio recorded and preserved."

Here, Dr. Abel testified that, although he asked Mr. Cruz a few questions before Mr. Cruz cut the exam short, the interview was not video or audio recorded:

> [DEFENSE COUNSEL]. When you met with Mr. Cruz, was this meeting recorded at all?
>
> [DR. ABEL]. I keep—I type what people tell me. There is not an auditory recording.
>
> [COUNSEL]. So you had no audio recording device?
>
> [DR. ABEL]. No.
>
> [COUNSEL]. No video recording device?
>
> [DR. ABEL]. No.

TR 9/5/18 p 9:1-8.

As defense counsel rightly noted, this failure was a violation of sections 16-8-115.5(5) and 16-8-106(1)(e). TR 9/5/18 p 10:14-24. The district court disagreed, ruling that no interview actually took place because Mr. Cruz was uncooperative and, therefore, there was no need to record what happened. TR 9/5/18 p 12:16-21.

The court's ruling is incorrect, as a factual matter. The interview had begun—Dr. Abel asked Mr. Cruz questions for the specific purpose of examining him, but Mr. Cruz cut it short:

> [DR. ABEL]. . . . I met with [Mr. Cruz] on his treatment unit. I introduced myself, I told him what the purpose of this evaluation was.
>
> He initially didn't seem to remember me, but then quickly remembered that he had met with me seven years ago. And then he said that he did not want to meet with me anymore. When I told him that if I didn't meet with him, it could possibly lead to an adverse effect for him. And he said that was okay, and that he did not want to meet with me.

TR 9/5/18 p 7:1-9. Sections 16-8-115.5(5) and 16-8-106(1)(e) required this limited interview to be video and audio recorded.

The court's ruling is also based on a misunderstanding of law. Nowhere in Title 16, Article 8 is there any suggestion that a defendant's failure to answer questions means that the interview doesn't need to be recorded. In fact, during the legislative hearings in passing the recoding requirement, Senator Cooke (one of the sponsors of the recording requirement) stated, "Videotaping insanity pleas is a lot like taping police custodial interrogations." Colorado General Assembly, official website, May 2, 2016, Senate Second Reading Special Order, Passed with Amendments, Committee, at 5:14. This suggests that videotaping preserves exactly what happened, creating the best evidence of what occurred during a court-ordered exam. Here, we are only left with Dr. Abel's recollection—*not* the best evidence of what happened.

Moreover, even had Mr. Cruz sat through the interview in silence—by invoking his right against self-incrimination, for example—section 16-8-106(1)(e) would still mandate video and audio recordings. Failure to comply with that mandate here was a violation of Colorado law. § 16-8-115.5(5) (any exam ordered revocation proceedings "shall be" consistent with section 16-8-106).

5. The court denied Mr. Cruz's request for an independent evaluation.

Under sections 16-8-106(1)(a), 16-8-108(1)(a), and 16-8-115.5(5), a defendant is entitled to an independent mental health examination and nothing "shall abridge [that] right," § 16-8-106(1)(a).

Here, though, the district court denied defense counsel's request for an independent mental health examination because "it would be meaningless" once Mr. Cruz failed to cooperate with the CMHIP's evaluation, which required automatic revocation. TR 9/5/18 p 14:21-14. But the statutes are clear that *nothing* abridges the individual's right to an impartial, independent evaluation. In fact, impartiality is precisely what Mr. Cruz was worried about in this case; Dr. Abel said Mr. Cruz refused to answer further questions once he realized Dr. Abel was the same psychiatrist who evaluated him several years prior and had denied his request for unconditional release (i.e., total freedom). TR 9/5/18 pp 6:23-7:9.

Put simply, Mr. Cruz was entitled to an independent evaluation and the court erred in denying it. § 16-8-106(1)(a); § 16-8-108(1)(a); § 16-8-115.5(5).

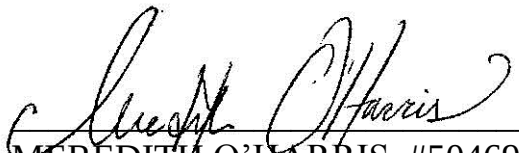
C. Reversal is Required

Individually and cumulatively, the extensive "failure to comply with essential statutory provisions [is] grave enough to 'undermine confidence in the fairness and outcome of the [revocation] proceedings." *Gilford*, 2 P.3d at 125-26. It was the manifest intent of our legislature that the above processes be followed. Here, the extensive and repeated disregard of those requires reversal. *See id.*

CONCLUSION

Based on the authorities and arguments above, the district court erred in revoking Mr. Cruz's conditional release. Mr. Cruz respectfully requests reversal of that order and remand with directions consistent with the process argued above.

MEGAN A. RING
Colorado State Public Defender



MEREDITH O'HARRIS, #50469
Deputy State Public Defender
Attorneys for JOHN CRUZ
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on August 13, 2019, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's office through their AG Criminal Appeals account.