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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Deputy Clerk - Waters, Renee

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, v. BRYAN C. KOHBERGER, Defendant.	Ada County Case No. CR01-24-31665 **ORDER ON STATE'S MOTION FOR §18-207 EXAMINATION AND EXTENSION OF DEADLINE**

I. INTRODUCTION

Before the Court is the State's motion to conduct an examination of Defendant pursuant to I.C. § 18-207(4)(c) and to extend the penalty-phase rebuttal disclosure deadline to accommodate opinions arising from that examination. Defendant does not dispute that his penalty-phase expert disclosures opining to his mental conditions trigger the State's right under the statute to conduct its own mental health examination. What is in dispute, however, is the scope of the examination, whether defense counsel may be present and whether the State has shown good cause to extend the rebuttal disclosure deadline.

Oral argument[1] on the motion was held by video conference on May 5, 2025, after which the Court ruled from the bench. This Order memorializes that ruling.

II. STANDARDS

Constitutional questions are questions of law. *State v. Sanchez*, 165 Idaho 563, 567, 448 P.3d 991, 995 (2019). Whether good cause has been shown for an extension of time is a discretionary decision. I.C.R. 45. On discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the boundaries of such discretion; 3) act consistently with any legal standards applicable to the specific choices before it, and; 4) reach its

[1] Because the motion was likely to—and did—generate discussion about issues concerning Defendant's mental health, including matters not admissible at trial, the Court sealed the hearing pursuant to I.C.A.R. 32(c)(3)(A) to both protect against the disclosure highly intimate facts which would be highly objectionable to a reasonable person if disseminated and to preserve Defendant's right to a fair trial. Sealing the hearing was the least restrictive way to protect the privacy interests at issue. Neither party objected to sealing the hearing.

decision by an exercise of reason. *State v. Herrera*, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018).

III. PROCEDURAL BACKGROUND

On January 23, 2025, Defendant timely disclosed guilt-phase expert opinions by two mental health professionals who examined Defendant and subsequently diagnosed him with various mental and behavioral conditions, including Autism Spectrum Disorder ("ASD"), Obsessive-Compulsive Disorder ("OCD") and Attention Deficit Hyperactivity Disorder ("ADHD"). Following those disclosures, the State provisionally retained a psychologist to conduct an examination of Defendant pursuant to I.C. § 18-207(4)(c) and provide a report for rebuttal purposes.[2]

On March 31, 2025, Defendant timely disclosed penalty-phase expert opinions by five mental health professionals—including the two previously disclosed—regarding his various mental/behavioral health conditions. The deadline for the State's penalty-phase expert disclosures was set for April 28, 2025.

On April 2, 2025, the State initiated communications with defense counsel about conducting an examination of Defendant pursuant to I.C. § 18-207(4)(c). Decl. Hurwit, Exh. S-1, p. 4. Defense counsel responded that same day requesting the name of the experts, the nature of the testing and whether there was any objection to defense counsel being present for the exam. *Id.* The following day, the State provided the information requested, including the proposed testing. *Id.* at pp. 3-4. Among the tests listed was an assessment of "personality structure." The State also objected to defense counsel being present. *Id.* In response, defense counsel did not object to the evaluation, but did object to any testing outside the scope of what Defendant's experts had conducted, specifically personality testing. She also asked the State to reconsider its position as to having counsel present during the examination. *Id.* at pp. 2-3.[3] On April 7, 2025, the State responded, indicating it would not remove personality testing from the proposed

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[2]The State also moved *in limine* to exclude the proposed penalty-phase testimony by these two experts on grounds that their opinions did constitute a mental element defense and, therefore, did not fall within the scope of I.C. § 18-207(3). The Court ultimately held that testimony by the two experts during the penalty phase would not be permitted, with limited exception, unless Defendant testifies at trial. *See*, Order on State's Motion in Limine re: Neuropsychological and Psychiatric Evidence (Apr. 18, 2025)

[3] Both parties agree that the Defendant's disclosure of his psychological experts to testify in mitigation triggered a waiver of any privilege by the defendant and a mandatory right of the state to have its expert(s) conduct an examination of the defendant. *See* I.C. § 18-207(4)(c).

examination and would not agree to counsel being present during the examination except through a video feed or otherwise by having counsel shielded from Defendant's view.

On April 11, 2025, the State's mental health expert informed counsel he was not able to continue on the case. Approximately one week later, the State retained a replacement, Dr. [Redacted until the state formally discloses the expert], and informed Defendant of such. Decl. Hurwit, Exh. S-2. The State indicated it still needed to discuss with specifics of the examination with their new doctor, including his position on having counsel present. *Id.* On April 22, 2025, the State alerted defense counsel via email that their new doctor believed personality testing was warranted and objected to counsel's presence. The State also sought a stipulation to extend the rebuttal disclosure deadline for purposes of disclosing the doctor's opinion. Defense counsel responded that same day objecting to the deadline extension, to personality testing and to her exclusion from the room. On March 25, 2025, the State filed the current motion.

IV. ANALYSIS

In its motion, the State seeks an order from the Court: 1) extending the deadline for its penalty-phase rebuttal disclosures for 21 days following the completion of the State's expert examination; 2) allowing the State's expert to administer standardized personality testing on Defendant, and; 3) excluding defense counsel's presence at the examination. Defendant responds that: 1) there is no good cause for the extension, and it would be highly prejudicial given the posture of the case; 2) personality testing is beyond the scope of rebuttal and would violate his Fifth Amendment rights against self-incrimination, and; 3) counsel's presence during the examination is required by the Sixth Amendment.

As indicated at the hearing on the motion, the Court finds good cause for a short extension to the deadline. As for the examination, personality testing will not be allowed nor will counsel's presence in the examination room be allowed.

A. A Limited Extension of the Rebuttal Disclosure Deadline is Warranted.

Because the State filed the current motion prior to the expiration of the rebuttal disclosure deadline, the question of whether to extend the deadline is guided by the good cause standard. I.C.R. 45(b)(1)(A). In the civil context, "[g]ood cause implies the existence of factors outside a [party's] control, as opposed to the [party's] lack of diligence." *Grazer v. Jones*, 154 Idaho 58, 70, 294 P.3d 184, 196 (2013). The reason for the delay must be "truly unforeseen and excusable" as opposed to counsel's "failure to diligently prosecute this issue before the crisis was upon

him." *Dodd v. Jones*, 2025 WL 665547, at *20 (Idaho Mar. 3, 2025), *reh'g denied* (Apr. 15, 2025). The Court may also consider whether Defendant will be prejudiced by the delay. *Cannon v. Teel*, 173 Idaho 755, 759, 548 P.3d 380, 384 (Ct. App. 2023), *review denied* (Jan. 24, 2024). These considerations apply equally in the criminal context.

Evaluating these factors, the Court finds good cause has been shown for a limited extension to the deadline.[4] While the State should have filed its motion to extend the deadline weeks sooner,[5] the Court is sympathetic to the fact that the State's mental health expert—who had been provisionally retained shortly after Defendant's guilt-phase expert disclosures—decided to withdraw from the case just two weeks prior to the rebuttal disclosure deadline, leaving the State to scramble to retain another expert. Based on the State's representations during the hearing, the expert's withdrawal was unforeseen by, and beyond the control of, the prosecution. Until [Redacted] was retained, the State did not know his position on the two issues holding up the examination, i.e., personality testing and presence of counsel. Once the State learned of his position and confirmed Defendant's objections, it moved accordingly. Considering these circumstances, the Court finds the delay to be more attributable to the prior expert's unexpected withdrawal than lack of diligence by the State.

However, the State's request to extend the rebuttal disclosure deadline to 21 days after the examination runs the risk of prejudicing Defendant. Given the posture of this case, the volume of discovery and the upcoming trial date, the Court will only allow an extension to May 27, 2025[6] so that Defendant has ample time to consider and potentially respond to the State's disclosure. Defendant shall be made available to the State's expert for examination within the next seven to ten days, thus leaving the doctor approximately two weeks to complete his report.

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[4] Granting this extension, though limited by the Court in both scope and time, is consistent the substantive, and mandatory, i.e. non-discretionary, right of the state to conduct such an examination pursuant to I.C. § 18-207(4)(c).

[5] Given that time was of the essence, the State should have considered filed a motion to extend the deadline, at the latest, by April 3, 2025, after it learned Defendant would be objecting to personality testing and exclusion of counsel from the examination. While the Court appreciates that counsel attempted to reach resolution without the Court's involvement, this is a significant matter that called for prompt resolution once it appeared the parties were at odds.

[6] In its oral ruling, the Court indicated the extension would be 21 days from the date of the hearing, which falls on Memorial Day. Due the holiday, the Court will allow the State an extra day. Further, given that the deadline follows a holiday weekend, the Court expects Defendant will be flexible if a day or two extra is needed.

B. Personality Testing Will Not Be Allowed.

The State seeks leave to allow its expert to conduct personality tests on Defendant during the examination to confirm, rebut or otherwise contextualize the neuropsychological conditions diagnosed by Defendant's experts, particularly ASD. The State argues there is no basis to limit its doctor's professional judgment as to the appropriate areas of examination and, further, Defendant has opened the door by offering testimony about his lack of personality disorder.[7] The State contends it will only seek to utilize the results of the examination as rebuttal evidence in the penalty phase and will disclose all of the results of the examination to Defendant.

Defendant objects, arguing personality tests exceeds the scope of proper rebuttal. He points out his own experts did not perform personality testing or diagnose him with a personality disorder; rather, his proffered evidence concerns his diagnoses of ASD, OCD, ADHD and his history of eating disorders and substance abuse. He also argues nature of personality testing violates his Fifth Amendment right against self-incrimination.

As both parties appear to agree, the scope of the State's examination of Defendant is confined to purposes of rebuttal. This is borne out by the language of I.C. § 18-207(4)(c), which provides for a limited Fifth Amendment waiver for the mental condition placed at issue, stating:

> (4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars:
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> ....
>
> (c) Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence *on the subject* and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental condition may be in issue.

I.C. 18-207(4)(c) (emphasis added).

The "subject" to which waiver applies is "an issue of mental condition." In other words, the statute does not provide for waiver of a defendant's entire mental condition; it only waives

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[7] One of defendant's forensic psychiatrists, Dr. Eileen Ryan, concluded in her expert report that Defendant "does not have a childhood history of behavior that is consistent with conduct disorder or antisocial personality disorder in adulthood, nor does he meet criteria for antisocial personality disorder." Ryan Report, p. 49, attached as Exh. S-3 to Hurwit Declaration.

privilege attaching to the mental condition he chooses to place before the jury so as to allow the State to "controvert[] his proof on an issue that he interjected into the case." *State v. Payne*, 146 Idaho 548, 577, 199 P.3d 123, 152 (2008) (*Estelle v. Smith*, 451 U.S. 454, 470 (1981)). This is consistent with well-settled waiver principles under the Fifth Amendment. When a defendant waives his Fifth Amendment right against self-incrimination by voluntarily providing testimony in his own defense, he does so *only* on the matters raised by his own testimony on direct examination. *Brown v. United States*, 356 U.S. 148, 155 (1958).

Indeed, it is recognized among courts that waiver under provisions similar to I.C. § 18-207 is limited to the issue raised by the defense. As noted by the Fifth Circuit in *Hernandez v. Davis*,

> [B]y relying on the testimony of a mental-health expert who has examined him, the defendant waives his Fifth Amendment privilege. Nonetheless, the scope of that waiver is 'limited to the issue raised by the defense,' and any testimony about the court-ordered psychiatric evaluation cannot go beyond this limited rebuttal purpose. *Saldano v. Davis*, 701 F. App'x 302, 309–10 (5th Cir. 2017) (per curiam); *see also Cheever*, 571 U.S. at 97 [] (noting that '[n]othing' in our precedents '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 the trial' (alteration in original) (quoting *Powell v. Texas*, 492 U.S. 680, 685–86 n.3 [] (1989) (per curiam)).

750 F. App'x 378, 383 (5th Cir. 2018).[8]

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[8] *See also*, *Gibbs v. Frank*, 387 F.3d 268, 274 (3d Cir. 2004) (when a defendant initiates a trial defense of mental incapacity or disturbance, his or her limited Fifth Amendment waiver "only allows the prosecution to use [a compelled psychiatric interview] to provide rebuttal to the psychiatric defense"); *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996) ("[A] defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence."); *Bilal v. United States*, 240 A.3d 20, 29 (D.C. 2020) ("[F]rom *Cheever*, there is no Fifth Amendment bar against a compelled mental examination of the defendant if the defendant will rely on testimony of a mental health expert who has examined him, and the compelled examination will be limited to the issue(s) raised by the defense."); *United States v. Johnson*, 383 F. Supp. 2d 1145, 1167 (N.D. Iowa 2005) (notice of a defendant's intent to rely on a mental condition mitigating factor does not effect a comprehensive waiver of the defendant's right against self-incrimination such that the government's experts are entitled to ask about his thinking or conduct at the time of the charged offenses); *Polvon v. State*, 682 S.W.3d 651, 660 (Tex. App. 2024) ("[A] trial court should limit a compelled psychiatric examination to rebuttal issues.").

Here, the parties do not dispute that the scope of the State's examination is limited to rebut the mental conditions Defendant has placed at issue. They agree that the State cannot explore new diagnoses or mental health conditions other than those placed at issue. What they do dispute is the manner in which the examination may proceed; specifically, whether personality testing should be allowed.

According to Defendant, the personality testing proposed should not be allowed because it is not aimed at revealing proper rebuttal evidence. He points out that rebuttal evidence "explains, repels, counteracts, or disproves evidence with has been introduced by or on behalf of the adverse party." *State v. Moses*, 156 Idaho 855, 332 P.3d 767 (2014). There must be a "nexus between the purported rebuttal evidence and the evidence that the purported rebuttal evidence seeks to rebut." *United States v. Stitt*, 250 F.3d 878, 897-98 (4th Cir. 2001). Defendant notes that his proffered evidence is limited to his diagnoses of ASD, OCD, ADHD and history of eating disorders and substance abuse. Because he has not been diagnosed or even tested for a personality disorder, he argues testing for such is beyond the scope of rebuttal.

In support, Defendant cites to several cases where courts have limited the types of testing conducted in rebuttal examinations based on the scope of the mental health evidence proffered by the defendant. For example, in *United States v. Taylor*, 320 F. Supp. 2d 790 (N.D. Ind. 2004), the defendant sought to introduce "expert evidence regarding [his] developmental history and mental condition relating to substance abuse during the sentencing phase," and was ordered to submit to a rebuttal examination. *Id.* at 791. The defendant subsequently objected to four tests the government intended to use—including a personality test—on the ground that those tests were "designed to indicate personality disorders and mental conditions ... not mental condition[s] related to substance abuse," and therefore exceeded the scope of any Fifth Amendment waiver. *Id.* at 794. The court agreed, concluding that the government could use such tests "only to the extent that the tests contain testing scales for substance abuse," and that the prosecution should be "barred from introducing any materials that are outside the scope of mental health testing as it relates to substance abuse." *Id.*[9]

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[9] *See also, U.S.A. v. Jackson*, 2015 WL 4885997, at *5 (C.D. Cal. Aug. 13, 2015) (where defendant placed his mental condition at issue by presenting expert opinion that he experienced combat-related traumatic brain injury and PTSD, the court found the government expert's proposed personality test exceeded the scope, noting it "does not test for cognitive functioning or impairment," and is instead "used to assess an individual's personality traits" which the defendant had not placed at issue); *Centeno v. Superior Court,* 117 Cal. App. 4th 30, 45 (2004) (holding that compelled mental examinations are "permissible only to the extent they are reasonably related to the determination

The State responds that it is not proposing the personality tests simply as a fishing expedition; rather, he believes the tests will aid in rebuttal for several reasons. As he explains:

> In my professional opinion, including broader testing of personality and psychopathology is important for several reasons. First, these tests contain the most sensitive symptom validity measures that help determine if the examinee is reporting information in a consistent and reliable manner without significant over-reporting (exaggeration) or under-reporting (defensiveness). In her evaluation of Defendant, it does not appear that Dr. Rachel Orr, PsyD, ABPP-CN, administered any tests that formally evaluate symptom validity to this level. These validity measures help ensure that the results of other self-report measures that do not contain validity scales are valid. Second, not only is it important to rule in diagnoses such as those that have already been diagnosed, but also to rule out diagnoses that could account for the same symptom presentation. The diagnostic criterion for many disorders includes that the symptoms are not attributed to, or are not better accounted for, by another condition. Therefore, ruling out those conditions is important. Third, with autism specifically, there are certain personality characteristics that are common and supportive of that diagnosis. Obtaining information about those characteristics helps ensure a proper diagnosis. The battery of testing that I propose would be significantly less than the testing battery already completed by Dr. Orr. The battery would serve to supplement the battery that Dr. Orr completed and provide some additional valuable information. In my professional judgment, I would not administer the Hare PCL-R that is discussed in the report of defense expert John F. Edens, Ph.D.

Decl. [Redacted], ¶ 4.

The State also notes that, to the extent teh testing strays from its rebuttal purpose in any respect, there is no prejudice to Defendant because he will have a chance to object prior to admission of the evidence at trial. To this end, the State cites to various cases where courts have declined to impose strict limits on the scope of court-ordered psychological exams, observing that even if the examination exceeds the scope of reasonable rebuttal, it will not be admitted at trial.[10]

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of the existence of the mental condition raised," and that the trial court must "determine whether the proposed tests are reasonably related to the ... issue tendered by the defendant"); *U.S. v. Williams*, 731 F. Supp. 2d 1012, 1017–20 (D. Hawai'i 2010) (holding inadmissible results of a test employed to diagnose psychopathy and Antisocial Personality Disorder because that test addressed factors not placed at issue by defendant's evidence of borderline intellectual function and brain damage).

[10] *See, e.g., United States v. Mills*, No. 16-CR-20460, 2019 WL 2339289, at *2 (E.D. Mich. June 3, 2019) (noting that "if the examination poses a risk to [the defendant's] Fifth Amendment rights beyond the purposes of rebutting

The Court's concern with allowing the State's expert to conduct personality testing is two-fold. First, the Court is not convinced from the expert's explanation that the testing is within the scope of rebuttal. The first purpose identified, i.e., to ensure Defendant's self-reported symptoms (particularly to Dr. Orr) are valid, might carry great importance if Dr. Orr's diagnoses were made largely based on Defendant's self-reporting, but they were not. Dr. Orr's neuropsychological examination included extensive interviews with Defendant's family members, co-workers, former teachers and psychologists and an evaluation of Defendant's health and educational records. Moreover, Dr. Orr specifically observed that, on symptom inventories, Defendant "chose not to comment on any concerns about himself" and he showed "very little insight into his behavior and emotions." Exh. D7-E, p. 25 (Orr Phase 2 Rpt).[11] In other words, there was very little by way of self-reported symptoms. Consequently, the Court struggles to understand why it is necessary to test the validity of self-reported symptoms through personality testing.

The Court's second—and more significant—concern is with the use of personality testing to rule out other diagnoses or "personality characteristics" that may account for the same symptoms. This has the potential to generate new mental health diagnoses or other evidence outside the scope of Defendant's Fifth Amendment waiver. While the State asserts that its expert does not intend to "explore" new diagnoses or mental health conditions, there is a fine line between ruling out other mental health conditions and "exploring" them. The danger of that line being crossed is too great and could lead to evidence that could be viewed as aggravating in nature, or at least make it difficult to parse the aggravating evidence from the mitigating.

Moreover, considering that the Court is allowing the State an extension of time to examine Defendant and disclose its expert's opinions, time is of the essence. Any new potential

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his intellectual disability claim, this can be easily addressed through post-examination motions."); *Abernathy v. State*, 462 S.E.2d 615, 617 (Ga. 1995) (declining to place limits on scope of exam since the nothing obtained in the examination may be used at trial except in rebuttal); *United States v. Wilson*, 920 F. Supp. 2d 287, 303–04 (E.D.N.Y. 2012) (noting that to the extent the examination seeks information beyond the scope of waiver, the defendant may later seek to preclude the admission of the evidence.); *Hess v. Macaskill*, 67 F.3d 307 (9th Cir. 1995) (noting that any opinions and evidence gained from the evaluations could be used only to rebut the defendant's battered woman's syndrome defense).

[11] Similarly, Dr. Ryan also observed during her forensic psychiatric examination of Defendant that he did not "thrust forward" his symptoms in a manner suggesting malingering and, in fact, took "great pains to minimize and deny psychiatric symptomatology." Exh. D-13E, p. 54 (Dr. Ryan Phase 2 Rpt.)

diagnoses or evidence uncovered through personality testing may elicit the need for further testing and sur-rebuttal by Defendant, as well as significant post-examination motion practice. Weighing the marginal utility of personality testing in this case against the existing time constraints, and the timing of the State's motion considering its knowledge of the scope of the Defense's agreement,[12] the Court will not allow it.

However, to equalize the playing field, the Court will not allow defense experts to testify about whether Defendant meets, or historically met, the criteria for personality disorder or reference the State's failure to conduct personality testing on Defendant. In other words, Defendant cannot use personality disorder, or the asserted non-existence thereof, and the lack of testing for it, as a shield and a sword. Moreover, the Court will not prohibit its expert from commenting on the fact that personality testing may have aided in his evaluation, but that testing was not performed by the defense experts, nor available to him. In turn the Defendant may not assert or imply that [Redacted] could have conducted personality testing. This approach strikes a balance between ensuring Defendant's rights are preserved while at the same time allowing the State a means for effective rebuttal within the time constraints posed by the extension.

C. The Sixth Amendment Does Not Require Counsel's Presence at the Exam.

Finally, the State seeks to exclude defense counsel from its examination, asserting Defendant has no Sixth Amendment right to the presence of counsel at the examination. It further argues exclusion of counsel is consistent with standard psychology practices and the American Bar Association Standards on Mental Health, which advise that defense counsel should only be present if requested by the evaluator.[13] According to Dr. [Redacted], defense counsel's presence would interfere with the validity of the examination. Decl. [Redacted], ¶ 5.

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[12] The Court finds that even if the State otherwise should be entitled to administer personality testing, the State failed to preserve that right by not earlier seeking a order allowing it, when they knew the defense would not agree to that part of the evaluation, and that personality testing, should the Court approve it, likely could not be administered and scored in time for the state to meet its April disclosure deadline. This stands in contrast to the remainder of the state's requested evaluation, which was not objected to, leaving the state to believe an Order would not be necessary as to it.

[13] For examinations of a defendant by the prosecution such as those permitted by I.C. § 18-207, the standards state that "the defense attorney should be present at the evaluation only at the request of the evaluator for reasons relating to the effectiveness of the evaluation. If present, the attorney may actively participate only if requested to do so by the evaluator." ABA Standard on Mental Health 7-6.4(d) and 7-3.5(c)(ii). Available at: https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (last visited April 30, 2025).

He also points out defense counsel was not present when Defendant was examined by his own experts. *Id.*, ¶ 8.

Defendant responds that he has a Sixth Amendment right to the presence of counsel during the examination because it is a "critical stage" in the proceeding, particularly given that this is a capital case and "death is different" for Sixth Amendment purposes. He further notes that having counsel present is consistent with the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[14]

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."[15] It guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. *United States v. Wade,* 388 U.S. 218, 224 (1967); *Estrada v. State,* 143 Idaho 558, 562, 149 P.3d 833, 837 (2006). The test for whether a stage is "critical" is whether the accused finds himself "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States v. Ash,* 413 U.S. 300, 310 (1973).

With regard to court-ordered psychiatric examinations under I.C. § 18-207(4)(c), no Idaho appellate court has expressly held that the examination itself is a "critical stage" of the proceeding, thus triggering the Sixth Amendment. However, in *State v. Payne*—a capital case—the Court held:

> [A] defendant has the right to assistance of counsel, as opposed to the presence of counsel, during a compelled mental examination [pursuant to I.C. § 18-207(4)(c)]. *Estrada v. State*, 143 Idaho 558, 563, 149 P.3d 833, 838 (2006). This right is based on the Sixth Amendment. *Id.* at 562, 149 P.3d at 837; *Estelle* [*v. Smith*], 451 U.S. [454], 470 [(1981)].

146 Idaho 548, 577, 199 P.3d 123, 152 (2008).

By this holding, the Court implied that a I.C. § 18-207 examination was a "critical stage," but did not pass on the question. In *Estrada*—the case *Payne* cited to for its holding—the Court held that the decision of whether to participate in a psychosexual exam was a "critical stage" triggering the defendant's Sixth Amendment right to counsel. 143 Idaho at 562-63, 149 P.3d at 837-38. Although the defendant did not assert he was entitled to counsel's presence during the

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[14] American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1058 (2003).

[15] Idaho's corollary right is found in Article I, § 13 of the Idaho Constitution, but it is not relied upon by the parties here.

examination, the Court added that the Sixth Amendment's "right to *assistance* of counsel in the critical stage of a psychosexual evaluation inquiring to a defendant's future dangerousness, does not necessarily require the *presence* of counsel during the exam." *Id.* (emphasis in original).

Read together, *Payne* and *Estrada* suggest that regardless of whether an examination under I.C. § 18-207(4)(c) is a critical stage or not, the Sixth Amendment does not provide a right to the presence of defense counsel *during* the examination. In fact, subsequent case law from the Idaho Court of Appeals supports this conclusion. In *Hughes v. State*, the Court of Appeals squarely held that the Sixth Amendment did not require the presence of counsel at compelled pyschosexual examinations, even if they were a critical stage.[16] 148 Idaho 448, 451, 224 P.3d 515, 518 (Ct. App. 2009). In doing so, the Court of Appeals examined *Estrada* at length, particularly the efforts made by the Idaho Supreme Court to distinguish between the right to assistance of counsel under the Sixth Amendment and the "limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda*." *Id.* at 454-55, 224 P.3d at 521-22 (citing *Estrada*, 143 Idaho at 562-63, 149 P.3d at 837-38). In making this distinction, *Estrada* drew from *Estelle v. Smith*—also relied upon by *Payne*—where the United States Supreme Court held that a capital defendant's pretrial psychiatric evaluation was a critical stage of the proceeding, but his Sixth Amendment rights only encompassed the right to assistance of counsel *before* submitting to the examination. *Id.* (citing *Estelle v. Smith*, 451 U.S. 454, 470 (1981)). In its opinion, the *Estelle* court observed that the defendant was not seeking the right to have counsel actually present during the exam and noted that because the psychiatric evaluation at issue was conducted after adversary proceedings were instituted, the Court was "not concerned" with the limited right to the presence of counsel recognized as a Fifth Amendment safeguard in *Miranda*. *Id.* (citing *Estelle*, 451 U.S. at 471, n. 14).

Based on the distinctions drawn in *Estrada* and *Estelle* between the Sixth Amendment right to assistance versus the limited right to presence of counsel under the Fifth Amendment, the Court of Appeals in *Hughes* rejected the notion that that the Sixth Amendment provides an absolute right the presence of counsel during a psychosexual examination, even if it were

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[16] In considering whether psychosexual examinations themselves were "critical stages" implicating the Sixth Amendment, the Court of Appeals observed that that the "majority of courts" have held that, while the *decision* to undergo pretrial psychiatric examinations—which are similar to psychosexual examinations—is a critical stage, the actual examination is not. *Id* at 453-54, 224 P.3d at 520-21 (collecting cases).

determined to be a critical stage. *Id.* at 455-56, 224 P.3d at 522-23. Rather, the Sixth Amendment simply guarantees the defendant the advice of counsel prior to submitting to the examination. *Id.* The *Hughes* opinion and its examination of *Estrada* and *Estelle* shed light on what the Idaho Supreme Court intended in *Payne* when it held that a defendant undergoing a compelled mental examination under I.C. § 18-207 has a Sixth Amendment right "to the assistance of counsel, as opposed to the presence of counsel[.]" Whether or not the examination itself is a critical stage, the Sixth Amendment right is only one of assistance, not presence, of counsel.

Indeed, "most courts" have concluded that a defendant has no constitutional right to be represented by counsel during the examination, either because the examination is not considered a "critical stage" or because the Sixth Amendment carries a right to assistance rather than presence of counsel. 6, Wayne R. LaFave, et al., Criminal Procedure § 26.5(b) (4th ed.) (November 2024 update); see also, *See* Annot., *Right of Accused in Criminal Prosecution to Presence of Counsel at Court–Appointed or –Appointed Psychiatric Examination,* 3 A.L.R.4th 910, 915.[17]

Defendant, however, contends that that *Payne* is not controlling as it relied upon dicta from *Estrada*. He notes that *Estrada* declined to rule on whether the Sixth Amendment mandated

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[17] See, e.g., *State v. Martin*, 950 S.W.2d 20, 26 (Tenn. 1997) (observing that "a substantial majority of state and federal jurisdictions have held that a defendant does not have the right to counsel during a psychiatric examination."); *Hollis v. Smith,* 571 F.2d 685, 692 (2nd Cir. 1978) ("[T]he Sixth Amendment does not requires that a defendant be permitted to have counsel present at a mental examination conducted to rebut a psychiatric defense he has initiated."); *Hess v. Macaskill*, 67 F.3d 307 (9th Cir. 1995) (defendant has no right under the Sixth Amendment to have her counsel physically present in the room during the course of a psychiatric examination, which was compelled after she placed her mental state at issue at a defense); *United States v. Greene,* 497 F.2d 1068, 1079-80 (7th Cir.1974) (where defense counsel has consented to a defendant's examination by a government mental health expert, exclusion of defense counsel from the examination does not violate defendant's Sixth Amendment rights.); *United States v. Trapnell*, 495 F.2d 22, 24 (2d Cir. 1974) (no right to counsel at a psychiatric examination because it is not a critical stage); *White v. United States*, 451 A.2d 848, 854 (D.C. 1982) (although psychiatric evaluation was a "critical stage," it does not require the presence of counsel); *United States v. Wilson,* 920 F. Supp. 2d 287, 305 (E.D.N.Y. 2012) (the Sixth Amendment does not require that a defendant be permitted to have counsel present at a mental examination conducted to rebut a psychiatric defense he has initiated); *State v. Steiger*, 218 Conn. 349, 369–70, 590 A.2d 408, 420 (1991) (when criminal defendant places mental state in issue, his Sixth Amendment right ensure an opportunity before the state's pretrial psychiatric exam to consult with counsel, not a right to counsel at the examination itself.); *State v. Whitaker*, 207 N.E.3d 677, 709 (Ohio 2022) (the decision to undergo a compelled psychiatric examination is a critical stage, but the exam itself is not, thus the defendant has no right to have his attorney present).

the presence of counsel during a compelled mental examination. Regardless of whether the statement was dicta in *Estrada*, *Hughes* squarely held that presence of counsel was not required at compelled mental examinations. Further, although *Payne* may have cited to dicta, its holding was not. At issue in *Payne* was whether counsel rendered ineffective assistance—a Sixth Amendment claim—by, *inter alia*, failing to "be present during the examinations[.]" 146 Idaho at 577, 199 P.3d at 152. The Court held the Sixth Amendment did not carry a right to the presence of counsel at the examination. *Id.* Thus, *Payne* is controlling.

Defendant also contends that the plain language of I.C. § 18-207(4) referring to the "adversarial process" triggered by a defendant placing a mental health condition at issue indicates that the examination is adversarial proceeding, unlike psychosexual examinations where the expert is court-appointed. However, even assuming the examination itself is an adversarial process and, therefore, a critical stage, *Payne* instructs that there is no right under the Sixth Amendment to the presence of counsel at the examination conducted by the State's expert.

Defendant further cites to a handful of cases where courts have found a right to presence of counsel during psychiatric examinations. In two of those cases, that right was not derived from the Sixth Amendment and, therefore, not instructive here. In *Houston v. State,* in which the Alaska Supreme Court held that the guarantee of effective assistance of counsel provided in Alaska's constitution required the presence of defense counsel during a mid-trial psychiatric interview which was conducted by the prosecution pursuant to a court order. 602 P.2d 784, 795-96 (Alaska 1979). However, the Alaska Supreme Court is "not limited by decisions of the United States Supreme Court or the United States Constitution when [it] expound[s][its] state constitution; the Alaska Constitution may have broader safeguards than the minimum federal standards." *Roberts v. State,* 458 P.2d 340, 342-43 (Alaska 1969). Thus, how the Alaska Supreme Court chooses to interpret the counsel guarantee provided in Alaska's constitution is not particularly useful. Similarly, in *State v. Mains*, defense counsel was present at the psychiatric examination not due to a Sixth Amendment right, but because the district court ordered his presence when ordering the examination. 669 P.2d 1112, 1114 (1983).

In the two other cases cited by Defendant, the right to counsel's presence was limited. In *People v. Guevara*, the court held defense counsel's exclusion from the defendant's pretrial psychiatric examination was reversible error based on the case of *Lee v. County Ct. of Erie County,* 27 N.Y.2d 432, 267 N.E.2d 452 (1971), where the court interpreted the Sixth

Amendment as requiring presence of counsel. 37 N.Y.3d 1014, 1015, 174 N.E.3d 1240, 1241, (2021).[18] However, *Lee* limited that right to observation only so as to "make more effective [the] basic right of cross-examination" should the examining psychiatrist be called at trial. *Lee*, 267 N.E.2d at 444. *Lee* also permitted the prosecutor to be present. *Id.* Similarly, in *State v. Hutchinson*, the Supreme Court of Washington found that defendants do have a right to the presence of counsel at court-ordered examinations, but only as observers. 766 P.2d 447, 454 (Wash. 1989).

However, these two cases fall into the minority of courts which have determined the issue. Further, courts in the majority have cited grave concerns with this approach because of the potential for defense counsel's mere presence to disrupt the dynamic and, therefore, the effectiveness of the court-ordered examination. As noted by the D.C. Circuit in *United States v. Byers*:

> Even if counsel were uncharacteristically to sit silent and interpose no procedural objections or suggestions, one can scarcely imagine a successful psychiatric examination in which the subject's eyes move back and forth between the doctor and his attorney. Nor would it help if the attorney were listening from outside the room, for the subject's attention would still wander where his eyes could not.

740 F.2d 1104, 1120 (D.C.Cir. 1984); *see also, Estelle,* 451 U.S. at 470-71, n. 14 (noting the appeals court's recognition that having counsel present during the psychiatric interview "could contribute little and might seriously disrupt the examination.")

In addition, the majority of courts recognize that the need for counsel's presence is obviated "since the accused's privilege against self-incrimination will be given full effect with regard to his inculpatory statements to the examining expert on the issues of guilt and punishment." *White v. United States*, 451 A.2d 848, 854 (D.C. 1982). Indeed, where counsel is relegated to a purely observational role during the examination, it is difficult to see how "assistance" is provided as contemplated by the Sixth Amendment.

As to Defendant's argument that "death is different," implying that more robust Sixth Amendment rights should apply, *Payne*—also a capital case—declined to find right under the Sixth Amendment to the presence of counsel during an I.C. § 18-207 examination. As

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[18] In addition, *Guevara* noted that the statute governing such examinations permitted the presence of both defense counsel and the prosecutor at the examination. *Guevara*, 174 N.E.3d at 1241, fn 1 (citing N.Y. Crim. Proc. Law § 250.10). This statute codified *Lee*. *Id.*

mentioned, *Payne* is controlling. That said, the Court will allow counsel for both sides to watch the examination through a one-way video feed or some similar method that prohibits them from being seen or heard during the examination. Under no circumstances will counsel be able to interrupt the examination.

V. ORDER

Based on the foregoing, State's "Motion for Examination of Defendant Pursuant to Idaho Code § 18-207 and for an Extension of Time to Complete Rebuttal Penalty Phase Expert Disclosures" is GRANTED, in part, and DENIED, in part.

IT IS SO ORDERED.

DATED this 6th day of May, 2025.

Steven Hippler
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on 5/7/2025, I served a true and correct copy of the ORDER ON STATE'S MOTION FOR 18-207 EXAMINATION AND EXTENSION OF DEADLINE

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