UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Jared Lee Loughner,

Defendant.

CASE NO. 11cr0187 TUC LAB

DISTRICT COURT'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Thank you for inviting my response to the defense's emergency petition for writ of mandamus. I write to make two points.

First, I was mistaken, in the first instance, to authorize the defense to commission *its own* examination of Mr. Loughner's competency. Under 18 U.S.C. § 4247(b), ***the court*** designates the examiner for any competency examination it orders pursuant to 18 U.S.C. § 4241. Section 4247(b) does allow for "more than one . . . examiner" if the court finds this would be appropriate, but that additional examiner must still be designated by ***the court***. (Defendants may, under § 4247(b), ask to select their own, additional examiner for competency examinations ordered pursuant to 18 U.S.C. §§ 4245, 4246, or 4248, but Mr. Loughner's examination was not ordered pursuant to those statutory provisions.)

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I made this mistake in an attempt to accommodate the defense's concern, which I explicitly do not share, over the impartiality of Bureau of Prisons staff.[1] I therefore propose striking from my original order the allowance that "[d]efense counsel may retain an independent medical expert to conduct a separate mental competency examination of the defendant." (Order Re: Competency Exam, Doc. No. 165 at 6.) I also propose striking 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.* at 4.) Both statements were inartfully worded and manifest a misunderstanding of § 4247(b). That said, I do have the authority under § 4247(b) to appoint "more than 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 this case, the Court finds it appropriate to authorize an independent competency exam." (Order Re: Competency Exam, Doc. No. 165 at 4 n. 1.) 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.

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." (Emergency Motion For Stay, Doc. No. 168 at 6.) The effect of adopting the proposed modification to my March 21 order is that the stay of the order, to the extent it "directs that any defense-retained examiner shall prepare a formal written report and provide

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[1] *See* Defendant's Requests Re: Competency Procedures, Doc. No. 159 at 3–4 ("To ensure that the examiner both be and appear to be impartial, counsel further request that the Court not appoint any examiner employed by the government, and specifically object to any evaluation by Bureau of Prisons employees."); Order Re: Competency Exam, Doc. No. 165 at 4 n. 1 ("The Court emphasizes that no reason has been shown at this point to question the objectivity of the medical staff at the Springfield MRC."); Amended Order Denying Motion for Stay and Reconsideration, Doc. No. 175 at 4 ("The Court does not share the defense's apparent cynicism of medical staff at the Springfield MRC, and at this point will defer to their professionalism and experience.").

the report to the district court and government counsel," would become moot. (Order, *Loughner v. United States District Court*, Case No. 11-70828, Doc. No. 3 at 1.) There would no longer be a distinction between a court-ordered competency examination and the defense's own competency examination. Instead, there would be two court-ordered examinations.

Second, while I am largely indifferent to whether Mr. Loughner's clinical interviews in either court-ordered examination are recorded, I do believe video recordings would inform both *my own* determination of whether Mr. Loughner is competent to stand trial *and* the parties' understanding of the basis for the examiners' opinions. The defense requested this accommodation, in part, "to create a full and reliable record of the basis of the evaluator's opinion," and on that basis I granted it.[2] Developing a full clinical record should not be a windfall to the defense, however. As my order denying the defense's motion for reconsideration makes clear, there may be an adversarial hearing on the issue of Mr. Loughner's competency, and neither party is entitled to the advantage of superior information going into that hearing. I believe Mr. Loughner is amply protected against the adverse collateral use of any video recordings by Supreme Court case law, 18 U.S.C. § 4241(f), and Rule 12.2(c)(4), as I explained in my March 24 amended order.

That said, in its motion for reconsideration the defense asked the court, at the very least, to "strike the requirement that a videorecording be made of all defense examinations" and to "order any recordings of the court-ordered evaluation be made available only to defense counsel, or that no recording be made at all." (Emergency Motion For Stay, Doc. No. 168 at 12.) Likewise, the Government, in its opposition to the motion for reconsideration, concedes it "would be well within the Court's discretion to order no recording of the competency evaluations." (Response To Emergency Motion To Stay, Doc. No. 170 at 2.)

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[2] "In order to safeguard Mr. Loughner's Sixth Amendment rights, as well as to create a full and reliable record of the basis of the evaluator's opinion, counsel requests that provision be made for observation by the defense counsel of the examination by live video feed, that the examination be videotaped, that the videotape be secured, and be disclosed only to defense counsel." (Defendant's Request Re: Competency Procedures, Doc. No. 159 at 5.)

The Government also argues that "[t]o avoid any possible issues that the defendant has articulated, however, and because he has not shown he is entitled to videotape pre-trial competency evaluations, this Court can simply order that no recording will occur." (*Id.* at 4 n. 3.)

Perhaps the best solution is simply to strike from my order any requirement that the clinical interviews of Mr. Loughner be video recorded. But I must adhere to my view that if the interviews are to be recorded, adversarial fairness dictates that the parties should have equal access to them.

DATED: March 25, 2011

HONORABLE LARRY ALAN BURNS
United States District Judge