Motion to preclude the defendant from relying on expert mental health testimony at guilt phase and to require defendant to undergo mental exam before sentencing

Nov 5, 1997

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

UNITED STATES OF AMERICA, Plaintiff, v. THEODORE JOHN KACZYNSKI, Defendant.	)))))))))))	CR NO. S-96-0259 GEB GOVERNMENT'S MOTION TO PRECLUDE DEFENDANT FROM RELYING ON EXPERT MENTAL HEALTH TESTIMONY AT THE GUILT PHASE AND TO REQUIRE THE DEFENDANT TO UNDERGO A MENTAL EXAMINATION BEFORE SENTENCING Date: November 21, 1997 Time: 1:30 p.m. Dept.: Garland E. Burrell, Jr.

The United States, through its undersigned attorneys, hereby moves for an order precluding the defendant from presenting expert testimony to show that he suffers from a mental defect, disorder, or condition at the guilt phase of trial. The government further moves for an order directing the defendant to undergo a mental examination before sentencing or suffer preclusion of his expert mental health testimony in the penalty phase.

I. BACKGROUND

On June 24, 1997, the defendant filed a "Notice Pursuant to Fed. R. Crim. P. 12.2(b)" stating his intention to introduce expert testimony "relating to a mental disease or defect or any other . mental condition of the defendant bearing upon the issue of guilt." In response, the government moved for more specific notice anti* for an order requiring the defendant to undergo a mental examination by government experts. The government's motion argued (at 7) that "[s]uch an examination is necessary to allow the government to provide meaningful expert testimony in response to the defendant's introduction of testimony concerning a mental defect, disease, or condition, *both at trial and at sentencing*." (emphasis added).

On September 19, 1997, this Court granted the government's motion. In ordering the defendant to undergo a mental examination by government experts, the Court concluded that "it would be unfair to the government to permit Kaczynski to use expert testimony without allowing the government the opportunity to prepare an effective means to rebut that testimony." 9/19/97 Order at 7. The Court found that a government mental examination "is the most trustworthy means for the government to verify Kaczynski's claims and should provide it access to the same type and quality of information upon which the defendant intends to rely." Ibid. The Court further held that Fed. R. Crim. P. 12.2(d), which provides for the exclusion of expert testimony as a sanction for failure to undergo a court-ordered mental examination, "shall govern any failure to comply with this Order." *Ibid.*

After the Court issued its order, the defense objected to virtually all of the conditions under which the government sought to conduct the mental examination. In particular, the defendant asserted that the government should be limited to a single expert; that the examination should last no more than 12 hours; and that the expert should not be allowed to ask the defendant any questions concerning any of his criminal conduct. On October 22, 1997, the Court rejected these objections and ordered the examination O'er go forward.[1]

On October 23, the defense informed the government by letter that "Mr. Kaczynski will not be participating in the examination." On October 24, 1997, when the government expressed its intention to go forward with the examination, the defense responded by noting that "the possible sanction for non-compliance" with the Court's order was an order precluding him from presenting expert testimony on the issue of mental capacity. That same day, the Court convened a telephone conference at which defense counsel agreed with the Court that Kaczynski was "defying [the Court's] orders of September 19, 1997, and October[2], 1997," and that, therefore, he would not undergo the examination ordered by the Court. Defense counsel further agreed that Kaczynski would "live with" "whatever the consequences" under Rule 12.2(d) of his refusal to comply with the Court's order. 10/24/97 Tr. 8.

[1] The Court upheld the defendant's objection to having the examination videotaped.

[2] As noted, after the Court directed the defendant to undergo the government mental examination, the parties disagreed over the extent, length, and scope of the examination. Although Kaczynski's counsel's letter to the government stated that Kaczynski declined to participate in the examination after learning of "the conditions of the examinations as specified in the order filed October 22, 1997," he did not offer to participate in a single examination of limited length and scope.

II. KACZYNSKI SHOULD BE PRECLUDED FROM PRESENTING EXPERT TESTIMONY IN SUPPORT OF A MENTAL DEFECT DEFENSE AT THE GUILT PHASE OF TRIAL.

In ordering the defendant to undergo a government mental examination, the Court specifically declared that Fed. R. Crim. P. 12.2(d) "shall govern any failure to comply with this Order." Rule 12.2(d) provides in part:

> If there is a failure ... to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

The Court acted well within its authority in adopting Rule 12.2(d) in this case. As the Court recognized in granting the government's motion, the Court has inherent authority to compel Kaczynski to submit to a mental examination. *See United States v. Phelps*, 955 F.2d 1258, 1264–65 (9th Cir.), *cert. denied*, 504 U.S. 989 (1992); *United States v. Malcolm*, 475 F.2d 420, 424 (9th Cir. 1973). To implement that authority, the court of appeals has recognized that a defendant's "refusal to talk to the [government's] psychiatrists" during a court-ordered examination "may be sanctioned by the court at the least by the exclusion of defendant's own experts' testimony." *Karstetter v. Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975); *see United States v. Caplan*, 633 F.2d 534, 539 (9th Cir. 1980). As the court of appeals explained in upholding an order requiring a federal defendant to undergo a government mental examination or suffer preclusion of his own expert testimony,

> It would indeed be anomalous if defendant were permitted to offer psychiatric testimony to support his offense of insanity, and by refusing to submit to an examination by a court -appointed psychiatrist preclude the Government from offering testimony to the contrary.

United States v. Handy, 454 F.2d 885, 888–89 (9th Cir. 1971) , *cert. denied*, 409 U.S. 846 (1972) . Similarly, the Supreme Court has held that "it would be artificial indeed" to hold that a court has the authority to issue a discovery order, but to "deprive the court of the power to effectuate that judgment." *United States v. Nobles*, 422 U.S. 225, 241 (1975) . Thus, the Court's inherent authority extended not only to ordering Kaczynski to undergo a government mental examination, but also to sanctioning his failure to comply with that order by excluding his expert mental defect testimony.

Kaczynski's refusal to comply with the Court's order plainly calls for exercise of that sanction. The Court's order directing the examination is indisputably lawful, and

the defendant has not even suggested that he has a valid reason or excuse for failing to comply with it. Instead, after three months of litigation over this issue, Kaczynski admits that he is simply defying the Court's order. His decision to do so is therefore both willful and contumacious. Moreover, unless the Court excludes Kaczynski's expert mental health testimony, his defiance of the Court's order will result in precisely the unfairness that the Court sought to prevent. As the Court recognized, a mental examination is "'the only reliable means of ascertaining the truth concerning a defendant's [mental status.]'" 9/19/97 Order at 7 (quoting *United States v. Albright*, 388 F.2d 719, 724 (4th Cir. 1968)). If, therefore, the Court does not exclude Kaczynski's expert mental health testimony, the jury will not hear effective rebuttal from the government and may form a distorted and one-sided view of Kaczynski's alleged mental condition. Accordingly, this Court should apply the sanction contemplated in its September 19, 1997, order and preclude the defendant from introducing "any expert witness offered by the defendant on the issue of the defendant's guilt."

That sanction finds ample support in the caselaw. For example, many courts have concluded that a defendant may be precluded from putting on expert testimony concerning a mental defect or insanity defense merely for failure to give timely notice of that defense. *See United States v. Castro*, 15 F.3d 417, 421 (5th Cir.), *cert. denied*, 115 S. Ct. 127 (1994); *United States v. Cervone*, 907 F.2d 332, 346 (2d Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *United states v. Buchbinder*, 796 F.2d 910, 915–6 (7th Cir. 1986); *United States v. McLernon*, 746 F.2d 1098, 1115 (6th Cir. 1984); *United States v. Dill*, 693 F.2d 1012, 1015 (10th Cir. 1982). Kaczynski's deliberate disobedience to the Court's order is more deserving of a preclusive sanction, not only because it is contumacious, but because the Court lacks any other measure to remedy the defendant's failure to comply with its order. Thus, a court may be able to redress a defendant's untimely notice under Rules 12.2(a) or (b) by granting the government a continuance to prepare to meet the defendant's expert mental defect testimony, but it cannot provide an effective substitute for an expert mental health examination. Because the defendant has deprived the government of the most valid and reliable method to rebut his expert mental health testimony, he should be precluded from introducing expert testimony in support of his mental defect defense.

The Court should also exclude the defendant's expert psychiatric or psychological testimony to sanction the defendant's contumacious conduct and vindicate its own authority. A court has the authority to impose such a preclusive sanction when a defendant willfully violates a court order. See *Taylor v. Illinois*, 484 U.S. 400, 415 (1988); *United States v. Nobles*, 422 U.S. at 241; *United States v. North*, 708 F. Supp. 389, 396 (D.D.C. 1988); *see also Chappee v. Vose*, 843 F.2d 25, 28 (1st Cir. 1988) ("accused's right to present a defense ... may be limited in instances when he has figuratively thumbed

his nose at applicable requirements of pretrial discovery").[3] Moreover, the sanction of civil or criminal contempt, by which a court may seek to vindicate its authority over a recalcitrant defendant, is unlikely to be effective against a defendant in a capital case. Indeed, "[t]he risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years." Taylor v. Illinois, 484 U.S. at 413–14.3 For these reasons, the only effective method of sanctioning the defendant and enforcing the Court's authority is to preclude the defendant from presenting any expert mental health testimony at trial.

III. KACZYNSKI SHOULD SUBMIT TO A GOVERNMENT MENTAL EXAMINATION OR BE PRECLUDED FROM PRESENTING EXPERT TESTIMONY IN SUPPORT OF A MENTAL DEFECT DEFENSE AT THE PENALTY PHASE OF TRIAL.

The government moved for a mental examination of the defendant to rebut the defendant's mental defect defense at trial and to respond to the defendant's use of expert mental health testimony at sentencing. Since the government filed its motion, the defendant has confirmed that he may rely on his asserted mental condition as a mitigating factor in the penalty phase. Thus, in seeking discovery from the government, the defendant stated that the "potentially applicable mitigating factors" at the penalty phase include impaired capacity" to "appreciate the wrongfulness of his conduct" (18 U.S.C. § 3592(a)(1)) a and "severe mental or emotional disturbance" (18 U.S.C. § 3592(a)(6)). *See* Defendant's Motion to Compel Discovery and to Clarify the Government's Further Discovery Obligations at 4 (filed September 12, 1997). The defendant's refusal to undergo a pretrial mental examination, combined with his potential reliance on his mental state at sentencing, requires the government to ask the Court to direct the defendant to undergo a government mental examination prior to the penalty phase.

The considerations that led the Court to require the defendant to undergo a mental examination at the guilt phase apply with equal force to the penalty phase. Therefore, if the defendant intends to introduce expert mental health testimony at sentencing, he should be required to undergo a mental examination by government experts. If the defendant refuses to undergo a government mental examination prior to sentencing,

[3] As *Taylor* and *Nobles* make clear, the defendant's deliberate defiance of the Court's order and the lack of other available sanctions overcome the defendant's right under the Sixth Amendment to produce witnesses in his favor. *See Taylor*, 484 U.S. at 415; *Nobles*, 422 U.S. at 241.

he should be precluded from introducing expert mental health testimony during the penalty phase.

The Court's authority to grant that relief flows from the government's statutory right to "rebut any information received at the [sentencing] hearing," 18 U.S.C. § 3593, and from the Court's inherent judicial authority. Indeed, three courts have recently ordered defendants in capital cases to provide notice of intent to rely on mental health evidence at sentencing and to undergo a government mental examination to rebut that testimony. *See United States v. Beckford*. 962 F. Supp. 748 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406 (D.N.M. 1996); *United States v. Vest*, 905 F. Supp. 651 (W.D. Mo. 1995). In each case, the court concluded that "the Government's statutory right of rebuttal provides implicit authority to require notice, examination, and conditions in order to make the right of rebuttal meaningful." *Beckford*, 962 F. Supp. at .760; *see Haworth*, 942 F. Supp. at 1407–08; *Vest*, 905 F. Supp. at 653.

In particular, the statutory right to rebuttal would be "rendered meaningless" "unless a government-selected mental health expert is permitted to examine defendant." *United States v. Vest*, 905 F. Supp. at 653. Thus, the *Vest* court concluded, in language that echoes this Court's order directing the defendant to undergo a mental examination, that "[u]nless the government is allowed to conduct its own mental health examination, it may be deprived 'of the only effective means it has of controverting ... proof on an issue that [defendant has chosen to] interject[] into the case." *Id.* at 653 (quoting *Estelle v. Smith*, 451 U.S. 454, 465 (1981)). Likewise, in *Beckford*, the court concluded that "the Government's ability to rebut a defendant's evidence of mental condition would be sharply curtailed, if not eviscerated, if notice of a mental health defense is not required and, if, thereafter, the Government is not afforded the opportunity to have the defendant examined by an independent mental health expert." *Id.* at 758. *Accord Haworth*, 942 F. Supp. at 1408.

In short, Kaczynski has no more right to introduce unrebutted expert mental health testimony at sentencing than he does at the trial phase. This Court should therefore exercise its authority to require the defendant to undergo a mental examination or suffer preclusion of his expert mental health testimony at sentencing.

Respectfully submitted,
PAUL L. SEAVE
United States Attorney
By: [signed]
ROBERT J. CLEARY
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Special Attorneys to the
U.S. Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on November 5, 1997, she served a copy of the GOVERNMENT'S MOTION TO PRECLUDE DEFENDANT FROM RELYING ON EXPERT MENTAL HEALTH TESTIMONY AT THE GUILT PHASE AND TO REQUIRE THE DEFENDANT TO UNDERGO A MENTAL EXAMINATION BEFORE SENTENCING by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Sacramento, California or by depositing said envelope and contents in the inter-office mailbox at the Clerk's office, Federal Building, Sacramento, California, or by hand delivery.

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[signed]
SANDRA CALLAHAN

United States District Court
for the
Eastern District of California
November 4, 1997 —

* * CERTIFICATE OF SERVICE * *

2:96-cr-00259

USA
v.
Kaczynski

_ _ _ _ _ _ _ _ _ _ _ _

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 4, 1997, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Jack L. Wagner, Clerk

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