ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK W. GIBBONS, DISTRICT COURT JUDGE, Respondents, ALFRED P. CENTOFANTI, III, Real Party in Interest.	Case No. 38987

FILED

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REAL PARTY IN INTEREST'S OPPOSITION TO STATE'S WRIT OF MANDAMUS

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REAL PARTY IN INTEREST'S OPPOSITION TO STATE'S WRIT OF MANDAMUS

I.

Statement of Issues

1. Whether Judge Gibbons abused his discretion in denying the State's request for discovery not allowed by Nevada Statutes or case law?

2. Whether the State is entitled to make a defendant's psychiatric condition an issue as a method to compel discovery in the form of production of defendant for an examination or production of expert notes and source material in violation of defendant's Fifth and Sixth Amendment Rights?

3. Whether discovery matters are the proper subject of a writ of mandamus or prohibition?

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II.

Introduction

There are only two issues before this court, those being whether Judge Gibbons abused his discretion in denying the State's request for (1) "notes" and "everything" defendants experts relied upon in forming their opinions regarding defendant and (2) an independent psychiatric examination of defendant. These items are not discoverable under Nevada Law, and would, if disclosed, violate Defendant's Fifth and Sixth Amendment Rights, and therefore, the decisions of Judge Gibbons in denying the State's requests were proper, not an abuse of discretion, and should be upheld by this Court.

III.

Relevant Background Facts

A. Background

Defendant Alfred P. Centofanti III was arrested on December 20, 2000, and charged with open murder in connection with the death of Virginia Centofanti. During the arrest Defendant was observed as being "comatose" and upon arrival at the Clark County Detention Center was deemed "unable" to assist in the booking procedures and after being interviewed by jail personnel, both police and psychiatric staff, defendant was placed on suicide watch (see Section "B" below). The Defendant has pled not guilty to the open murder charge and has not indicated that he intends to argue insanity as a defense. However, the State has attempted to place his credibility at issue with regards to Defendant's observed "shock-like" condition after the incident, prior to and at the time of his arrest, and his subsequent incarceration, as reflected in the

pleadings, motions, arguments, questioning of witnesses, and in discovery.

Specifically, the State has attacked Defendant's credibility by alleging Defendant's condition observed in connection with his arrest and incarceration were "feigned" and an attempt by Defendant to "manufacture" a defense. When the State placed Defendant on constructive notice his credibility through this "feigned" psychiatric condition would be in issue the Defendant retained experts in the field of mental health to be prepared to counter any argument by the State as to Defendant's credibility and observed condition.

Defendant, in these circumstances, has an absolute right to counter the State's allegations regarding his credibility and observed mental state and not be required to waive his Fifth and Sixth Amendment Rights in doing so. The decisions of Judge Gibbons limiting the State's access to the Defendant and material relied upon by the Defendant to prepare for trial are proper and should be upheld.

B. Evidence Introduced by the State Attacking Defendant's Credibility

The following is a non-exhaustive list of evidence the State intends to introduce attacking the Defendant's credibility.

1. Las Vegas Metropolitan Police Department Continuation Report:

a. On 12/21/2000 at 0310 hours, Det. Thowsen and Det. LaRochelle contacted Alfred "Chip" Centofanti III at the Clark County Detention Center. Centofanti was housed at 2-C and placed on suicide watch for his own protection.

Centofanti was laying on a bed in the cell when detectives entered. He then sat up as Det. LaRochelle began talking to him. Det. LaRochelle read aloud to Centofanti the Rights of Persons Arrested Card. Centofanti did not respond when asked if he understood his rights and did not speak with detectives. Page 17.

b. Officer Tiffany Gauguin:

> I then escorted Alfred outside to my patrol car where I placed him in the back, locked the doors and put my spotlight on him, so that he could be monitored. During this time, I observed Alfred to appear catatonic, with no type of facial expression. Alfred did not exchange any type of dialog with any one present . . .

During the transport to the Clark County Detention Center, Alfred didn't speak and continued to sit in a catatonic state. Pages 2-3.

c. Voluntary Statement Mark Wright Recorded:

> Q. What was his demeanor like and what was his actions when he came into the house?
>
> A. Oh, he, he, he had no, he had no actions, no reactions. He didn't say a word, uh, he just, we, we, we, he, you almost had to pull him over and set him, we had to set him down, pushed him down onto the couch to sit down. He was very stiff, uh, he, he looked glassy-eyed. He just like he was staring into outer space.
>
> Q. Did anything occur between the police arriving and Chip Jr. sitting down or?
>
> A. No, he never moved, never said anything, just looked straight ahead. Page 8.

d. Voluntary Statement Mark Wright Written:

> We took Chip and sat him on the sofa he was in shock, we had to pull him along to get him to move, he never said anything. Page 1.

e. Voluntary Statement Marila Wright Written:

> Chip Jr. was just looking not saying a word . . . he just looked ahead in shock. Page 1.

f. Voluntary Statement Marila Wright Recorded:

> Chip Jr. was right behind him and looked just dazed . . .And then I set Chip down here and I'm asking him and he's not answering me at all. He's just staring into space. Pages 8-9.
>
> And he was just dazed. Page 12.

2. In an interview with Brian Tanko, Esq. conducted with Det. Jim LaRochelle, on April 25, 2001, and obtained by the defense, the following was noted as to Det. LaRochelle's opinions:

> Chip acted catatonic the whole time. When he was placed in custody, he told jail staff that he wants to see an attorney. He is very animated when talking to his attorney, then becomes catatonic afterwards.

3. LVMPD Officer's Report, dated 12/21/00 at 1600.

> Today I arrived at Post 22 (2C) at 0540 hours. While conducting my first welfare check I noticed that inmate Centofanti was on a four minute 405 (suicide) watch. I also noticed that he was in the fetal position every time I conducted my welfare checks. During my welfare check at approximately 0740 hours, Inmate Centofanti said to me, "I need to talk to someone." I replied "Who do you need to speak with." Inmate Centofanti then said "I want to speak with my lawyer and my family." At 0850 hours the psych doctor, Dr. Descartes, arrived at post 22 to speak with Centofanti. The doctor asked Centofanti some questions, he replied, "I want to speak with my lawyer and my family." After speaking with the doctor Inmate Centofanti returned to the fetal position and remained that way until his attorneys arrived. Centofanti's attorneys . . . arrived at 2C at

1010 hours . . . Inmate Centofanti was taken off of 405 (suicide) watch by Dr. Descartes at 1100 hours."

4. Grand Jury Testimony - January 9, 2001:

a. Officer Tiffany Gauguin:

At that point I told the younger person, Alfred, to stand up, and he was just sitting there just staring. I asked him again. He wasn't really following verbal commands, and I kind of assisted him up and at which time I put him into custody. Page 99, lines 13-18.

b. Alfred Centofanti Jr:

I see my son with a gun to his head. I am not sure how its being held. All I know is he had a gun to his head. Page 35, line 11, lines 15-16.

c. Marila Wright:

Q. Describe Chip, Jr's or Chip the son, describe his demeanor.

A. He was just - - there was no - - his eyes were - - I just have to say there was not whites in his eyes. They were just totally black. I grabbed him to say what happened, but it was like I wasn't even there. He didn't see me. There was no response. His arms were to his side. He was just like a zombie. He was just like, I don't know, out of it. Page 67, lines 8-17.

Q. Did Chip the son say anything to you?

A. Not a word. He just stared straight. Page 68, lines 2-3.

d. Mark Wright:

Q. Can you describe Chip the son, his demeanor at that time?
A. He was a zombie, basically. He

didn't say anything. He was - - his eyes were glassy. He looked straight ahead. He was very stiff. We tried to get him to sit down. We had to actually move him and sit him down on the couch. He was staring straight ahead, didn't look at anybody, didn't react to anybody, just - Page 75, lines 3-11.

e. Thomas Thowsen:

Q. Anything unusual about about his person.

A. He was staring and not speaking. p. 121, lines 8-9.

5. Motion to Admit Evidence of Other Bad Acts:

a. The Defendant then told Gina he was going to kill her, the kids and himself. Page 2, lines 23-24.

b. In both instances [December 5, 2000 and December 20, 2000] defendant threatened to take his own life. In the first instance, the defendant threatened to kill himself. In the second instance, he was in the process when his father took the gun from him. Page 5, lines 25-27.

c. When he eventually killed her, he had built in self-defense argument. Page 6, line 22.

d. [Defendant's] plan to set Gina up as the guilty party, and he as the sympathetic party, so that when he would kill her eventually, he would have a built in defense. Page 7, lines 3-5.

6. State's Motion in Liminee filed on September 19, 2001:

That after the murder Chip had the divorce proceedings sealed. p. 3 line 13.

C. State's request for expert materials and production of defendant.

1. Oral Motion of December 21, 2001:

The State first brought up the issue of being allowed access to the Defendant for a psychiatric examination of the Defendant and examination of Defense experts notes, orally, on December 21, 2001 as reflecting in the following exchange:

> MR. LAURENT: There is another issue that will come down in the future, Judge. They haven't decided whether they're going to call a psychological expert. I image they will. They've put one on their witness list. But we're also going to need access to the defendant to have him tested as well. And prior to doing that, of course, we're going to want to have the notes relief upon by that expert, just so - - I'm just throwing it out there. I know it's not ready yet. Page 239 line 17 through 240 line 2.

The Court held the matter over until December 27, 2001, in order to give Defendant a chance to respond and for the Court itself to examine the issue. Defendant submitted a written Opposition to the oral motion (Exhibit "A") and the State presented an "oral" reply on December 27, 2001.

On December 27, 2001, the State presented the following statements:

> MR. LAURENT: Our Nevada Supreme Court has not had the occasion to pass upon the issue of whether an individual who claims an insanity defense or other psychological defense may be compelled to attend a psychiatric exam by a State's expert. Page 125, lines 8-12.
>
> THE COURT: Mr. Laurent, is there any authority, statutory or case law, of the State of Nevada, the Nevada Supreme Court, that

> requires a defendant to submit to a psychological exam before the trial? Page 126, lines 12-15.

Mr. Laurent then claimed that Defendant denied them access to reports and test results under the reciprocal discovery statute (Page 126 line 16 through page 127 line 23) going as far as claiming "the defendant is a piece of psychical evidence at this point. He becomes a piece of physical evidence and he's being tested , he's being examined and looked at. And we're entitled to the information." (Page 128 lines 2-5). Mr. Laurent goes on to claim:

> [Most courts hold that the attorney/client privilege is waived only if the defendant calls a psychiatrist as a defense witness or places the psychiatrists name on a witness list. So as soon as that happens, we don't have that attorney/client privilege anymore. He becomes a piece of evidence. Page 128 line 22 through page 129 line 5.

IV.

Argument

A. *Judge Gibbons did not abuse his discretion in denying the State's request for discovery not allowed by Nevada Statutes or case law.*

Defendant, by declaring experts in the field of mental health, whom might *never* be called at trial, is merely *responding to issues created by the State*. The State has clearly indicated its intention to attack Defendant's credibility through the use of testimony related to observations made by others of Defendant at various points after the incident.

To allow the State to create an issue; forcing Defendant to prepare and respond, then demanding that the State be allowed to take steps which invade Defendant's 5th Amendment rights would wreak

havoc on the discovery system. Under the theory proposed by the State, the State could handcuff a Defendant's Constitutional Right to present a full defense by requiring the defense to make a Hobson's choice: either concede that the State's claim that Defendant's post-traumatic shock symptoms were feigned, OR give up Defendant's 5th Amendment Right to remain silent by the mere listing of a mental health expert who may or may not be called to counter the State's attack on Defendant's credibility.

The request for a psychiatric examination of Defendant and the discovery items requested by the State are not discoverable under Nevada Law. Disclosure would violate Defendant's Fifth and Sixth Amendment Rights, and therefore, the decisions of Judge Gibbons in denying the State's requests were proper, not an abuse of discretion, and should be upheld by this Court.

A court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is clearly erroneous. **Real Estate Division v. Jones**, 98 Nev. 260 (1982). An abuse of discretion can be an error of law in determining the factors which govern discretion. **Franklin v. Borzois Realty, Inc.**, 95 Nev. 559 (1979). An abuse of discretion only occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. State, Depot Mar. Ve. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

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B. *The State is not entitled to make a defendant's psychiatric condition an issue as a method to compel discovery in the form of production of defendant for an examination or production of expert notes and source material in violation of defendant's Fifth and Sixth Amendment Rights*.

The State's argument at hearing was:

> [Most courts hold that the attorney/client privilege is waived only if the defendant calls a psychiatrist as a defense witness or places the psychiatrists name on a witness list. So as soon as that happens, we don't have that attorney/client privilege anymore. He becomes a piece of evidence.

What the State ignores is the Nevada Statutes and case law prohibiting the very discovery they seek. Furthermore, the State's position is incorrect and misstates the law on the issue. As will be further explained and analyzed below, all of the cases cited to by the State (1) are outdated and have been superceded (2) involve cases where competency to stand trial was an issue or (3) involve cases where insanity was a defense.

Further, and more importantly, is the fact that the expert in question (1) is not a psychiatrist and (2) may not be called as a witness. There is no requirement that Defendant call any witness, even an expert. Under the State's theory, even if the Defendant does not call an expert in the field of mental health, Defendant has, by merely listing an expert witness, entitles the State to pierce the veil of Defendant's Fifth Amendment Right to remain silent, and Sixth Amendment Right to Counsel by granting the State unfettered access to the Defendant and materials clearly protected by the attorney client and attorney work produce privilege. This is not, nor should it be, the law in Nevada.

1. Neither Nevada Statutes or Case Law Provide Authority for the State's Position.

A. Statutes Prohibit the Discovery the State Seeks of Written Materials.

The State of Nevada *alleges* that Judge Gibbons abused his discretion when he refused to allow the following:

(1) Discovery of notes, reports and tests conducted by defendant's psychiatric experts;

(2) Independent psychiatric examination of defendant.

As state above, these issues were first raised, orally, by the State at the December 21, 2001, hearing. First, this is a mischaracterization of what the state was requesting. The State's request was more inclusive and was stated as follows on the record:

> The State also requested the notes, everything that the defense is relying upon to form that opinion. We're entitled to that pursuant to the discovery order. Transcript, page 130 line 22 through page 131 line 1.

Judge Gibbons did not abuse his discretion in refusing the State's request to be provided "the notes [and] everything the defense is relying upon". These items are clearly an illegal request for internal notes and memorandum relied upon by the defense and specifically prohibited from discovery by NRS 174.245.

> 2. The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
>
> (a) An internal report, document or memorandum that is prepared by or on behalf of the defendant or his attorney in connection with the investigation or defense of the case.
>
> (b) A statement, report, book, paper,

> document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the constitution or laws of this state or the Constitution of the United States.

Neither NRS 174.234 and NRS 174.245 provide for anything other than the disclosure of *reports* and *test results*. The "notes" and "everything" request, while permitted in a civil case is not allowed in a criminal one.

NRS 174.234, provides, in pertinent part, that a defendant provide a written notice containing:

> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at the direction of the expert witness.

Again, no mention of "notes" or "everything" the expert relied upon.

NRS 174.245, provides, in pertinent part, defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:

> (1)(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.

This statute specifically provides the information the State is entitled to, those being "results or reports" *not* "notes" and "everything" relied upon.

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B. Statutes Do Not Provide for Psychiatric Examination of Defendant.

Neither NRS 174.234 or NRS 174.245 provide the State authority to compel an examination of the Defendant, supra.

C. Nevada Case Law on Point Prohibits Examination of Defendant by State.

Judge Gibbons clearly did not abuse his discretion in following the Nevada Supreme Court's most recent two decisions from 1982 and 1997 prohibiting compelled examinations of a criminal defendant. It should be noted that these Supreme Court cases are ignored by the State in their Writ, which, instead, cites to out dated federal cases not on point.

In **McKenna v. State**, 98 Nev. 38, 639 P.2d 557, 1982 Nev. LEXIS 380 (1982), the Court stated:

> We have recently held that statements made by a defendant to a psychiatrist during a court ordered mental examination may not be used to impeach the defendant's testimony. Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980). In *Esquivel* we commented, "[A] subject being examined by a court appointed physician should feel free in such a clinical climate to discuss all the facts relevant to the examination without the guarded fear that statements may be used against him. Fair play dictates nothing less." 96 Nev. at 778, 617 P.2d at 587.
>
> We think that the same rationale applies to the case before us. Fair play does indeed dictate that our trial courts not appoint a psychiatrist to examine an accused and then employ the confidential contents of the interview to obtain a conviction. We agree with the decision in Collins v. Auger, 428 F.Supp. 1079 (S.D.Iowa 1977), that the introduction of this kind of evidence violates the defendant's right to due process.
>
> [I]t is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination

> as part of the prosecution's case to establish his guilt. It is immaterial whether the court ordered examination was at the request of defendant or the prosecution or whether it was to determine his capacity to aid in his own defense or his mental condition at the time of the crime. *Id.* at 1082. [1]

Furthermore, it would be impossible to meet the objectives of a court appointed examination if the defendant knew that his statements could be used to convict him. McKenna's right to due process guaranteed under the fourteenth amendment was therefore violated by the introduction of evidence concerning admissions made to a court appointed psychiatrist.

More recently, in **Brown v. State**, 113 Nev. 275, 934 P.2d 235, 1997 Nev. LEXIS 35, 113 Nev. Adv. Op. No. 31 (1997), the Court stated:

> We conclude that the district court's consideration of the Lakes Crossing psychological reports was an abuse of discretion. In Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981), the United States Supreme Court concluded that the testimony of a psychiatrist who evaluated a criminal defendant for purposes of competency was improperly used during the penalty phase of a trial. During the penalty phase, the psychiatrist testified regarding information he learned through the psychological examination, Stating among other things that the defendant was a sociopath whose condition would only get worse, that the defendant would continue his behavior, and that the defendant had no regard for other human beings' lives. Id. at 459.
>
> The jury imposed the death penalty, but the United States Supreme Court reversed the Sentence on the grounds that the defendant was entitled to the protection of the Fifth

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[1]This view is also consistent with the recent United States Supreme Court decision in Estelle v. Smith, 101 S. Ct. 1866 (1981). The Supreme Court held that a defendant's fifth amendment privilege against self-incrimination was violated by the introduction of testimony concerning admissions made during a court ordered psychiatric examination. The psychiatrist was permitted to testify to these admissions during the penalty phase of the trial.

Amendment at the court ordered psychiatric interview and was not apprized of his right to remain silent. Id. at 462. This protection existed even though the psychiatrist's testimony was used only for purposes of punishment and not guilt, because any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to [the psychiatrist] similarly infringes Fifth Amendment values. Id. at 463 (footnote omitted).

Nevada cases have utilized a similar analysis. In Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980), this court stated that it was improper for the prosecution to impeach a defendant with statements the defendant made during a court ordered mental examination. Id. at 778, 617 P.2d at 587. A defendant should feel free in a clinical climate to discuss all relevant facts without fear that those statements may be used against him later; "fair play dictates nothing less." Id.

In McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982), this court reversed McKenna's sentence when the prosecutor presented Substantive-evidence from a psychiatrist who testified that McKenna had admitted during a court ordered psychological examination that he had murdered the victim. This court, citing Esquivel, reversed the conviction, stating that it was unfair for the State to appoint a psychiatrist to examine an accused and then employ the confidential contents of that psychiatric interview to obtain a conviction. Id. at 39, 639 P.2d at 558; see also Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988).

Even though these Nevada cases only address the use of a court ordered psychiatrist's testimony in the guilt phase, the United States Supreme Court has stated that it could "discern no basis to distinguish between the guilt and penalty phases of . . . trial so far as the protection of the Fifth Amendment privilege is concerned" and that it is improper to use such psychiatric testimony at either the guilt phase or the penalty phase. Estelle, 451 U.S. at 462-63. We realize that Estelle, Esquivel, and McKenna all concerned the use of the

> psychological reports in the penalty phase of a first degree murder case and that the instant case concerns the use of such reports sentencing hearing of a non-first-degree-murder case; however the rationale from those cases applies here. See, Pens v. Bail, 902 F.2d 1464, 1466 (9th Cir. 1990) (in a rape case, unwarned statements given in a psychiatric evaluation about other offenses could not be used to enhance a sentence); State v. Valera, 74 Haw. 424, 848 P.2d 376, 382 (Hawaii 1993) ("the use at sentencing of statements previously obtained in violation of a defendant's privilege against self-incrimination violates that defendant's privilege against self-incrimination"). Pursuant to this case law, we conclude that the district judge abused his discretion and that Troy is entitled to a new sentencing hearing. The district judge ordered the psychological examination of Troy and then relied on the conclusions of that exam, including his unwarned statements to the psychiatrist, to determine that Troy was likely to act out sexually and that he was not falsely convicted. Such consideration of the reports violates the "fair play" rules set forth in Esquivel and McKenna and the Fifth Amendment concerns set forth in Estelle, and constitutes reversible error.

These are the very same decisions cited to in Defendant's Opposition filed and considered by Judge Gibbons (Exhibit "A"), in considering the issue that the State has no right to the discovery they seek and the examination they demand and is the proper standard for this Court to apply.

Furthermore, the Nevada Supreme Court has examined the issue The Nevada Supreme Court examined the issue of a psychiatric examination in **Gallego v. State**, 23 P.3d 227, 2001 Nev. LEXIS 33, 117 Nev. Adv. Op. No. 33 (Nev. 2001) where they recognized that a defendant has the Fifth Amendment right to remain silent during a court-ordered psychiatric interview. n19 (See U.S. Const. amend. V; **Brown v. State**, 113 Nev. 275, 288-89, 934 P.2d 235, 244 (1997)).

The Nevada Supreme Court also visited these issues in the case of **Winiarz v. State**, 104 Nev. 43, 752 P.2d 761, (1988). The Court determined that it was error under **Esquivel v. State**, 96 Nev. 777, 617 P.2d 857 (1980), to permit Dr. Master to attack Consuelo's credibility, to say that she was "lying" and "feigning," when such testimony was based largely upon his psychiatric interview with her. Secondly, the Court held that under **McKenna v. State**, 98 Nev. 38, 639 P.2d 557 (1982), *cert. denied*, 106 S.Ct. 868 (1986), it was error for Consuelo's psychiatrist to use the confidential contents of his interview with her in order to assist the prosecution in obtaining a conviction. Finally, Dr. Master's testimony that he believed Consuelo was a cold-blooded murderer goes to the ultimate issue in this case and constituted a highly prejudicial, improper expression of opinion.

D. State's Case Law Distinguishable

1. *State's Case Law in First Set of Points and Authorities*

a. Williams v. Florida, 399 U.S. 78 (1970) - **Alibi case.**

Since *alibi* is not at issue in this case, **Williams** is distinguishable on its facts. In **Williams** petitioner filed a "Motion for a Protective Order," seeking to be excused from the requirements of Rule 1.200 of the Florida Rules of Criminal Procedure regarding alibi evidence. In his motion petitioner openly declared his intent to claim an alibi, but objected to the further disclosure requirements on the ground that the rule "compels the Defendant in a criminal case to be a witness against himself" in violation of his Fifth and Fourteenth Amendment

rights. This case is therefore not relevant to the issues before this Court and should be disregarded.

b. Binnegar v. Eighth Judicial District 915 P.2d 889(Nev. 1996) **Discovery Statute.**

This Court, in its decision in Binnegar, specifically prohibited the discovery the State seeks by way of its writ:

[T]he defendant would be forced to disclose witness statements and the results or reports of mental and physical examinations and scientific tests or experiments, even if the defendant never intended to introduce the statements or materials at trial. In such circumstances the defendant would be compelled to do more than simply accelerate the timing of intended disclosures of materials; the defendant would be forced to disclose information that he never intended to disclose at trial, some of which could be incriminating. Such a situation would violate a defendant's constitutional guaranties against self-incrimination. Id. at 552.

As will be explained below, Federal and State decisions have followed Nevada in prohibiting the disclosure of notes and other "raw" materials to the State in a criminal proceeding. See, **United States v. Marenghi**, 893 F. Supp. 85, 99 & n.22 (D. Me. 1995).

c. United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) **Insanity Defense.**

In Byers, the Court ruled that when a defendant asserts, and supports through expert testimony, the defense of insanity, the guarantee of the Fifth Amendment against compelled self-incrimination is violated by a government psychiatrist's testimony

to unrecorded statements made by the defendant during a court-ordered examination. Additionally, the guarantee of the Sixth Amendment to assistance of counsel is violated by the exclusion of counsel from such an examination. In fact the Court ruled the exclusion of psychiatric testimony that is the product of such a lawful examination.

These are not issues in this case, and in fact, in Byers, the Court noted the distinction:

> Where testimony to a defendant's statement during a compelled psychiatric examination is introduced not on the defendant's sanity but to prove that he committed the criminal act in question, of course a different issue is presented. Such testimony is proscribed by both 18 U.S.C. § 4244, and Fed. R. Crim. P. 12.2(c), *see, e.g., United States v. Bennett*, 148 U.S. App. D.C. 364, 460 F.2d 872, 878-79 n. 23 (D.C. Cir. 1972); *Edmonds v. United States*, 104 U.S. App. D.C. 144, 260 F.2d 474 (D.C. Cir. 1958). Some courts have held it to be constitutionally inadmissible. *Gibson v. Zahradnick*, 581 F.2d 75, 78 (4th Cir. 1978), *cert. denied*, 439 U.S. 996, 99 S. Ct. 597, 58 L. Ed. 2d 669 (1978); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971). Id. at note 8, page 21.

d. United States v. Cohn, 530 F.2d 43 (5th Cir. 1976) **Competency**.

In **Cohn** the issue was a district court's inherent authority to admit psychiatric testimony about a defendant's mental condition at the time of the commission of the offense based on information obtained at an examination ordered pursuant to 18 U.S.C. § 4244 (1970) to determine the accused's capacity to stand trial. In **Cohen**, the federal government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defense. In this situation, this Court held that the

introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial.

> [A]lthough we have never reached the issue of whether a defendant's privilege against self-incrimination is violated per se by a court-ordered psychiatric examination solely to determine the accused's mental condition at the time of the commission of the offense. Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, n10 while one has indicated approval of it. n11 Relying on a balancing test, n12 we choose to follow the former line of cases and permit compelled psychiatric examinations when a defendant has raised the insanity defense. Id. at 48.

e. United States v. Bohle, 445 F.2d 54 (7th Cir. 1971) **Insanity.**

Nearly two months prior to the beginning of the trial, the Government had moved to have Bohle examined by the Government's own psychiatrist. The motion was denied by the court at that time. At the close of the second day of trial, just prior to the Government's resting its case, when the defendant indicated that insanity was to be an issue, the district court then granted the Government's motion and denied Bohle's request that his counsel be present during the psychiatric examination. The Court ruled that Federal courts have the inherent power to order a defendant to submit to and cooperate with examination by a Government psychiatrist where the defendant's insanity has been made an issue in the case. Id. at 67.

f. United States v. Albright, 388 F.2d 719(4th Cir.1964) **Insanity.**

In ***Albright***, on the day that defendant's trial began, his counsel disclosed that defendant would interpose insanity as

a defense. No question of sanity had been previously raised, and this disclosure came as a surprise to government counsel. The government presented its case against the defendant; and when its efforts to preclude the defendant from presenting psychiatric testimony to support his defense were unsuccessful, it sought and obtained, over defendant's objection, a recess of the trial and an order to require him to submit to a psychiatric examination.

g. Pope v. United States, 372 F,2d 710 (8th Cir. 1967) **Insanity.**

The Court in **Pope** determined that it was not a constitutional violation or prejudicial error to admit the government's psychiatric examiners once defendant raised the insanity defense and introduced his own witnesses. More importantly, the court noted that in the absence of a statute a state court has no power to order a psychiatric examination of the defendant and to do so may be a violation of the Fifth Amendment. **State v. Olson**, 274 Minn. 225, 143 N.W.2d 69 (1966).

h. United States v. Wade, 489 F.2d. 258 (9th Cir. 1973) **Competency/Insanity.**

In Wade Appellant underwent a court-ordered psychiatric examination to determine both his competence to stand trial and his sanity at the time he committed the offense. Appellant claimed that the examination impermissibly infringed his constitutional rights.

Limiting its decision to the facts of the case, the Court in Wade affirmed appellant's conviction and held that the order for the examination was made under the authority of 18 U.S.C.S. § 4244, which no longer authorized such orders.

Nevertheless, the lower court still had the authority, as part of the inherent power of the court, to order such an examination. The court also held that appellant could not challenge the validity of the lower court's stated sanction for not submitting to the examination because he had already complied with the order compelling the examination. Further, the court could not decide whether an order that prohibited all evidence on insanity at the time that the offense was committed was impermissibly broad.

i. United States v. Handy, 454 F.2d 885 (9th Cir. 1972) **Insanity.**

In Handy, Defendant claimed insanity to the charges against him regarding tax evasion. What the State fails to include in their citation to Handy is the following language, which makes this case distinguishable:

> The examination ordered by the Court was authorized by statute. 18 U.S.C. § 4244. The statute contains protective features barring the use of any statement made by an accused person on the issue of guilt.

No such statute with the appropriate Constitutional protections exists in Nevada.

j. Hollis v. Smith, 571 F.2d 685(2nd Cir. 1978) **Sentencing.**

In Hollis, the Court determined that no person convicted of a crime punishable in the discretion of the court with imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life, shall be sentenced until a psychiatric examination shall have been made of him and a complete written report thereof shall have been submitted to the court. Such examination shall be made in the manner prescribed by

N.Y. Crim. Proc. Law §§ 659-662. Such report shall include all facts and findings necessary to assist the court in imposing sentence. A copy thereof shall be transmitted by the clerk of the court to the warden or superintendent of the correctional institution to which the prisoner is committed. N.Y. Penal Law § 2189. The quote the State attributes to the case was made in the following context:

> We see no basis for a different rule where the psychiatric examination is incident to the extent of punishment. Id. at 692.

Furthermore, the actual quote the State uses regarding the presence of counsel at psychiatric examination is from the case of *Tippett v. State of Maryland*, 436 F.2d 1153, 1158 (4 Cir. 1971), *cert. dismissed*, 407 U.S. 355, 32 L. Ed. 2d 791, 92 S. Ct. 2091 (1972). In that case, the court affirmed, holding that the Maryland Defective Delinquents Act constitutionally dealt with habitual criminal offenders. Petitioners alleged that the housing facility was in fact a penal institution, and the proceedings for determination of defective delinquency were equivalent to criminal prosecutions. As the Act did not focus on particular criminal acts but on the mental and emotional condition of the person thought to be a member of the statutorily defined class, the proceedings were civil not criminal. The procedural safeguards erected by the Act were adequate to protect petitioners' constitutional rights.

The court held that determination of defective delinquency did not focus on particular criminal acts but on the mental and emotional condition of the person and thus, the proceedings were civil. The procedural safeguards were adequate and counsel did not need to be present.

2. *Additional Case Law in Second Set of Points and Authorities*

a. Buchanan v. Kentucky, 483 U.S. 402 (1987) **Insanity.**

The Court held that the introduction of a psychological report for limited rebuttal purposes did not constitute a violation of the accused's Fifth or Sixth Amendment rights where the accused asserted an insanity defense and placed his mental status at issue. The State cites to the Buchanan's use of its decision in Smith, however the court in Buchanan stated:

> This case presents one of the situations that we distinguished from the facts in *Smith*. Here petitioner's counsel joined in a motion for Doctor Lange's examination pursuant to the Kentucky procedure for involuntary hospitalization. Moreover, petitioner's entire defense strategy was to establish the "mental status" defense of extreme emotional disturbance. Id. at 356-57.

b. Powell v. Texas 492 U.S. 680 (1989) **Insanity.**

The court reversed the judgment because the evidence of future dangerousness was taken in deprivation of petitioner's right to the assistance of counsel, and because there was no basis for concluding that petitioner waived his U.S. Const. amend. VI right. The court held that the appellate court conflated the U.S. Const. amend. V and U.S. Const. amend. VI analyses and provided no support for its conclusion that petitioner waived his U.S. Const. amend. VI right when he introduced psychiatric testimony in support of a defense of insanity. The evidence of future dangerousness was taken in deprivation of petitioner's right to assistance of counsel and there was no basis for concluding that petitioner had waived his Sixth Amendment right.

> Nothing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial.
>
> Likewise, the waiver discussions contained in *Smith* and *Buchanan* deal solely with the Fifth Amendment right against self-incrimination. Indeed, both decisions separately discuss the Fifth and Sixth Amendment issues so as not to confuse the distinct analyses that apply. No mention of waiver is contained in the portion of either opinion discussing the Sixth Amendment right. Id. at 685.

c. Estelle v. Smith, 451 U.S. 454 (1981) **Sentencing.**

The court affirmed the order vacating defendant's death sentence because he was not notified of his Fifth Amendment right to remain silent when the state's psychiatrist interviewed him before the sentencing phase of his trial. The state's failure to notify his counsel that the interview would cover his future dangerousness denied him his Sixth Amendment right to assistance of counsel to help him decide whether to submit to the interview. Smith introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Smith's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. See Tex. Code Crim. Proc. Ann., Arts. 37.071 (b) and (c) (Vernon Supp. 1980). To meet its burden, the State used Smith's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. "In these distinct circumstances, the Court of

Appeals correctly concluded that the Fifth Amendment privilege was implicated." Id. at 1876.

d. Satterwhite v. Texas, 486 U.S. 249 (1988) **Right to Counsel.**

This case can be distinguished on it facts. The admission of psychiatric testimony based upon an examination taken where the right to consult with counsel before submitting to the psychiatric examination was not afforded defendant was not harmless error.

Defendant was charged with the capital crime of murder during a robbery. Before he was represented by counsel, the judge granted the state's request for a psychological examination to determine his competency to stand trial, sanity at the time of the offense, and future dangerousness. Defendant was convicted and sentenced to death. The question on appeal was whether it was harmless error to introduce psychiatric testimony obtained in violation of the safeguard in a capital sentencing proceeding that a defendant was to have the advice of counsel before submitting to psychiatric examinations designed to determine future dangerousness. The court found that the finding of future dangerousness was critical to the death sentence. Only one psychiatrist testified on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony. The court found that it was impossible to say beyond a reasonable doubt that the expert's testimony on the issue of future dangerousness did not influence the sentencing jury. Thus, the admission of this testimony was not harmless error.

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e. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981) **Miranda Violation.**

The state's introduction into evidence of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information obtained by the psychiatrist from his interrogation of a defendant in custody who has neither requested the examination nor introduced psychiatric evidence on that issue, without a prior warning to the defendant that he has the right to remain silent and that any statement he made could be used against him at a sentencing proceeding, violates the rule adopted in Miranda.

The Court went on to note:

> According to the Supreme Court, "(t)he essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips,' " Estelle v. Smith, supra, -- - U.S. at -- , 101 S. Ct. at 1872, quoting Culombe v. Connecticut, 367 U.S. 568, 581-82, 81 S. Ct. 1860, 1867-68, 6 L. Ed. 2d 1037 (1961) (emphasis added in Smith) and " "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.' " Id., at -- , 101 S. Ct. at 1872-73, quoting In re Gault, 387 U.S. 1, 49, 87 S. Ct. 1428, 1455, 18 L. Ed. 2d 527 (1967). Because the privilege, where available, protects a person from being compelled to give any statement which would "furnish a link in the chain of evidence" necessary to impose a punishment upon that person, Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951), and because proof of a capital defendant's future dangerousness is just such a "link" which the State of Texas must prove in addition to a defendant's guilt to impose a capital

> sentence, Estelle v. Smith, supra, -- - U.S. at -- , 101 S. Ct. at 1874-75, proof of a capital defendant's guilt did not by itself remove the protection of the fifth amendment privilege. Id. at 698.

In fact, a closer examination of Battie disposes of most of the State's arguments:

> However, when the same type of examination is used to determine a defendant's culpability or responsibility for the crimes charged against him the fifth amendment privilege is involved because the use of a psychiatric or psychological examination in this context may assist the State in establishing the basis for imposition of a criminal punishment. n21 This use of psychiatric or psychological testimony can arise in a variety of situations. One such situation was present in Smith. There the State used the results from a court-appointed psychiatric examination of a defendant who neither requested the examination nor introduced psychiatric testimony himself in order to prove an essential element under state law for imposing a criminal punishment. In that situation, the Supreme Court held that the defendant is entitled to the protection of the fifth amendment and also that a court-appointed psychiatrist must inform that defendant of his fifth amendment rights in accordance with Miranda prior to any custodial interrogation in order for the State to introduce at trial the results obtained from that interrogation. Id. at 702.

The State contends however that a defendant's mere submission to a psychiatric or psychological examination constitutes a waiver of the fifth amendment privilege. But the waiver doctrine is inapplicable, as here, when the defendant does not introduce the testimony of a mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case. Accordingly, a defendant can invoke the protection of the privilege when he does not introduce mental

health expert testimony. **Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the fifth amendment's protection. Therefore, this ground offered by the State to distinguish the Smith case is untenable.** Id. at 703. (emphasis added).

f. Atkins v. State, 112 Nev. 1122 (1996) **Prosecutorial Misconduct/Sentencing.**

Atkins has absolutely *nothing* to do with the issue of psychiatric examinations. The *complete* quote to **Snyder** concerned alleged improper comments made by a prosecutor in closing argument:

> The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just desserts. Apropos to the point is the statement by the venerable Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122, 78 L. Ed. 674, 54 S. Ct. 330 (1934), that "justice, though due to the accused is due to the accuser also: The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Id. at 1137.

3. *Other Case Law Refutes State's Position.*

Here, the State is attempting to introduce psychiatric evidence against the Defendant in the form of attacking his credibility. The State has already conducted multiple evaluations of Defendant, which have yet to be properly disclosed in discovery, and now, having creating the issue of Defendant's mental state, seek to compel an examination of Defendant. A criminal defendant, who neither initiates a psychiatric evaluation

nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him. **Estelle v. Smith**, 451 U.S. 454, 468, 68 L.Ed. 2d 359, 101 S.Ct. 1866 (1981).

Furthermore, in the case of **State v. Fair**, 197 Conn. 106, 496 A.2d 461, 463 (Conn. 1985), the defendant raised the affirmative defense of extreme emotional disturbance to the charge of murder. The defendant challenged a compelled psychiatric examination. The court noted that a defendant, "by merely contesting the intent element of a charged crime, does not ordinarily put his mental state in issue and may not be subjected to a court-ordered psychiatric examination." 496 A.2d at 464 n.3.

A defendant, by merely contesting the intent element of a charged crime, does not ordinarily put his mental status in issue and may not be subjected to a court-ordered psychiatric examination. Of course, a defendant may choose to offer relevant evidence derived from a psychiatric examination where intent is an issue. See ***State v. Burge***, 195 Conn. 232, 240, 487 A.2d 532 (1985); ***State v. Hines***, 187 Conn. 199, 204, 445 A.2d 314 (1982).

In **United States v. Davis**, 93 F.3d 1286 (6th Cir. 1996), the Sixth Circuit Court of Appeals observed a distinction between a Defendant's introduction of psychiatric evidence to satisfy an affirmative defense and the introduction of such evidence to negate an element of the crime on which the State bears the burden of proof: The defendant who claims insanity injects a new issue into the proceedings on which he or she bears the burden of proof. The privilege is not violated by an examination, because the examination does not concern an element of the crime. When the

defendant claims "diminished capacity," however, her or she seeks to undercut the government's proof of the elements of the offense. Therefore, any compelled examination will necessarily involve self incrimination. Id. at 1295 n.8 (citations omitted).

> we find it unlikely that the Supreme Court or Congress intended the first sentence of Rule 12.2(c) to resolve, *sub silentio*, the Fifth Amendment concerns arising from a compelled, custodial pretrial examination of a criminal defendant concerning her or his mental state at the time of the alleged offense --an element of the crime which the government bears the burden of proving. Id. at 1295, cited with approval and followed in United States v. Akers, 945 F. Supp. 1442, 1996 U.S. Dist. LEXIS 16661 (D. Colo. 1996).

Other Courts have also come out strongly against not only the examination of a Defendant but the discovery of the raw data a psychiatric expert relies upon. **United States v. Marenghi**, 893 F. Supp. 85, 99 & n.22 (D. Me. 1995) in deciding that "the defendant may not be compelled to submit to a psychiatric examination", The court held that (1) the Insanity Defense Reform Act (IDRA), 18 U.S.C.S.§ 17, did not preclude psychiatric evidence to directly negate mens rea; (2) defendant was permitted to present evidence of battered woman's syndrome to show duress; (3) the government was not entitled to expert's notes of interviews with defendant under Fed. R. Crim. P. 16(b)(1)(B); and (4) defendant was not required to undergo a psychiatric evaluation against her will in the absence of statutory authority and without evidence that the exam would serve any purpose.

> Rule 12.2(c) permits a mental examination of a defendant in an "appropriate case . . . pursuant to 18 U.S.C. [§§] 4241 or 4242." Fed. R. Crim. P. 12.2(c). The statutory references in that provision address only the

> determination of mental competency to stand trial and the determination of the existence of insanity at the time of the offense, two scenarios with no relevance to these proceedings. The Government argues that despite this language, the only reasonable interpretation of this rule provides that such an examination may be ordered since Defendant was required to provide advance notice to the Government of any intention to produce evidence of "a mental disease or defect," and not merely in the context of competency to stand trial or as part of an insanity defense.
>
> This Court, however, is loathe to submit Defendant, to a psychiatric examination against her will in the absence of express statutory or administrative authority and without evidence that such an examination would serve any purpose. **The fact that such an examination will assist the Government, which has the greater burden of proof on the mens rea issue, does not provide a basis for this Court to help "even the playing field."** The statutes and rules establish the proper procedure for allocating burdens, rights, and obligations in federal criminal proceedings, and this Court sees no reason to stray from applying the sense and prudence of such rules and laws here. Id. at 99 (emphasis added).

United States v. Davis, 93 F.3d 1286 (6th Cir. 1996)(district court lacked authority to order commitment for mental examination based only on defendant's notice of intent to offer defenses of diminished capacity or mental disease or defect or incapacity to form specific intent); **United States v. Akers**, 945 F. Supp. 1442 (D.Colo. 1996)(Rule governing compelled mental examinations of defendants did not apply to defendant who claimed that her psychiatric condition prevented her from forming specific intent necessary to commit bank fraud, but did not raise insanity defense).

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State cannot be allowed to place a Defendant's psychiatric condition in issue as a way to compel disclosure of discovery not allowed under Nevada Law and in violation of a Defendant's Fifth and Sixth Amendment Rights. To follow the D.A.'s theory would set the United States Constitutional protections of the 5th and 6th Amendment on its head. It would allow the D.A. to gain indirectly what 213 years of American jurisprudence has always said cannot be gained directly: ie, force the defendant to make a statement to the prosecution against his will. This is why the United States Supreme Court and other federal appellate courts and other state courts have consistently held that the D.A.'s request is improper.

DATED this 29th day of January, 2002.

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FILED

DEC 27 11 00 AM '01

CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. ALFRED P. CENTOFANTI, III, Defendant.	Case No. C172534 Dept. No. VII Date of Hearing: Time of Hearing:

RESPONSE TO PROSECUTION'S ORAL REQUEST TO (1) REQUIRE THE DEFENDANT TO BE EXAMINED BY A PROSECUTION PSYCHIATRIC EXPERT IF HE WISHES TO PRESENT PSYCHOLOGICAL EVIDENCE IN HIS DEFENSE and (2) REQUIRE DEFENDANT TO PROVIDE EXPERTS NOTES AND REPORTS

COMES NOW, Defendant ALFRED P. CENTOFANTI, by and through his attorneys of record, ALLEN BLOOM, retained out-of-state counsel, PHILIP J. KOHN, Special Public Defender and GLORIA M. NAVARRO, Deputy Special Public Defender , local counsel, and submits his Response to Prosecution's Oral Request to (1) Require the Defendant to be Examined by a Prosecution Psychiatric Expert if He Wishes to Present Psychological Evidence in his Defense and (2) Require Defendant to Provide Experts Notes and Reports.

EXHIBIT "A"

This Response is based upon the attached Points and Authorities, all papers and pleadings on file herein and any oral argument as may be adduced at the time of the hearing of said Motions.

DATED this 21 day of December, 2001.

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POINTS AND AUTHORITIES

INTRODUCTION

The State has stated to the court and the defense that it believes it is entitled to require that the defendant subject himself to an examination by a prosecutor retained psychologist as well a be provided with all of the notes and other materials that were relied upon by experts in their examination of the defendant under Nevada's reciprocal discovery statutes.

This is incorrect and contrary to the law and should not be ordered by this court as it violates Defendants Fifth and Sixth Amendment Rights.

ARGUMENT

There is no case law or statutes which allow the State to (1) examine the defendant or (2) be provided with any expert material other than the report to be introduced at trial.

NRS 174.245 states in pertinent part as follows:

> Disclosure by defendant of evidence relating to defense; limitations 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:

(a) Written or recorded statements made by a witness the defendant intends to call during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant;

(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant; and

(c) Books, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.

2. The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:

(a) An internal report, document or memorandum that is prepared by or on behalf of the defendant or his attorney in connection with the investigation or defense of the case.

(b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the constitution or laws of this state or the Constitution of the United States.

In the case of United States v. Edelin, 134 F. Supp. 2d 45, 2001 U.S.Dist.LEXIS 1481 (D.D.C. 2001) the Court ruled that while the information the Government sought, including the examination of the defendant, was allowed for sentencing purposes, it is not allowed in the guilt phase as being in violation of the defendants Fifth and Sixth Amendment Rights.

The Court reasoned:

"The Fifth Amendment to the Constitution would prohibit the guilt phase use of information gathered during a mental health examination of the defendant by the Government's expert witnesses. The Court concludes, therefore, that Government counsel will not have access to the report of the Government's mental health experts, nor to any information that was gleaned from any examinations of the defendant, until after the guilt phase of the trial.

At that point, if the defendant still plans to present mental health evidence at the sentencing, the Government's expert reports will be unsealed, as will any report by the defendant's expert mental health witnesses."

"While the defendant must provide the Government with the defense expert reports, the Court limits further discovery by the Government. To the extent that the Government requests disclosure of information that is not included in a report filed by the defendant's expert witnesses, the Court finds that the discovery should not be granted. While the defense experts' reports will necessarily include the nature of the proffered mental condition and its onset, the summary of the defense mental health expert opinions and diagnoses, and a summary of the basis for those opinions and diagnoses, none of this information need be provided to the Government before the verdict in the guilt phase of trial. The Court's decision to seal the expert witness reports of the Government and the defense is based on a desire to protect the Fifth and Sixth Amendment rights of the defendant; namely, the rights of the defendant to not incriminate himself, and to effective assistance of counsel."

"The Government goes too far in seeking information regarding the defendant's mental health, and attempts to pierce the sphere of information that should remain in the hands of the defense until after the verdict in the guilt phase of trial. The Government has not provided the Court with a single case where a trial court granted such a request for advance evidence of the nature of the proffered mental condition or defect. This information need not be disclosed to the Government at this time. Government counsel shall be prohibited from learning the results of the Government's mental health examination of the defendant until after the guilt phase of the trial has terminated, and then only if the defendant provides subsequent notice that he will be presenting mental health information at sentencing. "

Id. p. 29-32.

If the court were to grant the State's request, it would, in essence be ordering the defendant to undergo a psychiatric examination which the Supreme Court of Nevada has already determined violated defendant's Fifth Amendment Rights.

In the case of McKenna v. State, 98 Nev. 38, 639 P.2d 557, 1982 Nev. LEXIS 380 (1982)the Nevada Supreme Court stated:

"We have recently held that statements made by a defendant to a psychiatrist during a court ordered mental examination may not be used to impeach the defendant's testimony. Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980). In Esquivel we commented, "[A] subject being examined by a court appointed physician should feel free in such a clinical climate to discuss all the facts relevant to the examination without the guarded fear that statements may be used against him. Fair play dictates nothing less." 96 Nev. at 778, 617 P.2d at 587.

"We think that the same rationale applies to the case before us. Fair play does indeed dictate that our trial courts not appoint a psychiatrist to examine an accused and then employ the confidential contents of the interview to obtain a conviction. We agree with the decision in Collins v. Auger, 428 F.Supp. 1079 (S.D.Iowa 1977), that the introduction of this kind of evidence violates the defendant's right to due process.

[I]t is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt. It is immaterial whether the court ordered examination was at the request of defendant or the prosecution or whether it was to determine his capacity to aid in his own defense or his mental condition at the time of the crime. Id. at 1082. [1]

"Furthermore, it would be impossible to meet the objectives of a court appointed examination if the defendant knew that his statements could be used to convict him. McKenna's right to due process guaranteed under the fourteenth amendment was therefore violated by the introduction of evidence concerning admissions made to a court appointed psychiatrist.

The decision of the Nevada Supreme Court in McKenna was followed, also by the Nevada Supreme Court in In Brown v. State, 113 Nev. 275, 934 P.2d 235, 1997 Nev. LEXIS 35, 113 Nev. Adv. Op. No. 31 (1997) the Nevada Supreme Court stated:

In McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982), this court reversed McKenna's sentence when the prosecutor presented Substantive-evidence from a psychiatrist who testified that McKenna had admitted during a court ordered psychological examination that he had murdered the victim. This court, citing Esquivel, reversed the conviction, stating that it was unfair for the State to appoint a psychiatrist to examine an accused and then employ the confidential contents of that psychiatric interview to obtain a conviction.

Id. at 39, 639 P.2d at 558; see also Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988).

Even though these Nevada cases only address the use of a court ordered psychiatrist's testimony in the guilt phase, the United States Supreme Court has stated that it could "discern no basis to distinguish between the guilt and penalty phases of . . . trial so far as the protection of the Fifth Amendment privilege is concerned" and that it is improper to use such psychiatric testimony at either the guilt phase or the penalty phase. Estelle, 451 U.S. at 462-63. We realize that Estelle, Esquivel, and McKenna all concerned the use of the psychological reports in the penalty phase of a first degree murder case and that the instant case concerns the use of such reports sentencing hearing of a non-first-degree-murder case; however the rationale from those cases applies here. See, Pens v. Bail, 902 F.2d 1464, 1466 (9th Cir. 1990) (in a rape case, unwarned statements given in a psychiatric evaluation about other offenses could not be used to enhance a sentence); State v. Valera, 74 Haw. 424, 848 P.2d 376, 382 (Hawaii 1993) ("the use at sentencing of statements previously obtained in violation of a defendant's privilege against self-incrimination violates that defendant's privilege against self-incrimination"). Pursuant to this case law, we conclude that the district judge abused his discretion and that Troy is entitled to a new

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[1] This view is also consistent with the recent United States Supreme Court decision in Estelle v. Smith, 101 S.Ct. 1866 (1981). The Supreme Court held that a defendant's Fifth Amendment privilege against self-incrimination was violated by the introduction of testimony concerning admissions made during a court ordered psychiatric examination. The psychiatrist was permitted to testify to these admissions during the penalty phase of the trial.

sentencing hearing. The district judge ordered the psychological examination of Troy and then relied on the conclusions of that exam, including his unwarned statements to the psychiatrist, to determine that Troy was likely to act out sexually and that he was not falsely convicted. Such consideration of the reports violates the "fair play" rules set forth in Esquivel and McKenna and the Fifth Amendment concerns set forth in Estelle, and constitutes reversible error.

CONCLUSION

Case law is manifestly clear in Nevada that there are no provisions in Nevada law which require the defendant to make himself available to the State for an examination and in fact to do so would be reversible error. Nor is their any requirement anywhere in the very precise language of the reciprocal discovery statutes which allow or require the defendants experts to turn over any documents or other evidence considered other than the contents of any report, pre-trial. Therefore, the State's request, which is improper, and has no basis in law, must be denied.

Dated this 27 day of December, 2001.

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Local Counsel for Defendant

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **RESPONSE TO PROSECUTION'S ORAL REQUEST TO (1) REQUIRE THE DEFENDANT TO BE EXAMINED BY A PROSECUTION PSYCHIATRIC EXPERT IF HE WISHES TO PRESENT PSYCHOLOGICAL EVIDENCE IN HIS DEFENSE and (2) REQUIRE DEFENDANT TO PROVIDE EXPERTS NOTES AND REPORTS** is hereby acknowledged this 27th day of December, 2001.

STEWART L. BELL
District Attorney
200 S. Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

DECLARATION OF MAILING

DONNA POLLOCK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 29th day of January, 2002, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Real Party in Interest's Opposition to State's Writ of Mandamus in the case of State of Nevada, Petitioner vs. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable Mark W. Gibbons, District Court Judge, Respondents, and Alfred P. Centofanti, III, Real Party in Interest, Case No. 38987, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Frankie Sue Del Papa, Attorney General, 100 North Carson Street, Carson City, Nevada 89701, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 29th day of January, 2002.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Real Party in Interest's Opposition to State's Writ of Mandamus** is hereby acknowledged this 29th day of January, 2002.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By _____

RECEIPT OF A COPY of the foregoing **Real Party in Interest's Opposition to State's Writ of Mandamus** is hereby acknowledged this 29th day of January, 2002.

MARK W. GIBBONS
DISTRICT COURT JUDGE

By _____