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## State v. Velasco Appellant's Brief Dckt. 38866

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, ) NO. 38866  
 )  
 v. )  
 )  
 MANUEL GARCIA VELASCO, ) APPELLANT'S BRIEF  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

COPY

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BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BINGHAM

\_\_\_\_\_  
HONORABLE DARREN B. SIMPSON  
District Judge  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

Manuel Garcia Velasco appeals from his judgment of conviction for lewd conduct with a minor under the age of sixteen. He asserts that his Fifth Amendment rights were violated when the district court used information contained in his competency evaluation against him.

### Statement of the Facts and Course of Proceedings

Mr. Velasco was charged with one count of lewd conduct with a minor under the age of sixteen. (R., # 36094, p.16.)<sup>1</sup> Counsel for Mr. Velasco moved for, and the court ordered, a competency evaluation pursuant to I.C. § 18-211. (R., # 36094, pp.22, 24.) The evaluation found that Mr. Velasco was competent, and Mr. Velasco entered a plea of not guilty. (R., # 36094, p.28.) Several months later, the court ordered another competency evaluation after questioning Mr. Velasco about entering an *Alford* plea. (R., # 36094, p.36.) While this report found Mr. Velasco to be competent, the court ordered Dr. Lindsey to recommend an aide or assistant to assist with Mr. Velasco and his attorney during the change of plea process. (R., # 36094, p.40.) Dr. Christensen was suggested as this assistant. (R., # 36094, p.42.)

Mr. Velasco subsequently entered an *Alford* plea. (R., # 36094, p.46.) The State agreed to recommend probation if the psychosexual evaluation did not find him to be a pedophile, a sexual predator, or a moderate to high risk to re-offend or have any previous felony convictions on his record. (R., # 36094, p.46.) Afterward, the court indicated that it would do some research to determine whether Mr. Velasco's plea was

“knowing and voluntary.” (R., # 36094, p.49.) The court subsequently entered an order accepting Mr. Velasco’s plea. (R., # 36094, p.51.) The court then ordered a psychosexual evaluation. (R., # 36094, p.59.)

At sentencing, the district court imposed a unified sentence of thirty years, with ten years fixed. (R., # 36094, p.68.) Mr. Velasco appealed, but the appeal was dismissed. (R., p.8.) However, the district court granted post-conviction relief to Mr. Velasco and re-entered the judgment of conviction. (R., p.16.) Mr. Velasco again appealed. (R., p.20.) He asserts that the district court erred by using information in his competency evaluations against him at sentencing.<sup>2</sup>

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<sup>1</sup> The Idaho Supreme Court has taken judicial notice of the transcript and record in docket number 39064, the prior appeal of this conviction that was dismissed.

<sup>2</sup> Prior to the sentencing hearing, the district court inquired into a mental health evaluation, stating, “I don’t think ... that a 19-2524 evaluation is necessary given the pretty comprehensive evaluations that we’ve had so far in this case.” (Sent. Tr., p.54, Ls.17-20.) Counsel for Mr. Velasco agreed. (Sent. Tr., p.54, L.21.) For this reason, Mr. Velasco does not assert that the district court erred by failing to order a mental health evaluation for sentencing.

## ISSUE

Did the district court violate Mr. Velasco's Fifth Amendment privilege against self-incrimination when it improperly used information obtained for purposes of determining Mr. Velasco's competency at sentencing?

## ARGUMENT

### The District Court Violated Mr. Velasco's Fifth Amendment Privilege Against Self-Incrimination When It Improperly Used Information Obtained For Purposes Of Determining Mr. Velasco's Competency At Sentencing

#### A. Introduction

Mr. Velasco asserts that the district court improperly considered his statements, and the medical conclusions based directly upon these statements, contained within his competency evaluation for purposes of aggravation at sentencing.

#### B. The District Court Violated Mr. Velasco's Fifth Amendment Privilege Against Self-Incrimination When It Improperly Used Information Obtained For Purposes Of Determining Mr. Velasco's Competency At Sentencing

The Fifth Amendment to the United States Constitution guarantees that “No person . . . shall be compelled in any criminal case to be a witness against himself.” This safeguard against compelled self-incrimination applies to both the guilt and penalty phases of a trial. *Mitchell v. United States*, 562 U.S. 314, 325-27 (1999); *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981); *Estrada v. State*, 143 Idaho 558, 563-64 (2006); *State v. Lankford*, 116 Idaho 860, 871-72 (1989). A competency evaluation ordinarily does not implicate the Fifth Amendment because any disclosures made by the defendant are not used against him but are used only for the limited purpose of determining whether he is competent to stand trial. *See Estelle*, 451 U.S. at 465. Fifth Amendment rights come into play, however, if disclosures made during a competency evaluation, or medical conclusions derived from such disclosures, are later used against the defendant at either the guilt or penalty phase of the proceedings. *Id.* Consequently, statements made by an accused during a competency evaluation and derivative psychiatric opinions generally may not be admitted against the individual for sentencing purposes unless the defendant was advised of the right against self-incrimination and

waived those rights. *Estelle*, 451 U.S. at 469; *State v. Jockumsen*, 148 Idaho 817, 820 (Ct. App. 2010).

Additionally, the Idaho Court of Appeals has instructed, “[i]f in any district court of this state it is a routine practice of the presentence investigator to attach copies of competency evaluations to PSIs, the practice should be discontinued.” *Jockumsen*, 148 Idaho at 823 n.1. Further, where a medical diagnosis from a competency evaluation is partly predicated on the statements of the defendant, that diagnosis should likewise not be considered at sentencing. *Estelle v. Smith*, 451 U.S. at 464.

Mr. Velasco acknowledges that he did not raise these concerns to the district court. However, this claim may still be addressed pursuant to Idaho’s fundamental error doctrine. In order to establish fundamental error, Mr. Velasco must show

(1) the defendant must demonstrate that one or more of the defendant’s unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant’s substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

*State v. Perry*, 150 Idaho 209, 226 (2010). Mr. Velasco has established fundamental error. Regarding the first prong, as set forth above, this claim involves a Fifth Amendment violation, an unwaived constitutional right.

Regarding the second prong, the error is clear from the record. At the sentencing hearing, the court inquired of defense counsel whether probation was appropriate, “especially, where it appears that Dr. Lindsey, to some degree, really pegged his neurocognitive function at the beginning where he figured that he was – what was the term he used? Let’s see if I can find it here. I want to say manipulating; but I don’t think that was the actual term used.” (Sent. Tr., p.64, L.22 – p.65, L.3.)

When asked if the court was thinking about the prior competency evaluation, the court stated, “yes.” (Sent. Tr., p.65, Ls.5-6.) The court then expressed great concern about the fact that Mr. Velasco had denied remembering the alleged incidents during the competency evaluations but then admitted to the conduct during the psychosexual evaluation. (Sent. Tr., p.65, Ls.16-25.)

The prosecutor then pointed out that in the March 10, 2008, competency evaluation, that Dr. Lindsay opined that Mr. Velasco’s responses suggested a “malingered cognitive dysfunction.” (Sent. Tr., p.67, Ls.5-10.) The prosecutor believed, “that’s kind of what the Court was referring to earlier.” (Sent. Tr., p.67, Ls.12-20.)

When the court was imposing sentence it stated, “the other thing that was of concern of Dr. Lindsey and a concern of this Court, as we’ve discussed, is that given your neurocognitive functioning, you tend to play upon that and exaggerate that deficit to more than what it really is, which may have a bearing on how treatable you are.” (Sent. Tr., p.71, Ls.6-12.) The court remarked that, “I questioned that you were able to admit to a lot of the factual things on that evening, but couldn’t remember what actually happened between you and her.” (Sent. Tr., p.72, Ls.13-17.) The court ultimately concluded that Mr. Velasco finally admitted to the conduct during the psychosexual evaluation because, “you basically knew, based upon that deception, that you weren’t going to get around that anymore and came to your senses.” (Sent. Tr., p.72, Ls.17-22.)

Again, the district court referenced Dr. Lindsey’s psychosexual evaluation, stating that, “on Page 2, is that we still have some concerns about the nature and severity and extent of your cognitive abilities because you didn’t put forth a consistent and adequate effort on those testing procedures.” (Sent. Tr., p.77, Ls.1-5.) The psychosexual

evaluation referenced the prior competency evaluations, including the conclusion that Mr. Velasco was exaggerating his condition. (Psychosexual Evaluation.) The court therefore concluded that Mr. Velasco did indeed remember the events of the incident at hand despite “your times here in court and initially with Dr. Lindsey” when he denied remembering what had happened. (Sent. Tr., p.77, Ls.6-12.) It is clear from the record that the district court was using information contained the competency evaluations against Mr. Velasco.

Regarding the third prong, the error affected the outcome of the proceedings. As set forth above, the record demonstrates that the court, over and over again, referenced the fact that Dr. Lindsey believed that Mr. Velasco was malingering, and repeatedly stated that it believed that Mr. Velasco had always remembered the incidents at hand, despite reporting otherwise to Dr. Lindsey. These conclusions clearly played a role the court’s sentence and, therefore, Mr. Velasco has established that the error affected the outcome of the proceedings.

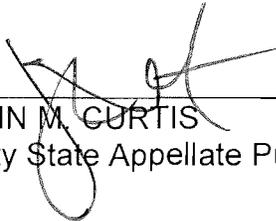
The district court considered both the competency evaluations directly, and the references to them in the psychosexual evaluation. This was improper, because, as set forth above, statements made by an accused during a competency evaluation and derivative psychiatric opinions generally may not be admitted against the individual for sentencing purposes unless the defendant was advised of the right against self-incrimination and waived those rights. *Estelle*, 451 U.S. at 469; *State v. Jockumsen*, 148 Idaho 817, 820, (Ct. App. 2010). There is no record in this case that Mr. Velasco waived his Fifth Amendment rights. The district court therefore erred in considering this information at sentencing. This case should be remanded for a new sentencing hearing where the court does not use the information contained the evaluations against

Mr. Velasco, and the references to the competency evaluations in the psychosexual evaluation should be stricken. See *Jockumsen*, 148 Idaho at 823 n.3.

CONCLUSION

Mr. Velasco respectfully requests that this Court remand his case to the district court for a new sentencing hearing with instructions that the district court not consider information obtained from the competency evaluations against Mr. Velasco.

DATED this 7<sup>th</sup> day of June, 2012.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7<sup>th</sup> day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MANUEL GARCIA VELASCO  
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ISCI  
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BOISE ID 83707

DARREN B SIMPSON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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JMC/eas