Defendant's Opposition to Motion to Preclude Expert Mental Health Testimony at the Guilt Phase and to Require Defendant to Undergo a Mental Examination Before Sentencing

Nov. 12, 1997

Contents

U.S. District Court, Eastern District, Sacramento

UNITED STATES OF AMERICA
Plaintiff,

V.

THEODORE JOHN KACZYNSKI,
Defendant.

CR-S-96-259 GEB

Date: November 12, 1997
Time: 1:00 p.m.
Hon. Garland E. Burrell, Jr.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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INTRODUCTION

The government sought and obtained an order that Mr. Kaczynski submit to a mental examination by government psychiatrists. The order was intended to ensure that the government had "access to the same type and quality of information upon which the defense intends to rely" in support of his mental state defense. Order, filed Sept. 19, 1997, at 7. The defendant failed to go forward with the examination, and now the government seeks sanctions for such failure. It is critical to understand what the government does and does not seek as sanctions.

The government does not seek an order precluding testimony on the issue of defendant's mental capacity "by any expert by whom he has been interviewed" – the sanction adopted by the government in its September 29, 1997, Motion To Compel Compliance, at page 10. The government does not seek an order precluding testimony by a defense psychiatrist – an arguably appropriate sanction for a defendant's refusal to be examined by government psychiatrists. The government does not seek an order of preclusion at the guilt phase only – an appropriate limitation in light of the fact that it was defendant's notice that he intended to present expert testimony "bearing upon the issue of guilt" under Federal Rule of Criminal Procedure 12.2(b), that triggered the court-ordered examination. Instead, the government asks the Court to preclude any testimony by a mental health expert – whether a psychiatrist or some other specialist, whether the expert has examined the defendant or not – at both the guilt and penalty phases of the trial. The draconian sanction sought by the government is unnecessary to provide the government access to the same information relied on by the defense experts, is without support in the law, and, if granted, would result in a manifest injustice in this capital case.

I. ANY REMEDY FOR DEFENDANT'S FAILURE TO COMPLY WITH THE COURT'S EXAMINATION ORDER SHOULD NOT EXCLUDE TESTIMONY FROM EXPERTS. EXCEPT FOR EXPERTS WHOSE TESTIMONY RELIES ON INFORMATION OBTAINED DURING A PSYCHIATRIC EXAMINATION OF THE DEFENDANT.

In its motion setting forth the conditions it sought for the examination of the defendant, the government advised the Court of the sanction it would seek if the defendant failed to comply with a mental examination:

If the defendant does not comply with the Court's order by submitting to the examination at the time set forth above, the government respectfully requests that he "be precluded at trial from presenting testimony upon the issue of his alleged mental capacity by any expert by whom he has been interviewed." United States V. Handy,

454 F.2d [885] at 888-89 [(9th Cir. 1971)] (and cases cited therein)

Government's Motion To Compel Compliance, filed Sept. 29, 1997, at 10. The indicated sanction advanced the government's claimed entitlement to parity, or a "level playing field," by precluding expert testimony that was supported by information to which the government experts were denied access.

Inexplicably, the government now ignores the Ninth Circuit authority it previously adopted and takes the unsupportable position that the Court should preclude all mental health expert testimony from the guilt and the penalty phases of the trial – even if the expert's testimony would not rely on any information gleaned from an examination and even if the expert never spoke to Mr. Kaczynski. Such an extreme sanction is virtually unprecedented in scope and far out-of-proportion to the degree the government conceivably may be "prejudiced" as a result of the defendant's failure to be examined by government experts. The government does not seek to level the playing field, but essentially asks for a guilty verdict and a death sentence before the trial begins.

Under Federal Rule of Criminal Procedure 12.2(d), the Court has discretion to impose a range of sanctions for failure to comply with the notice and examination requirements in Rules 12.2(b) & (c), including instructing the jury of defendant's failure to comply, granting a continuance, and limiting some or all of defendant's expert testimony. (1) See. e.g. United States V. Handy, 454 F.2d 885 (9th Cir. 1971) (approving of district court's order limiting some expert testimony), cert. denied, 409 U.S. 846 (1972); Karstetter V. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975) (trial court did not err in permitting the prosecution's psychiatric expert to testify that the defendant had refused to submit to a mental examination); see also People V. Mcpeters, 2 Cal.4th 1148, 9 Cal. Rptr.2d 834, 856, 832 P.2d 146 (1992) (upon defendant's refusal to submit to a court-ordered examination, court permitted the prosecution's psychiatrist to testify regarding the refusal) . Because the Court has engrafted the Rule 12.2 procedures on to this case through the exercise of its inherent authority, the appropriate sanction should take into account the reasons for defendant's non-compliance and should be carefully tailored in order to correct any disparity in the parties' positions that may have been caused by non-compliance.

Footnotes

1 The Court ordered a mental examination under its inherent powers, not under Rule 12.2. Order, filed Sept. 19, 1997. Nonetheless, the Court indicated that Rule 12.2(d) would guide the Court in deciding the appropriate remedy to apply if defendant failed to comply with the examination. Id. at 7; see also Fed. R. Crim. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district.")

2. For these reasons, cases where courts have precluded the defendant from presenting any mental health expert testimony as a sanction for defendant's failure to provide the notice required by Rule 12.2(b) are not illuminating in deciding the appropriate remedy for a defendant's failure to comply with an examination order. See Government's Motion To Preclude Testimony, at 5-6. Without the notice required by Rule 12.2(b), the government may be unable to effectively rebut defendant's expert mental condition testimony because it will not know to prepare its own experts or be prepared to cross-examine the defense experts. These cases, however, provide little support to exclude all mental condition expert testimony where a defendant provides timely Rule 12.2 notice, but merely fails or is unable to comply with an examination order.

3. Moreover, a total exclusion of defendant's mental health experts would also violate the Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause and the right against self-incrimination. In Taylor V. Illinois, 484 U.S. 400 (1988), the Supreme Court recognized that the Sixth Amendment right to offer testimony may be violated where a court's sanction entirely excludes the testimony of a material defense witness, despite the availability of lesser, appropriate remedies. Id. at 408-413. The court also explained that the "reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a detendant be permitted to offer testimony of witnesses in his defense." Id. at 417 n.23 (citing Washington V. Texas, 388 U.S. 14 (1967)); see United States V. Wade, 426 F.2d 64, 74 (9th Cir. 1970) (en banc) (an order that bars an insanity defense with respect to a defendant who is mentally unable to comply with an examination order would present "a grave constitutional question") . In light of the adequacy of lesser, more appropriate sanctions as set forth herein and the conditions surrounding defendant's non-compliance, see Dr. Foster Declaration, the government's request for total exclusion of defense expert testimony

would violate Mr. Kaczynski's rights under the Fifth and Sixth Amendments.

4. Karstetter is a habeas corpus case where the Ninth Circuit approved of the state court's decision to sanction the defendant's failure to submit to a mental examination by permitting the prosecution's expert to inform the jury of defendant/s refusal to comply. 526 F.2d at 1144. The government quotes broad dicta from Karstetter that cited Handy for the proposition that a defendant's refusal to submit to an insanity examination may be sanctioned by excluding defendant's experts' testimony on the insanity issue. Id. at 1145. Given that Handy approved only the lesser remedy of excluding testimony on the issue of defendant's alleged mental capacity from experts who interviewed the defendant, Karstetter's broad dicta is clearly not meant to apply to experts who will not testify on whether defendant has a reduced mental capacity or who have not conducted a psychiatric examination of the defendant.

5. Pursuant to the Court's order, defendant gave the government a more specific notice on October 9, 1997.

6. In a letter dated October 20, 1997, defense counsel providedthe government the names of the two expert witnesses described in the text, as part of its expert witness summaries under Fed. R. Crim. P. 16(b) (1) (C). The names of the two expert witnesses have not been disclosed in this pleading to protect their privacy. The letter to the government also provided the names and summaries of the testimony of two other expert witnesses. Defendant will not seek to introduce the testimony of these latter two witnesses in the guilt phase of trial, as a sanction for defendant's failure to comply with the examination order, as long as the Court permits the two experts identified in the text to testify.

7. The defense will provide the government with a summary of the testimony to be introduced through such witnesses, should it appear likely such witnesses will be called to testify.

8. 18 U.S.C. section 3593(c) states, in relevant part, that "[t]he government and the defendant shall be permitted to rebut any information received at the hearing."

9. Indeed, the Court stated that sections (c) and (d) of Rule 12.2 would apply to its order compelling Mr. Kaczynski to submit to a guilt phase examination.
In cases where the defense fails to provide timely notice that it intends to rely on an "insanity" or "diminished capacity" defense, the drastic sanction of exclusion of expert testimony may be appropriate to ensure that the defendant does not gain a tactical advantage through unfair surprise. See United States V. Veatch, 647 F.2d 995, 1002-03 (9th Cir. 1981) (notice filed on first day of trial) ; United States V. Caplan, 633 F.2d 534, 539 (9th Cir. 1980). (2) On the other hand, where, as here, the defendant

provides notice of an intent to present mental health expert testimony bearing on the issue of guilt, the government is made aware of the defense and can prepare before trial to rebut the defendant's case. The prosecution can have its mental health experts review all the evidence in its possession, can interview witnesses, can prepare for cross-examination of defense experts, and can undertake further investigation, if necessary. If the government is unable to present expert testimony encompassing a personal examination of the defendant, the court may likewise bar the defendant from presenting similar expert testimony that relies on an examination of the defendant as a basis for an opinion on his mental condition. Any greater sanction would go beyond merely "balancing the scales" or "leveling the playing field," and thus is not appropriate under Rule 12.2(d). The remedy should fit the violation. (3)

Indeed, the government acknowledged as much in its earlier brief when it quoted the Ninth Circuit's decision in United States V. Handy, 454 F.2d 885 (9th Cir. 1971). In Handy, the Court expressly approved the remedy whereby the district court precluded "testimony upon the issue of his alleged mental capacity by any expert by whom [the defendanti has been interviewed." Id. at 888 (emphasis added) ; see also United States V. Baird, 414 F.2d 700, 708 (2d Cir. 1969) ("It would still be open to the accused to present evidence of his own past behavior, of a family history of mental impairment and other relevant circumstances of his life, and alienists would still be afforded an opportunity on his behalf to give their opinions on his mental state or condition from hypothetical questions based on assumptions from evidence in the case") , cert denied, 396 U.S. 1005 (1970). No Ninth Circuit case has condoned the extreme remedy that the prosecution seeks in this case for defendant's failure to submit to a mental examination by government experts: the total preclusion of defendant's expert testimony. Rather, the Ninth Circuit has approved far less drastic sanctions for a defendant's failure to comply with a court-ordered psychiatric examination. See Karstetter V. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975). (4)

In this case, the defense filed its notice of intent to present expert testimony under Rule 12.2(b) on June 24, 1997, more than tour months before trial. 5/ The government sought to conduct a lengthy psychiatric examination in order to render an opinion whether the defendant suffered from a recognized mental disorder bearing on the issue of guilt. Long before the defense provided notice, however, the government had sufficient information to select and retain at least one forensic expert who began evaluating the voluminous written materials, including Mr. Kaczynski's journals and medical records, in preparing to rebut a potential mental state defense. By at least August of this year, the government had retained a second, equally qualified expert to review the life history documents, as well as to identify and interview life history witnesses. Indeed, as suggested by published news accounts, the unavailability of Mr. Kaczynski for examination has not hampered the government's ability to "conduct meaningful interviews with witnesses who have interacted with defendant and who may provide

evidence relevant to his contention that he has a mental disease, defect, or condition." Government's Motion For More Specific Notice Under Fed R Crim P 12 2(b) And For A Mental Examination Of The Defendant By The Government's Expert, filed July 30, 1997, at 5. Rather, the two government experts apparently have identified sufficient clinical necessity for conducting field interviews of Mr. Kaczynski's acquaintances, including former neighbors in Montana.

Moreover, the nature and scope of the interview, as requested by the government, sought information that was in excess of that available to the defense and unnecessary to diagnose the nature and severity of Mr. Kaczynski's mental condition. As reflected in the Declaration of David V. Foster, M.D., a reliable evaluation of Mr. Kaczynski's (5) condition and its functional impact can be made on the basis of his documented medical and social history, exclusive of any personal examination. Dr. Foster Declaration, at pp. 3-5. As further evidenced by Dr. Foster's declaration, the symptomatology manifested in Mr. Kaczynski's own writings includes a pathological dread of examination by psychiatrists. Dr. Foster did not discuss the alleged criminal conduct with Mr. Kaczynski, nor was such discussion necessary to formulate a professional opinion to a medical certainty that Mr. Kaczynski's conduct was the product of a sincere belief that he was defending himself against personal annihilation by an omnipotent organization of scientists and technocrats, against which he felt powerless. Id at p. 5.

Thus, the inability to subject Mr. Kaczynski to an examination does not deprive the government's experts of a fair opportunity to refute the bases of the defense experts' opinions. However, should the Court nevertheless conclude the lack of access to Mr. Kaczynski disadvantages the government's experts, the appropriate remedy would be to (1) instruct the jury as to the defendant's lack of compliance with the ordered examination, or (2) , at most to, preclude the defendant from presenting testimony from any expert who would rely on information from a psychiatric examination of the defendant in rendering an opinion regarding the defendant's mental condition. There are no grounds, however, for precluding testimony by mental health experts who are not psychiatrists, psychiatrists who do not rely on any contact with the defendant in forming their opinions, or psychiatrists who would testify on the general nature of a particular type of mental illness.

In particular, the Court should not exclude testimony of the following expert witnesses (6):

1. A licensed psychologist with expertise in clinical neuropsychology to testify solely as to the results of neuropsychological testing of the defendant.

The defense intends to introduce the testimony of a licensed psychologist with expertise in clinical neuropsychology regarding the results of a battery of neuropsychological tests administered to the defendant. These tests involve intellectual capacity,

perceptual, attentional, memory, language, problemsolving, behavioral regulation, and olfactory functions. The witness's scoring and results of these tests, together with the raw data, have been turned over to the government as part of defendant's reciprocal discovery obligations. The defense intends to present the opinion of this psychologist based solely on the objectively verifiable results of these tests. The psychologist did not ask Mr. Kaczynski any questions about any charged or uncharged crimes.

This testimony should not be barred, because the psychologist's testimony will be limited to an evaluation of Mr. Kaczynski's neurological development and functioning. The witness's testimony will be based solely on information that is in the government's possession. The government and the defense will be on a level playing field, because the defense expert will be relying on exactly the same data that is available to the government's experts. Absent a valid, scientifically based challenge to the reliability of the testing data and results, the government cannot claim any disadvantage in preparing to meet the defense evidence. Indeed, the standard of care in the field of neuropsychology militates against repeate'd testing. See. e.g. United States V. Beckford, 962 F. Supp. 748, 765-66 (E.D. Va. 1997) ("the Government proffers that it has 'consulted with several mental health professionals [who] uniformly indicated to the government that certain intelligence tests can be administered to a person only once in any one-year period due to the 'practice' effect of the test.' Thus, the Government apprehends that ... no valid retest will be possible within a useful time frame.") Thus, this psychologist should be permitted to testify solely concerning the results of neuropsychological testing on the defendant

2. A psychiatrist who met Mr. Kaczynski only in connection with his sleep deprivation problems.

Defendant also proposes to present a psychiatrist to testify that the defendant suffers from a chronic psychiatric disorder, as previously disclosed to government counsel. This psychiatrist met the defendant briefly while he was interviewed by a sleep-disorder specialist regarding ambient noise levels at his place of confinement and his sleep patterns. The witness was in the same room with Mr. Kaczynski for just over an hour and did not conduct a clinical interview. The witness's testimony will be based on a variety of information, including an analysis of defendant's writings, physical evidence from the cabin, and medical, educational, and psychological records – all sources available to government experts. The witness's testimony will not rely on any information discussed in the witness's presence regarding the defendant's sleep problems.

In addition to these expert witnesses, the defense should not be barred from presenting the testimony of any other experts who have not conducted a psychiatric examination of Mr. Kaczynski or who would testify only as to the general nature of a particular

mental iliness.(7)

II. THE COURT LACKS AUTHORITY TO ORDER THE DEFENDANT TO SUBMIT TO A PENALTY PHASE EXAMINATION.

The prosecution also moves for a mental examination of the defendant before the penalty phase of the trial to rebut the defendant's possible use of mental health expert testimony in the penalty phase. The prosecution requests that, if defendant fails to submit to a penalty phase examination, the defendant be barred from introducing any mental health testimony during the penalty phase. Government's Motion, at 8. Mr. Kaczynski opposes this request on the ground that there is no authority for ordering him to submit to an examination for the penalty phase of a capital trial. Moreover, if the Court were to order such an examination, the Court should set the conditions for the examination before it considers the government's extreme request for total preclusion of mental health expert testimony from the penalty phase, as a sanction for non-compliance.

The government erroneously argues that the Court's authority to grant a penalty phase examination flows from two sources: its right to rebut the information received at a capital sentencing hearing under 18 U.S.C. section 3593(c) and from the Court's inherent judicial authority. However, section 3593(c) does not provide for an examination. It speaks only in general terms of the government's right to rebut mitigating information presented by the defendant. (8) In this regard, it should be noted that the government expressly disavowed any claim that Federal Rule of Criminal Procedure 12.2(c) provided a right to compel an examination after the defendant provides notice of a possible mental condition defense under Rule 12.2(b), even though the terms of that rule could more easily be construed as according such a right than Section 3593(c) does. See Government's Motion For More Specific Notice And To Compel A Mental Examination Of The Defendant, filed July 30, 1997, at 7-8 n.5 (noting split of authority on question whether Rule 12.2(c) provides basis for mental examination where defendant provides Rule 12.2(b) notice).

Moreover, the Court lacks the inherent authority to order defendant to submit to a mental examination in connection with the penalty phase of a capital trial. In 18 U.S.C. section 3593, Congress set forth comprehensive procedures to be followed in a capital sentencing hearing. Section 3593 (a) requires the government to provide notice of its intention to seek the death penalty and to identify the aggravating factors it will seek to prove in support of the death penalty. Although Section 3593(c) provides that the prosecution may rebut evidence presented by the defense in mitigation, the statute does not require the defendant to provide notice of an intent to introduce expert testimony or to submit to an examination. Since Congress has established a detailed capital sentencing scheme, the Court should presume that any omissions

were intentional, see. e.g. Pittston Coal Group V Sebben, 488 U.S. 105, 119 (1988); Lorillard V. Pons, 434 U S 575, 582 (1978). It is one thing for a Court to rely on its inherent powers to fill in the perceived gaps in Rule 12.2, which requires mental examinations in analogous contexts, it is quite another for the Court to create such a power where no similar rule was included in a comprehensive statutory scheme.

If the Court determines that it may compel the defendant to submit to a mental examination in connection with the penalty phase, the Court should set conditions for the exam before it decides whether any sanctions would be appropriate if defendant failed to comply. The conditions for a penalty phase examination would likely be significantly different from an examination for the guilt phase, in light of the entirely different purposes of the guilt and penalty phases of trial. See United States V. Beckford, 962 F. Supp. 748, 764 (E.D. Va. 1997) (ordering that report of government experts' examination be sealed with the court until after conclusion of guilt phase of trial) . Moreover, it would be premature to determine the issue of sanctions before the Court decides whether it even has authority to compel a penalty phase examination or the conditions of such exam. Mr. Kaczynski notes that the Rules of Evidence do not appiy in the penalty phase and preclusion of mental health expert testimony in the penalty phase of a capital trial would violate his Eighth Amendment right to reliable sentencing and to consider and give full effect to evidence of mental illness, see Lockett V. Ohio, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original) (footnote omitted) ; Eddings V. Oklahoma 455 U.S. 104, 110-12 (1982) , Penry V. Lynaugh, 492 U.S. 302 (1989), in addition to his rights under the Fifth and Sixth Amendments. Section I at 6 n.3, supra.

CONCLUSION

The Court should not preclude the testimony of any defense mental health expert from the guilt phase of the trial, except for testimony that relies on a psychiatric examination of the defendant as part of the basis for the expert's opinion on defendant's mental condition. The Court should also deny the government's request for a penalty phase examination because of the absence of authority to order such an examination.

Dated: November 12, 1997.

Respectfully submitted,

(Proxy signatures for Quin Denvir and Judy Clarke)

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