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 REGARDING DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, TO AMEND RELIEF ARTICULATED IN ORDER P-68 (D-201)	

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. *See* Order P-68.

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. Order C-79.

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

In Motion D-201, the defendant seeks to strike the relief granted in Order P-68. Motion at p. 1. The defendant argues that: (1) the scope of the new examination ordered by the Court exceeds the scope of the relief sought by the prosecution; (2) there is no factual support in the record for the Court's conclusion that an entirely new sanity examination is necessary; (3) ordering an entirely new sanity examination interferes with a number of the defendant's constitutional rights; and (4) Order P-68 improperly interferes with the new examiner's ability to exercise his independent medical judgment. *Id.* at pp. 2-13. In the alternative, the defendant asks that the Court make unspecified amendments to Order P-68 to avoid interfering with the new examiner's independent medical judgment. *Id.* at p. 13. The prosecution opposes both requests. *See generally* Response.

For the reasons articulated in this Order, Motion D-201 is denied without a hearing. The defendant's request to strike and his alternative request to amend lack merit.

However, this Order makes two amendments to Order P-68 independent of the defendant's general request to amend. First, the Court rescinds the requirement in Order P-68 that the parties forward an unredacted copy of that Order to the new examiner. Instead, the Court will provide the new examiner a redacted copy of

Order P-68 that omits the discussion [redacted] *See* Attachment 1.[4] No other copies of Order P-68 and no versions of related Orders inaccessible to the public may be forwarded to the new examiner without the Court's authorization. Second, while the Court denies the defendant's request for an order prohibiting the parties from sending the new examiner the rest of the materials related to the litigation of Motion P-68, this Order amends the part of Order P-68 that requires the parties to submit such materials to the new examiner. This is consistent with Order C-41, which dealt with the first court-ordered examination.

To further address some of the defendant's concerns, the Court enters Order C-94, which: (1) admonishes the new examiner not to draw any improper inferences from Order P-68, related Orders, or media reports about such Orders; and (2) prohibits the new examiner from reviewing any version of Order P-68 that is different than the redacted one attached. At the defendant's request, Order C-94 also advises the new examiner that he may not conduct any narcoanalytic testing without the Court's authorization.[5]

---

[4] Attachment 1 is the redacted copy of Order P-68 the Court will forward to the new examiner. It is hereby suppressed. The Court will not forward the attached copy of Order P-68 to the new examiner unless it lifts the stay it has placed on Order P-68. *See* Order C-90-A. The attached copy of Order P-68 shall not be forwarded to the new examiner by anyone other than the Court.

[5] The Court will not send Order C-94 to the new examiner unless the stay on Order P-68 is lifted. Order C-94 shall not be forwarded to the new examiner by anyone other than the Court.

Within two business days of this Order, the parties may submit additional proposed admonishments for the new examiner. If such a request is submitted, there must be compliance with the conferral requirement, and the opposing party shall have one business day to respond.

ANALYSIS

I. Request to Strike

A. The Examination Ordered Was Within the Court's Discretion

The defendant contends that, "[b]ecause no party or pleading requested the remedy provided in [Order P-68], the issue of whether to order an entirely new sanity examination was not a justiciable issue presented to the Court." *Id.* at p. 6. At the outset, the Court notes that, while it opted for "a new sanity examination," instead of "a supplemental examination," it did not order that the new examination must start from scratch or that the first examination should be disregarded. Order P-68 at pp. 46-47. To the contrary, the Court specifically stated that the new examiner may rely on the neuropsychological tests already administered by CMHIP. *Id.* at p. 47.

In conducting the next sanity examination, the new examiner is neither limited to follow-up questions not previously propounded by Dr. Metzner nor compelled to perform any aspect of the examination that he concludes has already been satisfactorily completed by Dr. Metzner and is sufficiently reliable to render

repeating it unnecessary. In effect, then, the further sanity examination ordered is neither strictly a "supplemental" examination nor necessarily a "brand-new" examination.[6]

Although the new examiner should consider Dr. Metzner's work, he should not be restricted by it. Similarly, although the new examiner should address the Court's findings of inadequacy, he should not be limited by them.[7] Mindful of Dr. Metzner's examination and the Court's findings, the new examiner must exercise his independent medical judgment and conduct the next sanity examination as he deems fit.

The defendant's contention that the Court exceeded its authority because it ordered another sanity examination, rather than a supplemental examination, lacks merit. The prosecution concedes that the second examination ordered "goes beyond the scope of the [supplemental] examination [it] requested." Response at

---

[6] The Court made the distinction between a further complete sanity examination and a further supplemental sanity examination at the beginning of the evidentiary hearing, in part because it realized that, if it denied the People's request to have their experts examine the defendant, it could appoint Dr. Metzner to complete a supplemental examination. *See* 1/27/14 Tr. at pp. 6-9. After the hearing, however, the Court concluded that asking Dr. Metzner to perform a supplemental examination was not advisable under the circumstances. Order P-68 at pp. 43-46.

[7] In Order P-68, the Court concluded there were two general areas of deficiency in Dr. Metzner's examination: (1) incomplete and inadequate data gathering; and (2) conclusory findings and opinions. There is some overlap between those areas. Further, the Court understands that the new examiner cannot speculate about the missing rationale for Dr. Metzner's conclusory findings and opinions. Indeed, that is one of the reasons the Court found a limited supplemental examination inadvisable. Order P-68 at pp. 46-47.

p. 1.[8] However, the prosecution maintains that in resolving Motion P-68, the Court was not limited to the remedy requested by either party. *Id.* at p. 2. The prosecution is correct.

In ordering further examination of the defendant, the Court relied on section 16-8-106(1). That statute states, in pertinent part:

> For 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.***

§ 16-8-106(1) (Emphasis added). Hence, having found good cause, the Court was not restricted to the relief requested by the prosecution. Instead, the Court had the discretion to order "such further or other examination as [was] advisable under the circumstances." *Id.*

---

[8] The Court does not believe that the relief granted in Order P-68 exceeded the scope of the prosecution's motion for further or other examination. Rather, the examination the Court found advisable under the circumstances differed from the supplemental examination the prosecution asserted was advisable. The prosecution asked "for a further and other examination to address the areas [of deficiency] that were identified" by its experts. 1/27/14 Tr. at pp. 6-7. Contrary to the defendant's understanding, the prosecution never agreed that the new examination should be strictly limited to follow-up questions not previously asked during Dr. Metzner's interview of the defendant. The prosecution was unsure about the type of supplemental examination that would be necessary. During the colloquy that took place at the beginning of the evidentiary hearing, the prosecutor candidly admitted that, while he was requesting an "examination to deal with the issues that were noted by [his expert witnesses]," he did not "really know" what type of examination was necessary to accomplish that goal. *Id.* at p. 8. The prosecutor indicated that he would elicit testimony from Dr. Resnick regarding the type of examination necessary to deal with the areas of deficiency identified. *Id.* After expressing a preference for a "complete examination," Dr. Resnick testified that, even if the Court restricted him to a limited supplemental examination, he "would need to [redacted] According to Dr. Resnick, this would entail spending "a number of hours [to] try to clarify" certain points in the first examination [redacted] Thus, the prosecution's view of a supplemental examination seems broader than the more restrictive type of supplemental examination the defendant argues the Court had authority to order in resolving Motion P-68.

The defendant avers that, since the Court found good cause pursuant to the prosecution's motion, not its own motion, it was limited to the type of examination requested by the prosecution. Motion at pp. 6-7. According to the defendant, the discretion to order "such further or other examination as is advisable under the circumstances" applies only when the Court finds good cause for such examination "upon its own motion." *Id.* (quoting § 16-8-106(1)). The defendant cites no authority for this strained interpretation of section 16-8-106(1). The Court is aware of none.

When construing a statute, the Court's "primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole." *Fifield v. Pitkin Cnty. Bd. of Comm'rs*, 292 P.3d 1207, 1208 (Colo. App. 2012) (citation omitted); *see also People v. Morales,* 298 P.3d 1000, 1011 (Colo. App. 2012) ("we must give [statutory] phrases their ordinary and plain meaning"); *People v. Zweygardt*, 298 P.3d 1018, 1022 (Colo. App. 2012) (courts must "give effect to the plain meaning of each and every word and phrase" of a statute "unless the result is ambiguous or nonsensical"). The Court must construe "words and phrases according to grammar and common usage." *Apodaca v. Allstate Ins. Co.*, 255 P.3d 1099, 1102 (Colo. 2011) (citation omitted); *see also People v. McCoy*, 821 P.2d 873, 875 (Colo. App. 1991) (same). Further, the Court must avoid interpretations

that would produce absurd or illogical results. *In re Miranda*, 289 P.3d 957, 960 (Colo. 2012); *Sidman v. Sidman*, 240 P.3d 360, 362 (Colo. App. 2009).

No grammatical acrobatics are necessary to discern the General Assembly's intent in section 16-8-106(1). If good cause is established for further or other examination, either upon a party's motion or upon the Court's own motion, "the [C]ourt may order such further or other examination as is advisable under the circumstances." § 16-8-106(1).

Significantly, defense counsel's oral argument at the end of the hearing contradicts the interpretation of the statute advanced in Motion D-201. When the Court asked counsel whether she "trust[ed] Dr. Metzner to conduct any supplemental evaluation that [the Court] felt was necessary," she responded that "it would be within the Court's discretion" to appoint Dr. Metzner as the new examiner, although the defendant was "not conceding" that Dr. Metzner should be appointed. 1/30/14 p.m. Tr. at p. 114. Counsel then elaborated as follows:

> I do believe we did make -- we did articulate that 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). Thus, at the hearing, counsel admitted that in the event the Court found the People had established good cause, it had the

discretion to decide who should conduct the next examination based on what was "advisable under the circumstances." *Id.* at p. 115. If the Court had such discretion, then it also presumably had the discretion to determine what type of further or other examination to order. There is no basis to conclude that when good cause is found pursuant to a party's motion, the Court has the discretion to select the new examiner based on what is advisable under the circumstances, but is restricted to order the type of examination requested by the moving party.

The defendant complains, however, that "the issue of whether to grant an entirely new sanity examination was not briefed or argued by either party." Motion at p. 6. The defendant asserts that this is unfair and violates his due process rights because he lacked notice that a new sanity examination was an option. *Id.* at p. 7. The Court is unpersuaded.

Motion P-68 clearly stated that it was grounded in section 16-8-106(1). The plain meaning of the statutory language put both parties on notice that the establishment of good cause—based either on a party's motion or on the Court's own motion—would require the Court to exercise its discretion to "order such further or other examination as is advisable under the circumstances." § 16-8-106(1). Defense counsel's oral argument demonstrates that they were familiar with the Court's discretion under the statute at the time of the hearing. *See* 1/30/14 p.m. Tr. at pp. 114-15.

The parties briefed Motion P-68 extensively.[9] The Court then held a lengthy evidentiary hearing for which the parties had more than a month to prepare. At the end of the hearing, the Court afforded counsel an opportunity for oral argument. The Court subsequently granted the defendant leave to file additional motions challenging Order P-68, including Motion D-201, which specifically argues that ordering another sanity examination exceeded the scope of the Court's authority and deprived him of due process.[10] The Court allowed the defendant to file an opening brief and a reply brief with respect to each of the motions, and, on its own, stayed Order P-68 until those motions are resolved. Order C-90. Considering all of the circumstances, there was nothing unfair or unconstitutional about the process followed by the Court.

Even assuming, for the sake of argument, that the defendant lacked sufficient notice to raise this argument before the Court issued Order P-68, the defendant has now raised it in Motion D-201. The Court agrees with the prosecution that the defendant cannot continue to claim prejudice after filing Motion D-201. Response at p. 4.

---

[9] After an initial round of briefs, the Court granted the defendant's requests for additional briefing and for a continuance of the hearing. *See* Order D-193. The defendant thereafter filed a 29-page single-spaced revised response.

[10] The defendant's three motions challenging Order P-68 total 60 single-spaced pages. *See* Motions D-200, D-201, and D-202.

Apparently recognizing the merit of the prosecution's position, the defendant avers for the first time in his reply that the Court deprived him of due process because, in addition to being unable to brief the issue, he did not have an opportunity "to introduce evidence" on the matter. Reply at pp. 1-2. The defendant failed to include this claim in his motion. *See generally* Motion. Therefore, it is rejected as untimely and improperly raised. In any event, for the reasons articulated in section (I)(B) of this Order, no additional evidence or argument is warranted on this point. Under the circumstances, a new sanity examination was the only advisable examination.

Finally, the defendant avers that the Court "improperly assumed the role of an advocate and violated the Separation of Powers clause of the Colorado Constitution." *Id.* at p. 7. The defendant is mistaken. The Court set a briefing schedule, reviewed the parties' filings, scheduled a hearing, presided over the hearing, considered the evidence presented and the attorneys' oral arguments, made credibility determinations, researched the issues, reviewed the record, and resolved the motion in a detailed order. These are not the tasks of an advocate. Rather, these are the responsibilities the Court is entrusted to carry out when a motion such as Motion P-68 is filed.

Neither the Court's unfavorable rulings nor its inherent fallibility provide the defendant reason to question its impartiality. To the extent that the defendant

disagrees with the discretion vested in the Court by section 16-8-106(1), he should direct his arguments to the legislature.[11] However, the Court's exercise of that discretion to the best of its ability does not render it "an advocate." Nor did the Court take on the role of an advocate simply because it disagreed with *both* parties on the type of further examination advisable under the circumstances.

B. There is Ample Support in the Record for the Relief Granted

The defendant claims that the record does not support "the Court's conclusion that there is 'good cause' to conduct a [new] sanity examination." Motion at p. 8; *see also id.* at p. 9 ("Nor did Dr. Mohandie's testimony support the Court's conclusion that good cause exists for [a] [] [new] sanity examination"). The defendant misunderstands section 16-8-106(1). Once good cause for further or other examination is established, the statute does not require additional good cause with respect to the type of examination that may be ordered. Rather, where, as here, the Court finds good cause for an additional examination, it has the discretion to select any further or other examination it deems advisable under the circumstances. Having found good cause for an additional examination, the Court

[11] The defendant does not assert that section 16-8-106(1) is unconstitutional.

concluded that another sanity examination by a new examiner was advisable under the circumstances. Order P-68 at pp. 46-47.[12]

The defendant insists, however, that there is no basis in the record for the Court's determination that a supplemental examination was not advisable under the circumstances. Motion at pp. 8-10. The Court disagrees. In the Court's view, under the circumstances, the only advisable option was to order another sanity examination.

"Advisable" is defined as "wise, sensible, or reasonable." *Advisable*, *Merriam-Webster*, http://www.merriam-webster.com/dictionary/advisable (last visited April 2, 2014). Although the Court agreed with the prosecution that good cause existed for further examination, it agreed with the defendant that it was not advisable to appoint the prosecution's experts to complete it. Order P-68 at pp. 41-43. On the other hand, the Court also found that it was equally unreasonable to ask Dr. Metzner to perform a supplemental examination. *Id.* at pp. 43-46. The Court ultimately concurred with the defendant and concluded "that any further examination should be completed by a neutral expert selected by CMHIP." *Id.* at p. 46 (citing Motion P-68 Revised Response at p. 26).[13]

---

[12] Even if the statute could be interpreted as requiring good cause for the specific type of further or other examination that may be ordered, the ruling in Order P-68 requiring another sanity examination would pass muster. *See* Order P-68 at pp. 43-47.

[13] In a footnote in the Revised Response to Motion P-68, the defendant stated that "Dr. Metzner should be the one to conduct" any further or other examination ordered. Motion P-68 Revised

Having concluded that it was not advisable to appoint Dr. Metzner to conduct any further or other examination, the Court denied the prosecution's request for a supplemental examination. *Id.* at pp. 46-47. The Court reasoned as follows:

> A supplemental examination may have been appropriate[14] if the Court had authorized Dr. Metzner to perform it, as he conducted 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.

Id.

The Court's decision to ask CMHIP to select a different psychiatrist or a forensic psychologist to conduct another sanity examination was based on the number and nature of the deficiencies that rendered Dr. Metzner's examination

---

Response at p. 20 n.13. Later 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 neutral, court-appointed expert selected by CMHIP, to conduct the further examination is not 'narrowly tailored' to achieve this goal." *Id.* at p. 26. At the hearing, the defendant stated that the Court could either appoint Dr. Metzner or ask CMHIP to select a new examiner. 1/30/14 p.m. Tr. at pp. 114-15.

[14] "Appropriate" is a synonym of "advisable." *See* http://thesaurus.com/browse/advisable (last visited April 2, 2014).

incomplete and inadequate,[15] as well as logic, common sense, and the Court's review of the record. It is undisputed that this is a voluminous and complex case with much at stake for the parties and the named victims. Given the findings in support of the Court's good cause determination, it would have been unreasonable to appoint a new examiner, who has never met the defendant—never mind built a rapport with him or earned his trust—to ask only those questions that Dr. Metzner failed to ask, assuming the new examiner could even identify all of those questions.

Contrary to the defendant's contention, the record supports the Court's conclusion. Defense counsel asked Dr. Metzner "about spending a lot of time with [the defendant] [redacted] Specifically, she asked him if there was "any importance to building as much of a rapport with the patient as you can when doing the evaluation." *Id.* Dr. Metzner answered as follows:

> [Y]ou know, ***when you talk with someone for 25 hours, you do build a certain rapport***, and part of the ethical [sic] is not to manipulate that rapport, and you gotta continually or periodically remind them that none of this is confidential. And so with that disclaimer, yes, if you have -- you know, ***I'd probably get more information now from Mr. Holmes because I have met with him for 25 hours than someone who meets him tomorrow for the first time.***

Id. at p. 44 (emphasis added).

---

[15] *See* Order P-68 at pp. 16-32, 36-39.

Significantly, if, in the process of exploring areas Dr. Metzner failed to adequately investigate, the new examiner determines that he needs to ask follow-up questions in areas already covered by Dr. Metzner, or that he needs to review or revisit issues already addressed by Dr. Metzner, a limited supplemental examination would preclude the new examiner from doing so. As Dr. Resnick pointed out, even if the Court limited him to a supplemental examination, he would need to clarify [redacted] obtained by Dr. Metzner. 1/27/14 Tr. at pp. 50-51. Thus, it would have been inadvisable to restrict the new examiner as the defendant proposes in Motion D-201.

[redacted]

It would have been equally insensible to require the new examiner to discern the rationale for those opinions and findings in Dr. Metzner's report which the Court ruled remained conclusory after Dr. Metzner testified.[16] Inasmuch as the new examiner did not participate in Dr. Metzner's lengthy examination—which included a twenty-five hour interview with the defendant and numerous other interviews—and given that Dr. Metzner himself was unable to provide satisfactory explanations and rationale for some of his opinions and findings, the new examiner would have to engage in conjecture to explain why Dr. Metzner reached those opinions and findings.

Considering that the Court was dealing with an incomplete and inadequate sanity examination containing multiple troublesome deficiencies, the Court was

[16] The defendant argues that Order P-68 "indicates [the Court's] desire for the new examiner to . . . 'address' [Dr. Metzner's] 'conclusory' opinions and findings." Motion at p. 12. No citations to Order P-68 accompany these internal quotation marks because the defendant quotes Order P-68 out of context. Nowhere in Order P-68 did the Court express a desire to have the new examiner supplement Dr. Metzner's conclusory opinions and findings. To the contrary, one of the reasons the Court decided against a supplemental examination is that it would have been inappropriate to ask a new examiner to speculate about the rationale for Dr. Metzner's conclusory opinions and findings. Order P-68 at p. 47.

not comfortable ordering a new psychiatrist to resume where Dr. Metzner left off, much less to fill in the blanks of the first examination or to address the conclusory nature of some of Dr. Metzner's findings and opinions.[17] The work in question is too complicated, the stakes in the case too high, and the inadequacies in the first examination too numerous and substantial, to grant the defendant's request to strike the conclusion in Order P-68 that a limited supplemental examination is not suitable.

The defendant argues that the prosecution's expert witnesses "never expressed the opinion that doing a more limited examination focused more narrowly on the supposed deficiencies [they] identified . . . would be difficult, much less impossible or inappropriate." Motion at p. 8. Be that as it may, the record, logic, and common sense support the Court's decision. Moreover, Drs. Resnick and Mohandie also did not opine that it would be advisable to ask a new examiner, with no familiarity with the case, to conduct a limited supplemental examination such as the one the defendant proposes in his motion. To the

[17] The defendant avers that the prosecution did not demonstrate "that there were issues with Dr. Metzner's examination that fundamentally undermined its reliability as a whole." Motion at p. 8. The Court disagrees. *See generally* Order P-68; Order D-200; Order D-202. Regardless, this is not the applicable standard. The good cause requirement "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)). There must simply 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").

contrary, Dr. Resnick, who is very familiar with the case, stated that, "if [he] had [his] druthers, [he] would like to do a complete examination." 1/27/14 Tr. at p. 50. Further, as indicated, even if Dr. Resnick had been authorized to perform only a supplemental examination, he would still "need to [redacted] Thus, he "would need to spend a number of hours . . . to clarify those points." *Id.* at p. 51.

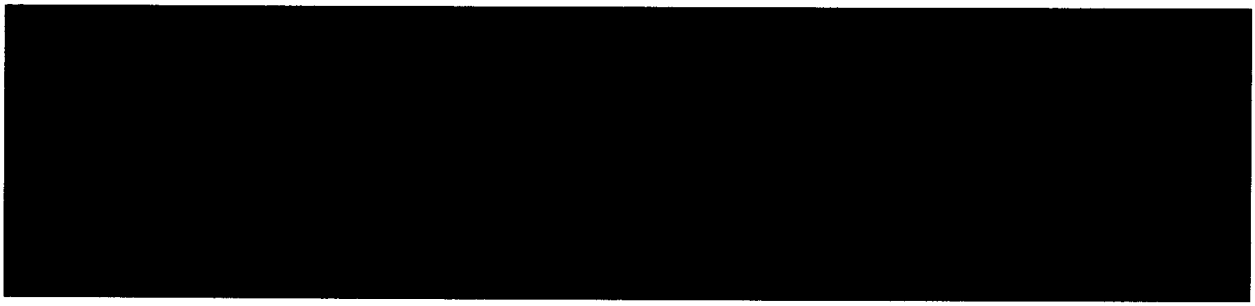
The defendant next takes issue with the Court's conclusion that it was not advisable to ask Dr. Metzner to complete a supplemental examination.[18] He notes that Dr. Resnick testified "that he did not believe Dr. Metzner was unqualified or biased when he conducted his examination of Mr. Holmes," Motion at p. 9, and that Dr. Mohandie simply opined that [redacted] may have "unintentionally [led] to issues with following up on particular questions or areas of inquiry" or caused Dr. Metzner to subconsciously place "'different emphases' . . . that are 'subconsciously driven.'" *Id.* at p. 9 n.5 (quoting 1/28/14 Tr. at p. 252). These observations miss the mark. The Court's ruling that it was inadvisable to ask Dr. Metzner to conduct a supplemental examination was in no way premised on his qualifications or any

[18] As indicated, the defendant specifically told the Court at the hearing that he was "not conceding" that Dr. Metzner should be appointed. 1/30/14 p.m. Tr. at p. 114.

bias during the examination.[19] It was largely premised on Dr. Metzner's current bias. *See* Order P-68 at pp. 43-46.

Drs. Resnick and Mohandie were not questioned about Dr. Metzner's current bias and offered no testimony about it. Nor could they opine about it—they testified before Dr. Metzner, and witnesses (including experts) are not allowed to testify about other witnesses' credibility. "It is the province of the trial court sitting as the fact finder to determine the credibility of a witness and to determine the weight and probative effect of the testimony." *People ex rel. S.G.*, 91 P.3d 443, 452 (Colo. App. 2004) (citation omitted); *see also Davis v. People*, 310 P.3d 58, 62 (Colo. 2013) ("This state's case law disfavors comments by one witness about another witness's truthfulness") (citations omitted). When acting as a fact finder, the trial court "is entitled to reject part of a witness's testimony that it finds to be untruthful and still accept other parts that it finds to be credible." *People ex rel. S.G.*, 91 P.3d at 452 (citation omitted).[20]

[19] Actually, the Court reached the opposite conclusions—it found that the deficiencies in the first examination were "not a reflection on Dr. Metzner's abilities," and that "Dr. Metzner's testimony put the allegation" that he was biased during the examination "to rest." Order P-68 at p. 35; p. 11 n.7.



More importantly, the Court adopted one of the two options proposed by the defendant: it ordered CMHIP to select the next examiner. 1/30/14 p.m. Tr. at p. 114. The defendant cannot be heard to complain now about the Court's decision to proceed as he specifically requested.

In sum, the legislature has vested the Court with broad discretion to determine what type of examination is advisable under the circumstances when good cause exists for further or other examination. Under all the circumstances, it would have been nonsensical to ask another psychiatrist to conduct a limited supplemental examination in order to attempt to make up for the deficiencies in Dr. Metzner's examination. Further, the nature of the numerous deficiencies in Dr. Metzner's examination, the record, logic, and common sense all militated against a limited supplemental examination.

C. Order P-68 Does Not Violate the Defendant's Constitutional Rights

The defendant asserts that ordering another sanity examination violates various provisions of the United States and Colorado Constitutions. Motion at pp. 10-11. The defendant cites no authority to distinguish between his constitutional rights during an initial compulsory examination and a second compulsory

examination. *Id.* None exists. Because the Court previously considered and rejected the constitutional arguments advanced in Motion D-201,[21] it rejects them here as successive.

D. The New Examiner's Professional Medical Judgment

The defendant posits that, even if the Court had "the authority" to order a new sanity examination, Order P-68 "is nevertheless problematic because it . . . demands that the new examiner make specific inquiries concerning areas of interest to the prosecution," which, in turn, "interfere[s] with the new examiner's ability to exercise his . . . professional medical judgment." *Id.* at p. 11. The Court is unpersuaded.

The defendant concedes that the "direction from the Court" to the new examiner in Order P-68 regarding "the identified areas of deficiency [in Dr. Metzner's examination] . . . would have been necessary" if the Court had "ordered only a limited further examination with specific inquiry into" those areas. *Id.* This concession logically leads to two conclusions: (1) the defendant does not have a wholesale objection to the Court providing the new examiner the direction set forth in Order P-68; and (2) since the Court's direction would have been acceptable and "necessary" if a limited supplemental examination had been ordered, such

[21] *See generally* March 7, 2013 Order Regarding Defense Motions D-28, D-29, D-30, D-31, and D-32; May 29, 2013 Order Regarding Outstanding Issues in Defendant's Motions D-28, D-29, D-31, and D-32.

direction cannot be deemed to interfere with the new examiner's ability to exercise his professional medical judgment—lest the defendant be understood to suggest that interfering with the examiner's medical judgment is tolerable when only a limited supplemental examination is required. Thus, the defendant's argument seems to be that the new examiner does not need the direction set forth in Order P-68 because the Court required a new sanity examination. *Id.* (emphasis omitted). The Court disagrees.

It is true that the Court did not restrict the new examiner to a limited supplemental examination. However, the Court nevertheless expects the new examiner to consider Dr. Metzner's examination and the Court's findings related to the examination's inadequacies. That the new examiner is not strictly confined to addressing the deficiencies in Dr. Metzner's examination does not mean that he need not consider them. Rather, the new examiner will need to "exercise his . . . independent judgment" as he determines how to address those deficiencies during the next sanity examination, which he must decide "how best to conduct." *Id.*

It would have been inappropriate to require the new examiner to start from scratch without regard to the first examination and the resolution of Motion P-68. Indeed, the Court could not treat Dr. Metzner's examination as though it never happened and the findings of inadequacy in Order P-68 as though they were never made.

Moreover, if the Court had elected to provide no direction to the new examiner, he would have no way of knowing why a second examination was ordered. The Court agrees with the prosecution that "[i]t would be folly to ask an examiner to conduct an examination without knowing the issues that the [C]ourt found problematic with the first examination in the blind hope that the areas of concern found by the [C]ourt would be addressed." Response at p. 7.

This is a highly complex case and the first examination presented Dr. Metzner, an experienced and reputable psychiatrist, with multiple difficulties that he was unable to overcome. *See* Order P-68 at pp. 35-39. Dr. Metzner failed, not because of incompetence, but because of the voluminous and complex nature of the examination [redacted] The new examiner should be allowed to benefit from Dr. Metzner's struggles and mistakes. He should also have the benefit of the dialogue between the experts who testified at the hearing and the Court's subsequent detailed analysis of the flaws in Dr. Metzner's examination, including the areas that he failed to adequately explore.

Moreover, concealing Order P-68 from the new examiner would have made the next examination vulnerable. If the new examiner failed to address one of the areas in Dr. Metzner's examination the Court found deficient, it would give the parties an automatic ground to challenge the adequacy of the next examination.

Notably, the defendant was present during the lengthy hearing on Motion P-68, heard the experts' testimony and the parties' arguments regarding the inadequacies in Dr. Metzner's examination, and has access to the Court's detailed findings and conclusions in Order P-68. The next examiner would be at a significant disadvantage if he is not privy to the same information.

What's more, the jury will hear that the examination required by Order P-68 was conducted after Dr. Metzner's examination. If the Court agrees with the defendant's position in Motion D-201, jurors are likely to wonder why the new examiner did not consider Dr. Metzner's examination or the criticisms advanced by the prosecution's experts.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

The Court finds equally unpersuasive the defendant's contention that, parts of Order P-68 interfere with the new examiner's independent medical judgment by requiring the examiner to "consider and address the topics identified by the prosecution's experts, regardless of whether [the examiner] . . . agrees with Drs. Resnick and Mohandie that the areas they identified are necessary to an adequate sanity examination." *Id.* Again, the defendant ignores that, based on the credible and compelling expert evidence presented and subjected to cross-examination, the Court found that Dr. Metzner's examination was incomplete and inadequate because, among other things, it failed to properly consider and explore many of the topics discussed by the prosecution's experts. Having made specific findings related to the inadequacies in Dr.

Metzner's examination, the Court cannot ignore them, convey to the new examiner that there is a blank slate, and ask him to conduct a new examination that starts from scratch and completely discards Dr. Metzner's report and Order P-68.

Finally, the defendant asserts that Order P-68 contains [redacted] findings that are favorable to the prosecution." *Id.* at p. 13. The defendant is correct. However, the Court cannot strike its [redacted] findings from Order P-68 because its rulings are based in part on those findings.

The defendant insists, however, that Order P-68 "strongly suggest to the new examiner that the areas identified [redacted] are meritorious and potentially outcome-determinative." *Id.*[23] The defendant is partially correct—the areas of inadequacy [redacted] found persuasive by the Court are potentially outcome-determinative. That is precisely why the Court concluded that another examination is not only warranted, but necessary. Had the areas [redacted] lacked relevance, there may not have been good cause for another examination. The defendant fails to persuasively explain why the significance ascribed by the Court to the areas of inadequacy in Dr. Metzner's examination will unduly influence the new examiner,

[23] The Court will send the new examiner a redacted copy of Order P-68 that will omit any comments related to [redacted]

and there is no basis to believe that the new examiner will be influenced by the discussion in question in Order P-68.[24]

As for the rest of the defendant's contention, Order P-68 did not analyze, much less resolve, the merits of the defendant's insanity plea. It simply considered the prosecution's assertion that Dr. Metzner's examination was inadequate and unfair. The Court was required to make findings and decide whether the prosecution established good cause for a new examination. While the discussion in the Order makes clear the Court's determination that Dr. Metzner's examination is deficient and that there is good cause for another sanity examination, there is no suggestion that the prosecution's theories of the case have merit. The Court did not address the correctness of Dr. Metzner's findings and opinions; the Court analyzed the adequacy of his examination.

II. Request to Amend

At the end of his motion, the defendant asks the Court to amend Order P-68. *Id.* at p. 13. The defendant does not articulate the amendments he believes are appropriate. *Id.* Instead, he generally refers to amendments needed for "the reasons explained in section I(d)" of his motion and then urges the Court not to send Order P-68 to the new examiner. *Id.* The defendant's request to amend is both vague and puzzling. On the one hand, the defendant asks the Court to make

[24] In an abundance of caution, simultaneous with this Order, the Court enters Order C-94, which instructs the examiner not to draw any improper inferences from Order P-68.

unspecified amendments to Order P-68 before it is forwarded to the new examiner so as to eliminate the risk of improperly influencing him. On the other, the defendant asks the Court not to send Order P-68 to the new examiner. The Court has addressed the arguments raised in section I(d) of the motion in section (I)(D) of this Order. For the same reasons the Court concludes in section (I)(D) of this Order that the defendant's request to strike in section I(d) of the motion should be denied, it finds here that his general request to amend or abstain from sending a copy of Order P-68 to the new examiner should likewise be denied.

Nevertheless, out of an abundance of caution, the Court redacts the copy of Order P-68 it will send to the new examiner by excising any discussion related to [redacted] *See* Attachment 1. Consistent with those redactions, the Court hereby amends Order P-68 to the extent that it requires the parties to forward to the new examiner an unredacted copy of that Order. No other copy of Order P-68 and no versions of related Orders inaccessible to the public may be forwarded to the new examiner without the Court's permission, and the only version of Order P-68 the new examiner may review is the redacted one attached.

Additionally, simultaneous with this Order, the Court issues Order C-94, titled "Order Regarding Further Sanity Examination," which: (1) admonishes the new examiner not to draw any improper inferences from Order P-68, related

Orders, or media reports about such Orders; and (2) prohibits the new examiner from reviewing any version of Order P-68 that is different than the redacted one in Attachment 1. At the defendant's request, Order C-94 also advises the new examiner that he may not conduct any narcoanalytic testing without the Court's authorization.[25]

The defendant's request for an order "that no one provide the new examiner with a copy of the [remaining] materials surrounding the litigation of Motion P-68," *see* Motion at p. 13, is denied. As relevant here, Order P-68 requires the parties to forward to the new examiner a copy of Dr. Metzner's report, a copy of the suppressed transcript from the evidentiary hearing, copies of the exhibits admitted into evidence at that hearing, and copies of the parties' Motion P-68 briefs ("the remaining materials"). *See* Order P-68 at p. 47. The defendant's request related to the remaining materials appears to have anticipated that the Court would strike or amend Order P-68. Given that the Court denies the defendant's motion to strike or amend, and concludes that the new examiner should receive the redacted copy of Order P-68 in Attachment 1, the defendant presumably would want the new examiner to have the remaining materials as well.

[25] Either party may submit, within two business days of this Order, a request for additional admonishments to the new examiner. If such a request is submitted, there must be compliance with the conferral requirement, and the opposing party shall have one business day to respond.

Before the first examination, neither party requested any restrictions on the information they could submit to the court-appointed examiner. The parties gave Dr. Metzner more than 51,000 pages of documents—including the report prepared by Dr. Raquel Gur, a defense expert who conducted a sanity examination of the defendant—hundreds of DVDs and hundreds of CDs. 1/29/14 p.m. Tr. at p. 80. The Court has no basis to believe that the parties do not plan to share equally extensive information with the new examiner. Placing a restriction on the remaining materials may lead to unnecessary Court involvement and protracted litigation. Moreover, included in the remaining materials are the parties' pleadings, which include the defendant's arguments. Likewise, the transcript of the hearing contains the testimony of the witnesses called by the defendant, Drs. Hanlon and Metzner, to refute the opinions of Drs. Resnick and Mohandie. The remaining materials do not include any orders and do not contain any findings or conclusions by the Court.

Although the Court declines to enter an order prohibiting the parties from sharing the remaining materials with the new examiner, it concludes that the parties should not be required to forward such materials to the new examiner either. Therefore, the Court hereby amends Order P-68 to rescind the requirement to forward the remaining materials to the new examiner. This is consistent with Order C-41, which addressed the first compulsory examination.

Lastly, the Court would be remiss if it did not address the defendant's unsupported allegation that Order P-68 should be amended to avoid the appearance of partiality. Motion at p. 13. The defendant implies that the Court took "a role [in Order P-68] which [gives] the impression of partiality." *Id.* (quoting *People v. Hrapski*, 718 P.2d 1050, 1054 (Colo. 1986)). However, as indicated, in resolving Motion P-68, the Court agreed with each party in part and disagreed with each party in part. The Court then exercised the broad discretion vested in it by the General Assembly and disagreed with both parties on the type of examination advisable under the circumstances. The Court did not take a role that gave the impression of partiality and its Order did not create the appearance of partiality. If the defendant believes that the Court's rulings and Order P-68 gave the impression of "partiality," the Court and the defendant have a different understanding of the term. The Court's understanding of "partiality" is based on the term's plain and common meaning. *See Partiality*, *Merriam-Webster*, http://www.merriam-webster.com/dictionary/partiality (last visited April 2, 2014) (defining partiality as "an unfair tendency to treat one person, group, or thing better than another").

CONCLUSION

For all the foregoing reasons, Motion D-201 is denied without a hearing. Neither the defendant's request to strike nor his vague request to amend has merit.

Nevertheless, Order P-68 is amended and supplemented in accordance with this Order.[26]

Dated this 14th day of April of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

[26] The Court forwards a copy of this Order to the Attorney General, CMHIP's counsel. As soon as practicable, the Attorney General should communicate to the new examiner that he may not review any copies of Order P-68 until further order of the Court. If the Court lifts the stay it has placed on Order P-68, it will send the new examiner the redacted version of Order P-68 in Attachment 1, as well as Order C-94.

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, a true and correct copy of the **Order regarding Defendant's motion to strike, or alternatively, to amend relief articulated in Order P-68 (D-201)** 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)

Cheryl Robinson