DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING PEOPLE'S MOTION FOR FURTHER EXAMINATION PURSUANT TO C.R.S. § 16-8-106(1) (P-68)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, on July 20, 2012, during the midnight premiere of "The Dark Knight Rises." Following the defendant's plea of not guilty by reason of insanity, the Court ordered a sanity examination by the Colorado Mental Health Institute at Pueblo ("CMHIP"). Dr. Jeffrey Metzner completed the examination and filed a report on behalf of CMHIP in September 2013 ("CMHIP Report"). Approximately two months later, the People filed Motion P-68, which seeks a supplemental examination of the defendant's sanity by their expert witnesses, Dr. Phillip J. Resnick and Dr. Kris Mohandie. The defendant opposes the motion.

After Motion P-68 was briefed, the Court held a four-day evidentiary hearing between January 27 and January 30 of 2014.[1] At the end of the hearing, the Court took the matter under advisement. This Order resolves Motion P-68.

RULING

The Court finds that the People have established good cause for further or other examination of the defendant's sanity on the date of the offenses charged. More specifically, the Court concludes that the People have demonstrated that the CMHIP examination is incomplete and inadequate. Accordingly, the Court grants the People's request for further or other examination.

However, the Court disagrees with the People that it has the discretion to order a supplemental examination by their retained experts and that it is advisable to do so under the circumstances. The Court also determines that a supplemental examination by Dr. Metzner is inadvisable. Instead, the Court orders CMHIP to select another psychiatrist or a forensic psychologist by no later than March 10, 2014, to conduct a new sanity examination at CMHIP or at the Arapahoe County jail. Once the examination is complete, a report that complies with this Order should be filed no later than July 11, 2014. The new examiner shall not consider the defendant's competency to proceed or how any mental disease or defect or the

[1] Pursuant to Order D-191-A, the hearing was closed to the public. The Court subsequently suppressed the transcript of the hearing. *See* Order C-79. Where appropriate, the Court redacts references to the proceedings during the hearing from the public copy of this Order.

condition of mind caused by a mental disease or defect affects any mitigating factor identified in Colorado's death penalty statutes.

RELEVANT PROCEDURAL HISTORY

The prosecution has filed 166 charges against the defendant in connection with the July 20, 2012 mass shooting at the Century 16 Theatres.[2] On May 7, 2013, defense counsel filed a notice informing the Court that their client intended to tender a plea of not guilty by reason of insanity. Accordingly, on June 4, 2013, the Court advised the defendant of "the effect and consequences" of such a plea. *See* § 16-8-103(4), C.R.S. (2013).

As part of the June 4 advisement, the Court informed the defendant about "the applicable test for insanity" under Colorado law:

> (a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable. However, care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law;
>
> OR
>
> (b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable

[2] There are two counts of Murder in the First Degree for each of twelve deceased victims, two counts of Criminal Attempt to Commit Murder in the First Degree for each of seventy injured victims, one count of Possession of Explosive and Incendiary Devices, and one sentence-enhancing Crime of Violence count.

> mental state that is an essential element of a crime charged. However, care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, because, when the act is induced by any of these causes, the person is accountable to the law.

See June 4, 2013 Advisement at p. 1.

> The Court defined the following statutory terms for the defendant:
>
> "Diseased or defective in mind" does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> "Mental disease or defect" includes only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance but does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Id. at pp. 1-2.

Additionally, the Court explained that a "sanity examination" refers to a court-ordered examination "directed to developing information relevant to determining the sanity or insanity of the defendant at the time of the commission of the act with which he is charged and also his competency to proceed." *Id.* at p. 2. The Court notified the defendant that, in selecting the location of the examination, it was required to give priority to the place where he was in custody—the Arapahoe County jail—but that the nature and circumstances of the examination could require his commitment to CMHIP, the Colorado psychiatric hospital in Denver, or another public institution designated by the Court. *Id.*

After advising the defendant, pursuant to section 16-8-106(1), C.R.S. (2013), that he would be "observed and examined by one or more psychiatrists during such period as the Court direct[ed],"[3] the Court admonished him about the requirement to cooperate during the examination and the severe consequences for failing to do so:

> You shall cooperate with psychiatrists and other personnel conducting any examination ordered by the Court . . . .
>
> If you do not cooperate . . . the Court shall not allow you to call any psychiatrist or other expert witness to provide evidence at your trial concerning . . . the issue of insanity or at any capital sentencing hearing . . . .
>
> [T]he fact of your noncooperation . . . may be admissible in your trial to rebut any evidence you introduce with regard to . . . the issue of insanity and in any capital sentencing hearing . . . .
>
> [I]f you are non-cooperative . . . an opinion of your mental condition may be rendered . . . based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offenses charged, as well as your known medical and social history, and such opinion may be admissible into evidence at trial and in any capital sentencing hearing . . . .

Id. at pp. 3-4.

Of particular relevance to Motion P-68, the Court also instructed the defendant as follows, pursuant to section 16-8-106(1):

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[3] This statutory provision was amended after the advisement. The amended statute states that "[t]he defendant shall be observed and examined by one or more psychiatrists ***or forensic psychologists*** during such period as the court directs." (Emphasis added to reflect the statutory revision).

> ***For good cause shown,*** upon your motion or motion by the prosecution, or upon the court's own motion, ***the court may order such further or other examination, including services of psychologists, as is advisable under the circumstances.***

Id. at p. 2 (emphasis added).[4]

Following the advisement, the Court accepted the defendant's plea of not guilty by reason of insanity, which was entered orally by his counsel. With the parties' agreement, and in accordance with section 16-8-105.5(1), C.R.S. (2013), the Court "forthwith commit[ted] the defendant for a sanity examination." *See* Order C-41. Without objection, the Court selected CMHIP as the location for the examination.

The Court ordered CMHIP to submit its report no later than July 31, 2013. *Id.* at p. 1. Consistent with section 16-8-106(6), the Court required CMHIP to include the following information in its report: (1) the name of each physician or other expert who examined the defendant; (2) a description of the nature, content, extent, and results of the examination and any tests conducted; (3) a diagnosis and prognosis of the defendant's physical and mental condition; (4) an opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by a mental disease or defect that prevented him from forming the

[4] This statutory provision was amended after the advisement. The amendment omits the phrase "including services of psychologists." *See* § 16-8-106(1). As indicated in footnote 3, however, the preceding sentence in the statute was also amended after the advisement to allow "forensic psychologists," in addition to psychiatrists, to observe and examine the defendant in connection with the initial court-ordered sanity evaluation. *Id.*

culpable mental state that is an essential element of any crime charged; and (5) if the defendant suffered from such a mental disease or defect or from such a condition of mind, an opinion as to whether the defendant was insane, and, because this case involves class 1 felony charges, a separate opinion as to how the mental disease or defect or the condition of mind caused by mental disease or defect affects any mitigating factor identified in the death penalty statutes. *Id.* at p. 2.

On June 25, 2013, the Court granted CMHIP's request for an extension of time to complete its examination and report. *See* Order C-41A. On September 6, 2013, Dr. Metzner, a self-employed forensic psychiatrist, timely submitted a 69-page report on CMHIP's behalf. *See* Notice C-57.[5] The Court provided a copy of the CMHIP Report to each party on the same day.

On November 15, 2013, the prosecution filed Motion P-68. Simultaneously, the prosecution filed Motion P-67, which sought leave to file Motion P-68. Without objection, the Court granted Motion P-67 on December 9, 2013. *See* Order P-67. Thereafter, the parties briefed Motion P-68 and the Court held an extensive evidentiary hearing in January 2014. During the hearing, the prosecution clarified that it is requesting a supplemental examination of the defendant's sanity by its retained experts, Drs. Resnick and Mohandie. The prosecution informed the

[5] Dr. Metzner testified that, as a result of a conflict of interest, CMHIP's psychiatrists were unable to perform the court-ordered sanity examination. Therefore, CMHIP outsourced the examination. Dr. Metzner has "consulted generally on a monthly basis to CMHIP" since 1979. He has "a contract" with CMHIP.

Court that it is not seeking an additional examination regarding the defendant's competency to proceed or how any mental disease or defect or the condition of mind caused by a mental disease or defect affects any mitigating factor listed in the death penalty statutes.

The prosecution presented testimony from Dr. Resnick and Dr. Mohandie, and the defense presented testimony from Dr. Robert Hanlon and Dr. Metzner. At the end of the hearing, the parties made oral arguments.

CREDIBILITY DETERMINATIONS

The Court observed each witness' manner, demeanor, and body language while on the stand, and considered each witness' means of knowledge, strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether the witnesses had a motive to lie, as well as whether bias, prejudice, or interest in the case affected their testimony. Finally, the Court took into account all other facts and circumstances shown by the evidence which affected the credibility of any of the witnesses.

The Court finds the witnesses credible. The Court appreciates the candor generally exhibited by all four witnesses. The Court's resolution of any conflicts in the evidence is reflected in the Analysis section of this Order.

ANALYSIS

The prosecution argues that it has shown good cause for a supplemental examination of the defendant's sanity by Drs. Resnick and Mohandie. Motion at pp. 11-12.[6] The defendant counters that the prosecution cannot establish good cause for further examination and that, even if it could, "there is absolutely no authority or support in law, reason, or logic, to allow two biased prosecution experts to conduct this further evaluation." Response at p. 19. The Court partially agrees and partially disagrees with each party. The Court orders another examination on the issue of sanity by a psychiatrist or forensic psychologist selected by CMHIP.

[6] The prosecution filed its reply in support of Motion P-68 on December 11. On December 13, the Court sustained the defendant's objection to the reply because it included a new request and new arguments that were untimely and improperly raised. *See* Order D-193 at p. 5. Accordingly, the Court granted the defendant's request to file an additional response. At the December 18 status hearing, the Court set a new briefing schedule on Motion P-68. The Court indicated that it would treat the prosecution's December 11 reply as its opening brief. The Court then instructed the defendant to file a revised response and the prosecution to file a revised reply. For the sake of convenience, this Order refers to the prosecution's December 11 reply as "Motion," to the defendant's January 10 revised response as "Response," and to the prosecution's January 17 revised reply as "Reply."

A. Good Cause for Further or Other Examination

Section 16-8-106(1) provides, in pertinent part, that "[f]or good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination as is advisable under the circumstances." The good cause standard "is not an onerous one." *People v. Grant*, 174 P.3d 798, 803 (Colo. App. 2007) (citing *People v. Garcia*, 87 P.3d 159, 163 (Colo. App. 2003), *aff'd in part and rev'd in part on other grounds*, 113 P.3d 775 (Colo. 2005)). However, "there must be some basis, other than counsel's opinion, for showing that the first examination was inadequate or unfair." *Id.*; *see also Massey v. District Court*, 180 Colo. 359, 506 P.2d 128, 129 (Colo. 1973) (agreeing with the trial court that the defendant failed to establish "good cause" for a competency examination by a psychiatrist of his own choice because "[h]e made no effort to show that the examinations which had been conducted . . . were either inadequate or unfair").

"The purpose behind [section 16-8-106] was to cause the trial court, in the exercise of judicial discretion, to determine whether good cause has been shown or exists for the appointment of additional experts." *Massey*, 506 P.2d at 130; *see also Grant*, 174 P.3d at 803 ("The determination of whether good cause has been shown is a matter committed to the discretion of the trial court") (citation omitted). In order to give effect to the statute's legislative intent, "it is a better practice to

afford both parties the opportunity to present evidence" regarding the good cause requirement. *People v. Galimanis*, 765 P.2d 644, 646 (Colo. App. 1988). The trial court errs if it grants a party's request for a second examination without making findings or articulating reasons to support a showing of good cause. *Garcia*, 87 P.3d at 163; *see also Guevara v. Foxhoven*, 928 P.2d 793, 795 (Colo. App. 1996) ("A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair") (citation omitted).

Relying on the case law that has interpreted the good cause requirement in section 16-8-106(1), the prosecution asserts that the CMHIP Report is "inadequate." Reply at p. 2.[7] *Merriam-Webster Online Dictionary* defines "adequate" as "enough for some need or requirement;" "good enough;" "of a quality that is good or acceptable;" "of a quality that is acceptable but not better than acceptable." *Adequate*, *Merriam-Webster*, http://www.merriam-webster.com/dictionary/adequate (last visited February 11, 2014). Similarly, *Black's Law Dictionary* (9th ed. 2009) defines "adequate" as "[l]egally sufficient." In order to determine whether CMHIP's examination is enough for some need or requirement

[7] The prosecution further contends that the CMHIP examination is unfair because Dr. Metzner was biased. Dr. Resnick did not offer an opinion on bias, and the prosecution questioned Dr. Mohandie about it only after the defendant raised the issue on cross-examination. Moreover, Dr. Metzner's testimony put the allegation of bias to rest. The Court notes that at the hearing the prosecution also maintained, for the first time, that the examination's inadequacy renders it unfair. In addition to being untimely, this argument is irrelevant. Inadequacy is sufficient to establish good cause. As such, if the Court finds the examination inadequate, it matters not whether that also renders it unfair.

or legally sufficient, the Court must consider the purposes of a court-ordered sanity examination.

In *People v. Wilburn*, the Colorado Supreme Court observed that, in exercising its discretion under section 16-8-106 to identify the place where an examination is to be conducted and the period of time allocated for such examination, the trial court should consider the nature of the defense "and the kind of mental examination required to allow the prosecution to fairly rebut [that] defense." 272 P.3d 1078, 1084 (Colo. 2012); *see also Johnson v. People*, 172 Colo. 72, 470 P.2d 37, 40 (Colo. 1970) ("[T]he State is placed at a great disadvantage when it must prepare against a plea of insanity, and if its psychiatrists are met with a wall of silence, they would have no way of forming an opinion as to the defendant's sanity at the time of the commission of the act") (citation omitted). Like the Supreme Court, the Court of Appeals has acknowledged that the obvious reason for requiring a defendant who places his mental condition at issue to undergo a court-ordered examination "is to ensure that the prosecution is given a fair opportunity to rebut [the] mental condition evidence to be presented by [the] defendant." *People v. Herdman*, 310 P.3d 170, 178 (Colo. App. 2012) (citations omitted); *see also People v. Herrera*, 87 P.3d 240, 247 (Colo. App. 2003) (noting that if the defendant fails to cooperate with a court-ordered examination, the

prosecution is placed at a severe disadvantage when attempting to rebut his psychiatric evidence).

The notion that a defendant must undergo and fully participate in a court-ordered examination to allow the prosecution to fairly rebut his mental condition defense is not unique to Colorado. More than three decades ago, in *Estelle v. Smith*, 451 U.S. 454, 465, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the United States Supreme Court noted that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." Requiring a court-ordered sanity examination following a plea of not guilty by reason of insanity is understandable given that, without it, the prosecution would have virtually no ability to rebut the veracity, much less the validity, of a defendant's evidence of insanity.

In *Gray v. District Court*, the Court recognized another purpose for a compulsory examination when a defendant places his mental condition at issue as part of his defense: to preclude manipulation of the system in order to allow a reliable determination of the merits of the defense. 884 P.2d 286, 291 (Colo. 1994). There, the Court reviewed the legislative history of an earlier version of section 16-8-103.6, C.R.S. (2013), which addresses the waiver of any claim of confidentiality or privilege for a criminal defendant who places his mental

condition at issue. *Id.* The Court quoted the following testimony provided to the Senate Committee on Judiciary Hearings: "[w]hat our Bill needs to do is say, listen[,] if you want to plead insanity, fine . . . . Let's find out what the truth is . . . . What we're trying to prevent is to allow the defendant to manipulate the system." *Id.* In concluding that the legislature meant to require "broad disclosure," the Court relied in part on "public policy considerations," explaining that "[t]he fundamental purpose of a criminal trial is the fair ascertainment of the truth, and the trier of fact should not be deprived of valuable evidence or witnesses." *Id.*; *see also People v. Bondurant*, 296 P.3d 200, 207 (Colo. App. 2012) ("the General Assembly's purpose in requiring court-ordered psychiatric examinations was to prevent defendants from manipulating the system 'to get at the truth' of an insanity defense or impaired mental condition defense") (quoting *Gray*, 884 P.2d at 291).

Thus, the question is whether the CMHIP examination is enough or legally sufficient to afford the prosecution a fair opportunity to rebut the defense of insanity and to allow the Court to protect the proceedings from manipulation in order to effectuate the truth-finding process. The Court concludes that it is not.

The decision in *Grant* is instructive. There, as here, the defendant entered a plea of not guilty by reason of insanity to charges that included Murder in the First Degree and Criminal Attempt to Commit Murder in the First Degree. *Grant*, 174 P.3d at 802. A little more than a month before trial, the prosecution sought "a

further mental examination" pursuant to section 16-8-106(1), asserting that, while the parties had long been aware of the defendant's drug use, none of the experts who had examined him "had, until recently, considered whether [his] hallucinations could have been caused by his use of LSD even though it was not detected in his blood following the incident." *Id.* at 803. According to the prosecution, this "possibility" had been raised only after the physician who conducted the most recent examination "recommended further examination by an expert in a condition known as hallucinogen persisting perception disorder." *Id.* at 803-04.

The trial court granted the prosecution's request over the defendant's objection, finding that good cause for such further examination had been established. *Id.* at 804. The Court of Appeals perceived no abuse of discretion. *Id.* The Court reasoned as follows:

> [T]he prosecution did not request that defendant be examined by another expert simply because the prior experts' opinions were not favorable, but rather, because ***the prior experts' opinions were incomplete, that is, a potentially new and significant diagnosis had been proposed that could dramatically affect an assessment of defendant's behavior on the day of the incident.***

Id. (emphasis added).

Here, the Court finds persuasive most of the opinions offered at the hearing by Drs. Resnick and Mohandie. Therefore, the Court rules that the CMHIP examination is incomplete and inadequate.

1. Dr. Resnick

At the outset, the Court notes that it was extremely impressed with Dr. Resnick for multiple reasons. First, Dr. Resnick has outstanding credentials in the field of Forensic Psychiatry. Second, Dr. Resnick has been involved in just about every high profile homicide case this country has seen during the last couple of decades, including: Huberty v. McDonalds, Wisconsin v. Jeffrey Dahmer, Massachusetts v. John Salvi, South Carolina v. Susan Smith, United States v. Timothy McVeigh, United States v. Terry Nichols, United States v. Theodore Kaczynski, Texas v. Andrea Yates, California v. Scott Peterson, and Florida v. Casey Anthony. Dr. Resnick was also a consultant in United States v. Brian Mitchell, which involved the kidnapping of Elizabeth Smart, and in the recent kidnapping case against Ariel Castro in Cleveland. Third, over the years, Dr. Resnick has been retained by both defense attorneys and prosecutors. In fact, he has been retained by the defense more often than by the prosecution. Fourth, Dr. Resnick is one of the most credible witnesses the Court has ever seen.

Dr. Resnick identified eleven areas in the CMHIP Report which he testified lack data and are deficient. Dr. Resnick also testified that some of Dr. Metzner's opinions and findings are conclusory. At the hearing, Dr. Metzner effectively addressed some, but not most, of Dr. Resnick's criticisms. Based on Dr. Resnick's compelling testimony, the Court finds that Dr. Metzner failed to adequately

explore a number of important issues and that some of his opinions and findings are conclusory. Accordingly, the Court rules that the CMHIP examination is incomplete and inadequate.[8]

a) Deficiencies Based on Lack of Data

First, [redacted]

[redacted]

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8 [redacted]

[redacted]

[redacted]

[redacted]

9 [redacted]

[redacted]

10 [redacted]

Second, [redacted]

[redacted]

[redacted]

11 [redacted]

Third, [redacted]

Fourth, [redacted]

12 [redacted]

[redacted]

Fifth, [redacted]

[redacted]

13 [redacted]

[redacted]

Sixth, [redacted]

[redacted]

Seventh, [redacted]

[redacted]

b) Conclusory Opinions and Findings

Dr. Resnick demonstrated that, although Dr. Metzner collected and documented a lot of factual information as part of his examination, he offered little

[redacted]

rationale for some of his opinions and findings. Dr. Metzner attempted to address this criticism at the hearing. However, the Court remains dissatisfied with the reasoning for some of his opinions. [redacted]

Additionally, [redacted]

[15] [redacted]

Finally, [redacted]

2. Dr. Mohandie

Like Dr. Resnick, Dr. Mohandie is highly qualified in his field of expertise and has a diverse background. He has a Ph.D. in Clinical Psychology and is licensed in five states. Further, he has been retained by both defense attorneys and prosecutors in previous cases, and has performed numerous mental health evaluations, as well as provided expert testimony in the field of Psychology in eleven capital cases.

There is some overlap between Dr. Resnick's and Dr. Mohandie's criticisms of the CMHIP examination. [redacted] To the extent that Dr. Mohandie's opinions echoed those offered by Dr. Resnick, the Court does not discuss them here. The Court finds persuasive two of the deficiencies identified only by Dr. Mohandie, in part because his testimony in this regard is consistent with the testimony of the

defendant's own expert, Dr. Hanlon. The Court concludes that these shortcomings render the CMHIP examination incomplete and inadequate.

First, [redacted]

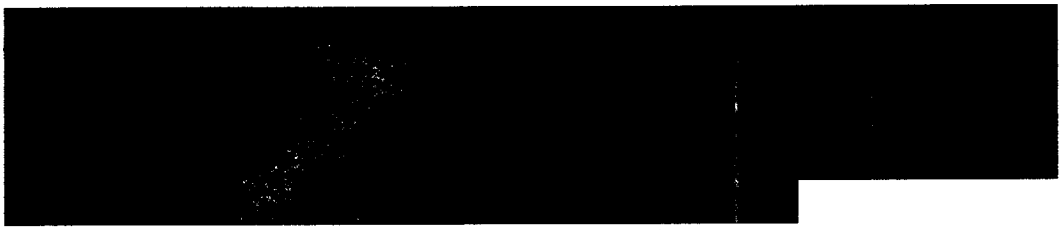
[redacted]

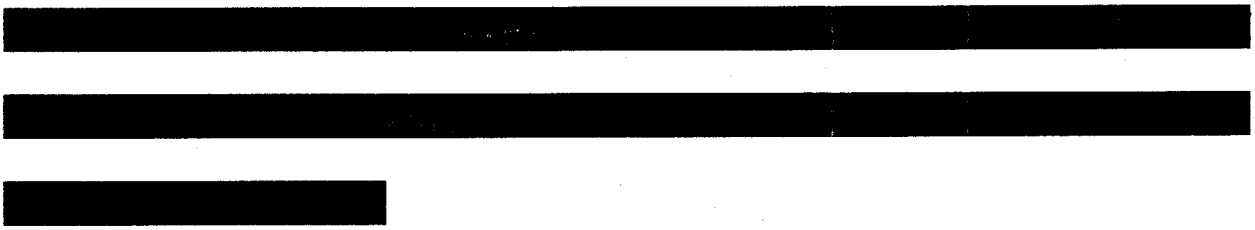
16 [redacted]

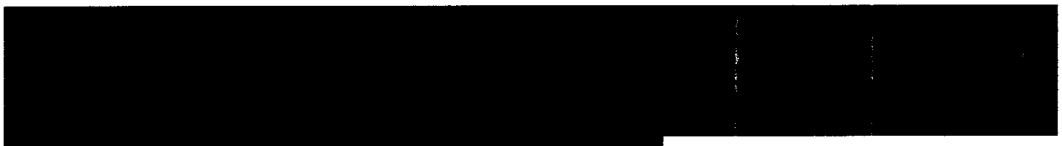
[redacted]

Second, [redacted]

[redacted]







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17 [redacted]

18 [redacted]

[redacted]

3. [redacted]

[redacted]

Because Drs. Resnick and Mohandie did not examine the defendant, their opinions will necessarily be limited at trial. Hence, as the prosecution notes, "the main evidence [it will] have available" to rebut the defense of insanity is "the examination and opinion[s] by Dr. Metzner." Motion at p. 2. To the extent that Dr. Metzner's opinions are vulnerable because he failed to adequately explore multiple areas of significance and because some of his opinions and findings are conclusory, the prosecution will be unduly prejudiced at trial. Indeed, the

defendant will be able to challenge Dr. Metzner's opinions based on some of these deficiencies and inadequacies.

[redacted]

[redacted] Because the Court has determined that Dr. Metzner's examination does, in fact, have a number of significant deficiencies that render it incomplete and inadequate, further examination on the issue of the defendant's sanity is appropriate and necessary. [redacted] The bases for Dr. Metzner's opinion regarding the issue of sanity are just as important to the truth-finding process as the opinion itself.

19 [redacted]

[redacted]

4. The Court Does Not Question Dr. Metzner's Competence

The Court wishes to be clear that its conclusion that the CMHIP examination is inadequate is not a reflection on Dr. Metzner's abilities. The evidence at the hearing showed that Dr. Metzner is a skilled forensic psychiatrist with an excellent reputation. In the Court's view, multiple obstacles made this daunting task particularly challenging, and in some ways, perhaps even unfair.

First, the voluminous nature of the project alone rendered it extremely difficult and would have intimidated many examiners—the parties forwarded more than 51,000 pages of materials, hundreds of DVDs, and hundreds of CDs to Dr. Metzner for his review, which took approximately 100 hours.[20] Second, as a result of a typographical error in the index of DVDs provided to him, Dr. Metzner did not review some of the defendant's relevant email communications until two weeks after the examination was completed. Third, this is a complex case with a lot of

20 [redacted]

information and potential theories and diagnoses to be explored. Fourth, Dr. Metzner had to interview numerous witnesses, including [redacted] mental health professionals who have interacted with the defendant. Fifth, mindful of the Court's deadline, Dr. Metzner completed his examination and the CMHIP Report in less than three months.[21]

Perhaps most importantly, [redacted]

[21] Of course, the Court would have granted a second request for an extension of the deadline to file the CMHIP Report.

[22] [redacted]

[23] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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24 [redacted]

25 [redacted]

[redacted]

[redacted]

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26 [redacted]

27 [redacted]

28 [redacted]

[redacted]

B. Further or Other Examination Ordered

The prosecution urges that section 16-8-106(1) does not place a restriction "on who the court could appoint to conduct [any] further or other examinations." Reply at p. 2. According to the prosecution, the Court enjoys the same unbounded discretion it has in selecting who conducts the initial court-ordered sanity examination. Motion at p. 3. Because the Court disagrees that it has discretion,

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29 [redacted]

much less unfettered discretion, in deciding who conducts the initial compulsory sanity examination, this contention fails.

Section 16-8-106(1) provides, in pertinent part, that the Court shall enter an order "specifying the place where [the initial] examination is to be conducted and the period of time allocated for such examination." In *Wilburn*, the Colorado Supreme Court held that this provision "plainly anticipates trial court discretion to specify, by order, 'the place where [the initial] examination is to be conducted and the period of time allocated for such examination.'" 272 P.3d at 1084 (quoting § 16-8-106(1)). Thus, "[t]he trial court should exercise its discretion considering the nature of [the defendant's] defense and the kind of mental examination required to allow the prosecution to fairly rebut his defense." *Id.* This includes the "discretion to consider and to order a suitable out-patient examination." *Id.*

However, *Wilburn* addressed a defendant's notice to introduce expert testimony of a mental condition pursuant to section 16-8-107(3)(b). *Id.* at 1079. In this case, the Court deals with a plea of not guilty by reason of insanity pursuant to section 16-8-103. Section 16-8-105.5(1) states that "[w]hen a plea of not guilty by reason of insanity is accepted, the court ***shall forthwith commit the defendant for a sanity examination,*** specifying the place and period of commitment." (Emphasis added). Under section 16-8-106(1), "[t]he defendant may be committed for such examination to the Colorado psychiatric hospital in Denver, the Colorado mental

health institute at Pueblo, the place where he or she is in custody, or such other public institution designated by the court." It appears that the Colorado psychiatric hospital in Denver is no longer in existence and that the only public institution in Colorado that currently conducts sanity examinations, whether at its facility or at the jail where a defendant is in custody, is CMHIP. Accordingly, contrary to the prosecution's assertion, CMHIP was the only public institution that could have performed the initial court-ordered sanity examination.

Inasmuch as the Court was required to order CMHIP to perform the initial sanity examination, and given that the only reason the Court is ordering another examination is that the examination completed by Dr. Metzner on behalf of CMHIP is inadequate, the Court believes that the new examination should also be completed by someone selected by CMHIP. Nothing in section 16-8-106(1) suggests that, in vesting the Court with discretion to order further examination when an initial examination is inadequate or unfair, the legislature intended a benefit for the prosecution that is not available when the initial examination is adequate and fair. Yet that would be the result if the Court appoints the prosecution's experts to conduct the additional examination.

More importantly, even if the Court had the discretion to appoint Drs. Resnick and Mohandie to perform the new examination, it would not be advisable to allow them to do so under the circumstances. Drs. Resnick and Mohandie were

retained by the prosecution as its consultants more than a year ago and are being compensated for their time at a rate of $400 and $300 per hour respectively. Considering the hours Dr. Mohandie has worked on the case so far, including his time during the hearing, the prosecution has already paid him more than $45,000. Not surprisingly, the defendant is skeptical of Dr. Resnick's and Dr. Mohandie's ability to complete an unbiased examination.

As credible as the Court found these experts, it would be inappropriate to order them to conduct the additional examination. "A court-appointed medical expert who expresses his professional opinion in a trial is not a partisan, but is, in effect, the court's witness." *Massey*, 506 P.2d at 131 (quotation omitted). It would be unfair and unrealistic to expect Drs. Resnick and Mohandie to be the Court's witnesses and to conduct a neutral compulsory examination. "Where the defendant asserts a mental defense, ***each party*** has a definite interest in finding out the truth concerning the defendant's mental state at the time the crime was committed." *Gray*, 884 P.2d at 296 (emphasis added).

Appointing the prosecution's experts to conduct the next examination would also create the appearance of unfairness. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) (noting the importance of "preserv[ing] both the appearance and reality of

fairness," which, in turn, "generat[es] the feeling, so important to a popular government, that justice has been done") (citations omitted); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n.3, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality").

Although the defendant did not request it, the Court considered appointing Dr. Metzner to conduct the new examination. As might be expected, the prosecution is as dubious about Dr. Metzner's ability to conduct an unbiased examination as the defendant is about Dr. Resnick's and Dr. Mohandie's ability to do the same. Given his familiarity with the case and the defendant, assigning any further examination to Dr. Metzner would keep the inevitable delay to a minimum. However, the Court concludes that it would be unfair and unrealistic to expect Dr. Metzner to continue to be the Court's witness and to conduct a neutral supplemental examination.

Dr. Metzner testified that when he received Motion P-68, he felt "significant anxiety," as "it was not a pleasing feeling" to learn that the prosecution was "claiming essentially that [he] did an incompetent exam and that . . . [he] had an unfair bias." This was not an unreasonable reaction given the prosecution's serious allegations in Motion P-68 and the high profile nature of this case.

Further, Dr. Metzner said that he felt "blindsided" and almost "set up" by the prosecutors because after he agreed to discuss his examination and report with them, they used his comments to assert that he had an "unfair bias." He "didn't feel good" about that experience, especially since the prosecution generated a report that he viewed as "a transcript" of what was said during the meeting. Dr. Metzner was very surprised by the discussion at the meeting and even more surprised by the contents of the prosecution's report. He did not believe the prosecution was "fair" with him because he was not informed ahead of time about the purpose of the meeting and, as a result, was not prepared for the questions posed during the meeting. He also did not like the "implications" created by the prosecution's submission of both "the corrected version" and "the incorrect version" of the report summarizing the discussion at the meeting.

At this time, Dr. Metzner appears to view the prosecuting attorneys as adversaries. Dr. Metzner admitted that he refused to meet with the prosecution the week before the hearing, even though he met with defense counsel three times in anticipation of the hearing. Dr. Metzner testified that he "didn't trust" the prosecution. He understood that the prosecution was attempting "to prove that [he] did a deficient examination and that [he] had an unfair bias." Thus, he decided he was not going "to clarify" things for the prosecution before the hearing "because that's . . . what the hearing was for."

Moreover, it became clear to the Court at the hearing that Dr. Metzner's opinions about the defendant's alleged acts are deeply entrenched. On more than one occasion, he acknowledged that there are additional issues that could be explored, including inquiries that could be made of the defendant, but he categorically opined that any new information obtained would not alter his conclusions. Understandably, at times, Dr. Metzner was defensive as he denied the prosecution's claims and attempted to justify his examination. The Court is not confident that anyone in Dr. Metzner's position would be able to resist the temptation during a supplemental examination to attempt to prove that, contrary to the prosecution's allegations, his initial opinions and findings were complete and adequate.

Under the circumstances, the Court concludes that it would not be appropriate to ask Dr. Metzner to perform the additional examination. Although Dr. Metzner was not biased when he completed his examination, the Court finds that he has developed a bias as a result of the filing of Motion P-68. At a minimum, assigning the new examination to Dr. Metzner would improperly create a perception of bias. The Court "must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to [its] judgments." *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997) (citation

omitted). The appearance of bias or prejudice can be as damaging to the integrity of the proceedings and the public confidence in the administration of justice as bias itself. *Klinck v. District Court*, 876 P.2d 1270, 1274 (Colo. 1994) (citation omitted).

The Court agrees with the defendant that any further examination should be completed by a neutral expert selected by CMHIP. Response at p. 26. Accordingly, the Court orders CMHIP to conduct a search for a psychiatrist or a forensic psychologist to complete another sanity examination.[30]

While selecting an examiner already familiar with Colorado law would be advantageous, CMHIP's search need not be limited to Colorado. The Court asks CMHIP to do its utmost to find the most qualified and neutral examiner available to complete the type of challenging examination required in this complex death penalty case. CMHIP shall submit the name of the new examiner to the parties and the Court no later than March 10, 2014.[31]

The prosecution's request for a supplemental examination in lieu of a new sanity examination, is denied. A supplemental examination may have been appropriate if the Court had authorized Dr. Metzner to perform it, as he conducted

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[30] As indicated, Dr. Metzner testified that a conflict of interest prevents CMHIP's psychiatrists and forensic psychologists from performing a sanity examination in this case.

[31] In the event CMHIP needs more time, a letter requesting an extension of the March 10 deadline should be filed.

the initial examination. However, considering that the Court orders the selection of a different examiner, it would be inappropriate to order him to supplement Dr. Metzner's examination. The new examiner would have a difficult, if not impossible, time completing Dr. Metzner's work given that the new examiner did not participate in Dr. Metzner's 25-hour interview with the defendant and was not present for any of Dr. Metzner's numerous other interviews. Nor would the new examiner be able to properly address Dr. Metzner's conclusory opinions and findings.

The new examination is to be completed at CMHIP or at the Arapahoe County jail. [redacted].[32] Although the new examiner may rely on the psychological tests already administered, he need not do so, and he may also administer any other tests he deems appropriate.

Among the materials forwarded to the new examiner, the parties are ordered to include an unredacted copy of this Order, a copy of the CMHIP Report, a copy of the suppressed transcript from the evidentiary hearing held on Motion P-68, copies of the exhibits admitted into evidence at that hearing, and copies of the parties' Motion P-68 briefs (including any exhibits or attachments). These materials should guide, not restrict, the second examination.

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32 [redacted]

The report from the new examiner must be filed no later than July 11, 2014. Pursuant to section 16-8-106(6), the report should include the following information: (1) the name of each physician, forensic psychologist, or other expert who examined the defendant; (2) a description of the nature, content, extent, and results of the examination and any tests conducted; (3) a diagnosis and prognosis of the defendant's physical and mental condition; (4) an opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by a mental disease or defect that prevented him from forming the culpable mental state that is an essential element of any crime charged; and (5) if the defendant suffered from such a mental disease or defect or from such a condition of mind, a separate opinion as to whether the defendant was insane on the date of the offenses charged. [redacted] The new examiner shall not consider the defendant's competency to proceed or how any mental disease or defect or the condition of mind caused by a mental disease or defect affects any mitigating factor in the death penalty statutes.

[redacted]

[redacted]

CONCLUSION

For all the foregoing reasons, the prosecution's Motion P-68 is granted in part and denied in part. The Court finds that the prosecution has established that good cause exists for further or other examination of the defendant's sanity on the date of the offenses charged because the CMHIP examination is incomplete and inadequate. Accordingly, the Court grants the prosecution's request for further or other examination regarding the issue of sanity.

However, the Court lacks the discretion to order a supplemental examination by the prosecution's experts. Even if the Court were vested with such discretion, it would decline to allow Drs. Resnick and Mohandie to conduct a supplemental examination. Because the Court also concludes that it would be inadvisable to ask Dr. Metzner to perform a supplemental examination, it orders CMHIP to select another psychiatrist or a forensic psychologist by no later than March 10, 2014, to conduct a new sanity examination at CMHIP or at the Arapahoe County jail. Once the examination is complete, a report that complies with this Order should be filed no later than July 11, 2014. The new examiner shall not consider the defendant's

competency to proceed or how any mental disease or defect or the condition of mind caused by a mental disease or defect affects any mitigating factor identified in the death penalty statutes.

Dated this 19th day of February of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2014, a true and correct copy of the **Order regarding People's motion for further examination pursuant to C.R.S. 16-8-106(1) (P-68)** was served upon the following parties of record:

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