[J-79-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 M.D. Appeal Dkt. 1999
	:	
Appellant,	:	Appeal from the Order of the Superior
	:	Court entered April 28, 1998 at No.
	:	0690PHL97, reversing the Order of the
v.	:	Court of Common Pleas of Lackawanna
	:	County, entered October 31, 1996 at No.
	:	93CR1613.
WILLIAM SARTIN,	:	
	:	
Appellee.	:	
	:	
	:	
	:	ARGUED: April 28, 1999
	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE

I agree with the Majority that the Fifth Amendment does not preclude a criminal defendant from having to submit to an independent pretrial psychiatric examination under these circumstances and, therefore, join in that portion of the opinion. However, I am compelled to dissent from that portion of the Majority Opinion that fashions various procedural "safeguards" notwithstanding the absence of a Fifth Amendment violation – i.e., the requirement that the results of that examination must be sealed, that the mental health professional who prepared the report must be subject to a gag order, and that the report may only be disclosed after the defendant "declares his intention to present psychiatric evidence in mitigation." See Slip Op. at 6.

It is not clear whether the Majority believes that the safeguards it has fashioned are mandated by the Fifth Amendment or are simply "more practical." See Slip Op. at 7. The primary reasoning provided by the Majority for its procedural safeguards is the following one-sentence quote from an opinion by a District Court in Virginia:

> courts must remain mindful that the . . . independent examination sought by the government [has] the potential for treading on the defendant's Fifth and Sixth Amendment rights.[1]

Slip Op. at 6, quoting United States v. Beckford, 962 F.Supp. 748, 763 (E.D. Va. 1997). The Majority does not explain why it believes this is so, much less why that perceived "potentiality" requires the safeguards it adopts.

All that is required to adequately protect appellee's rights under the Fifth Amendment is that the Commonwealth not be permitted to use the information contained in the report against appellee during the guilt phase of trial or, for that matter, during the penalty phase unless and until appellee raises the issue of his mental condition.[2] The Fifth Amendment right at issue is the right against self-incrimination, a right that is concerned primarily with trial matters. To protect that trial right, the Fifth Amendment has been extended to certain pre-trial settings. But even where, unlike here, that right has been violated, exclusion of the evidence from trial has been deemed an adequate remedy. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966). The same remedy is proper here.

Federal Rule of Criminal Procedure 12.2(c), which governs the use of an independent psychiatric examination of a defendant when the defendant has announced

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[1] As appellant has not raised a claim under the Sixth Amendment, the Majority presumably relies on the district court opinion only with regard to the Fifth Amendment reasoning.

[2] As the Majority notes, the Fifth Amendment analysis is equally applicable to appellee's claim under Article I, Section 9 of the Pennsylvania Constitution. Slip Op. at 4 n.5.

his intention to rely on an insanity defense, is instructive in this regard. Rule 12.2(c) provides:

> No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the defendant based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

Fed.R.Crim.P. 12.2(c). Nothing in this rule requires that the prosecution be denied access to the results of the examination until the very moment that the defendant introduces evidence regarding his mental health. Nonetheless, Fed.R.Crim.P. 12.2(c) has repeatedly been upheld in the face of challenges mounted under the Fifth Amendment's right against self-incrimination. United States v. Hall, 152 F.3d 381, 400 (5th Cir. 1998)(citing United States v. Lewis, 53 F.3d 29, 35 n.9 (4th Cir. 1995) and United States v. Stockwell, 743 F.2d 123, 127 (2d Cir. 1984)).

As the Fifth Circuit Court of Appeals noted in Hall, the risk that the prosecution will improperly use information learned from a psychiatric evaluation during the guilt phase when the defendant has undergone a psychiatric examination in anticipation of an insanity defense is no greater than the risk that it will do so during the penalty phase in the circumstances at issue in this case. Hall, supra. There is, in short, no constitutionally mandated reason to provide the safeguards the Majority has fashioned here. The better practice, one that fully protects whatever residual Fifth Amendment claim can be said to be implicated, is that provided for in the federal rule: that providing the information to the prosecution is not a license to use it. The trial court must merely be receptive, as it is in countless other Fifth Amendment situations in which evidence has been ruled either inadmissible or conditionally admissible, to objections that the prosecution is attempting to

use the information improperly. If the defendant believes that the prosecution is improperly seeking to introduce evidence that it derived from the government's psychiatric examination, then the defendant may make that objection. The trial court will then be required to exclude the evidence unless the prosecution carries its burden of establishing that the evidence originated from an independent, untainted source. See Alderman v. United States, 394 U.S. 165, 183 (1969)(when a defendant claims that the government has sought to introduce the fruits of a coerced confession, the defendant must go forward with specific evidence demonstrating taint, upon which the government "has the ultimate burden of persuasion to show that its evidence is untainted."); Hall, supra, at 399 (applying evidentiary framework of Alderman's "fruit of the coerced confession" doctrine in evaluating admissibility of evidence arguably stemming from pretrial independent psychiatric examination).

Nor is it logical to seal the findings until the penalty phase of trial given current Pennsylvania practice. In the guilt phase of a capital case in which a defendant may or may not present psychiatric evidence, the psychiatric examination results are not sealed until the time that the defendant puts the psychiatric defense in issue. The same should hold true in the penalty phase. Just as there is no compelling reason to place such evidence under seal at the guilt phase pending presentation of the defense, there is no compelling reason why such evidence should be sealed at the penalty phase unless and until the defense raises the mental health mitigators.

The only other reason proffered by the Majority in support of the seal and gag procedure beyond the potential Fifth Amendment issue that it perceives is a conclusion that it is "far more practical" to grant a continuance prior to the penalty phase of trial than to

resolve at trial questions concerning attempted improper use of the results in the guilt phase. But there being, in my view, no Fifth Amendment issue unless and until the prosecution improperly attempts to use the information at trial, I see no practicalities to weigh. In any event, even if there were a Fifth Amendment concern present, the Majority's solution disregards the realities of trial. Depending upon the contents of the sealed examination report, the Commonwealth or the defendant, or both, may need to conduct further investigation. Indeed, this is particularly likely for the defendant, because the Commonwealth's expert at least knows what is in the defendant's expert's report as well as in his own report. On the other hand, the defendant will have to have the report reviewed by his own expert in order to effectively make use of or to counter the results and to cross-examine the witnesses. Thus, the defense as well as the Commonwealth will be hampered in the ability to prepare effectively for the penalty phase of trial, raising the prospect of significant delay and inconvenience.[3] To hold that the report must be sealed is to return to the now discredited days of trial by ambush and surprise rather than the modern theory of open discovery and pre-trial announcement of defenses. [4]

In the meantime, of course, the jurors' recollection of the trial evidence, which is frequently adopted at sentencing, will fade. See Beckford, supra at 763. The inconvenience caused to jurors by the indeterminate delay required by the Majority's

[3] In this regard, it is worth noting that appellee in the case *sub judice* has not requested the protection that the Majority's rule would force upon him. Because the examination may well uncover something helpful for the defense, many defendants may want the results immediately. Indeed, the report may provide support for an insanity or diminished capacity defense at trial or for a claim that the defendant is incompetent to stand trial.

holding midway through a capital proceeding is not insignificant. In addition, if the jury is sequestered, the Commonwealth will bear the added expense of housing and feeding the jury during any delay and the jurors themselves will be subject to great personal inconvenience while both the prosecution and the defense prepare to initially read the report and then prepare to meet the report's conclusions or rebut them. On the other hand, determining the admissibility of evidence is an integral part of the trial court's responsibility at trial; I fail to see how challenges to trial evidence on the ground that it was derived from the then-inadmissible psychiatric examination report will cause any more delay in the proceedings than rulings on hearsay, the authenticity of documents, or any of a myriad of other evidentiary issues faced by trial courts on a daily basis.

Finally, I would note that the procedural safeguards fashioned by the Majority can succeed in their stated purpose – a purpose that ignores the countervailing considerations above – only if the mental health professional evaluating appellee abides by the order to seal the report and the corresponding gag order. There is no reason to believe that a mental health professional would be less likely to subvert the court's order than a prosecutor ordered not to improperly use the information gained from the evaluation. As officers of the court, prosecutors have an obligation to abide by court orders. They are subject to serious sanctions, up to and including discharge of the defendant, for violating a trial court's rulings. Officers of the court who can be trusted not to refer to statements that have been suppressed, for example, likewise can be trusted to refrain from improperly

(…continued)

[4] Indeed, practically speaking, it would seem to be built-in error if defense counsel, possessing expert evidence to support a mental mitigator, failed to present that evidence to the fact finder.

using pre-trial psychiatric reports unless and until the defendant raises the issue of his mental health, at whatever stage of the proceedings. The more practical solution is to permit disclosure

For the foregoing reasons, I join in the determination to reverse and remand for a pre-trial psychiatric evaluation, but dissent from the holding that the results of that examination must be sealed and the independent expert gagged unless and until the defendant "declares his intent" to present psychiatric evidence in mitigation.[5]

Mr. Justice Cappy joins this concurring and dissenting opinion.

[5] I should also note that, even if I could agree that the Fifth Amendment requires a procedural rule along the lines fashioned by the Majority, the Majority's rule provides insufficient guidance. For example, the rule does not provide a point certain by which the defendant must announce his intention: i.e., before the penalty phase begins, after the Commonwealth has rested in that phase, before the defendant calls his mental health expert, or at some other, unspecified time.