UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: JARED LEE LOUGHNER JARED LEE LOUGHNER, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest	C.A. No. 11-70828 D. Ct. No. 11-00187-LAB District of Arizona, Tucson **RESPONSE OF UNITED STATES OF AMERICA TO PETITION FOR WRIT OF MANDAMUS**

The United States of America, Real Party in Interest, by and through its attorneys, Dennis K. Burke, United States Attorney, and Christina M. Cabanillas and Bruce M. Ferg, Assistant U.S. Attorneys, and pursuant to this Court's order issued on March 24, 2011, hereby responds to the petition for writ of mandamus.

A. Facts & Procedural History[1]

On March 3, 2011, a federal grand jury in Tucson, Arizona filed a superseding indictment charging the petitioner, Jared Lee Loughner ("the defendant") with

[1] "CR" refers to the Clerk's Record, followed by the docket number.

multiple criminal offenses committed on or about January 8, 2011, including attempted assassination of a member of Congress, murder and attempted murder of federal employees, various weapons offenses, and injuring and causing death to participants at a federally provided activity. (CR 129.)

On March 7, 2011, the government filed a motion for a competency hearing and competency evaluation under 18 U.S.C. § 4241(a), based on information it provided to the district court in its pleading and separately under seal. (CR 141; RT 3/9/11 32, 38-39, 40; Petition's Exhibit C.) At the arraignment on March 9, 2011, the defense objected and stated that it is up to the defense to advise the court if and when a competency issue existed.[2] (RT 3/9/11 24-31, 37.) After correctly noting that § 4241(a) allows the government or the court to raise competency, the district court found that there was sufficient information providing "reasonable cause" to support the government's request for a competency hearing and evaluation under § 4241. (RT 3/9/11 26, 37-41; CR 153.)

On March 16, 2011, at the district court's request, the parties submitted recommendations concerning where the competency evaluation should be conducted. Based on the opinions of a Bureau of Prisons (BOP) chief psychiatrist and an

[2] The defense has objected to a competency evaluation of the defendant, although they describe him as "seriously mentally ill" and "gravely mentally ill." (Petition, p. 5; CR 168 at 2, 4, and 6 n. 4.)

experienced forensic psychiatrist, the government recommended that the competency evaluation be conducted by BOP medical personnel at a Medical Referral Center (MRC), noting that the closest MRC was in Springfield, Missouri. (CR 156.) The defense requested that any examination be conducted at the United States Penitentiary in Tucson and objected to conducting the evaluation at any other location. (CR 159.) In addition, the defendant requested certain limitations and protocols for the evaluation itself, including videotaping or live feed of the examinations, the appointment of a separate defense examiner, advance notice of all competency tests, limited disclosure of the competency evaluation reports, and other requests. (CR 159 at 4-6.)

On March 21, 2011, the district court ordered that the defendant be evaluated by BOP medical personnel at the MRC in Springfield, Missouri. In addition, although the district court was not required to do so, it granted the defendant's request for videotaping and permitted him to obtain separate defense examination. It ordered that all formal clinical interviews be recorded and copies provided to both counsel, and ordered that all competency evaluation reports be provided to the court and both counsel. (CR 165; Petition's Exhibit A) ("March 21st order").

At approximately 7:00 p.m. on March 22, 2011, the defendant filed an emergency motion for reconsideration and stay of the district court's March 21st

order. (CR 168; Petition's Exhibit B.) The next afternoon, on March 23, 2011, the government filed a response. (CR 170; Exhibit 1 to Response.) On that same date, the defendant filed a petition for writ of mandamus and emergency motion to stay with this Court, and filed a notice of appeal in the district court. (CR 171, 175 n. 1.)

The next morning, March 24, 2011, the district court issued an order denying the motion for reconsideration. (CR 173.)[3] That same day, the defendant filed another emergency motion in this Court to stay the district court's order pending his appeal in CA No. 11-10137.

Later on March 24, 2011, this Court issued two orders. With regard to the mandamus petition, this Court granted in part the defendant's emergency motion for stay of the district court's March 21st order, temporarily staying it to the extent that it "directs that copies of the video recordings of all formal clinical interviews with the defendant be provided to both counsel, and to the extent that the order directs that any defense-retained examiner shall prepare a formal written report and provide the report to the district court and government counsel." (March 24 Order, CA No. 11-70828.) This Court ordered that the video recording should proceed, but "no copy of any video recordings should be provided to or made available to any counsel, pending

[3] The district court also issued an amended order later that day, which does not amend the original order in any significant way. (CR 175; Ninth Circuit Docket Entry # 4.)

further order." (*Id.*) It also asked the government to respond to the petition by March 31st, limited to "addressing the district court's order directing that copies of the video recordings of all formal clinical interviews of the defendant be provided to both counsel and that the report of any defense-retained examiner be provided to the district court" and permitted the district court to respond to the petition if it desired. The defendant may also file a reply. This Court denied the mandamus petition with respect to all issues other than those it had identified in its March 24 order. (*Id.*)

In CA No. 11-10137, which concerns the defendant's interlocutory appeal, this Court entered an identical stay order. It further denied the defendant's motion for stay in all other respects, and stated that the briefing schedule remains in effect.

On March 28, 2011, as this Court permitted, the district court filed a response to the defendant's petition for writ of mandamus. (Ninth Circuit Docket Entry # 5.)

B. **The Defendant's Mandamus Petition Should Be Denied.**

1. Standard of Review

"Although [this Court] decide[s] de novo whether the writ should issue, [it] review[s] the district court's underlying orders for clear error." *In Re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007). This Court has "adopted five guidelines" to determine whether a writ should issue:

> whether: (1) [the petitioner] has no other adequate means, such as a direct appeal, to attain the desired relief; (2) he will be damaged or

> prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or an issue of law of first impression.

Id. at 712-13, citing *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977); *Cardoza v. Pac. States Steel Corp*., 320 F.3d 989, 998 (9th Cir. 2003).

"We have repeatedly emphasized that the writ of mandamus is an extraordinary remedy, limited to extraordinary causes." *In Re Anonymous Online Speakers*, 2011 WL 61635, at * 3 (9th Cir. 2011) (internal citations omitted). *See also Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (mandamus is "a drastic and extraordinary remedy, reserved for really extraordinary causes.") (internal quotations omitted).

2. <u>If This Court Accepts The District Court's Proposed Modifications To Its March 21st Order, Those Modifications Would Moot The Mandamus Issues Identified In This Court's March 24 Order.</u>

On March 28, 2011, the district court filed a response to the mandamus petition, in which it states that it would like to modify its March 21 order. In that response, the district court states that it mistakenly authorized the defense to conduct "*its own* examination of Mr. Loughner's competency." (Ninth Circuit Docket Entry # 5; D. Ct's Response, p. 1) (emphasis in original). The court stated that it did so to "accommodate the defense's concern," which the court "[does] not share, over the

impartiality of Bureau of Prisons staff." (*Id*. at 2.) The district court has proposed "striking from [its] original order the allowance that '[d]efense counsel may retain an independent medical expert to conduct a separate mental competency examination of the defendant,'" as well as the statement: "The Court exercises its authority under § 4247 to authorize a separate competency examination of the defendant by an independent psychiatrist or psychologist, if requested by defense counsel." (*Id*.) The district court wishes to modify its order to appoint an independent examiner instead:

> That said, I do have the authority under [18 U.S.C.] § 4247(b) to appoint "more that one" examiner if I find that appropriate, and I make that finding. As I said in my original order, "[G]iven the nature and scope of the charges, and the public interest and corresponding need for public confidence in decisions that may influence the outcome of the case, the Court finds it appropriate to authorize an independent competency exam." I am prepared to appoint a second examiner myself, and I will appoint a practicing forensic psychiatrist who has no affiliation with, or allegiance to, the Bureau of Prisons.
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> The critical point here is that this independent competency examination is not *the defense's* examination to orchestrate, oversee, or have privileged access to. Thus, requiring disclosure of the independent examiner's report to the Government is neither unconstitutional, nor, as the defense alleges, "an extraordinary intrusion into defense work product." The effect of adopting the proposed modification of my March 21 order is that the stay of the order, to the extent that it "directs that any defense-retained examiner shall prepare a formal written report and provide the report to the district court and government counsel" would become moot. There would no longer be a distinction between a court-ordered competency evaluation and the defense's own competency evaluation. Instead, there would be two court-ordered examinations.

(D.Ct's Response, pp. 2-3) (emphasis in original) (internal citations omitted).

Although the district court is under no obligation to appoint a second examiner, the government agrees with the district court that its proposed modification of its March 21st order would moot the related issues in the defendant's mandamus petition that this Court asked the parties to address, namely, whether "any defense-retained" expert's evaluation should be videotaped and such examiner's report disclosed to the court and the government. (Petition, pp 9-17.) If the district court's modification is adopted, then the appointed independent examiner would not be a "defense" expert. This Court should permit the modification that the district court has proposed.[4]

In addition, although the district court granted the defendant's videotaping request and believes that such recording "would inform its determination of whether Mr. Loughner is competent to stand trial and the parties' understanding of the basis for the examiners' opinions," it also acknowledges that "[p]erhaps the best solution

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[4] The district court's determination that the defense is not entitled to a separate defense competency examiner is further supported by *United States v. Owle*, 2010 WL 3259790 (W.D.N.C. 2010) ("While defendant has asked that he be allowed to retain an expert of his own choosing as to competence to proceed, such request is not supported by any reference to a provision of law that would allow such a request. Further, close review of the relevant portions of the applicable statutory provision counsels that such not be allowed: [Quotation of 18 U.S.C. § 4247(b).] The statute provides that only where the examination is ordered under Sections 4245, 4246, or 4248 is defendant entitled to appointment of [an] additional examiner of his own choosing. Here the examination was ordered under 4241, to which no similar right attaches."), *aff'd by district court*, 2010 WL 3522258 (W.D.N.C. 2010).

is simply to strike from [its] order any requirement that the clinical interviews be recorded." (D.Ct's Response, p. 4.) The government concurs with this proposal and asks that this Court simply strike from the district court's March 21st order "any requirement" that the competency interviews "be video recorded." If this modification to the order is made, it would also moot the defendant's mandamus arguments that involve videotaping.

In short, if the above two proposals are adopted as the district court has suggested, then, as so modified, the district court's order would moot all of the issues raised in the defendant's mandamus petition identified in this Court's March 24 order. *See Porter v. Jones,* 319 F.3d 483, 489 (9th Cir.2003) (a case may become moot after it is filed, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"); *Hunt v. Imperial Merchant Services, Inc.*, 560 F.3d 1137, 1142 (9th Cir. 2009) ("This appeal, while not moot in a classical sense, may be characterized as being 'anticipatorily moot'. . ."). The government respectfully asks this Court to modify, or allow the district court to modify, the March 21st order as it has suggested and deny the defendant's mandamus petition.[5]

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[5] Procedurally, this Court can either order the modifications to the district court's March 21st order that it proposed, or confer jurisdiction on the district court for the limited purpose of allowing it to amend its own order. In any event, amending the order will moot the remaining mandamus issues. It may also moot similar arguments that the defendant may raise on appeal in CA No. 11-10137. Although the BOP

3. In Any Event, The Defendant Has Failed To Show Clear Error.

If this Court declines to modify the district court's order as suggested above, and instead analyzes the merits of the mandamus issues identified in this Court's March 24 order, the defendant's mandamus petition should be denied. As noted earlier, there are five factors that this Court analyzes when determining whether to grant mandamus relief. *In Re Morgan*, 506 F.3d at 712. The third factor, whether there was clear error, is "dispositive" to whether mandamus should be granted, as the defendant notes. (Petition, p. 9, quoting *Calderon v. U.S. District Court for the Northern District of California*, 134 F.3d 981, 984 (9th Cir. 1998)). The defendant cannot show that the district court clearly erred, so he is not entitled to relief.

This Court has observed that many parties "do not fully appreciate the height of the hurdle they must clear when attempting to convince us" that the trial court's decision was "clearly erroneous." *Fisher v. Roe*, 263 F.3d 906, 912 (9th Cir. 2001), *overruled on other grounds, Payton v. Woodford*, 346 F.3d 1204, 1217 n.18 (9th Cir. 2003). "Review under the clearly erroneous standard is significantly deferential, requiring for reversal a definite and firm conviction that a mistake has been made. The standard does not entitle a reviewing court to reverse the findings of the trial

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examination has already begun, this Court can simply order that any videotaping cease and advise BOP what it should do with any tapes that may exist.

court simply because the reviewing court might have decided differently." *United States v. Asagba*, 77 F.3d 324, 325 (9th Cir. 1996), *citing Concrete Pipe & Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623-25 (1993). This Court has adopted the Seventh Circuit's description of the burden faced by the defendant: "'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Fisher*, 263 F.3d at 912, *quoting Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Moreover, unless the Ninth Circuit has taken a position contrary to what the district court has ruled, there can be no clear error warranting mandamus relief. *In Re Morgan*, 506 F.3d at 713 ("Because no prior Ninth Circuit authority prohibited the course taken by the district court, its ruling is not clearly erroneous.")

The defendant has not met his burden of demonstrating that the district court's order was "clearly erroneous." First, this Court has never "taken a position contrary to what the district court ruled" because no decision of this Court holds that a district court commits error if it grants a defendant's request to videotape competency evaluations and orders that all evaluations be videotaped and copies of the tapes and evaluation reports be provided to both counsel. That fact alone should prompt denial

of the defendant's mandamus. *In Re Morgan*, 506 F.3d at 713. Second, the district court did not err, much less clearly err with regard to its videotaping and disclosure orders. The district court's order was rooted in fairness and consideration to both sides.

As the government noted in its response to the motion for reconsideration, the defendant failed to establish at the outset that he was entitled to videotaping of a competency evaluation. (CR 170 at 2-4); *see also United States v. Byers*, 740 F.2d 1104, 1114-15 (D.C. Cir. 1984) (plurality opinion); *United States v. Hinckley*, 525 F.Supp. 1342, 1350 (D.D.C. 1981) ("Nor is an audio recording of psychiatric proceedings required by the Sixth Amendment to enable counsel to reconstruct the examination."). Because videotaping was not required, the district court was quite accommodating when it granted the defendant's videotaping request. (CR 165; CR 175 at 4-5.) Having granted that request, the district court correctly directed that, as a matter of "equity," all the competency examinations would be videotaped and that copies of the videotapes and competency evaluation reports would be provided to both parties before the competency hearing. (CR 165; CR 175 at 2.)[6]

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[6] As the district court observed, granting the defendant's videotaping request and his request for an examiner, but then prohibiting the government from receiving the evidence relevant to the defendant's competency, "would virtually obliterate as to one party all of the basic and fundamental rights inherent in the concept of a fair hearing: the right to be made aware of and have access to relevant evidence; the right to

Indeed, the law does not support the defendant's request for unequal disclosure of relevant evidentiary materials. The examination in this case was a competency examination ordered pursuant to 18 U.S.C. § 4241(a). Far from precluding the disclosure of reports to the government, § 4241(b) directs that they be filed in accordance with § 4247(b) and (c). Section 4247(c), which was cited by the district court (CR 175 at 5 n. 5), expressly requires that reports prepared under the provisions of the whole chapter "shall be filed with the court *with copies provided to the counsel for the person examined and to the attorney for the government*." (Emphasis added.) No distinction in distribution, depending on who nominated the examiner, is mentioned. Because of the express requirement for disclosure in § 4247(c), §§ 4241 and 4242 "do not provide for a right of privacy against the opposing party." *United States v. Mercado*, 2006 WL 245966 at *2 (10th Cir. 2006) (unpublished) (district court did not abuse its discretion in allowing BOP full access to the report of an exam performed pursuant to § 4241). *See also Nguyen v. Garcia*, 477 F.3d 716, 726 (9th Cir. 2007) (defendant's competency evaluation and statements are admissible in competency proceedings and *Estelle v. Smith*, 451 U.S. 454 (1981), is inapplicable).

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effective cross-examination; the right to present rebuttal evidence; and the right to be heard in meaningful argument. Validating the defense request would sharply and unfairly tip the adversarial balance in this case, and there is no legal justification for it." (CR 175 at 2-3) (emphasis in original).

Moreover, as the district court noted, § 4247(c) provides that the reports must include a description of the various tests employed during the exam and their results. (CR 175 at 5 n. 5.) To the extent that any videotape of what was done provides a "description" of the tests and results, the burden should be on the defendant to demonstrate a good reason why the videotapes should be treated differently from other forms of reports, which *must* be disclosed to the government. The defendant has not met this burden. The whole purpose of the competency examination is to determine competency, nothing more, so the district court correctly determined that all information relevant to that limited purpose is properly considered and should be equally available to both parties, to assist the court in making a reliable determination. "Not only does the Constitution preclude the conviction of an incompetent, it also requires an adequate hearing on his competence to stand trial." *United States v. Miller*, 267 F.Supp.2d 104, 108 (D. Me. 2003).

To support his videotaping request and other arguments below, the defendant relied on cases that did not concern competency evaluations, but psychiatric evaluations conducted under Federal Rule of Criminal Procedure 12.2. (CR 159; CR 168.) As the government noted in its response to the motion for reconsideration, the defendant's reliance on cases analyzing Rule 12.2 was misplaced, because the defendant has not provided notice under Rule 12.2 that he intends to present an

insanity or other mental condition defense at trial or sentencing, and this competency evaluation is not being conducted under that rule. (CR 170 at 2-4.) In any event, decisions analyzing Rule 12.2 and analogous situations further support the district court's determination that the government would be entitled to the competency videotapes and reports here. *See Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987) ("if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested") (citing *Byers*, 740 F.2d at 1111-13); s*ee also United States v. White*, 21 F.Supp.2d 1197, 1200 (E.D. Ca. 1998) ("White has pointed to her mental capacity at the time of the offense as the reason why she should not be found guilty of murder, and she intends to introduce psychiatric testimony for that purpose. The Fifth Amendment does not bar the government's ability to access the same type of evidence, and a fair and effective criminal process requires that the government be able to follow where [the defendant] has led.") (internal quotations omitted).[7]

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[7] The Fifth Circuit observed in a case construing Rule 12.2 that, "Noticeably absent from the rule is any requirement that the government be denied access to the results of the examination until after the defendant actually introduces testimony regarding his mental condition." *United States v. Hall*, 152 F.3d 381, 399 (5th Cir. 1998). "Rather, the rule merely precludes the government from introducing as evidence the results of the examination or their fruits until after the defendant actually places his sanity in issue." *Id.* As the district court noted, Rule 12.2(c)(4) and other

In his mandamus petition, the defendant claims that ordering the recording of the competency examination by the defense examiner and disclosure of the recording to the government would constitute a violation of his Fifth and Sixth Amendment rights, as well as work-product and other privileges. The defendant relies primarily on *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973). (Petition at 10-16.) However, *Wright* does not help the defendant.

First, the lengthy quotation on which he relies (Petition at 12) actually only lists *potential* problems that *might* arise, in the event "a defense investigator [was ordered] to turn over a copy of his investigative report to the Government." 489 F.2d at 1188. This is not a holding about how such problems would be resolved, because the Court found the district court's order to be reversible error without relying on the issues it listed as potential problems. *Id.* at 1188-95.

Second, those hypothetical problems do not even apply here, because they are all premised on the idea of the defense being required to turn over a report by its own

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authority precludes any improper use of the competency evaluation results. (CR 175 at 3 and n.2) ("[T]he Court doesn't need to restrict the Government's use of the clinical interview recordings because the law already does."); (CR 170 at 2-6); *see also Gruning v. DiPaolo*, 311 F.3d 69 (1st Cir. 2002) (no constitutional violation in state court decision requiring that recording of a psychiatric examination be given to the government as well as the defense; "[a]llowing the prosecution to hear the audiotape was a mild condition, far removed from Fifth Amendment compulsion"; prosecution could not have used the statements at trial unless the defense put the psychiatric evaluation at issue by having petitioner or his psychiatric expert testify).

investigator, *i.e.*, an agent of the defense. However, a court-appointed competency examiner is a neutral person (as the district court's proposed modification to its order would definitively reflect), not an agent of the defense, and the competency determination is not concerned with guilt or innocence, but simply whether the defendant is competent to stand trial. *See Estelle*, 451 U.S. at 465, 467; *Byers*, 740 F.2d at 1119-20 ("An examining psychiatrist is not an adversary" until he goes beyond the question of competence); *Nguyen,* 477 F.3d at 725 ("the sole purpose of [the competency hearing] is the humanitarian desire to assure that one who is mentally unable to defend himself not be tried upon a criminal charge") (internal citation omitted); *Miller*, 267 F.Supp.2d at 108 ("As the Supreme Court in *Estelle* clearly points out, however, using a defendant's statements from a psychiatric evaluation 'for the limited, neutral purpose of determining his competency to stand trial,' is quite different from using such statements 'for a much broader objective that [is] plainly adverse to the defendant.") (internal citation omitted); *United States v. Zhou*, 428 F.3d 361, 380 (2d Cir. 2005). Thus, there simply are no attorney-client or work-product privileges at issue here.

In short, if this Court does not modify the district court's March 21st order as the district court has suggested, the defendant nonetheless has failed to show that the

original order's videotaping and disclosure provisions were erroneous at all, much less clearly erroneous. *In Re Morgan*, 506 F.3d at 713; *Fisher*, 263 F.3d at 912.

4. The Other Four Factors Do Not Justify Mandamus Relief

The lack of clear error should dispose of the defendant's mandamus petition, *Calderon*, 134 F.3d at 984, and the four remaining mandamus factors do not support relief. *In Re Morgan*, 506 F.3d at 712-13.

With regard to whether the defendant can seek relief on appeal or will be damaged in a way not correctable on appeal, *In Re Morgan*, 506 F.3d at 712-13, he has filed an interlocutory appeal of the district court's March 21st order in CA No. 11-10137. The defendant claims that he cannot adequately appeal the district court's order that he be sent to Springfield and that if the competency examination is performed "under the conditions he is challenging as unconstitutional, it cannot be unperformed." (Petition at pp. 6-7.) Yet, this Court has already denied the portion of the defendant's mandamus petition that challenged his placement in Springfield and has ruled that the competency evaluations can proceed. The only remaining issues concern whether any defense examination can be videotaped and whether the parties can receive copies of the tapes and evaluation reports. Thus, the reasons that the defendant cites in his petition to argue that appeal would be inadequate no longer

appear germane. Moreover, even if there was no adequate remedy by appeal, mandamus relief is not warranted, particularly considering the lack of clear error.

The final two remaining factors also do not justify mandamus relief. As in *In Re Morgan*, "there is nothing in the record before [this Court] that indicates an oft-repeated practice" of ordering videotaping of competency examinations and the disclosure of those tapes and reports. *In Re Morgan*, 506 F.3d at 713. "Finally, the fifth factor is of no help," because even if this case "presents a question of first impression in the Ninth Circuit, this fact alone does not justify the 'extraordinary remedy' of mandamus. *Id*. Thus, based on all of the factors, particularly the lack of clear error, the defendant is not entitled to mandamus relief.

C. **Conclusion**

For the foregoing reasons, this Court should order the modifications to the district court's March 21st order that the district court has suggested (appointment of an independent evaluator and precluding videotaping of the examinations), or in the alternative, confer jurisdiction on the district court for the limited purpose of allowing it to amend its own order, and deny the defendant's petition for writ of mandamus. If this Court does not permit modification to the district court's March 21 order, the mandamus petition should be denied in any event, because the defendant has failed

to show that the district court's order was clearly erroneous and that he is entitled to the "extraordinary" remedy of mandamus relief. *Cheney*, 542 U.S. at 380.

Respectfully submitted this 31st day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2011, I electronically filed the Response of the United States to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Christina M. Cabanillas
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