

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 DEFENDANT'S MOTION TO RECONSIDER FINDINGS MADE IN ORDER P-68 (D-200)	

INTRODUCTION

This matter is set for trial on October 14, 2014. 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."¹ 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, a self-employed forensic psychiatrist, completed the examination and filed a report

¹ 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.

on behalf of CMHIP on September 6, 2013 (“CMHIP Report” or “Dr. Metzner’s Report”).² Approximately two months later, pursuant to section 16-8-106(1), C.R.S. (2013), the People sought “further or other examination” of the defendant by their expert witnesses, Dr. Phillip J. Resnick and Dr. Kris Mohandie. *See* Motion P-68. The defendant opposed the motion. After Motion P-68 was briefed, the Court held a four-day evidentiary hearing between January 27 and January 30, 2014.³ Drs. Metzner, Resnick, and Mohandie, as well as a defense expert, Dr. Robert Hanlon, testified at the hearing. On February 19, the Court granted the prosecution’s motion in part and ordered a new sanity examination by a psychiatrist or forensic psychologist selected by CMHIP.

On March 10, CMHIP submitted the name of the psychiatrist it selected to conduct the next examination. *See* C-83. In Order C-84, the Court appointed that psychiatrist to conduct the new examination. On March 14, the defendant filed three motions seeking, among other things, to reconsider, strike, amend, and clarify different parts of Order P-68. *See* Motions D-200, D-201, and D-202. The Court

² Dr. Metzner testified that, as a result of a conflict of interest, CMHIP’s psychiatrists were unable to perform the court-ordered sanity examination. 1/29/14 p.m. Tr. at p. 65. Therefore, CMHIP outsourced the examination. *Id.* at pp. 65-66. Dr. Metzner has “consulted generally on a monthly basis to CMHIP” since 1979 and has “a contract” with CMHIP. *Id.* at p. 63.

³ 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.

sua sponte stayed Order P-68 on March 18 pending resolution of those motions. Order C-90.

In Motion D-200, the defendant asks the Court to reconsider the rulings in Order P-68, arguing that: (1) the Court misapprehended the law; (2) the inadequacies it identified in Dr. Metzner's examination are irrelevant; and (3) its findings are unsupported and contradicted by the record. *See generally* Motion. On more than one occasion, the defendant criticizes the findings in the Court's 50-page Order as conclusory. *Id.* The prosecution opposes the motion. *See generally* Response. For the reasons articulated in this Order, the motion is denied without a hearing. This Order supplements Order P-68.

ANALYSIS

A. The Court Did Not Misapprehend The Law

The defendant argues that "the Court misapprehend[ed] the case law concerning the purpose of the insanity statute" and, consequently, "misconstru[ed] the good cause standard" in section 16-8-106(1). Motion at p. 1. The defendant is incorrect.

Contrary to the defendant's contention, the Court did not conclude, "essentially" or otherwise, "that a sanity examination is inadequate or unfair unless it satisfies every question or area of interest identified by the prosecution's experts." *Id.* (quotation marks omitted). The record reflects that the Court agreed

with most, but not all, of the areas of inadequacy identified by the prosecution's experts. Order P-68 at pp. 15-32. Persuaded by some of the prosecution's expert evidence, which was partially corroborated by the defendant's own expert evidence, the Court found that Dr. Metzner's examination was incomplete and inadequate. *Id.*

Relying on Colorado case law, Order P-68 identified two purposes for requiring a defendant to undergo a compulsory sanity examination when he pleads not guilty by reason of insanity: (1) to allow the prosecution to fairly rebut his insanity defense; and (2) to preclude manipulation of the system in order to allow a reliable determination of the merits of the defense—in other words, to effectuate the truth-finding process. *Id.* at pp. 12-14.⁴

The defendant erroneously implies that the Court understood the insanity statutory scheme to require it “to give the prosecution the guaranteed ability to rebut the insanity defense if the results of the examination favor the defendant.” Motion at p. 2 (emphasis omitted); *see also id.* at p. 2 n.3 (distinguishing between affording the prosecution an opportunity to rebut the insanity defense and “striving to provide it with the ability to rebut that defense”) (emphasis omitted). The defendant does not cite to Order P-68 or the record in support of this assertion.

Nor can he do so—the Court has never interpreted the insanity statutory provisions as the defendant suggests. It is equally inaccurate to insinuate that the Court believed it had “*cart blanche* to continue to order additional examinations” indefinitely “until a sanity examiner finally produces a report that is immune from criticism by people who are paid to find fault with it.” *Id.* at p. 3.

The defendant avers that, rather than “level the playing field,” the Court tilted it in favor of the prosecution “by endeavoring to assist the prosecution’s experts, and affirmatively help the prosecution win its case.” *Id.* at p. 2.⁵ The defendant is mistaken. The Court granted part of the People’s motion, not because it improperly endeavored to “affirmatively help” them win their case or to assist their expert witnesses, but because application of the law to the credible and persuasive evidence presented at the hearing required it. The deficiencies in Dr. Metzner’s examination do not merely constitute “material for cross-examin[ation]”

⁵ Regrettably, this is not the first unsupported allegation or suggestion of bias advanced by the defense in a pleading in this case. Allegations of partiality, preferential treatment, or judicial bias, even when raised in veiled innuendos, are serious and impugn the integrity of the Court. Where, as here, such allegations are untenable because they are entirely devoid of a factual basis, they are improper and have no place in pleadings, regardless of the nature of the case. “The judge of a court . . . [has a] bounden duty to protect the integrity of his court.” *In re Koven*, 35 Cal. Rptr. 3d 917, 924 (Cal. Ct. App. 2005) (quotation omitted). “However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.” *Id.* (quotation omitted). Deference to a tribunal is not inconsistent with the effective assistance of counsel, even in a death penalty case. This death penalty case highlights the point—the attorneys on both sides of the aisle have been appropriately deferential during every hearing the Court has held. There is no reason why some of the defense’s pleadings should reflect a different practice.

at trial, *see id.* at p. 3; they deprive the prosecution of a fair opportunity to rebut the insanity defense and jeopardize the truth-finding process. Regardless, neither the Court's partially unfavorable rulings nor its inherent fallibility gives the defendant a factual basis to question its impartiality.

Although the defendant posits that the Court took "a role which [gives] the impression of partiality" and that its Order creates an "appearance of partiality," *id.* at p. 2 (quoting *People v. Hrapski*, 718 P.2d 1050, 1054 (Colo. 1986)), the Court agreed with each party in part and disagreed with each party in part. The Court agreed with the prosecution that a further or other examination was warranted, but agreed with the defendant that the prosecution's experts should not be allowed to conduct it. Order P-68 at pp. 41-43. The Court also agreed with the defendant that CMHIP should select the next examiner. *Id.* at p. 46. Given these rulings, the Court disagreed with both parties on the type of further or other examination advisable under the circumstances. If that gives the impression of "partiality," the Court and the defendant have a different understanding of the term. *See Partiality, Merriam-Webster*, <http://www.merriam-webster.com/dictionary/partiality> (last visited April 1, 2014) (defining partiality as "an unfair tendency to treat one person, group, or thing better than another"). The Court is confident that, in exercising the broad discretion vested in it by the General Assembly, it did not take

a role that gave the impression of partiality and that its Order did not create the appearance of partiality.

The defendant notes that Dr. Metzner worked hard on the unbiased examination he conducted. Motion at p. 2. Be that as it may, it is not dispositive of the “good cause” standard under section 16-8-106(1). No matter how industrious and neutral an examiner may be, if his final work product is incomplete and inadequate, the Court, on a party’s motion or on its own motion, can find good cause for further or other examination. § 16-8-106(1). The Court appreciates Dr. Metzner’s time and effort in this case. But in the end, his examination was deficient.⁶

The defendant’s claim, that “not even the prosecution’s experts contend” that Dr. Metzner’s “thorough examination” was “deficient,” Motion at p. 2, is specious.⁷ While neither expert used the word “deficient” in their affidavits or testimony on direct examination, the record demonstrates that they concluded that Dr. Metzner’s examination was incomplete and inadequate.

⁶ This is not to say that Dr. Metzner’s work fell below the standard of care, such that it would subject him to malpractice. 1/27/14 Tr. at pp. 212-13. Both of the prosecution’s experts made clear that they were not opining that Dr. Metzner’s examination was below the standard of care or that he committed malpractice. *Id.*; 1/28/14 Tr. at pp. 111-12.

⁷ Dr. Resnick acknowledged that the first time he read Dr. Metzner’s report he considered it to be “a thorough report.” 1/27/14 Tr. at p. 32. However, once he had an opportunity to read it a second and third time, as well as to review some of the supporting documents, his “conclusion was that there were some areas which would be helpful to explore further.” *Id.* He then identified in his affidavit numerous areas that required further exploration, as well as findings and opinions that lacked support or explanation. *Id.*

Testimony elicited by the defendant himself establishes that Dr. Resnick deemed Dr. Metzner's report deficient. In response to a question on cross-examination, Dr. Resnick agreed that there were "deficiencies" in Dr. Metzner's report. 1/27/14 Tr. at p. 136. Later on, Dr. Resnick agreed that his opinions about "deficiencies in Dr. Metzner's report" relate to "areas that bear further explanation." *Id.* at p. 191. In answering a different question by the defendant, Dr. Resnick agreed that, other than the extensive criticisms in his affidavit, there were no "deficiencies" in Dr. Metzner's examination. *Id.* at p. 139.

In any case, the defendant misconstrues Dr. Resnick's discreetness to avoid usurping the province of the Court with lacking an opinion on the adequacy of Dr. Metzner's examination. Dr. Resnick candidly acknowledged that he did not use the word "deficiency" in his affidavit or during his direct examination because it was up "to the court" to ultimately determine whether Dr. Metzner's opinions "amount[] to a deficiency or not." *Id.* at p. 109; *see also id.* at p. 146 ("it's the Judge's decision to . . . conclude whether that's a deficiency or not"). However, Dr. Resnick submitted a six-page, single-spaced affidavit setting forth eleven "important areas which were not fully explored" by Dr. Metzner and were "incomplete[]." Motion P-68 Ex. B at p. 1. The affidavit advanced four additional criticisms based on certain conclusory findings and opinions reached by Dr. Metzner. *Id.* at pp. 5-6. At the hearing, Dr. Resnick testified extensively about all

of these important areas. In response to a question from the Court, Dr. Resnick confirmed that he believes that Dr. Metzner's examination is "inadequate to a certain degree, or that there are some inadequacies in [it]." 1/27/14 Tr. at pp. 215-16. He added that, "if further data could be gathered, I think all of us would be able to get closer to the truth." *Id.* at p. 216.

Similarly, Dr. Mohandie filed a six-page single-spaced affidavit highlighting his "concerns about the evaluation performed by Dr. Metzner." Motion P-68 Ex. A at p. 1. Dr. Mohandie attested that "[t]here were critical and significant content and topic oversights and omissions in Dr. Metzner's evaluation and interviews of Mr. Holmes." *Id.* at p. 2. [REDACTED]

[REDACTED]

At the hearing, Dr. Mohandie was asked about areas in Dr. Metzner's report that were "inadequately explored." 1/28/14 Tr. at p. 64. He testified that "it would be expected and ordinary" for sanity reports by psychiatrists and psychologists to include information Dr. Metzner omitted in his report. *Id.* at pp. 68-69. He also "rendered an opinion about shortcomings that [he] perceived existed within [Dr. Metzner's] evaluation." *Id.* at p. 115. Not only did Dr. Mohandie challenge the adequacy of Dr. Metzner's examination, he questioned his impartiality [REDACTED]

[REDACTED]

[REDACTED]

After reviewing Drs. Resnick's and Mohandie's attestations and testimony, it is unreasonable—even under the most liberal standard of objectivity—to conclude that, since they did not use the word “deficiency” in their affidavits and in their testimony on direct examination, they did not challenge the adequacy of Dr. Metzner's examination. Both of the prosecution's experts were critical of Dr. Metzner's work and questioned the adequacy of his examination. [REDACTED]

[REDACTED]

The defendant's attempt to distinguish *People v. Grant*, 174 P.3d 798 (Colo. App. 2007), as cited in Order P-68, fails. *See* Motion at p. 4. Although *Grant* is not directly on point, it provides guidance. There, after the defendant pled not guilty by reason of insanity to a murder charge, an expert raised the “possibility” that the defendant's hallucinations could have been caused by his use of LSD. *Grant*, 174 P.3d at 803-04. Pursuant to the expert's recommendation, the prosecution sought, and the trial court ordered, further examination of the defendant. *Id.* at 804. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Pursuant to their recommendations, the prosecution sought a further sanity examination. The Court granted the request because, [REDACTED]

[REDACTED]

[REDACTED]—it found that Dr. Metzner failed to adequately explore this and many other areas of importance during his examination and reached certain conclusory opinions and findings.

B. The Inadequacies Identified In Order P-68 Are Relevant

The defendant challenges the relevance of the inadequacies identified in Order P-68. Motion at p. 5. The Court finds that the deficiencies discussed in Order P-68 are highly relevant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As Order P-68 and this Order demonstrate, Drs. Resnick's and Mohandie's opinions include criticisms of Dr. Metzner's examination that are directly relevant to each element of the test for insanity. Accordingly, the defendant's relevance objection is overruled.⁸

C. Data Gathering

The defendant preliminarily takes issue with the Court's observation in Order P-68 "that Dr. Resnick identified eleven areas in the CMHIP Report which [Dr. Resnick] testified lack data and are deficient." Motion at p. 6 (quotation omitted). Employing an overly literal approach, the defendant argues that the Court is incorrect because Dr. Resnick did not use the word "deficient." *Id.* For the same reasons the Court disagreed with this argument in section A of the Analysis, it rejects it here.

⁸ This section of the Order addresses the defendant's general relevance objection. *See* Motion at pp. 5-6. Throughout the rest of the Order, the Court addresses other, more specific relevance challenges raised in section II of the Motion. *See id.* at pp. 6-32.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted text block consisting of 18 horizontal black bars]

[Redacted text block consisting of two horizontal black bars]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. The Inadvisability of Asking Dr. Metzner to Conduct a Supplemental Examination

In Order P-68, the Court concluded that it was not advisable to ask Dr. Metzner to perform a supplemental examination, in part because the Court felt that he had developed a bias as a result of the litigation of Motion P-68. Order P-68 at p. 45. The defendant asks the Court to reconsider its ruling requiring CMHIP to select a different psychiatrist or a forensic psychologist to conduct the new examination. Motion at p. 30. The defendant contends that “no party ever claimed that Dr. Metzner was biased as a result of the filing of Motion P-68.” *Id.* Further, asserts the defendant, the Court ignored that one of the prosecutors “stated on the

record that the prosecution was not” arguing it had concerns about working with Dr. Metzner. *Id.* (emphasis omitted).

The defendant is correct. The Court mistakenly, albeit inadvertently, overlooked the prosecutor’s comment when it drafted Order P-68. After ruminating about the issue, however, the Court concludes that no reconsideration of its ruling is warranted.

First, the record supports the Court’s findings regarding Dr. Metzner’s current bias as a result of the litigation of Motion P-68. *See* Order P-68 at pp. 43-44; 1/30/14 a.m. Tr. at pp. 58-74.²⁷ The Court cannot change those findings based solely on the statement made by a prosecutor.²⁸

Second, the Court is not bound by the prosecutor’s statement that he could work with Dr. Metzner. Once good cause has been established, section 16-8-106(1) vests broad discretion in the Court to determine what type of further or other examination is advisable under the circumstances.

²⁷ Contrary to the defendant’s assertion, in concluding that Dr. Metzner developed a bias as a result of the litigation of Motion P-68, the Court considered Dr. Metzner’s testimony that he could still work with the prosecution. Motion at p. 30; *see also* 1/30/14 Tr. p.m. at p. 66. However, the Court rejected this testimony based on other testimony provided by Dr. Metzner.

²⁸ The defendant alleges that the Court’s finding of bias “is based on . . . speculation that is refuted by the record.” Motion at p. 32. The Court understands the defendant’s disagreement, but the Court’s conclusion was not based on speculation. It was based on certain testimony provided by Dr. Metzner, *see* 1/30/14 a.m. Tr. at pp. 58-74, and the Court’s observations of Dr. Metzner on cross-examination.

Third, the same prosecutor who made the statement quoted by the defendant questioned Dr. Metzner at length about this issue and challenged his credibility. 1/30/14 a.m. Tr. at pp. 58-74. Indeed, the testimony on which the Court relied for its conclusion was elicited from Dr. Metzner by this prosecutor. *Id.* The prosecutor's questioning on this issue takes up the better part of 17 pages in the transcript of Dr. Metzner's testimony. *Id.* Not surprisingly, lead defense counsel, an experienced and perceptive attorney, anticipated the bias argument based on the prosecution's cross-examination of Dr. Metzner. Her first question on redirect examination was as follows:

Q. Doctor, I want to follow up a little bit in an area of bias. *You expressed during cross-examination your feelings about your last meeting with the prosecution and how that made you feel. And I can anticipate an argument that you are now biased towards the prosecution because of that experience.* Can you respond to that, please.

1/30/14 p.m. Tr. at pp. 65-66 (emphasis added).

In the middle of Dr. Metzner's answer indicating that he had "no concerns about being able to work with the prosecution," the prosecutor interjected:

Your Honor, if I could just make it clear. *We don't have any intention of arguing that . . . Dr. Metzner is biased to the point that he can't work with the prosecution.* That is not an argument we're going to make.

Id. at p. 66 (emphasis added). Given the cross-examination conducted by the same prosecutor—and specifically the extensive questioning related to bias as a result of

the litigation of Motion P-68—which the Court understood as defense counsel apparently did, this comment is curious.

Fourth, later that same day, during oral argument, a different prosecutor questioned the advisability of appointing Dr. Metzner to conduct the further examination based on bias, albeit for a different reason than the litigation of Motion P-68, and asked the Court to consider the issue in exercising its discretion:

I believe what the statute creates is discretion with Your Honor to appoint whoever Your Honor thinks is appropriate. Can you go to the state hospital and say, Yeah, give me somebody? Absolutely, you can. Can you go to Dr. Metzner and say, Dr. Metzner, I'd like you to do it? Absolutely, you can. And why wouldn't we want you to do that? Do we think Dr. Metzner is not qualified? Of course not. Dr. Metzner is qualified. Do we think Dr. Metzner wouldn't try and do a really good job? Of course, we do. Do I not think that Dr. Metzner wouldn't give this every effort to be fair and unbiased if Your Honor asked him to look at additional things? I think he would. I think he would act in good faith, and I think he would do everything he could do to be fair and unbiased.

But you've heard about cognitive bias, and you've heard about all these issues. What I would say that really talks about is a common sense understanding of human nature that we all implicitly know; that if you have reached a conclusion, if you have come to a conclusionary belief, even if you're doing your best to put that aside, even if you are doing everything you can to have even maybe a clean plate [sic] and look at everything anew, human nature says you're going to look at your previous -- everything through the lens of what you previously concluded. That's just human nature. That's cognitive bias. And can Dr. Metzner put that all aside and overcome the cognitive bias? Maybe. Am I saying he can't? No. But I think that that's something that the Court needs to consider.

Id. at pp. 102-03 (emphasis added).

Fifth, the bias Dr. Metzner developed as a result of the litigation of Motion P-68 was only one of the grounds on which the Court relied in reaching the conclusion that it was inappropriate to ask him to perform the next examination. Order P-68 at pp. 45-46. A separate, independent basis for that conclusion was the Court's determination that Dr. Metzner's "opinions about the defendant's alleged acts are deeply entrenched." *Id.* at p. 45. The defendant maintains, however, that this finding "is refuted by [Dr. Metzner's] testimony." Motion at p. 31. The defendant is mistaken.

On more than one occasion, Dr. Metzner acknowledged that there are additional issues that could be explored, including inquiries that could be made of the defendant. Nevertheless, he opined that any new information obtained would not alter his conclusions and would not affect whether his examination was complete and adequate. The following exchange highlights the point:

Q. Is it fair to say that -- based on that additional research you've done prior to today but subsequent to receiving the motion . . . that you might have asked different questions or explored different areas with the defendant?

A. Well, as I said, the thing that I would do differently is



So I -- you know, *if I had the opportunity, I'd ask some of these questions.* And if I did that and then you asked me a month later and someone else has talked to me, there's probably other questions. But,

yeah, I would ask more questions, *but I don't think not asking those questions made my examination deficient or -- in any material way.*

Q. And we'll talk about more of those things in a little more substance later. *But to be clear, based on what you told [defense counsel], having rendered your opinion, you don't believe that following up on any of the things that have shown up in the affidavits [submitted by the prosecution's experts] later or that you've researched later would have any impact in changing [your] opinion; is that fair?*

[REDACTED]

[REDACTED]

A. *Yes.*

1/30/14 a.m. Tr. at pp. 70-71.

Dr. Metzner repeatedly expressed such sentiments throughout the hearing.

See 1/29/14 p.m. Tr. at pp. 117-18

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Metzner's testimony gave the Court great pause about his ability to conduct an unbiased supplemental examination, and the Court ultimately concluded it was inadvisable to ask him to complete additional work on the case. Dr. Resnick's testimony corroborates the Court's concern. Consistent with the prosecution's closing argument, human nature, and common sense, he observed that, "once people make an opinion, they're not likely to change it." 1/27/14 Tr. at

p. 214. Given the record before it, the Court was not comfortable accepting at face value Dr. Metzner's representation that, if he had to "go back and explore areas and it's not consistent, then -- then [he] would have to change [his] opinion."
1/30/14 p.m. Tr. at p. 63.

Thus, even if the Court ignores Dr. Metzner's bias related to the litigation of Motion P-68, it would reach the same conclusion based on other independent grounds mentioned in Order P-68. Asking Dr. Metzner to perform a supplemental examination was inadvisable for all the reasons stated in Order P-68.

Finally, and perhaps most importantly, the defendant conceded at the hearing that it was within the Court's discretion to appoint Dr. Metzner as the next examiner or to ask CMHIP to select another examiner:

I do believe we did make . . . we did articulate [] in our pleading that *it would be within the Court's discretion to follow the process that was followed the first time when the initial exam was ordered. It would also be within the Court's discretion, if it were advisable and the Court were to conclude it was advisable under the circumstances, to ask Dr. Metzner to be the person conducting the further examination. But, again, we're not -- we don't believe there's good cause for the Court to order any further examination.*

Id. at pp. 114-15 (emphasis added).²⁹ In ordering CMHIP to select the new examiner, the Court followed one of the two alternative recommendations

²⁹ In the Revised Response to Motion P-68, the defendant stated in a footnote that "Dr. Metzner should be the one to conduct" any further or other examination ordered. Revised Response at p. 20 n.13. Later on in the response, however, the defendant asserted that, "[e]ven if the Court were to determine that a further examination for the reasons articulated by the prosecution's experts . . . is a 'compelling state interest,' allowing the prosecution's hand-picked experts, rather than a

advanced by the defendant. He cannot be heard to complain now that the Court proceeded as he specifically requested. Therefore, the issue related to Dr. Metzner's bias as a result of the litigation of Motion P-68 is moot. The defendant has waived any objection to having CMHIP select a new examiner. And the Court remains resolute in its determination that it would have been inadvisable to ask a new examiner to conduct a limited supplemental examination.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-200 lacks merit. Accordingly, it is denied without a hearing.

Dated this 14th day of April of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

neutral, court-appointed expert selected by CMHIP, to conduct the further examination is not 'narrowly tailored' to achieve this goal." *Id.* at p. 26.

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, a true and correct copy of the **Order regarding Defendant's motion to reconsider findings made in Order P-68 (D-200)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Tanya Smith
Attorney General's Office
1300 Broadway, Tenth Floor
Denver, CO 80203
(via e-mail)


