

<p>DISTRICT COURT HUERFANO COUNTY, STATE OF COLORADO</p> <p>200 West 5th #141 Walsenburg, CO 81089 719-793-7100</p> <hr/> <p>HENRY L. SOLANO, District Attorney for the Third Judicial District, in his official capacity and on behalf of the Third Judicial District Attorney's Office,</p> <p>Plaintiff,</p> <p>vs.</p> <p>BRUCE NEWMAN, Huerfano County Sheriff and the Huerfano County Sheriff's Office,</p> <p>Defendants.</p>	<p>DATE FILED: December 13, 2021 11:36 AM CASE NUMBER: 2021CV30020</p> <p>▲ FOR COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2021CV030020</p> <p>Division: D</p>
<p>ORDER GRANTING PRELIMINARY INJUNCTION</p>	

This matter is before the Court upon the motion for preliminary injunction filed by the Plaintiff on June 28, 2021. The Court held hearings on the matter on July 13, 2021 and on August 3, 4, and 5, 2021. At those times the Plaintiff appeared and represented himself. Defendants Bruce Newman appeared in person and on behalf of the Huerfano County Sheriff's Office (HCSO); he and the Huerfano County Sheriff's Office were represented by Matthew Z. Krob. The Court received testimony and admitted numerous exhibits at the three-day hearing. The parties each filed written closing arguments on October 13, 2021.

Having heard testimony, and reviewed pleadings and the exhibits, and considered the arguments of counsel, the Court now makes the following findings of fact and conclusions of law, and enters orders as follows.

THE PLEADINGS

In this suit the Plaintiff seeks declaratory relief. His complaint, filed on June 28, 2021, states as follows:

The claims raised in this matter are for declaratory judgment that the Huerfano County Sheriff and Sheriff's Office are not complying with the law enforcement obligation regarding criminal matters in Huerfano County, specifically, including but limited to, failing to: a) properly and timely provide to the Office of the District Attorney (hereinafter "DA's Office") investigatory evidence and information in their custody, possession or control under Rule 16 of the Colorado Rules of Criminal Procedure (hereinafter "Rule 16"); b) to properly maintain, preserve and/or inventory evidence including labeling and maintaining a "chain of custody" log; c) to timely and properly send evidence for testing; and d) follow appropriate standards related to extrajudicial publicity. The failure to perform these basic law enforcement functions has led to the DA's Office having to dismiss criminal matters where the Huerfano County Sheriff's Office is the lead or primary law enforcement entity on the criminal matter. The nature and quantity of failures are persistent and/or increasing to the point of bordering on a pattern of violation of obligations applicable to criminal matters pursuant to Rule 16 and therefore adversely affecting public safety in Huerfano County. This action is required to avoid any further dismissals of criminal matters due to these issues and to avoid judicial sanctions based on a pattern of violation of Rule 16 obligations.

This Complaint seeks a declaration as to the duties and obligations of Sheriff Newman and the Huerfano County Sheriff's Office related to criminal investigations and prosecution in Huerfano County and related injunction requiring Sheriff Newman and the Huerfano County Sheriff's Office to comply with its basic law enforcement obligations related to criminal prosecutions in Huerfano County.

*

The Plaintiff filed a motion on June 28, 2021, for a temporary injunction and on the same date he filed his motion for a preliminary injunction.

The Defendants did not file any pleading in response to either motion.

Nevertheless, without objection the Court began a hearing on the motion for a temporary injunction on July 13, 2021 but was unable to conclude the hearing because of a lack of time. The parties stipulated at that time that the testimony received at that hearing on could be held over and considered by the Court in ruling on the motion for preliminary injunction; however, the carryover applied only to testimony and not to exhibits.

The Plaintiff seeks a mandatory preliminary injunction which, simply put, would require the Defendants to comply with the timely and complete disclosure requirements of Criminal Procedure Rule 16 (hereinafter “Rule 16”).

In setting the background and basis for his request for a preliminary injunction, the Plaintiff alleges in his motion, in pertinent part, that:

1. As shown in the Verified Complaint, this action involves a dispute concerning timely and complete production of investigatory and evidentiary material by Huerfano County Sheriff Bruce Newman (hereinafter “Sheriff Newman”) and the Huerfano County Sheriff’s Office (“HCSO”).
2. Rule 16 provides that mandatory discovery materials are to be provided to a Defendants (his counsel) **as soon as practicable** but not later than 21 days after the appearance of the Defendants on a filed complaint. As stated in the Verified Complaints, most law enforcement agencies, including the other agencies that regularly are involved in criminal matters in the 3rd Judicial District, provide the Rule 16 mandatory discovery materials within 24-48 hours of summons or arrest. (Emphasis in original)
3. Providing the Rule 16 mandatory discovery materials to the DA’s Office allows the prosecutors to evaluate all appropriate information to properly prepare and file the complaint and information (which contain the actual charges) in the case or to make amendments to matters that proceed by summons.
4. Further, providing Rule 16 mandatory discovery materials to the DA’s office ensures compliance with a Defendant’s Constitutional right to a fair trial; right to effective counsel in considering whether to enter into a plea bargain, a plea of guilty, or set the case for trial; and enables the Court presiding over the matter to issue protection orders protecting victims of crime.
5. Rule 16(a)(3) specifically states: “The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.” Rule 16(b)(4) goes on to specify that DA Solano “shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.

6. Rule 16(c)(1) continues reinforcing this obligation and public policy in the specific identification of material held by other governmental personnel by stating DA Solano “shall use diligent good faith efforts to cause such material [discoverable information] to be made available to the defense”. Pursuant to Rule 16(c)(2) in an individual case, the Court may issue an order compelling compliance with providing discovery by government personnel within the jurisdiction of the Court. As the Verified Complaint shows the problem here is systemic and/or pervasive so that a preliminary injunction order is the most judicially efficient manner in which to proceed for the Court and given the limited resources of the DA’s Office.

7. As shown in the Verified Complaint, cases have been dismissed because Crim. Pro. Rule 16 discovery materials have not been promptly, timely or completely provided to the DA’s Office in Huerfano (hereinafter “DA’s Office”) and for over 6 months the Defendants have not provided these materials electronically, which system had been used by the Defendants since January 2018. The failure to use this system imposes an undue burden on the DA’s Office which is underfunded to fully perform its normal responsibilities.

8. As shown in the Verified Complaint, there are current cases where Rule 16 discovery materials have not been provided or what has been provided is incomplete and there is a real probability that there is or will be violations with Rule 16 on pending and future criminal prosecutions.

9. (Omitted)

10. Unless the requested injunction is granted, DA Solano and his prosecutors will be charged with violations of Rule 16 and/or a Court could find a willful or pattern of negligence regarding Rule 16 violations. Further, more criminal matters will be the subject of dismissal related to noncompliance with Rule 16 in order to avoid Rule 16 sanctions. All of this adversely affects public safety in Huerfano County since criminal matters cannot be pursued to an appropriate result. Motion for Preliminary Injunction

*

Based on these allegations, the Plaintiff requests a preliminary injunction:

- a) Restraining Sheriff Newman and the HCSO from failing to comply with Rule 16
- b) Requiring Sheriff Newman, the HCSO and their agents/employees to provide all the mandatory discovery as defined under the Colorado Rules of Criminal Procedure Rule 16 part I (a)(1)(I),(IV), (VII), (VIII) within five days of this Order

for all existing criminal matters that are pending in Huerfano County, and no later than 72 hours after arrest or summons for any cases initiated after this Order is issued; and to file any affidavits of arrest – whether warrantless or by warrant – with the Court within 24 hours of arrest.

b) (sic) Requiring Sheriff Newman, the HCSO, his/their agents, employees and those persons having active participation with them who receive actual notice of the Preliminary Injunction Order to timely and competently perform the law enforcement obligations including but not limited to

- i) fully and timely comply with Color R. Crim. Pro. Rule 16, by providing all investigatory and supplemental reports of all responding law enforcement personnel and other evidence including body camera, surveillance, CAD reports and recordings and detention facility video to the 3rd Judicial District Attorney's office in proper electronic form,

- ii) to properly preserve, catalogue and maintain a proper chain of custody for evidence related to any criminal matter investigated by them and related to any criminal prosecution in the 3rd Judicial District,

- iii) to timely (no later than 7 days after seizure or this Order for existing cases and properly send evidence, including but not limited to blood vials from DUI cases, drugs and DNA for free testing or analysis by the Colorado Bureau of Investigations within and to report the result thereof pursuant to Rule 16 in the appropriate electronic form to the 3rd Judicial District Attorney's Office,

- iv) to timely and properly perform follow up investigation and law enforcement functions related to criminal prosecutions they participate in with proper reporting and preserving evidence and information obtained and

- v) to comply with the standards regarding limited in pretrial statements and publicity, until further Order of this Court.

In his written closing argument, the Plaintiff modified his request for a preliminary injunction. In his brief he said:

DA Solano is narrowing the preliminary injunction request for relief, asking the Court to require Sheriff Newman and the HCSO pursuant to Rule 16 of the Colorado Rules of Criminal Procedure (hereinafter "Rule 16") a) to properly and

timely provide to the Office of the District Attorney (hereinafter “DA’s Office”) investigatory evidence and information in their custody, possession or control; b) to properly maintain, preserve and/or inventory evidence including labeling and maintaining a “chain of custody” log; c) to timely and properly send evidence for testing; and d) to use the state created, funded and free to law enforce E-Discovery Platform.

THE EVIDENCE

The Court received testimony from eight witnesses. Transcripts of the hearings have been prepared and filed.

The Court admitted Plaintiff’s Exhibits A-1HCSO, A-HCSO, B-HCSO, A-LASO, A-1-TPD, A-TPD, B-TPD, B-1, C, D, E-1, F, G, H, I, J, K, PI-1, M and N. The Court also admitted Defendants’ Exhibits 1 and 1-1.

Exhibit A-HCSO show that the average time lapse from the date of arrest to the date of electronic uploading of case information by the HCSO in the time period of June 6, 2010 to October 2, 2020 was a t least 56 days.

Exhibit A-1-HCSO shows the time lapses form the date of offense to the date of the HCSO provided various types of case information to the Plaintiff during the time period of January 2, 2019 to June 5, 2020. The average time delay for all types of matters was 21.5 days.

Exhibit PI-1, pages 1 and 2, lists the cases in which discovery was provided by the HCSO to the Plaintiff later than thirty days from arrest during the time period of November 23, 2020 to July 29, 2021. The HCSO delay in providing discovery data in 55% of the cases listed during that time period.

In addition, the parties filed, on August 18, 2021 a stipulation relating to the provisions of Rule 16 and its application in this case.

The testimony and exhibits are extensive and complex.

*

Although the Defendants’ failure to respond to either the motion for a restraining order or to the motion for preliminary injunction may be considered a confession of said motions (C.R.C.P. 121--§121-15(3)), such would be an abuse of discretion in light of the lack of objection thereto and the fact that all parties proceeded to hearing on merits.

The Court concludes that the situation is best resolved by the guidance set forth in *Meyer v. State Dept. of Revenue*, 143 P.3d 1181 (Colo.App.2006) wherein the Court of Appeals held that:

Although C.R.C.P. 121 § 1–15.1 does not require a party to respond to an opponent's motion, § 1–15.3 reflects a preference that the nonmoving party respond. A response promotes efficiency by informing the court of whether the motion is opposed, providing the court with argument and authorities, and enabling the court to determine whether oral argument is necessary. *See City & County of Denver v. Ameritrust Co.*, 832 P.2d 1054 (Colo.App.1992). A trial court may consider a party's failure to file a response to a motion as a confession of the motion. C.R.C.P. 121 § 1–15.3.

However, courts favor the resolution of disputes on their merits. *Craig v. Rider*, 651 P.2d 397 (Colo.1982). Accordingly, a court may not deem a motion for summary judgment to have been confessed by a failure to respond. Instead, the burden remains on the moving party, who must still establish all the requirements for summary judgment under C.R.C.P. 56. *Seal v. Hart*, 755 P.2d 462 (Colo.App.1988). Similarly, when the defendant in a lawsuit is not a private party, but an officer or agency of the state, the plaintiff is not entitled to default judgment without first establishing the right to relief based on the merits of the case. C.R.C.P. 55(e).

STANDARD OF REVIEW

The legal standard for preliminary injunctive relief is well established under *Rathke v. MacFarlane*, 648 P. 2d 648, 653-54 (Colo.1982). The six elements the Court must consider in issuing a preliminary injunction are : (1) whether there is a reasonable probability of success on the merits; (2) whether there is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) whether there is a plain, speedy and adequate remedy at law; (4) whether the granting of a preliminary injunction will disserve the public interest; (5) whether the balance of equities favors the injunction; and (6) whether the injunction will preserve the status quo pending a trial on the merits. *Id.*; *Dallman v. Ritter*, 225 P.3d 610, 620 (Colo.2010). The Plaintiff bears the burden of proving each of the elements by a preponderance of the evidence.

Here, even though the Defendants may be considered to have confessed the motions because of their failure to have filed written responses, the Plaintiff must still establish that he is entitled to a preliminary injunction based upon the merits of his case, given the nature of the relief sought and of the status of the Defendants as officers or agencies of the state. *Seal v. Hart, supra*.

ANALYSIS

The Court now considers the criteria for a preliminary injunction and concludes as follows:

(1) Whether there is a reasonable probability of success on the merits;

In both the testimony and in the closing brief (pages 9-24) the Plaintiff presented voluminous evidence as to how the non-compliance or delay by the Defendants regarding Rule 16 matters impairs the function of his office and his obligations. A prime example is the stipulated fact that:

According to the records available to the Parties, from the time period of September 30, 2020 to July 12, 2021, and as of the date indicated below, of the felony cases initiated by the Huerfano County Sheriff's Department, discovery was provided to the District Attorney's Office in a time period 30 days or more from the filing of charges in 38 cases out of 96 cases. Stipulation, page 2.

In addition, Exhibits A-1HCSO, A-HCSO, and B-HCSO all establish the delay and delinquency by the Defendants in providing the required evidentiary material needed by the Plaintiff to prosecute criminal cases.

Exhibit B-1 (Red Corrected) shows that from January 2, 2019 to July 29, 2021 the HCSO took thirty or more days in 38.6% of is to provided discovery to the Plaintiff, and 71.4% of those cases took more than 14 days to produce the discovery.

Also, the arguments of the Plaintiff in his closing brief (pages 9-24) also specify the failure of the Defendants to meet their obligation under Rule 65. The Court adopts the facts and findings set forth by the Plaintiff in his closing brief at pages 9-24, no contrary evidence having been presented by the Defendants.

Thus, assuming that the testimony at the hearing regarding the permanent injunction is consistent with that offered at the hearings on the preliminary injunction, and that no evidence comes forth contrary to that established by all of the testimony and exhibits admitted so far, the Court concludes that there is a reasonable probability that the Plaintiff will succeed in obtaining the relief sought in his complaint.

(2) Whether there is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;

There is no requirement that there be a showing of immediate, and irreparable injury when the relief sought is done so on behalf the public interest, as is the case here with the Plaintiff as the District Attorney and he is acting in his official capacity on behalf of the public.

In Lloyd A. Fry Roofing Co. v. State Department of Health Air Pollution Variance Board, 553 P.2d 800, 808 (Colo. 1976); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 1004 (Colo. 1957).

(3) Whether there is a plain, speedy and adequate remedy at law;

There is no statutory proceeding, nor none pursuant to the common law that the Court is aware of, which allows anyone to bring suit against the sheriff to compel him to perform his duties, either in general or in a specifically situation. Thus, since there is no remedy provided by law, the only recourse for persons in the situation such as the Plaintiff here is to seek a declaratory judgment and orders for injunctive relief. There is no plain speedy and adequate remedy at law available to the Plaintiff.

4) Whether the granting of a preliminary injunction disserves the public interest;

Here the Plaintiff seeks to compel compliance with a procedural rule. He pleads, and the Court concludes properly so, that it is in the public interest in general and to his the interest of his office in particular that there be compliance with applicable criminal law rules and procedures. Thus, the Court concludes that it is axiomatic that a preliminary injunction will serve the public interest by promoting compliance with criminal law and procedure and will enable the prosecution of criminal cases. Further, in this instance, a preliminary injunction will serve—rather than disserve—the public interest.

(5) Whether the balance of equities favor the injunction;

Balancing equities implies that there are, indeed, equities on both sides of the question. Here the Court sees no equity in *not* requiring the sheriff to perform his duties. Rather, the equities lie with the Plaintiff in seeking an order to compel the Sheriff to perform his lawful duties. A preliminary injunction would not require the Defendants to do anything not now being done by other persons and agencies in the Plaintiff's judicial district, as shown by Exhibits A-TPD, Exhibit A-LASO, and Exhibit A-1-TPD. Thus, the Court concludes, then, that all of the equities are in favor of granting the injunction.

(6) Whether the preliminary injunction preserve the status quo pending a trial on the merits.

The granting of a preliminary injunction is intended to preserve the status quo or otherwise grant emergency relief. *Macleod v. Miller*, 612 P.2d. 1158 (Colo.App.1980). A preliminary injunction is intended to prevent further harm where harm is alleged, or to grant emergency relief. *Graham v. Hoyl*, 404 P.2d 604 (1965), citing cases.

Granting a preliminary injunction in this case will not preserve the status quo pending a trial on the merits. Rather, a preliminary injunction will prevent harm to the public which may occur if criminal prosecutions are thwarted.

Preserving the status quo in this case would sanction the continuing noncompliance by the Defendants with their duties to support the law. The status quo hinders the protection of the public interest by handcuffing, so to speak, the District Attorney in performing his obligations to prosecute criminal cases.

The purpose of this suit and of the preliminary injunction is to disrupt the status---not to preserve it--so as to protect the public interest.

If the injunction is not granted, then the status quo will be perpetuated for some time, and the public interest left unprotected.

The Court does not consider that the status quo element requires a determination that the status quo absolutely be preserved before a preliminary injunction is issued, but rather it requires that the element be considered and analyzed in the context of the entire case.

CONCLUSIONS AND ORDERS

Having considered the testimony, exhibits and arguments of counsel, the Court concludes, overall, that there has been, and continues to be, a persistent failure of the Sheriff and the Huerfano County Sheriff's Office to comply with Rule 16 to such a degree and persistence that there is in a detrimental impact up public safety and the prosecution of criminal case in Huerfano County.

The Court further concludes that the granting of mandatory preliminary injunction as sought by the Plaintiff is necessary and in the public interest to protect the public, and such appears to be only means of securing compliance with Rule 16 to enable the successful prosecution of criminal cases.

The Plaintiff has established by a preponderance of the evidence that he is entitled to a preliminary injunction, even given the failure of the Defendants to have filed a response to his motion for a preliminary injunction.

Therefore,

IT IS ORDERED THAT:

A preliminary in junction is hereby entered granted, and, therefore, until further order of the Court,

Sheriff Bruce Newman and the Huerfano County Sheriff's Office are hereby directed to comply with the requirements, provisions and procedures of Colorado Rules of Criminal Procedure Rule 16, including, but not limited to:

- a) properly and timely provide to the Office of the District Attorney of the Third Judicial District of the State of Colorado such investigatory evidence and information coming into their custody, possession or control;
- b) properly maintain, preserve and/or inventory evidence including labeling and maintaining a "chain of custody" log;
- c) timely and properly send evidence for testing; and
- d) use the state-created, funded and free-to-law-enforcement E-Discovery Platform.

Done in chambers of December 13, 2021.

BY THE COURT

/s/ M. Jon Kolomitz

Judge