REDACTED

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 RULING ON MOTION TO QUASH PSDT-4 AND PSDT-5 FILED BY THE ATTORNEY GENERAL ON BEHALF OF [redacted] AND [redacted] AT COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO (C-61-A)

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres during the early morning hours of July 20, 2012. On June 4, 2013, he entered a plea of not guilty by reason of insanity. Pursuant to the Court's Order, the defendant thereafter underwent a sanity examination at the Colorado Mental Health Institute at Pueblo ("CMHIP"). This examination included psychological and neuropsychological testing by [redacted] and [redacted]. Motion at p. 2. To complete their testing, [redacted] and [redacted] employed various materials and tools that generated raw data. *Id.* They then reviewed and interpreted that raw data and reached certain

conclusions that were subsequently set forth in the CMHIP report authored by [redacted] and filed on September 6. *Id.*; Response at p. 1.

In Motion C-61, [redacted] and [redacted], through the Attorney General, move to quash, in part, subpoenas *duces tecum* ("PSDT") served on them by the prosecution on September 11, 2013: PSDT-4 and PSDT-5.[1] The prosecution opposes the motion. For the reasons articulated in this Order, Motion C-61 is denied. However, the Court enters a protection order to address some of the concerns raised in the motion. *See* Order C-65.

PSDT-4 and PSDT-5 request the entire files of [redacted] and [redacted] related to the evaluation of the defendant, including all tests, notes, testing results, raw data, and raw data print-outs. [redacted] and [redacted] "have no objection to producing notes regarding psychology and neuropsychology testing of Mr. Holmes." Motion at pp. 2-3. However, they object to the disclosure of testing materials and raw data as unreasonable and oppressive. *Id.* at p. 3. According to these clinicians, requiring them to produce such information "would compromise their professional ethical obligations, violates trade secret and copyright agreements with test manufacturers, and is contrary to public policy." *Id.*

The Court concludes that the production of the subpoenaed materials pursuant to this Order and Colorado law will not compromise the professional

[1] The prosecution also served PSDT-3 on CMHIP. At the subpoena return appearance on September 30, the Attorney General represented that CMHIP does not object to that subpoena.

ethical obligations of [redacted] and [redacted] Additionally, the Court rules that, even assuming [redacted] and [redacted] have standing to object to the subpoenas on the basis of trade secret and copyright agreements between CMHIP and test manufacturers or that CMHIP may properly raise such objections in their briefs, and assuming further that the materials in question will not be included in the disclosure by CMHIP pursuant to PSDT-3, the protection order entered contemporaneous with this Order alleviates the clinicians' concerns. The Court notes that, while CMHIP voices certain concerns in the clinicians' briefs, PSDT-4 and PSDT-5 were served on the clinicians individually and CMHIP chose not to object to PSDT-3, which seeks "[t]he entire CMHIP file related to James Eagan Holmes." PSDT-3 at p. 1.

In *People v. Spykstra*, the Colorado Supreme Court explained that "when a criminal pretrial third-party subpoena [*duces tecum*] is challenged," the party issuing the subpoena must show that: (1) there is a reasonable likelihood that the subpoenaed materials exists; (2) the materials are evidentiary and relevant; (3) the materials are not otherwise available by the exercise of due diligence; (4) the party cannot properly prepare for trial without the materials; and (5) the application is made in good faith, not as part of a general fishing expedition. 234 P.3d 662, 669 (Colo. 2010) (citations omitted). "In addition to this basic test, subpoenas issued for materials which may be protected by a privilege or a right to confidentiality

also require a balancing of interests." *Id.* at 670 (citations omitted). "In such circumstances, [the issuing party] must make a greater showing of need and, in fact, might not gain access to otherwise material information depending on the nature of the interest against disclosure." *Id.* (citations omitted). "The heightened sensitivity of protected information requires a proportionately greater showing of need before disclosure may be justified." *Id.* (citation omitted). This does not mean that in camera review of the records sought is required, "although such review may . . . be necessary in the interest of due process." *Id.* (citations omitted).

[redacted] and [redacted] do not contest that the People can meet the five-part test adopted in *Spykstra*, *see* Motion at p. 4, and the Court finds that the People have done so, *see* Response at pp. 1-2, ¶ 2. Rather, [redacted] and [redacted] argue that, before the Court may order the requested disclosures, it should "turn to the balancing test applicable to requests for confidential materials." Motion at p. 4. The prosecution agrees. *See* Response at p. 2 ("The Attorney General correctly cites the precedent of *Spykstra* for the proposition that where the materials are protected by a right of confidentiality or privilege, the issuing party must make a greater showing of need") (citing *Spykstra*, 234 P.3d at 670). The question for the Court, then, is whether the nature of the privilege and confidentiality claims raised by the clinicians, when weighed against the prosecution's showing of need, should

prevent the disclosure of the testing materials and raw data. The Court answers the question "no."

[redacted] and [redacted] first assert that disclosure of testing materials and raw data is contrary to their professional ethical obligations. Motion at p. 4. Because such materials and data will be produced pursuant to a court order and Colorado law, the Court disagrees.

Both of the sections of the APA Ethical Principles of Psychologists and Code of Conduct ("EPPCC") on which the clinicians rely allow the release of materials sought to the parties in this case through a court order or as required by law. Section 9.04(b), "Release of Test Data," provides, in pertinent part, that "psychologists provide test data ***only as required by law or court order***." Motion at Ex. 1 (emphasis added). Similarly, Section 9.11, "Maintaining Test Security," states, in pertinent part, that "[p]sychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques ***consistent with law*** and contractual obligations, ***and in a manner that permits adherence to this Ethics Code***," including Section 9.04(b). *Id.* (emphasis added).

The disclosure by [redacted] and [redacted] of testing materials and raw data is required by this Order. In fact, the Court is requiring them to produce this information over their objection. Moreover, the disclosure ordered by the Court is consistent with Colorado law. *See generally* 16-8-103.6(2)(a), C.R.S. (2013)

(setting forth two general consequences of a plea of not guilty by reason of insanity: (1) the defendant waives any claim of confidentiality or privilege as to communications made to a physician or psychologist in the course of an examination or treatment for his mental condition; and (2) the court must order both the prosecution and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for his mental condition).

As for any concerns that the disclosure of testing materials and raw data would violate trade secret and copyright agreements between CMHIP and test manufacturers, the clinicians have not established that they have standing to raise these issues. Conversely, to the extent that CMHIP voices its concerns in the briefs submitted by the clinicians, it has not demonstrated why it should be heard to complain about PSDT-4 or PSDT-5 when it elected not to oppose PSDT-3, which seeks "[t]he entire CMHIP file related to James Eagan Holmes." PSDT-3 at p. 1.

The tests identified in the motion were "purchased by CMHIP." Motion at p. 5. According to [redacted] and [redacted], Pearson Assessments ("Pearson"), the manufacturer of one of the testing tools at issue, "reserves the right to revoke CMHIP's right to purchase its testing materials, for violation of any Terms and Conditions." *Id.* The clinicians note that, as a condition of purchasing Pearson

products, "CMHIP agree[d] not to reproduce or adapt their copyrighted materials in any way or for any purpose." *Id.* The clinicians add that the agreement between Psychological Assessment Resources, Inc. ("PAR"), another test manufacturer, and CMHIP prohibits the reproduction of copyrighted materials. *Id.*[2] Thus, to the extent that the owners of the intellectual property have a legitimate expectation of non-disclosure, it is admittedly "based upon their copyright and license agreement with CMHIP." *Id.* It is CMHIP that "has a license to use the intellectual property of these entities;" it is "CMHIP [that] is [] bound by the copyright;" and it is "CMHIP's right to purchase testing materials" that could be revoked. *Id.* at pp. 5-6. In the Court's view, any issues related to CMHIP's contractual or licensing obligations, including compliance with trade secret and copyright agreements, should have been raised by CMHIP through its superintendent.

The clinicians' briefs note that CMHIP has concerns regarding copyrighted materials. *See id.* at pp. 5-6; Reply at p. 4. But neither PSDT-4 nor PSDT-5 was served on CMHIP. They were served on [redacted] and [redacted] individually.

Moreover, the prosecution served PSDT-3 on CMHIP seeking "[t]he entire CMHIP file related to James Eagan Holmes," *see* PSDT-3 at p. 1, including

[2] According to a "Dear Customer" letter by PAR, "[i]f a court insists on requiring the release of proprietary test materials for use by non-psychologists or other professionals who do not have the appropriate training," it requests: (1) "that the test materials and any records relating to the tests be disclosed for review only to a licensed psychologist or appropriately trained professional designated by the non-psychologist involved in the case;" and (2) "that the court issue a protective order." Motion at Ex. 3 (emphasis omitted).

presumably tests performed and data generated by [redacted] and [redacted], and the Attorney General orally represented at the September 30 return hearing that CMHIP does not object to PSDT-3. CMHIP does not explain why it should be allowed to be heard to complain about PSDT-4 and PSDT-5 when it has no objection to PSDT-3. Either CMHIP objects to the materials being requested or it does not. But it should not be permitted to take what are seemingly inconsistent positions.

Perhaps more importantly, inasmuch as CMHIP is willing to disclose its entire file on the defendant to the prosecution and, by extension, to the defense, PSDT-4 and PSDT-5 appear to be unnecessary and the clinicians' motion to quash the same appears to be moot. The parties will presumably receive the challenged documents regardless of how the Court rules on Motion C-61. Indeed, when viewed in this context, the requests in Motion C-61—and more specifically the complaints from CMHIP included therein—are perplexing.

The clinicians advise that they are willing to provide their testing materials and raw data (including printouts) directly to experts designated by "the prosecution and/or the defense." Reply at p. 2. In fact, [redacted] and [redacted] acknowledge that "[a] review [of the testing materials and raw data] by a clinician would aid the prosecution in preparing for trial." *Id.* However, in advancing this

offer, the clinicians appear to ignore that the parties would be entitled to review the data on which their expert witnesses rely.

The Attorney General no doubt recognizes that, in order to comply with its discovery obligations, the prosecution may well be *required* to disclose the bases of its experts' opinions to the defense. *See* Crim. P. 16 (I)(d)(3) ("Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness"). To effectuate the intent of Rule 16(I)(d)(3)—which is "to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705"—and considering that the defendant's mental condition is likely to be a key issue at trial in this case and that the defense would have no other means of obtaining the information at issue, the Court would likely require such disclosure. *Cf.* Order D-59 at p. 3 (denying the defendant's request for discretionary expert disclosure because he failed to assert, much less demonstrate, "the information sought [was] unavailable from any source other than the prosecution").

In any event, even assuming [redacted] and [redacted] have standing to raise CMHIP's trade secret and copyright objections or that CMHIP may voice such objections through their briefs, and assuming further that the testing materials and raw data requested will not be produced by CMHIP in response to PSDT-3, the

Court is convinced that it can address the concerns advanced in Motion C-61 through a protection order.[3] The contention by [redacted] and [redacted] that a protection order would be ineffective, *see* Motion at p. 7, is unpersuasive.

First, the clinicians speculate that "counsel cannot be expected to erase the details of test materials and raw data from their memory and not to use the benefit of the information therein to assist future clients." *Id.* The record supports the opposite conclusion. [redacted] and [redacted] concede that, because "raw data generated by psychological/neuropsychological testing does not lend itself to interpretation by lay people," counsel lack the education, training, and skills necessary "to assess the meaning of the data generated." Reply at pp. 2-3; *see also* Motion at Ex. 3 (PAR referring to "non-psychologists or other professionals who do not have the appropriate training and expertise to review and interpret the tests such as attorneys"). Given that counsel lack the qualifications to understand the test materials and analyze the raw data, the clinicians' concern that counsel will be unable to erase the details of the test materials and raw data from their memory lacks validity. In the Court's view, it is unlikely that an attorney will have a difficult time forgetting that which he or she cannot understand or interpret in the first place.

[3] The prosecution submitted a proposed protection order with its response. As part of their reply, [redacted] and [redacted] proposed a different protection order.

Second, there is no basis in the record to think that the parties will not comply with a protection order. While there is never a way to predict with any degree of certainty whether counsel and the parties will comply with a protection order, the Court may not presume, based on mere conjecture, that they cannot or will not do so.

The Court recognizes that there is a "strong public policy against disclosure of . . . tests," as test security is necessary to maintain the validity of tests. *Detroit Edison Co. v. Nat'l Labor Relations Bd.*, 440 U.S. 301, 314, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). But the Court concludes that the clinicians' public policy contention may be addressed through an appropriate protection order.

In sum, having [redacted] and [redacted] disclose the testing material and raw data pursuant to this Order and Colorado law would not violate their professional ethical obligations. The remaining concerns advanced in the motion to quash, even assuming they are properly raised, may be addressed through a protection order. With the entry of such a protection order, these concerns do not outweigh the prosecution's showing of need for the materials in question.

The testing materials and raw data form part of the basis of the opinions of [redacted] and [redacted] [redacted] relied on those opinions in reaching his conclusions regarding the defendant's sanity and mitigation in this death penalty case. The opinions of all these doctors are highly relevant. In fact, they are almost

certain to be key evidence at trial and at any capital sentencing hearing held. The People have persuaded the Court that they cannot accurately assess CMHIP's report or effectively prepare to examine [redacted] without access to all of the records that form his opinions, including the testing performed by [redacted] and [redacted] and the raw data generated by such testing. *See* Reply at p. 2 ("[a] review [of the testing materials and raw data] by a clinician would aid the prosecution in preparing for trial"). Nor does the prosecution have any way of acquiring these records other than through a subpoena.[4]

For all the foregoing reasons, the Court concludes that Motion C-61 lacks merit. Accordingly, it is denied.[5] However, contemporaneous with this Order, the Court enters a protection order. *See* Order C-65.[6]

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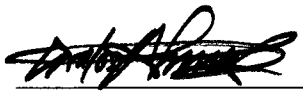
[4] As indicated, in the event that the materials in questions are produced by CMHIP in response to PSDT-3, it would render PSDT-4 and PSDT-5 unnecessary and Motion C-61 moot. Duplicate records need not be produced at the continued return hearing.

[5] The objection to tests that cannot be copied, [redacted] is sustained in part and overruled in part. To the extent that it is impractical to reproduce a test, the Court modifies the subpoenas to allow photographs of such a test to be disclosed. *See* Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive"); *Spykstra*, 234 P.3d at 668 ("Crim. P. 17(c) requires a court, on motion, to block the enforcement of an unreasonable or oppressive subpoena by modifying or quashing the subpoena").

[6] The Court does not understand the clinicians' proposed protection order. Consistent with the letter from PAR, the clinicians suggest that, if instead of allowing them to disclose the testing materials and raw data to another licensed psychologist, the Court "permits any disclosure of . . . confidential tests and raw data," then "[i]nformation is to be released . . . only to a qualified psychologist." Reply at p. 6 (emphasis omitted); *see also* Motion at Ex. 3 ("If a court insists on requiring the release of proprietary test materials for use by non-psychologists or other professionals who do not have the appropriate training and expertise . . . we request that the test

Dated this 2nd day of October of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

materials . . . be disclosed for review only to a licensed psychologist or appropriately trained professional designated by the non-psychologist involved in the case") (emphasis omitted). Although framed as an alternative position, this is merely a restatement of the clinicians' only position—that testing materials and raw data should not be disclosed to anyone other than a qualified psychologist.

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2013, a true and correct copy of the Court's Order Ruling on Motion to Quash PSDT-4 and PSDT-5 Filed by the Attorney General on Behalf of [redacted] and [redacted] Colorado Mental Health Institute at Pueblo (C-61-A) was served upon the following parties of record:

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