

October 17, 2001

Stephen R. Welch, Jr., Esquire
Department of Justice
102 West Water Street
Dover, Delaware 19901

Lloyd A. Schmid, Jr., Esquire
Office of the Public Defender
530 South State Street, Suite 108
Dover, Delaware 19901

Re: **State v. Jonathan Howard**
I.D. No. 0010012373

Dear Counsel:

The State has filed a motion seeking disclosure of testing data from the Defendant. The sole issue before the Court is whether the Defendant is obligated to turn over testing data or reports upon which Dr. Abraham Mensch, a defense expert, rendered an opinion as to Defendant's mental status. This information is sought pursuant to Superior Court Criminal Rule 16(b)(1)(B) and D.R.E. 705(a).

Facts

The Defendant in this case has been examined by a psychiatric expert who has prepared a report as to the capacity of the Defendant to stand trial. Obviously, this expert may testify at trial. It does not appear that the Defendant has made that final decision yet. It is believed that the Defendant has agreed to produce this report. The State, however, has requested, in addition to the report, the underlying testing data

prepared by the psychiatric expert.¹

Before the Court can proceed further, an examination of Superior Court Criminal Rule 16 is required.

Applicable Law

(1) Delaware Superior Court Criminal Rule 16(a) and Rule 16(b) - Discovery:

16(a) Disclosure of evidence by the defendant -information subject to disclosure:

16(a)(1)(C) *Documents and tangible objects.* Upon request of the defendant, the State shall permit the defendant to inspect and copy documents and tangible items which are material to the preparation of the defendant's defense or as evidence in chief at trial.

16(a)(1)(D) *Reports of examinations and tests.* Upon request of the defendant, the State shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments which are within State's possession, custody, control or with due diligence may become known to the State, and which are material to the preparation of the defense or intended for use by the State as evidence in chief at trial.

16(a)(1)(E) *Expert witnesses.* Upon request of a defendant, the State shall disclose to the defendant any evidence which the State *may* present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form

¹ At the hearing on its motion, the State indicated that it was no longer seeking other notes of the doctor which it had previously requested. The State is now seeking testing documents relied upon by Dr. Mensch in rendering his assessment. Additionally, medical records prepared prior to the evaluation(s) at issue in the motion, which were also sought by the State, were agreed to be produced by the Defendant.

of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

16(b) Disclosure of evidence by the defendant - information subject to disclosure:

- (A) *Documents and tangible objects.* If defendant requests disclosure under 16(a)(1) (C), (D), or (E) of this rule, upon compliance with such request by the State, the defendant, on request of the State, shall permit the State to inspect and copy books, papers, documents, photographs, tangible objects, or copies which the defendant intends to introduce as evidence in chief at trial.
- (B) *Reports of examination and tests.* If defendant requests disclosure under 16(a)(1) (C), (D), or (E) of this rule, upon compliance with such request by the State, the defendant shall turn over any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, . . . which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.
- (C) *Expert witnesses.* If defendant requests disclosure under 16(a)(1) (C), (D), or (E) of this rule, upon compliance with such request by the State, the defendant, on request of the State, shall disclose to the State any evidence the defendant may present at trial under Rules 702, 703, or 705 of the D.R.E.

(2) Definition of Response under Rule 16:

The State argues that it has responded by default, because it has nothing with which to respond to as of yet. Its doctor has not finished a report. For this reason, because of its good faith, the State has a right to the underlying testing data used by the expert to prepare his or her report.

Discussion

The Defendant has not requested disclosure under Rule 16(a)(1)(E) and the State has not responded. Under Rule 16, it appears that the Defendant has no duty to respond until the State has responded. Since the State alleges it has an expert doctor preparing a report, under the "plain meaning" of the terms of the Rule, it appears that the State has not responded under the rule. Therefore, Defendant's duty appears to be contingent and his obligation to respond has not arisen.

Certainly, by time of trial, the defense must produce these reports. *See e.g. Richardson v. State*, Del. Supr., 401 A.2d 75 (1979). The underlying tests at issue here under *Richardson* are discoverable by the opposing party and can be submitted to the opposing party's expert witness for developing cross-examination.²

² I am aware of *State v. Lynch*, Del. Super., 559 A.2d 302 (1988). This case conditionally granted the State's motion to compel, upon a showing by the defendant that the psychiatrist's report would be used at trial. If the report was going to be used at trial, the defense had to produce the full report (including a clinical interview and patient history) thirty days before trial. This would allow the State opportunity to prepare for cross-examination. If this is the procedure to be followed in the case before the Court, *Lynch* will be followed.

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Therefore, for the foregoing reasons, the State's Motion for Disclosure of Testing Data is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Counsel
File