

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA *
Plaintiff * CRIM. NO. 00-000
vs. *
DEFENDANT *
Defendant *
* * * * *

**MEMORANDUM OF LAW CONCERNING ANNOUNCED TESTIMONY
DIRECTED TOWARDS MENTAL DISEASE, DEFECT AND
MENTAL CONDITIONS OF THE DEFENDANT BEARING
UPON THE ISSUE OF GUILT**

TO THE HONORABLE DANIEL R. DOMINGUEZ
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW co-defendant, represented by the Federal Public Defender, and respectfully
STATES and PRAYS:

I. Introduction

1. On January 18, 2000, the undersigned filed Notice of it's intent to present expert testimony directed towards mental disease, defect and mental conditions of the defendant bearing upon the issue of Guilt.
2. At the hearing held on the same day the issue of this Notice was discussed.
3. At that time the Court decided that the issue of defendant's mental condition had to be one directly related to an insanity defense, that is, that the defendant was inimputable at the time of the events. The Court determined that if the expert testimony was not directly directed to that issue the

same then became pertinent only at sentencing, and therefore would be excluded from being presented.

4. The defense understands that under current First Circuit case law it can present expert psychiatric testimony directed towards mental disease, defect and mental conditions of the defendant bearing upon the issue of Guilt without presenting an insanity defense, and presents the following Memorandum of Law in support of it's position.

5. The above also forces the discussion of other related issues, including the examination of defendant by government's expert, whether this examination is to be conducted in a custodial or in a non-custodial setting. The Memorandum will address this issues as well.

II. Admissibility of Expert Testimony

6. The Insanity Defense Reform Act of 1984¹, (IDRA), 98 Stat. 2057, established, that:

“It is an affirmative defense to a prosecution under any Federal Statute that, at the time of the commission of the acts constitution the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature ad quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.”

7. At a first glance it may appear the with this Act Congress abolished the diminished capacity defense. That is not the case. The amendments introduced meant that this defense of mental disease or defect rather had to conform the limitations therein imposed. Indeed, soon after the implementation of IDRA the U.S. Court of Appeals for the First Circuit recognized that “diminished capacity is an accepted defense”. *U.S. vs White*, 766 F. 2d 22 (1985), at 24.

¹ This act is also referred to as the Comprehensive Crime Control Act of 1984, 18 U.S.C. 20 (a). This is also the language of the current Rule 12.2 (b) of the Federal Rules of Criminal Procedure.

8. Various Courts belonging to the First Circuit have appraised the defense, and have determined it admissible. In *U.S. vs Marenghi*, 893 F. Supp. 85, 89 (D. Maine, 1995) the Court stated: “This Court concludes, as did the trial court in *Saban Gutierrez*² [a District of Puerto Rico case], that the IDRA does not preclude the admissibility of psychiatric evidence to directly negate mens rea”

9. As recently as *U.S. vs Schneider*, 111 F. 3d 197, 201 (1997) the First Circuit determined:

“Aside from the final sentence of section 17 (a), **in principle there should be no bar to medical evidence that a defendant, although not insane, lacked the requisite state of mind.** As LaFave and Scott say:

The reception of evidence of the defendant’s abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged.

1 LaFave & Scott, Substantive Criminal Law, sec. 4.7 at 530. The circuits that have considered the question have taken this view. **After all, if the state of mind is a potential issue - as it is in most but not all criminal cases - why should expert medical testimony be excluded out of hand?**

We doubt that the final sentence of section 17 (a) was intended to exclude mental-condition evidence short of insanity. *Pohlot* canvassed the arguments and legislative history at length, and concluded (1) **that the statute does not preclude a defendant from offering evidence to negate a requisite state of mind**, but (2) that - apart from such a negation - it does preclude any other new and different defense of diminished responsibility to excuse or mitigate the offence. *Pohlot*’s analysis seems to us persuasive on both issues.

Similarly, our own decisions in *White* and *Kepreos* were not intended to establish a general rule that mental-condition evidence is always inadmissible except in relation to insanity.”

² *U.S. vs Saban Gutierrez*, 783 F. Supp. 1538 (D. Puerto Rico, 1991).

10. As defined in *U.S. vs White*, 21, F. Supp. 2d 1197 (E.D. California, 1998), at 1200, “a insanity defense is differentiable from a diminished capacity defense. The insanity defense operates to completely excuse the defendant whether or not guilt can be proven while **the diminished capacity defense is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines a crime.**” (Citations deleted)

11. All the above acquires particular pertinence when it is considered that Mr. Defendant is charged with a **crimes of specific intent**, namely importation of narcotics with intent, 21 U.S.C. 952 (a), and possession with intent to distribute 21 USC 841 (a)(1).

12. Considering the arguments rendered, it becomes clear-cut that the defense raised in this case can be presented as an issue separate and distinct from insanity, with it’s own standards of proof and requirements.

III. Examination of Defendant by Government’s Expert

13. Having established that the current controlling case law allows defendant to present a defense of diminished capacity, the next question is the Government’s right to examine defendant.

14. Defendant has presented his notice, and will present the testimony under Rule 12.2 (b) of the Federal Rules of Criminal Procedure (F.R.C.P.), which states in it’s pertinent part:

“It is an affirmative defense to a prosecution under any Federal Statute that, at the time of the commission of the acts constitution the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature ad quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.”

15. Courts have determined that when the issue of psychiatric expert testimony arises in the context of F.R.C.P. 12.2 (b) the Government does not have a **right** to submit the defendant to an

evaluation by it's expert. Rather, any possibility of an examination by the Government resides in the Court ordering the same under it's inherent power to supervise proceedings, and only if the Court deems it necessary. The examination not arising as a matter of right, the manner in which the same is to be conducted varies greatly from the Government's examination under an insanity defense per Rule 12.2 (a) pf the F.R.C.P.

16. *U.S. vs Davis*, 93 F. 3d 1286 (1996), decided by the Fifth Circuit, presented a similar procedural situation. The Court of Appeals stated that, when the notice is given under Rule 12.2 (b) of the F.R.C.P., "... the district court lacked the authority to order the commitment and examination of the defendant under either Criminal Rule 12.2 (c) or 18 USC 4241 and 4242.". In that case the defense gave notice of intent to offer the defense of diminished capacity and/or incapacity to form specific intent pursuant to rule 12.2 (b).

18. At page 1291 the *Davis* Court stated:

Clearly, the defendant could not be committed for the purpose of conducting a psychological or psychiatric evaluation pursuant to 18 USC 4242.Defendant did not give notice of her intent to rely on the defense of insanity, and disclaims such intent. Rather, **she gave notice of her intent "to introduce expert testimony relating to a mental disease or defect or any other mental condition bearing upon the issue of guilt.**

Section 4242 neither permits nor requires a court-ordered examination by the Government regarding defendant's "mental condition" at the time of the alleged offence when the defendant gives notice of her intent to rely on expert testimony on the subject.

.....

On the other hand, the facts on which the defendant is required to give notice under subdivisions (a) and (b) differ, in a highly significant way. **Subdivision (a) directs the defendant to give notice of his or her intent "to rely upon the defense of insanity" while subdivision (b) directs the defendant to give notice of her or**

his intent “to introduce expert testimony ...”. As Congress has already recognized in 18 USC 4242, an insanity defense will necessarily put in issue a very specific question regarding the defendant’s mental condition at the time of the offence, and will therefore require that the government be permitted to examine the defendant. By contrast, the introduction of expert testimony regarding a mental condition, disease, or defect does not particularly suggest the need for an examination of the defendant, let alone require it.

The kinds of expert testimony which could be presented regarding the defendant’s mental condition may vary widely. ... Expert testimony may generally describe the effects of a particular condition, relying on other evidence to establish the defendant suffered from that condition, or it may particularly concern the defendant, based upon examination or observation.

.....

The commentary notably does not suggest the government would be prejudiced if it were not given sufficient notice to enable it to examine the defendant. As the commentary implies, the government can prepare to meet expert defense evidence in a variety of ways, including the retention of a government expert to attend at trial and assist the government in cross examination, and review of evidence relied upon by the defense expert. Thus the need for advance notice of expert evidence does not imply a court-ordered examination of the defendant is intended or appropriate. **The commentary to Rule 12.2 (b) does not demonstrate the drafters intended the notice to prompt a court ordered examination of the defendant under Rule 12.2 (c).**” (Emphasis provided)

19. This case, and it related jurisprudence, indicates that the Court has the power, after a case by case examination of the facts, to order the mental examination not as a matter of right for the Government but as an exercise of the Court’s inherent power to direct proceedings. The Davis Court established, at 1295:

“While neither Rule 12.2 (c) nor 18 USC 4241 and 4242 authorizes a district court to order a custodial pretrial examination of the defendant concerning his or her mental state at the time of the offense, **the statute and rule do not displace extant inherent authority to order a reasonable, noncustodial examination of a defendant under appropriate circumstances.** The extent of this authority of course must be determined on a case by case basis. The district court here has the

inherent authority to order an examination of the defendant, provided the examination is both reasonable and non-custodial.”

20. Since such an examination does not arise as a matter of right, the manner in which the same is to be conducted should be differentiated for a 12.2(a) or 12.2 (c) examination.

IV. Terms Under Which Examination of Defendant by Government’s Expert Should be Held

21. Having established that the Government does not have access to an examination as a right, but rather under a Court’s order, the question arises concerning the manner in which this examination is to be held.

22. The defense identified two main issues here, being (1) whether this examination should be held in a custodial setting, and (2) the extent and scope of the examination.

23. The Government has advanced that if the Court is to admit the testimony, it will request that the defendant be evaluated under custody at a BOP facility.

24. Reasons of economy, both in terms of time and money, militate against the Government’s proposed alternative. Additionally, a major consideration in this case is the liberty interest of defendant, who is currently in bail, and will be incarcerated as a practical consequence of raising a defense, not for a violation of the terms of Bail. Indeed none of the elements required for revocation of bail under 18 USC 3148 (b) are present in this case.

25. Mr. Defendant is currently being treated by two mental health experts, Dr. , a psychiatrist, and Dr. , a psychologist, as part of the conditions imposed for release on bail. This two experts are familiar with the case, since they have both treated defendant at least since July, 1999, and therefore are familiar with his clinical situation, treatment received, and therapeutic options.

26. In contrast, Mr. Defendant would be evaluated in FCI Butner by physicians who do not have prior knowledge of the case, who would rely on the medical files of Dr. and Dr. , and who would have to “start from scratch”.

27. Both Dr. and Dr. currently treat defendant under a contract with the Miami office of Pre Trial Services. Neither have been contracted by the defense nor by the Government. The expense of the treatment they give defendant is, and will continue to be, borne by Pre Trial Services.

28. Based on the above, to put it bluntly, it is both faster and cheaper to order a non-custodial examination by Dr. and Dr. .

29. These doctors are in the best position to provide objective non partisan evaluation of defendant.

30. However even if the Government insisted that it wanted it’s own experts, that by itself should not be the single reason for a custodial examination at FCI Butner.

31. Again, were this defendant ordered to submit to examination at FCI Butner, he will be incarcerated as a practical consequence of raising a defense, not for a violation of the terms of Bail. As far as is know defendant has not violated the terms of his pre trial release. Repeated due to it’s importance, **none of the elements required for revocation of bail under 18 USC 3148 (b) are present in this case.**

32. The defense proposes that the Government can evaluate defendant in a non-custodial setting, which will provide to the Government all the information it needs without imposing an undue burden on Mr. Defendant.

33. An additional consideration are the terms of the examination to be held. Of particular consideration are fifth amendment issues that might arise due to the examination.

34. Addressing specifically this point, in an extensive footnote the *Davis* court stated:

“FN 8. The defendant's statements to the government expert during the examination are unquestionably "testimonial." *Estelle*; also see *Pennsylvania v. Muñiz*, 496 U.S. 582, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990). Although court-ordered examinations regarding insanity have generally been found not to violate the Fifth Amendment, the fact that the defendant's mental state is an element of the crime which the government must prove may differentiate a defendant's expert evidence about her or his mental condition from a claim of insanity for purposes of determining whether a compelled pretrial examination of the defendant violates the Fifth Amendment privilege against self-incrimination.

The defendant who claims insanity interjects a new issue into the proceedings on which he or she bears the burden of proof. 18 U.S.C. 17. The privilege is not violated by an examination, because the examination does not concern an element of the crime. See *Estelle v. Smith*, 451 U.S. 454, 465, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981). The limited purpose of the examination concomitantly restricts the use the government can make of it: The results of the examination can only be used to rebut defendant's expert evidence. **Estelle teaches that a defendant's compelled testimony before a government expert, and the fruits of the examination (i.e., the expert's conclusions), cannot be used against the defendant in the government's case-in-chief.**

When the defendant claims "diminished capacity," however, he or she seeks to undercut the government's proof of an element of the offense. Therefore, any compelled examination will necessarily involve self-incrimination. *Estelle*, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866. While Rule 12.2(c) would prohibit the government from introducing the incriminating statements (or expert testimony based on them) unless the defendant introduces testimony regarding mental condition, the existence of an exclusionary rule will not easily justify a compelled examination in the first place. Exclusion is a remedy for a constitutional violation; the defendant should not be precluded from preventing the constitutional violation from occurring.

The issue squarely presented by a government request to examine the defendant regarding his or her mental state at the time of the offense is whether the defendant waives the privilege against self-incrimination by giving notice of intent

to introduce expert evidence on that subject. Criminal Rule 12.2 was not intended to resolve this constitutional issue, and we need not and do not decide the issue here.”

35. Defendant acknowledges that *U.S. vs White*, 21 F. Supp. 1197, reaches the exact opposite result concerning the possibility of fifth amendment issues, since it deems the right waived in this situations. There is no specific First Circuit case law on point.

25. Since there is authority on both sides of the issue, and no controlling First Circuit case law on whether defendant’s Fifth Amendment right to self incrimination is protected, the defense cannot explicitly consent to an examination if it would mean a waiver of this right. Indeed the reasoning in *U.S. vs White*, 21 F. Supp. 1197, was that consenting to the examination by itself was a waiver. Obviously if the Court Ordered the examination it then could not be construed as a waiver of the privilege.

36. Based on the above it is imperative that the examination of Mr. Defendant be given the guarantees that the statement by him given to the Government’s expert not be admitted unless they are directly related to the issue raised by the notice under Rule 12.2 (b), namely expert testimony directed towards mental disease, defect and mental conditions of the defendant bearing upon the issue of Guilt.

WHEREFORE, defendant respectfully requests this Honorable Court to take notice of the above and grant the request.

I HEREBY CERTIFY: That a copy of the foregoing Motion was served to U.S. Attorney Guillermo Gil (**Att. Assistant U.S. Attorney Antonio Bazán**), Federico Degetau Federal Building, Room 452, Hato Rey, Puerto Rico 00918.

In San Juan, Puerto Rico, this September 13, 2001.

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Joseph C. Laws, Jr.
Federal Public Defender

Assistant Federal Public Defender
USDC-PR
259 F. D. Roosevelt
Hato Rey, P.R. 00918
TEL. (787) 281-4922
FAX. (787) 281-4899