Boulder District Court, Boulder County, State of Colorado 1777 Sixth Street Boulder, Colorado 80302	DATE FILED September 13, 2024 11:02 AM
People of the State of Colorado, v. **AHMAD AL ALIWI ALISSA,** Defendant.	**▲ COURT USE ONLY ▲**
Attorneys for the People: Michael Dougherty, Esq., Adam Kendall, Esq., and Ken Kupfner, Esq. *Attorneys for Defendant:* Samuel Dunn, Esq., and Kathryn Herold, Esq.	Case Number: **2021CR497** Division **13** Courtroom **G**
ORDER RE: DEFENDANT'S MOTION IN LIMINE REGARDING DR. TORRES' TESTIMONY (D-067)	

BACKGROUND

On November 14, 2023, Defendant pled not guilty by reason of insanity ("NGRI") and the Court advised Defendant regarding his rights and the potential consequences of a NGRI plea. The Court ordered that Defendant be examined pursuant to C.R.S. § 16-8-106 and the initial Sanity and Mental Condition Evaluation Report was filed with the Court on April 29, 2024. On May 3, 2024, Defendant requested a second Sanity and Mental Condition Evaluation be performed pursuant to C.R.S. § 16-8-108. The Court granted this request and Defendant subsequently met with Dr. Jeffrey Janofsky for a series of recorded interviews. This matter now comes before the Court regarding Defendant's *Motion in Limine Regarding Dr. Torres' Testimony (D-67),* filed with the Court on September 8, 2024. The People filed their *Response to Defendant's Motion in Limine Regarding Dr. Torres' Testimony (D-67)* on September 10, 2024.The Court reviewed the evidence, the case file, applicable law, and considered the arguments of counsel. The Court now issues the following findings and orders.

APPLICABLE LAW

"A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity pursuant to section 16-8-103… or, for offenses committed on or after July 1, 1999, by seeking to introduce evidence concerning his or her mental condition pursuant to section 16-8-107(3) waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or

psychologist in the course of an examination or treatment for the mental condition for the purpose of any trial or hearing on the issue of the mental condition…" C.R.S. § 16-8-103.6(2)(a).

"To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists, forensic psychologists, and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists, forensic psychologists, or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial… In any trial or hearing on the issue of the defendant's sanity… the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. For offenses committed on or after July 1, 1999, when a defendant undergoes an examination pursuant to the provisions of paragraph (b) of this subsection (3) because the defendant has given notice pursuant to section 16-8-107(3) that he or she intends to introduce expert opinion evidence concerning his or her mental condition, the physicians, forensic psychologists, and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as such statements and reactions entered into the formation of their opinions as to the mental condition of the defendant." C.R.S. § 16-8-106(3)(b-c).

"Except as otherwise provided in this subsection (1.5), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed; except that, for offenses committed on or after July 1, 1999, such evidence shall also be admissible as to the defendant's mental condition if the defendant undergoes the examination because the defendant has given notice pursuant to subsection (3) of this section that he or she intends to introduce expert opinion evidence concerning his or her mental condition." C.R.S. § 16-8-107(1.5)(a).

"If the defendant wishes to be examined by a psychiatrist, psychologist, or other expert of his own choice in connection with any proceeding under this article, the court, upon timely motion, shall order that the examiner chosen by the defendant be given reasonable opportunity to conduct the examination. An interview conducted pursuant to a court order under this section must be video and audio recorded and preserved. The court shall advise the defendant that any examination with a psychiatrist or forensic psychologist may be audio and video recorded. A copy of the recording must be provided to the prosecution with the examination report… The court shall determine the admissibility of

any recording or partial recording, in whole or in part, subject to all available constitutional and evidentiary objections." C.R.S. § 16-8-108(1)(a and c).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

In their written motion, Defendant asserted that pursuant to C.R.S. § 16-8-108, Dr. Jeffrey Janofsky met with Defendant to be interviewed and evaluated regarding his defense of not guilty by reason of insanity. The recording of this interview was provided to the People on July 30, 2024. On August 26, 2024, Defendant received an investigation report from the People containing an interview conducted with Drs. Torres and Gray on August 23, 2024, wherein the People asked Dr. Torres for her overall opinion about recorded interviews conducted with Defendant subsequent to April 29, 2024, the date of her previously provided Sanity and Mental Condition Evaluation Report. Dr. Torres stated that she was now more confident in her opinion that she previously reported to the Court after viewing the subsequent recordings.

Defendant argued that the Court should exclude Dr. Torres' testimony that she is now more confident in her opinion after viewing materials that were provided after the examination she performed and report she wrote pursuant to C.R.S. § 16-8-106. Defendant argued that C.R.S. § 16-8-106 does not grant an examiner the ability to testify at trial about information obtained after their examination and report absent the ordering of further examination by the court pursuant to C.R.S. § 16-8-106(1)(a). Defendant argued that the People's attempt to get Dr. Torres to testify regarding information she did not consider during her evaluation and when writing her report is not allowed by the plain language of the statute. Defendant further argued that the statute does not allow for unlimited time for further examination to occur nor does it permit further examination to be performed without the Court's order. Defendant asserted that C.R.S. § 16-8-106(3)(b) permits an examiner to testify at trial to the results of procedures and statements and reactions of the defendant insofar as these entered into the formation of their opinion regarding the defendant's mental condition, but that they cannot testify at trial relating to a different, subsequent examiner's interview, as that did not enter into the formation of their opinion during the initial examination and was not included in the report that resulted from their court-ordered examination pursuant to C.R.S. § 16-8-106. Defendant argued that a harmonious reading of each of the relevant sections of C.R.S. § 16-8-106 results in the conclusion that a "neutral, court-ordered examiner is allowed to take into account a broad range of evidence in questioning a defendant as part of their evaluation, and can use a broad range of evidence in forming their opinion as part of their charge in giving an opinion on sanity and mental condition that evaluators must provide in their reports to the court. However, examinations are time limited, absent either party or the court extending such limits."

Defendant argued that C.R.S. § 16-8-107(1.5)(a) allows for evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of examination pursuant to C.R.S. § 16-8-106 or acquired pursuant to C.R.S. § 16-8-103.6, but not pursuant to C.R.S. § 16-8-108. Defendant conceded that C.R.S. § 16-8-103.6(2)(a) provides that a defendant waives privilege of confidentiality concerning their mental condition as to communications made to a physician or psychologist in the course of an examination for such mental condition, but

Defendant argued that it does not allow for the evidence of these communications to be introduced through a third-party witness. Defendant argued that the statute instead allows for traditional rules of evidence to apply and contemplates that a witness to whom such statements were made or who performed such evaluations be called to testify. Defendant argued that if the People wanted to introduce evidence from the subsequent evaluation conducted pursuant to C.R.S. § 16-8-108 by Dr. Janofsky, they could have simply subpoenaed him to testify at trial. Defendant asserts that the People are instead attempting to "violate [Defendant's] rights to conduct his defense, due process, and confrontation by attempting to backdoor such evidence through the court-appointed, neutral evaluators Drs. Torres and Gray." Defendant argued that Dr. Torres did not rely on Dr. Janofsky's interview in forming her sanity opinion and so she therefore cannot testify regarding this subsequent interview. Defendant argued that this subsequent opinion of Dr. Torres prejudices Defendant in that if it was discovered sooner, it would have impacted trial strategy and creates an untenable situation for Defendant in violation of the applicable statutory authority and rules of procedure and evidence.

The People asserted in their written response that following their receipt of a copy of Dr. Janofsky's videotaped interviews with Defendant, Defendant indicated that they would not be providing a report because they would not be calling Dr. Janofsky as a witness at trial. The People asserted that it was "clear Defendant provided significantly more information to Dr. Janofsky than he provided to Drs. Torres and Gray." The People asserted that this additional information is significant because of the way that Drs. Torres and Gray qualified their opinion that Defendant was sane at the time of the alleged offenses, stating that "[i]n no small part because of Mr. Alissa's reluctance or inability to verbalize information, the evidence available pertaining to his sanity at the time of the alleged offenses is somewhat limited. One consequence is that some of the data is potentially interpretable in different ways, rendering it more challenging to draw definitive conclusions and thereby leaving us less confident in our conclusions." After first reviewing the new interviews themselves, the People then forwarded Dr. Janofsky's video-recorded interviews of Defendant to Dr. Torres and asked her to review them. The People asserted that during an August 2024 trial preparation meeting, Dr. Torres told the People that her review of Defendant's statements to Dr. Janofsky made her more confident in her initial conclusion regarding Defendant's sanity.

The People argued that Defendant's reliance upon C.R.S. § 16-8-106 is misplaced because the statute addresses only the procedure for completing an initial court-ordered examination of a defendant's sanity at the time of the offense – it does not define the admissibility of information acquired by the evaluator after the initial evaluation and does not preclude an initial examiner from considering information acquired afterward their examination of Defendant for purposes of their trial testimony. The People further argued that C.R.S. § 16-8-107 governs the use of statements made by a defendant during sanity evaluations, and subsection 1 of that statute explicitly authorizes the People to use statements a defendant made during his court-ordered examination to "rebut evidence of his or her mental condition introduced by the defendant to show incapacity to form a culpable mental state." The People assert that the only limitation on this general rule is that the People may not use statements made during a sanity evaluation to prove a defendant's guilt or to aggravate the defendant's culpability at sentencing, but they

"intend to use Defendant's statements to Dr. Janofsky, and Dr. Torres's evaluation of them, for the limited purpose of rebutting Defendant's theory that he was insane at the time of the offense."

Third, the People asserted that C.R.S. § 16-8-108 provides both that the prosecution will receive the evaluation ordered at a defendant's insistence as well as the statements made in connection thereto and that those statements are admissible "subject to all available constitutional and evidentiary objections." The People argued that the obvious purpose behind this disclosure requirement is to allow the People a fair opportunity to review the subsequent expert's opinions and related materials in order to address the defense's theory at trial, so it would make no sense to require the defense to produce these expert materials while also prohibiting the People from using them at trial. The People argued that, to the contrary, the Legislature intended for the statements made during a second evaluation to be accessible to the jury so that they may consider all the evidence related to sanity, so "Defendant's argument that the sanity statutes preclude Dr. Torres from supplementing her opinion fails." The People argue that, so long as they only use Defendant's statement to Dr. Janofsky to prove Defendant's state of mind at the time of the offense, "nothing in Title 16 prohibits their admission or the prosecution's experts from relying on them."

The People conclude by arguing that there are no valid constitutional or evidentiary objections to the People's use of Defendant's statements to Dr. Janofsky. The People asserted that Defendant's statements, when offered by the People through Dr. Torres, would not be excluded as impermissible hearsay because they are statements of a party opponent, citing CRE 801(d)(2)(A) and *People v. Abad*, 2021 COA 6, ¶63. Additionally, the People argued that Defendant's confrontation rights are not violated by admission of his statements to Dr. Janofsky because the Confrontation Clause does not apply when Defendant himself is the declarant, citing *People v. Crespi*, 155 P.3d 570, 575-76 (Colo. App. 2006). Finally, the People argued that Defendant's appeal to C.R.C.P. 16 that it is too "late in the game" for Dr. Torres to develop a new opinion has no merit because "Defendant has been in possession of his own statements since he made them; the People received Dr. Torres's supplemental opinion during trial preparation and immediately discovered it; and Defendant has not articulated how an earlier disclosure of the supplemental opinion would have impacted trial strategy."

With no case law immediately on point on this issue, the Court turns to an interpretation of the plain language of the relevant statutes, ultimately concurring with the People's analysis in this matter. Though C.R.S. § 16-8-106 dictates the time, place, and manner that a court-ordered examiner may interview a defendant and evaluate their mental condition at the time of their alleged offenses, it does not place further limits on the nature of their ultimate testimony at trial. Additionally, the Court disagrees with Defendant's argument that C.R.S. § 16-8-107(1.5)(a) allows for evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of examination pursuant to C.R.S. § 16-8-106 or acquired pursuant to C.R.S. § 16-8-103.6, but not pursuant to C.R.S. § 16-8-108. In the Court's interpretation of the statute, C.R.S. § 16-8-107(1.5)(a) does not exclude evidence obtained pursuant C.R.S. § 16-8-108 by omission. C.R.S. § 16-8-103.6(2)(a) provides that by placing his mental condition at issue, Defendant "waives *any* claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist

in the course of an examination or treatment for the mental condition for the purpose of any trial or hearing on the issue of the mental condition," (emphasis added) and this necessarily includes an examination pursuant to C.R.S. § 16-8-108. Therefore, the People are not precluded from using the evidence obtained as a result of his interviews with Dr. Janofsky and the Court shall determine the admissibility of such evidence "subject to all available constitutional and evidentiary objections." C.R.S. § 16-8-108(c).

Turning to the Defendant's argument that that the People are instead attempting to "violate [Defendant's] rights to conduct his defense, due process, and confrontation by attempting to backdoor such evidence through the court-appointed, neutral evaluators Drs. Torres and Gray," the Court again disagrees and concurs with the People's analysis. Defendant's due process concerns are unfounded as he was thoroughly advised regarding the waiver of privilege as to any communications between Defendant and the examiners of his sanity and mental condition, and that "[i]n any trial or hearing on the issue of your sanity/mental condition or eligibility for release, the physicians and other personnel conducting the examination may testify to the results of *any* of these procedures and your statements and reactions may be revealed if they entered into the formation of the expert's opinion on your mental condition." See the Court's *Advisement on Plea of Not Guilty by Reason of Insanity,* Paragraph 8, from November 14, 2023. Despite Defendant's argument to the contrary, this does not limit said expert's opinion to that of the time of their initial evaluation and report. The expert witness's opinion is not frozen in time at the moment that their report is filed and can adapt to the introduction of new, relevant, and substantial information subsequently acquired through legally permissible means.

Furthermore, the Court agrees with the People's analysis regarding the remaining evidentiary and constitutional challenges to the admissibility of Defendant's statements to Dr. Janofsky, and that "nothing in Title 16 prohibits their admission or the prosecution's experts from relying on them." There is no Confrontation Clause concern as the statements at issue are those made by Defendant himself and these statements are not impermissible hearsay for essentially the same reason – they are statements made by a party opponent. Additionally, Defendant's argument appealing C.R.C.P. 16 fails for the reasons stated by the People and Defendant has not sufficiently articulated how an earlier disclosure of the supplemental opinion would have impacted their trial strategy. Therefore, the Court finds that Defendant's statements made to Dr. Janofsky as part of the court-ordered examination pursuant to C.R.S. § 16-8-108 are admissible and Dr. Torres may rely upon them in her testimony at trial.

Dated September 13, 2024.

BY THE COURT

Ingrid S. Bakke

District Court Judge