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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, vs. **MOHAMED MOHAMED NOOR,** Defendant.	)	**STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS THE DEFENDANT'S PSYCHOLOGICAL RECORDS** MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

STATEMENT OF FACTS

The defendant has moved this court to suppress the defendant's psychological records, which were obtained by two search warrants executed on August 31, 2017 and November 30, 2017. The records are the Fitness for Duty evaluation of the defendant prepared by Dr. Thomas Gratzer, M.D. on February 23, 2015, a clarification letter by Dr. Gratzer on March 10, 2015, and the raw data from the MMPI exam administered to the defendant by Marvin Logel, Ph.D. on February 17, 2015. The evaluation was conducted as part of the Minneapolis Police Department's (MPD) pre-hiring protocol after the MPD gave the defendant a conditional offer of employment as a police officer. The Fitness for Duty Report, which contains the results of the MMPI and the results as interpreted by Dr. Logel, and the letter were forwarded to the Health and Wellness Coordinator for the MPD who eventually forwarded the information to at least two other MPD employees (including the Commander of the Minneapolis Police Academy, a Human

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Resources Generalist and possibly the Deputy Chief of Professional Standards) before the MPD hired the defendant. The records were kept in the defendant's MPD personnel file in a section entitled "psychological records." Page 1 of Dr. Gratzer's report reads:

> **STATEMENT OF CONFIDENTIALITY:**
>
> Mr. Noor was informed that the interview would not be confidential and that information obtained would be used in preparation of this report. With that understanding he agreed to proceed to the interview.

Information contained in these records is relevant to issues of probable cause, the defendant's state of mind, the applicability of the "reasonable police officer" standard, jury instructions and other potential legal issues.

ARGUMENT

The records at issue were seized from the Minneapolis Police Department during the execution of two search warrants, both of which were duly signed by the court and state sufficient probable cause. The defense raises no argument that the search warrants were in any way insufficient, defective, or unsupported by probable cause. The defense argument to suppress appears to rest only on the assertion that the records are covered by the physician-patient privilege and because of that the records cannot be acquired by search warrant and must be suppressed. The physician-patient privilege, however, is a testimonial privilege and therefore pertains to admissibility at trial, not the way in which records are acquired. Also, that privilege does not apply here because the defendant was not seeing Dr. Gratzer to obtain medical care as required by the privilege statute. Finally, the records themselves are neither confidential nor privileged and that was communicated directly to the defendant at the time of the examination. He had no expectation of privacy in Dr. Gratzer's evaluation or report.

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The Fourth Amendment protection against unreasonable searches and seizures requires that law enforcement obtain a warrant to seize property in which a party has a legitimate privacy interest. That is, the warrant requirement exists *because* of a particular privacy interest and a valid warrant based on probable cause overrides that interest. Citizens have privacy interests in all manner of things and places. *See e.g.*, *State v. deLottinville*, 890 N.W.2d 116, 120 (Minn. 2017) (recognizing Fourth Amendment protects places in which persons have legitimate expectations of privacy) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)); *Minnesota v. Olson*, 495 U.W. 91, 98 (1990) (holding overnight guests have privacy interest in host's home); Minn. St. § 626A.42, Subd. 2 (requiring search warrant for location tracking data); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (same); *State v. Holland*, 865 N.W.2d 666 (Minn. 2015) (recognizing warrant is required to search cell phone absent valid exception).

A physician-patient privilege exists where:

1. A physician-patient relationship exists;
2. The information acquired by the physician is the type contemplated by the statute;
3. The information was acquired by the physician in attending the patient;
4. The information was necessary to enable the physician to act in a professional capacity.

State v. Staat, 192 N.W.2d 192, 196 (Minn. 1971).

The search warrants of August 31, 2017 and November 30, 2017 were validly issued and supported by probable cause (which, again, the defendant does not contest). The records belong to the MPD, not the defendant, and the warrant was served on the department. The Minnesota statutory physician-patient privilege does not, as the defendant contends, override in some way the law governing search warrants and the Fourth Amendment, nor does it prohibit the execution of search warrants for medical records. For example, medical records in violent crime cases,

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even those of defendants, are regularly obtained as part of law enforcement investigations. A search warrant can compel a defendant to have a medical or sexual assault examination, give blood, or be photographed for injuries.

The case cited by the defendant for the proposition that the testimonial privilege "prohibits disclosure of medical records to any third party without consent – even pursuant to a search warrant" actually says nothing of the kind. In *State v. Poetschke*, 750 N.W.2d 310 (Minn. Ct. App. 2008), a DWI defendant was injured in an accident and hospital personnel drew her blood "as part of the diagnosis and treatment for her injuries." The police asked the defendant for a second and separate sample for the purposes of the criminal investigation and the defendant consented. Due to the defendant's injuries, medical personnel were unable to obtain that second sample. The police later got a search warrant for the defendant's medical records and the first blood sample but only got the records because the first sample had been destroyed. The records showed a BAC of .152 and the defendant was charged with DWI. On appeal, the State conceded that the records fell within the scope of the physician–patient privilege because medical personnel took the first sample for purposes of diagnosis and treatment. The State argued that the consent for the second sample for law enforcement should apply to the first sample. The court found that there was no waiver of the privilege as to the first sample, the privilege applied, and the results were inadmissible. The court said nothing about the manner in which the records were acquired and certainly did not hold that search warrants are prohibited if there is a physician-patient privilege.

No physician-patient privilege exists here and the defendant has no expectation of privacy in the records. Again, the records belong to the Minneapolis Police Department, not the defendant. Dr. Gratzer was never the defendant's physician and he did not see him for purposes

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of diagnosis or treatment of a psychiatric condition. The defendant saw Dr. Gratzer because he was required to as a condition of his employment with the MPD. Dr. Gratzer told the defendant that the interview and report would not be confidential. Dr. Gratzer saw the defendant only once and provided no treatment or follow up. There was no physician-patient relationship here. The defendant's argument that he provided a "limited waiver of the physician-patient privilege" is inaccurate; Dr. Gratzer needed nor sought any waiver because no physician-patient relationship existed.

Claims of privilege by police officers objecting to the disclosure of their pre-employment psychological evaluations in cases involving officer misconduct or criminal activity are rejected by courts across the United States. *See, e.g. Ashford v. City of Milwaukee,* 304 F.R.D. 547, 551-552 (E.D. Wisc. 2015) ("It is doubtful whether there would be any confidential communications between an officer and a psychologist or other professional who tests or examines an officer for the purpose of determining whether he is fit for duty. Presumably, the results…will be shared with the City and therefore the officer will not expect his statements…to remain confidential"); *Dorato v. Smith,* 163 F. Supp. 3d 837, 886-887 (D. N.M. 2015) ("If a party is informed that the evaluations…will be disclosed to his or her employer, that party cannot have a reasonable expectation of privacy); *Estate of Turnbow v. Ogden City,* 254 F.R.D. 434, 437 (N.D. Utah 2008) (Finding no privilege or expectation of privacy where"[i]t is clear on the face of the letter the records were to be disclosed to the…police department"); *Kamper v. Gray,* 182 F.R.D. 597, 599 (E.D. Mo. 1988) ("Since [defendant] was aware that his evaluations would be submitted to his employer, [defendant] had no reasonable expectation of confidentiality regarding his communication with [psychotherapists]"); *Valentin v. Bootes,* 740 A.2d 172 (N.J. Super. Ct.

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Law. Div. 1988). The defendant was very clearly informed that his evaluation was for employment purposes, would be shared with the MPD, and was not confidential.

CONCLUSION

The court should deny the defendant's motion to suppress the records from the defendant's pre-employment psychological evaluation because the records were properly acquired with valid search warrants and no physician-patient privilege bars their admissibility at trial.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

By: _____
AMY E. SWEASY (26104X)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

By: _____
PATRICK R. LOFTON (0393237)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

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