02-16WAC

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

Appeal No. 38987

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 JUDGE

Respondents,

and

ALFRED P. CENTOFANTI, III,

Real Party in Interest.

FILED

FEB 25 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY L. Richards
CHIEF DEPUTY CLERK

AMICUS CURIAE BRIEF OF

NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

JoNell Thomas
State Bar No. 4771
616 South 8th Street
Las Vegas, NV 89101
(702) 471-6565
Attorney for Proposed Amicus
Nevada Attorneys for
Criminal Justice

MAILED ON
1-17-02

02-01461

IN THE SUPREME COURT OF THE STATE OF NEVADA

Appeal No. 38987

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 JUDGE

Respondents,

and

ALFRED P. CENTOFANTI, III,

Real Party in Interest.

AMICUS CURIAE BRIEF OF
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

JoNell Thomas
State Bar No. 4771
616 South 8th Street
Las Vegas, NV 89101
(702) 471-6565
Attorney for Proposed Amicus
Nevada Attorneys for
Criminal Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Statutory Authority

I. INTRODUCTION

The Nevada Attorneys for Criminal Justice is a voluntary organization whose members are attorneys who defend people accused of violating criminal laws. NACJ's members believe that both the criminal justice system and the ideal of justice are enhanced by the considered and fair application of statutory and constitutional principles to every criminal proceeding. NACJ's members believe that the issues presented in this matter are of great importance to the citizens of this state and that the impact of this Court's decision in this matter will go far beyond Mr. Centofanti and the individual concerns presented by this case.

NACJ submits this amicus brief in support of Real Party in Interest Alfred P. Centofanti, III. The district court did not abuse its discretion in denying the State's request for pretrial disclose of notes, reports and tests conducted by Mr. Centofanti's psychiatric experts and the State's motion for an independent psychiatric evaluation of Mr. Centofanti. The State's petition for a writ should therefore be denied.

II. FACTUAL STATEMENT

On January 10, 2001, the State charged Mr. Centofanti with one count of murder with use of a deadly weapon. Mr. Centofanti entered a plea of not guilty and this case was eventually scheduled for trial to begin on January 2, 2002. Prior to trial, Mr. Centofanti's counsel filed a notice of witnesses in which he informed the State that he might call two psychiatric expert to assist in his defense. The State filed a motion for discovery of the experts' notes, report and tests and a motion for an independent psychiatric evaluation of Mr. Centofanti. On December 27, 2001, the district court entertained extensive argument by the prosecutor and then denied the State's motions. State's Exhibit 3 at pg. 129. The district court recognized that there was no specific statutory authority for the State's request. Id. It also ruled that it would accommodate the State's needs by permitting the State to have an expert present in the courtroom

during the direct examination of the defendant's expert, in the event that the defendant elected to call the expert at trial. Id. The State's expert would be permitted to testify as a rebuttal witness. Id. The district court further ruled that the State would not be entitled to discovery unless the defendant's expert witness actually testified after noting that the mere fact that a witness was listed on a defendant's witness list did not mean that the witness would actually be called to testify at trial. Id. at 131-32. It also ruled that it would accommodate the State's need to prepare for cross-examination of the witness by providing a break in the trial following direct examination and prior to cross-examination. Id. at 133. The State would be permitted to consult with its expert in preparing for cross-examination of the defendant's expert during the break. Id. The State requested a stay of the district court's ruling. That motion was denied. Id. at 130, 133.

On or about December 28, 2001, the State filed in this Court a motion to stay the trial and a petition for a writ of mandamus. On December 28, 2001, this Court granted the State's motion for a stay and directed Mr. Centofanti's counsel to file an answer to the State's petition within 20 days. This amicus brief filed in support of Mr. Centofanti by NACJ now follows.

III. ISSUE PRESENTED

A. Whether the district court acted within its discretion in denying the State's motion to compel a psychological evaluation of the defendant in light of the fact that there is no statute or other authority which authorizes psychological evaluation of the defendant under these circumstances.

B. Whether it is a violation of the defendant's constitutional rights to force him to undergo an invasive and degrading psychological examination at the hands of the State.

C. Whether the district court acted within its discretion in denying the state's motion for production of privileged reports in light of the fact that Nevada's discovery statutes do not mandate disclosure of these reports.

D. Whether this Court should deny the State's petition for a writ of mandamus because the trial court did not abuse its discretion in fashioning a remedy on this discovery issue.

IV. ARGUMENT

Defendants in criminal cases may be interviewed by a psychologist or psychiatrist prior to trial. There are a number of reasons why these interviews might take place. Often, defense counsel and their clients will not decide whether these witnesses actually be called at trial until after the State rests its case-in-chief. It is not uncommon for psychologists and/or psychiatrists to examine a witness and then submit a report to counsel prior to trial. These reports must be kept confidential from the prosecution, and not be subject to disclosure until defense counsel decides to actually call the expert as a witness. These reports will often involve un-Mirandized statements by the defendant to his doctors, and may involve his account of the facts at issue in this case. The mere fact that a defendant and his counsel have taken the preparatory step of meeting with a psychologist and listing the psychologist as a witness does not compel a defendant to be interviewed by the State's expert witness. There is no statutory authority for the State's requests here and the proposals by the State would violate a defendant's constitutional rights.

A. There Is No Statute Or Other Authority Which Authorizes Psychological Evaluation of the Defendant Under These Circumstances

The State argues that it is entitled to a psychological evaluation of the defendant because he may present a psychiatric expert in support of his claim of self-defense. The State fails to cite any authority which mandates that the defendant undergo this

type of evaluation under these circumstances. The State acknowledges that there is no Nevada statute providing for such an evaluation and that this Court has not authorized examinations of the type requested here by the State. Petition at page 12. While the Nevada Legislature has directed psychological evaluations in certain situations, it has not provided for psychological evaluations of defendants in criminal cases under these circumstances. Cf. NRS 176.139 (providing for psychosexual evaluation of a defendant prior to submission of presentence investigation report where defendant is convicted of a felony that is a sexual offense); NRS 176A.416 (as a condition of probation in cases involving cruelty to animals, court may order psychological evaluation of the defendant).[1] The fact that the Legislature has not enacted legislation authorizing the type of examination requested here demonstrates that there is no lawful basis for such a request. Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237 (1967) (applying the rule that the expression of one thing amounts to the exclusion of others - expressio unius est exclusio alterius).

---

[1]In its petition, the State argues extensively that psychological examinations have been permitted by courts in cases involving insanity defenses. Petition at 12-14; Supplemental Points and Authorities at 3-5. The State cites no authority for the proposition that examinations in insanity defenses are equivalent to examinations concerning mental states potentially at issue through claims of self-defense, duress, coercion, etc. NACJ respectfully submits that there are significant differences between an insanity defense and evidence offered by a defendant to refute the State's claim that it has established the mens rea of an offense in a case such as this, which involves a claim of self-defense. For example, the State bears the burden of proving that a defendant did not act in self-defense while the defendant bears the burden of proof when he presents an affirmative defense of insanity. See Finger v. State, 117 Nev. __, 27 P.3d 66, 76 (2001). Moreover, it is essential that psychiatric experts be called in all cases involving an insanity defense because lay witnesses are unable to fully understand the complexity of the insanity defense. Id. at 85. It is not uncommon, however, for cases of self-defense to be presented without use of a psychological expert.

B. It Is a Violation of the Defendant's Constitutional Rights to Force Him to Undergo an Invasive and Degrading Psychological Examination at the Hands of the State.

In the case at bar the State is requesting that the Defendant be forced to submit to a substantial and invasive psychological examination merely because an expert has been endorsed by the Defendant. The State has not explained what use it would make of the evidence nor has it declared that the evidence (whatever that evidence is) is necessary to rebut the Defendant's defense.

Testimony obtained from a compelled psychological examination cannot be used to establish guilt, but it is only admissible when necessary to determine issues involving the Defendant's subjective mental capacity. Forcing the Defendant to testify against himself through a compelled psychological examination infringes on the Defendant's Fifth Amendment rights. Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359 (1981). The Nevada constitution provides a similar right under Art. 1, Sec. 8. Binegar v. Eighth Judicial District Court, 112 Nev. 544, 915 P.2d 889 (1996).

Compelled psychological examinations have been upheld in only a few very specific circumstances. The court may force a psychological examination when the competency of the accused or the mental capacity of the Defendant is an issue. Clearly when the competency of the Defendant is at issue a psychological examination is essential. To make a competency determination, the court must have information regarding the subjective state of mind of the accused. This does not violate the right against self-incrimination, because the information obtained cannot be used to determine guilt or for any other purpose. Any information obtained through a competency examination cannot be used at sentencing, Estelle, 451 U.S. 454, 68 L. Ed. 2d 359, it cannot be used to attack the credibility of the accused, Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988); it cannot be used to impeach the accused when he

testifies, Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980), or to prove consciousness of guilt, Smith v. State, 111 Nev. 499, 505-06, 894 P.2d 974 (1995). Because the information obtained through a compulsory psychological examination to determine competency cannot be used to incriminate the accused, it is not taken in violation of his rights.

Compulsory psychological examinations may also be authorized when the accused raised the issue of insanity and an examination by the State is necessary to rebut that defense. Buchanan v. Kentucky, 483 U.S. 402, 422, 97 L. Ed. 2d 336, 355 (1987) ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." (citation omitted)). The courts have been very careful to state that although such evidence is admissible as to the sanity of the accused, this forced testimony cannot be admitted against the accused to prove his guilt. United States v. Leonard, 609 F.2d 1163, 1165 (5th Cir. 1980) (statements cannot be used on issue of guilt, but rather solely on the issue of sanity.). The court in United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971), overruled on other grounds, United States v. Lawson, 653 F.2d 299 (7th Cir. 1981) (overruled regarding the defendant's right to confront witnesses against him), stated:

> Such an examination [psychological examination] does not violate the Fifth Amendment privilege, because its sole purpose is to enable an expert to form an opinion as to defendant's mental capacity to form a criminal intent. It is not intended to aid in the establishment of facts showing that defendant committed certain acts constituting a crime. It cannot be so used, for it is impermissible to introduce into evidence on the issue of guilt any statement made by the defendant during the course of such an examination.

Even United States v. Byers, 740 F.2d 1104, 1111 n.8 (D.C. 1984), which was cited by the State, said:

> 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. sec. 4244, and Fed. R. Crim. P. 12.2(c). (citations omitted). Some Courts have held it to be constitutionally inadmissible.

Forcing the Defendant to submit to a psychological examination when the issues of competency to stand for trial or mental capacity are not before the court violates the Defendant's right against self-incrimination. For example, the State is not entitled to a compelled psychological exam to rebut the defense of duress, because duress is not a mental capacity defense. United States v. Bell, 855 F. Supp. 239, 240-41 (N.D. Ill. 1994). Duress is an admission that the accused had the capacity to form the intent to commit the act, but it is also a legal justification for the act. Id. See also United States v. Williams, 163 F.R.D. 249, 250 (E.D. N.C. 1995) (denying government's motion to compel defendant to undergo psychiatric evaluation in case where the defendant intended to raise a defense of battered woman's syndrome, finding that the syndrome is akin to self-defense, and concluding that such a defense did not pertain to the defendant's mental capacity, even though it related to her state of mind). The State has not shown that there is an issue involving the Defendant's mental capacity to form the intent to kill, therefore, the State is not entitled to compel a psychological examination of the Defendant.

C. Nevada's Discovery Statutes Do Not Mandate Disclosure Of These Reports

In addition to its request that Mr. Centofanti be examined by the State's expert witness, the State also seeks copies of notes and reports prepared by defense psychological experts. There is no basis for the State's request. Generally, the statements of a defendant to a psychiatrist to assist the attorney in preparing a defense are protected by the attorney-client privilege from disclosure to the State. This

remains so even after the adoption of reciprocal discovery statutes. NRS 174.234(2) requires the parties to identify the expert witnesses they intend to call at trial and disclose reports made by or at the direction of the expert witness. The statute also provides, however, that "[a] party is not entitled, pursuant to the provisions of this section, to the disclosure of the name or address of a witness or any other 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." NRS 174.234(7). Likewise, NRS 174.245(2) provides that "[t]he 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 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." The reports at issue here are privileged under both Nevada law and the state and federal constitutions.

1. **The Statutory Privileges**

The Nevada legislature has provided for extensive privileges concerning psychiatric and psychological treatment and confidential communications. The statutes relevant to this matter are as follows:

NRS 49.215. Definitions.

As used in 49.215 to 49.245, inclusive:

1. A communication is "confidential" if it is not intended to be disclosed to third persons other than:
   (a) Those present to further the interest of the patient in the consultation, examination or interview;
   (b) Persons reasonably necessary for the transmission of the communication; or
   (c) Persons who are participating in the diagnosis and treatment under the direction of the doctor, including

members of the patient's family.

2. "Doctor" means a person licensed to practice medicine, dentistry or osteopathic medicine in any state or nation, or a person who is reasonably believed by the patient to be so licensed, and in addition includes a person employed by a public or private agency as a psychiatric social worker, or someone under his guidance, direction or control, while engaged in the examination, diagnosis or treatment of a patient for a mental condition.

3. "Patient" means a person who consults or is examined or interviewed by a doctor for purposes of diagnosis or treatment.

NRS 49.225 General rule of privilege
(Psychiatrists and Psychiatric Social Worker)

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family.

NRS 49.207 Definitions

As used in 49.207 to 49.213, inclusive, unless the context otherwise requires:

1. A communication is "confidential" if it is not intended to be disclosed to third persons other than:

(a) Those present to further the interest of the patient in the consultation, examination or interview;

(b) Persons reasonably necessary for the transmission of the communication; or

(c) Persons who are participating in the diagnosis and treatment under the direction of the psychologist, including members of the patient's family.

2. "Patient" has the meaning ascribed to it in NRS 641.0245.

3. "Psychologist" has the meaning ascribed to it in NRS 641.027.

NRS 49.209 General rule of privilege
(Psychologist)

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family.

The psychiatric-patient privileges recited above are broad privileges that protect all confidential conversations and information unless and until the patient waives confidentiality. The scope of these privileges was explained by this Court in Ashokan

v. State, Dept. of Ins., 109 Nev. 662, 856 P.2d 244 (1993). In that case, a doctor claimed that medical peer review documents were privileged and could not be used unless the doctor waived confidentiality. This Court disagreed and concluded that the peer review statute was limited in scope and that if confidential documents were obtained without resort to discovery proceedings, they could be used in court proceedings. In reaching this decision, this Court contrasted the broad privileges that limit use of confidential information to those instances where there has been an express waiver:

> In NRS chapter 49, the Nevada legislature has demonstrated its ability to grant broad privileges. Under the legislature's typical formulation, the holder of a privilege has the right "to refuse to disclose, and to prevent any other person from disclosing, confidential communications...." Cf. NRS 49.095 (attorney-client); NRS 49.185 (accountant-client); NRS 49.225 (doctor-patient); NRS 49.247 (marriage/family therapist-client); NRS 49.252 (social worker-client).
>
> The legislature grouped NRS 49.265 with other privileges whose scope differs from the usual formula. See, e.g., NRS 49.255 (clergyman "shall not ... be examined as a witness as to any confession" without consent); NRS 49.275 (reporter "may not be required to disclose" information or sources). This group of privileges, which the NRS categorizes as "OTHER OCCUPATIONAL PRIVILEGES," evidences the legislature's effort to tailor certain privileges to specific parameters. In enacting NRS 49.265(1), the legislature obviously understood that it was creating a privilege with a much narrower scope than that of other privileges.
>
> . . . .
>
> Given the competing interests behind the privilege, the legislature's demonstrated ability to draft privilege statutes with very precise parameters, and the general interpretive principle that privileges should be construed narrowly, we conclude that petitioner's speculations as to legislative intent are insufficient to justify expansion of the privilege statute beyond the plain meaning of its words.

Id. at 669-670, 856 P.2d at 248-49.

Unlike the limited peer-review statute at issue in Ashokan, the privileges here are broad and enable defendants in criminal cases to invoke the statutory privileges to preclude the production of confidential reports. Because these reports are privileged

under Nevada law, NRS 174.234(6) excludes them from mandatory disclosure to the State.

2. **These Reports Are Privileged Under The Fifth Amendment**

The reports are also privileged pursuant to the constitutional right against self incrimination. This Court has continually recognized that psychiatric records of a criminal defendant are privileged under the Fifth Amendment. For example, in Brown v. State, 113 Nev. 275, 288-289, 934 P.2d 235, 243-245 (1997), this Court found that the district court erred in admitting evidence from a defendant's psychological evaluation during a sentencing hearing:

> 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, 101 S.Ct. 1866, 68 L.Ed.2d 359 (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, 101 S.Ct. at 1871.
>
> 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 Amendment at the court ordered psychiatric interview and was not apprised of his right to remain silent. Id. at 462, 101 S.Ct. at 1872. This protection existed even though the psychiatrist's testimony was used only for purposes of punishment and not guilt, because
>
> > [a]ny 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, 101 S.Ct. at 1873 (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; "[f]air 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, 101 S.Ct. at 1872-73. 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 in the 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 (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.

In other cases, where confidential conversations were at issue, this Court has consistently protected the privilege. See e.g. Binegar v. Eighth Judicial District Court, 112 Nev. 544, 550, 915 P.2d 889, 891-95 (1996) (discovery statute unconstitutional in part because of infringement on Fifth Amendment rights); Smith v. State, 111 Nev. 499, 505-06, 894 P.2d 974, 977-78 (1995) (psychiatric evidence inadmissible as character evidence and because of the defendant's Fifth Amendment rights; "There was no evidence presented that the doctors in question advised Smith that any statements he made would be admissible in court and that by submitting to a

competency examination he was waiving his right against self-incrimination."); Winiarz v. State, 104 Nev. 43, 46, 752 P.2d 761 (1988) ("it was error for [the defendant's] psychiatrist to use the confidential contents of his interview with [the defendant] in order to assist the prosecution in obtaining a conviction.") (citing McKenna); Esquivel v. State, 96 Nev. 777, 778, 617 P.2d 587 (1980) (admission of statement's made to psychiatrist, over defense objection, violated defendant's right not to have his statements to psychiatrist used against him). See also Estelle v. Smith, 451 U.S. 454 (1981). Because the reports at issue here are privileged under the Fifth Amendment unless and until a defendant in a criminal case waives the privilege, NRS 174.234(7) excludes these reports from mandatory disclosure to the State.

3. **Other Courts Hold That The Reports Need Not Be Disclosed Until The Privilege Is Formally Waived**

Nevada is not alone in recognizing that privileged psychological reports should not be subject to disclosure to the prosecution unless and until the defendant waives his statutory and constitutional privileges. Other courts have also concluded that reports similar to those at issue here are protected from mandatory disclosure until such time that the defendant waives his statutory and constitutional privileges. For example, in Rodriguez v. Superior Court, 14 Cal.App.4th 1260 (1993), the California Appellate Court held that not only could the defense delete portions of an expert's report that had statements from the defendant, but that the entire report was not discoverable because it fell within the attorney-client privilege and California Penal Code § 1054.6. Likewise, in In re Spencer, 406 P.2d 33 (Cal. 1965), the California Supreme Court explained the rule as follows:

> If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should not be permitted to testify at the guilt trial. If defendant does specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should be permitted to

> testify at the guilt trial, but the court should instruct the jurors that the psychiatrist's testimony as to defendant's incriminating statements should not be regarded as proof that such of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of showing the information upon which the psychiatrist based his opinion.

The Spencer court also noted that not even a plea of not guilty by reason of insanity places mental condition at issue. Id. at n.10. Later, the court in People v. Davis, 31 Cal.App.3d 782, 785-86 (1973), explained that psychiatric evidence is testimonial in nature and therefore privileged until the defendant affirmatively waives the privilege:

> We do not agree with the trial court's rationale that psychiatric testimony is analogous to handwriting exemplars, chemical tests or the defendant's trying on of clothing which have been classified by the courts as real or physical evidence. (Holt v. United States, 218 U.S. 245; Schmerber v. California, 384 U.S. 757; People v. Ellis, 65 Cal.2d 529). While some state courts have so classified psychiatric tests (Parkin v. State, (Fla). 238 So.2d 817, 820; State v. Grayson, 239 N.C. 453 [80 S.E.2d 387], California has considered them as communicative or testimonial in character (In re Spencer, 63 Cal.2d 400, 409; People v. Spencer, 60 Cal.2d 64, 82-83; People v. Ditson, 57 Cal.2d 415; People v. Combes, 56 Cal.2d 135, 149-50. . . .
>
> However, by presenting psychiatric testimony in support of his diminished capacity defense, defendant here has waived his privilege against self-incrimination, at least to the extent of foreclosing any objection to the testimony of a court-appointed psychiatrist relating to the diminished capacity issue (In re Spencer, supra, fn. 10, p. 412). Our Supreme Court has held in Spencer that opinion testimony from court appointed psychiatrist based upon his examination of a defendant in a criminal case is admissible as prosecution rebuttal during the guilt phase of the trial, once the defendant has placed his mental condition in issue by proffering an insanity or diminished capacity defense.

See also Buchanan v. Kentucky, 483 U.S. 402 (1987) (psychiatrist's records properly admitted as rebuttal only after defense presented mental state defense).

This issue was recently considered at length by the California Court of Appeals in Andrade v. Superior Court, 46 Cal.App.4th 1609, 1611-1613, 54 Cal.Rptr.2d 504, 506-507 (1996):

> Defendant acknowledges his statutory duty to supply the prosecution with reports prepared by experts designated as trial witnesses. (§ 1054.3, supra.) He contends, however, this duty is subject to his right to exercise his statutory and constitutional privileges including

the attorney-client, psychotherapist-patient and work product privileges and the right not to incriminate himself. Defendant's contention is supported by section 1054.6 and by the decision in Rodriguez v. Superior Court (1993) 14 Cal.App.4th 1260, 18 Cal.Rptr.2d 120, a case directly on point.

Section 1054.6 provides: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product ... or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." Thus, discovery in criminal cases does not extend to any material or information covered by the attorney-client privilege (Evid.Code § 954), the psychotherapist-patient privilege (Evid.Code § 1014) or the Fifth Amendment's protection against self-incrimination.

The facts in Rodriguez v. Superior Court, supra, are very similar to those in the case before us. Rodriguez, who was charged with several crimes including murder, retained a psychologist, Dr. LaCalle, for the purpose of evaluating his mental condition to see if any mental defenses should be raised. After reviewing LaCalle's report, defendant notified the prosecution he intended to call LaCalle as a witness at trial. Defendant provided the prosecution with a copy of LaCalle's report but redacted the portion which contained statements by defendant regarding the charged offenses. The prosecution moved to compel production of the complete, unedited report. Rodriguez opposed the motion, arguing the deleted portion of the psychologist's report was protected from disclosure by the attorney-client and psychotherapist-patient privileges and the privilege against self- incrimination. The trial court rejected defendant's argument and ruled that if defendant intended to call the psychologist then defendant's statement "in its entirety" must be turned over to the prosecution. The Court of Appeal granted defendant a writ of mandate vacating the trial court's order.

The court held Rodriguez's statements to the psychologist regarding the charged offenses were covered by the attorney-client privilege because the psychologist was acting as the agent of Rodriguez's attorney for purposes of preparing a psychological evaluation for the defense. (14 Cal.App.4th at pp. 1265-1266, 18 Cal.Rptr.2d 120.) As was stated in City & County of S.F. v. Superior Court (1951) 37 Cal.2d 227, 236, 231 P.2d 26, "[W]hen communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed."

Rodriguez held this same rule applies when it is the client who is being compelled to disclose the information. (14 Cal.App.4th at p. 1266, 18 Cal.Rptr.2d 120.)

The court further held the attorney-client privilege is not waived merely because the defendant intends to call the psychologist as a defense witness at trial. This is so even if the psychologist "may be testifying concerning statements [defendant] made to him concerning the event and ... his opinion could, conceivably, be based, in part on those statements." (14 Cal.App.4th at p. 1267, 18 Cal.Rptr.2d 120.) This result is unavoidable when sections 1054.3 and 1054.6 are read together.

Unless section 1054.3 applies, there is no statutory or constitutional duty on the part of the defendant to disclose anything to the prosecution. (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 379, 285 Cal.Rptr. 231, 815 P.2d 304.) In Rodriguez, the discovery provisions of section 1054.3 were triggered only because the defense intended to call Dr. LaCalle as a defense witness. If this was sufficient to waive the privilege then section 1054.6, which exempts privileged material from discovery, would have no object. Unless the material is discoverable under section 1054.3 it is not discoverable at all and there is no need to exercise a privilege to keep the material confidential. On the other hand, if material otherwise discoverable under section 1054.3 is not protected under section 1054.6 then the latter section would be, in the words of the Rodriguez court, "a nullity--superfluous and of no significance." (14 Cal.App.4th at p. 1269, 18 Cal.Rptr.2d 120.)

Finally, the Rodriguez court held the attorney-client privilege was not waived by partial disclosure of the psychologist's report. The court noted the disclosure was not voluntary in that it was done pursuant to court order and, in any event, waiver of privilege as to one aspect of a protected relationship does not necessarily waive the privilege as to other aspects of the privileged relationship. (14 Cal.App.4th at p. 1270, 18 Cal.Rptr.2d 120, citing In re Lifschutz (1970) 2 Cal.3d 415, 434-436, 85 Cal.Rptr. 829, 467 P.2d 557, among other cases.) The court also expressed the view that from a public policy standpoint it would be unfair to declare the privilege waived when defendant was simply making a good faith attempt to comply with the discovery provisions of section 1054.3. (14 Cal.App.4th at p. 1270, 18 Cal.Rptr.2d 120.)

D. The Trial Court Did Not Abuse its Discretion in Fashioning a Remedy on this Discovery Issue and A Writ of Mandamus Should Therefore Not Issue.

Resolution of discovery requests are committed to the sound discretion of the trial court. Lisle v. State, 113 Nev. 679, 695, 941 P.2d 459 (1997). The decision to grant or deny a request for a psychological examination is within the sound discretion of the trial court. Chapman v. State, 117 Nev. Adv. Op. No. 1, 16 P.3d 432, 434 (2001). The party requesting discovery must advance some factual predicate which makes it reasonably likely that the requested information will bear some value to his case. Sonner v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707 (1998) (citation omitted). A bare assertion that the information "might" bear fruit is insufficient. Id. An abuse of discretion in denying discovery occurs if the trial court's decision is

arbitrary or capricious or if it exceeds the bounds of law or reason. See Jackson v. State, 117 Nev. Adv. Op. No. 12, __, 17 P.3d 998, 1000 (2001).

In the case at bar, the trial court ordered that the State's expert could listen to the testimony of the Defendant and the Defendant's expert. Exhibit 3 to State's Supplemental Points and Authorities at pg. 129. The trial court also offered to take a recess if the State needed time to formulate cross-examination questions. Id. at 133. Clearly the trial court fashioned a remedy that would enable the State to rebut the Defendant's evidence.

It is not an abuse of discretion to deny discovery that violates the constitutional rights of the Defendant and is inadmissible at trial. To use evidence from a compelled psychological exam to establish guilt violates the Defendant's right against self-incrimination. Estelle, 451 U.S. 454, 68 L. Ed. 2d 359 (1981). The State is not entitled to any evidence 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. NRS 174.234 (7).

Because the Defendant's mental capacity is not an issue nor is the Defendant's competency to stand trial an issue, the State cannot compel the Defendant to submit to a psychological exam by the State's expert. This evidence would not be admissible to prove guilt, therefore, it would be error to grant the request.

The trial court fashioned a remedy that allows the State to rebut the Defendant's evidence without violating the Defendant's rights. This Court should deny the State's Petition for Writ of Mandamus.

///

///

///

V. CONCLUSION

The district court acted well within its discretion in denying the State's motions and in formulating relief to satisfy the State's declared needs. The State has not proven that the district court manifestly abused its discretion and the State's petition for a writ of mandamus should therefore be denied.

Dated this 17th day of January, 2002.

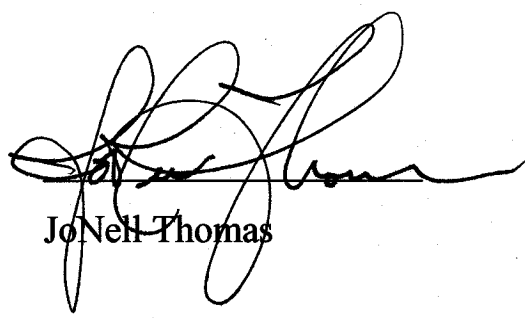
Respectfully submitted,

JoNell Thomas, Esq.
Nevada Bar No. 4771
616 South 8th Street
(702) 471-6565
Counsel for Amicus Curiae
Nevada Attorneys for Criminal Justice

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28 (e) which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be sanctioned in the even that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of January, 2002.



JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned hereby certifies pursuant to NRAP 25, that on this 17th day of January, 2002, she deposited for mailing in the United States mail, postage prepaid, a true and correct copy of the foregoing **Amicus Curiae Brief Of Nevada Attorneys for Criminal Justice**, addressed to counsel as follows:

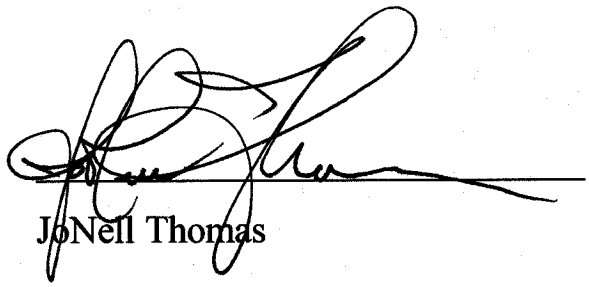
Allen Bloom
1551 Fourth Avenue
Suite 801
San Diego, CA 92101-3156

Gloria Navarro
Clark County Special Public Defender
309 South Third Street
Fourth Floor
PO Box 552316
Las Vegas, NV 89155-2316

Stewart L. Bell
Clark County District Attorney
200 South Third Street, Suite 701
PO Box 552212
Las Vegas, NV 89155-2211

Frankie Sue Del Papa
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701-4717

The Honorable Chief Judge Mark E. Gibbons
District Court Department VII
200 South Third Street
Las Vegas, NV 89155



JoNell Thomas