IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re JARED LEE LOUGHNER	)	U.S.C.A. No. 11-70828
_____	)	U.S.D.C. No. 11CR187-TUC (LAB)
	)	
Jared Lee Loughner,	)	
Petitioner;	)	
	)	**PETITIONER'S REPLY TO**
U.S. District Court for the	)	**DISTRICT COURT AND**
District of Arizona,	)	**PROSECUTION'S RESPONSE**
Respondent;	)	**TO PETITION FOR WRIT**
	)	**OF MANDAMUS**
United States of America,	)	
Real Party in Interest.	)	
_____	)	

INTRODUCTION

Petitioner Jared Lee Loughner files this Reply to the Responses by the District Court and the United States of March 28 and 31, 2011. [DE 5, 6].

The district court acknowledged a mistake in authorizing a defense-commissioned evaluation of Mr. Loughner's competency to stand trial under 18 U.S.C. §4247(b), and has now recommended modification of its March 24, 2011, Order to provide for a second *court-ordered* evaluation. The district court concludes that this modification moots one of the two currently pending mandamus issues, specifically the compelled production of a defense evaluator's report to the government. The Government suggests mooting the second issue, concerning production of videotapes of the evaluation(s) to both parties, by deleting the

videotaping requirement altogether. Regardless, the Government argues, the issues before the Court are not properly addressed on mandamus.

CONSTITUTIONAL ISSUES

The district court suggests that the defense is attempting to "orchestrate, oversee, or have privileged access to" the competency evaluation(s) and rejects the defendant's Fifth and Sixth Amendment arguments about the profound constitutional implications of providing videotapes of Mr. Loughner's clinical interviews to government counsel. *See* March 28, 2011, Dist. Ct. Response, DE 5 at 2. The district court summarily dismisses any such concerns, concluding that the information obtained from, and the statements made by Mr. Loughner during these compelled evaluations are protected from *use* outside of the competency process. *See id.*, at p. 3 ("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."). The government seems to recognize that providing it with unfettered access to many hours of video recordings from compelled examinations might be problematic but proposes to solve the problem by having "this Court simply strike from the district court's March 21st order 'any requirement' that the competency interviews 'be video recorded.'" March 31, 2011, Govt. Response, DE 6-1 at 9. In short, the Government's solution is to remove the

defendant's primary protection against incomplete or misleading rendering of his statements, his behavior, and his affect during the court-ordered evaluation. The government's stance on the question of *use* is also more ambiguous than the district court's. While it insists on the one hand that the court-appointed examiner is a neutral person who will determine "simply whether the defendant is competent to stand trial," the Government on the other hand suggests that it will ultimately be entitled to use the defendant's statements against him as rebuttal evidence at trial. *Id.* at 15 (citing *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")). Missing from the Government's response altogether is an appreciation of the constitutional gravity of any compelled intrusion into a criminal defendant's thoughts and emotions. No matter how justified, countless hours of compelled interviews are not like a fingerprint or a booking photo, and no constitutional system that respects the integrity and autonomy of the individual citizen would treat this sort of interaction as though the government and an accused citizen were equal adversaries with equal rights to record and review the defendant's innermost thoughts. That the defendant's rights are paramount here is self-evident; the question is how this salutary constitutional imbalance should find expression.

The defense seeks video recordings of the compelled evaluations for two reasons: (1) to be able to gauge whether the evaluator obtained an accurate appreciation of the depth of Mr. Loughner's mental impairments and their effects on his capacity to assist counsel and have a rational and factual understanding of the proceedings, and (2) to protect Mr. Loughner's substantial rights. After all, it is the defense team members who have spent time with him and who continue to struggle to understand the impact of his mental illness on his capacity to stand trial.[1] And it is defense counsel who bear the primary responsibility of asserting his constitutional and statutory protections. Obviously, should the defense use the videotapes in litigating the issue of competency, the government would be entitled to examine and use any relevant portions of the same recordings. But it is the defense, not the Government, who needs the recordings in the first instance.

1 At the core of the competence decision is the capacity of the defendant to work with counsel, and counsel's ability to engage in an interactive dialogue about the multiple layers of issues arising in a capital case. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.5(C) ("Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case [list omitted].") Here, the video recordings will assist defense counsel in this most critical process.

The ABA Mental Health Standards say it clearly:

> All court-ordered evaluations of defendant initiated by the prosecution should be recorded . . . if possible, on videotape, and a copy of the recording should be provided promptly *to the defense attorney. The defense may use* the recording for any evidentiary purpose permitted by the jurisdiction. If the defense intends to use the recording at trial, it should notify the court. Upon receiving notice, the court should promptly provide to the prosecution a copy of the recording. Upon defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.

ABA Standards for Criminal Justice: Mental Health, Standard 7-3.6(d) at 100 (1986) (emphasis added). As the ABA standards provide, only the defense should receive a copy of the examination videotape; the government should receive a redacted version *only* "[i]f the defense intends to use the recording at trial" and when the defense provides such notice to the court. *See also id.*, Standard 7-3.6(c) (iii) ("The prosecutor may not be present at any mental evaluation of the defendant."). The commentary explains this as an important constitutional protection for the defendant:

> The sixth amendment right to adequate representation by an attorney is protected under the standard by the requirement that all court-ordered evaluations initiated by the prosecution be recorded, preferably through videotaping, and by the further requirement that a copy of the recording be supplied to defense counsel.

Id. at 107 (commentary to paragraph (c)).

In short, there is nothing unusual or unreasonable about our request that the court compelled evaluations be video recorded and that they be provided to defense

counsel *only*. Indeed, we would be remiss in not seeking video recordings of these compelled evaluations under the circumstances of this case.

With these constitutional considerations in mind:

(1) We agree that by clarifying that the second §4247 evaluation will be by a court-appointed evaluator and by removing any requirement that video recordings or *defense* work product be produced to the government, the district court's proposed modification renders moot one of the two questions this Court has directed be addressed on mandamus.

That said, the government appears to adopt an extreme interpretation of the district court's suggestions with which the defense disagrees. Specifically, the government suggests in broad language that the district court's proposed modifications mean "that the defense is not entitled to a separate defense competency examiner" and then cites an unpublished magistrate's order out of the Western District of North Carolina in which the magistrate denied the defense request to retain an independent expert for the purpose of rebutting a BOP competency finding. *See* DE 6-1 at 8 n.4 (citing *United States v. Owle*, 2010 WL 3259790 (W.D.N.C. 2010)). To the extent that the district court intended any of its modifications to hinder or prohibit access of an independent, defense-retained expert to Mr. Loughner for purposes of these competency proceedings—regardless of who the court-appointed evaluators may be,

or if this Court views such modifications as incorporating such limitations, the defense requests the opportunity for further briefing.[2]

(2) We continue to seek defense-only access to video recordings of the court ordered evaluations. Alternatively, if the video recordings are to be produced to the

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2 As a preliminary matter, the government's position appears to be rooted in a misunderstanding of the competency statutes. The relevant provision, 18 U.S.C. § 4247(b), concerns whether the defense may *select* an examiner who is appointed by the court. Indeed, by its own terms, it is limited to examinations "ordered" pursuant to the court's authority under §4241 *et seq.* In certain proceedings (those under sections 4245, 4246, and 4248, but not 4241, 4243, or 4244), the defendant gets to "select[]" one of the two or more court *court-appointed* examiners—that is, the defendant gets to pick an expert who then answers to the court and is paid out of court funds. *See* 18 U.S.C. § 4247(b). Nothing about this provision concerns the defendant's right to *retain* or *commission* its own expert to act as an agent of the defense, to be paid out of defense funds. In fact, the statutes expressly contemplate that the defense might hire its own expert, *see* 18 U.S.C. § 3006A(e)(2) (authorizing counsel for indigent defendants to "obtain . . . investigative, expert, and other services without prior authorization if necessary for adequate representation"), for the purpose of "present[ing] evidence" at the competency hearing. 18 U.S.C. §4247(d). Indeed, the case law makes clear that the defense's ability to secure a "select[ed]" expert under §4247(b) boils down to a question of *funding source*, not whether the defense gets an expert at all. *See United States v. Rogalsky*, 575 F.2d 457, 459 (3d Cir. 1978) (defense expert retained for proceedings under §4244, the predecessor statute to §4241, should have been paid for out of §3006A funds, not §4244 court funds because he was a defense-retained expert, not a court-appointed one). Nothing about §4247 abrogates the defense's right to retain its own experts. *See United States v. Rinchack*, 820 F.2d 1557, 1564-65 & n.9 (11th Cir. 1987) (in case involving §4241 competency proceedings, recognizing that "the appointment of an expert pursuant to some other statutory section cannot be a substitute for a defense expert appointed pursuant to Section 3006A(e)"). In an abundance of caution, this Court should clarify this point of law in the interest of justice and judicial efficiency, and to avoid probable re-litigation of the issue in light of the government's reading of the district court's proposed modifications.

government, we ask that this Court direct that neither the video recordings, the information contained in them, nor any information or evidence obtained from their use be used in any way against Mr. Loughner in any proceedings other than on the issue of his competency to stand trial.

A related issue remains outstanding. That is the use to which information obtained by the court-appointed BOP evaluator from defense counsel may be put.[3] Already, the BOP evaluator at Springfield has asked defense counsel to provide information to her, and to discuss with her counsel's interactions with Mr. Loughner. We appreciate the evaluator's need for information from the defense and very much want to provide it. However, absent a protective order by the Court, or an agreement from the government, the risk that defense disclosures of privileged attorney-client interactions to a court-appointed evaluator will be deemed a waiver of the attorney-client and work-product privileges is too great. The entire problem would be solved immediately, of course, if the Government would give reality to its assurance that "the competency determination is not concerned with guilt or innocence, but simply whether the defendant is competent to stand trial," DE 6-1 at 17, by providing written

3 We continue to request full briefing on the issues raised in the interlocutory appeal, including seeking a stay of the competency evaluation pending resolution of these issues. In all likelihood, the challenge to Mr. Loughner's removal to Springfield, and the other conditions of the district court's March 21, 2011 order, will be rendered moot if a stay is not granted.

assurance that the Government will forgo any use of defense disclosures made in connection with the competency determination for any other purpose whatsoever—including cross-examination and rebuttal at both trial and sentencing. But absent such assurance, defense counsel must assume that the government will make every effort to use any defense disclosures for whatever advantage it might obtain from them at trial. *See generally*, *Buchanan v. Kentucky*, *supra*. Thus, we again ask for a protective order sufficient to permit defense to assist the court-appointed evaluators as requested.

ADDITIONAL ISSUES CONCERNING THE DISTRICT COURT'S PROPOSED CHANGES

However this Court rules on the above-addressed issues, the district court's proposed modifications continue to raise concerns that have not been addressed because they leave unchanged the provisions of the March 21st order that require production and disclosure of a written report by all "examiner(s)" by May 11th. Order Re: Competency Exam, March 21, 2011, at 6 (attached as Exhibit A to DE 1). This language, on its face, appears to encompass defense-retained examiners. It must be clarified to specifically provide an exception for defense-retained experts. The proposals also fail to alleviate the requirement that any defense examination occur before April 29, 2011. *See id.* at 4. Any order by this Court should allow the defense an adequate opportunity to perform an independent examination within a reasonable

time period after this Court issues its decision and the court appointed evaluators have completed their work.

Respectfully submitted,

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