UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA **PLAINTIFF**

v.

STEVEN D. GREEN **DEFENDANT**

UNITED STATES' MOTION FOR ORDER AUTHORIZING ACCESS TO CONFIDENTIAL COMMUNICATIONS BETWEEN DEFENDANT AND PSYCHOTHERAPIST

Comes the United States, by counsel, and moves the Court for authorization to access confidential communications between the defendant and an Army psychotherapist, Dr. E. B. The defendant waived his psychotherapist-patient privilege by placing his mental health squarely at issue in this case when he filed notice of intent to assert the defense of insanity under Federal Rule of Criminal Procedure 12.2(a). Accordingly, in order to prepare to meet this defense at trial, the United States must be permitted access to confidential communications between the defendant and Dr. E. B.

I. Facts

The indictment alleges that on or about March 12, 2006, the defendant committed, among other things, premeditated murder and aggravated sexual abuse while serving in the United States Army in Iraq. Over the next few weeks, Green visited a combat stress unit in Iraq where he was

seen by Dr. E. B. – a licensed psychiatrist. Dr. E. B. eventually recommended that Green be discharged from the Army on grounds of an anti-social personality disorder.

In February 2007, three months after the defendant was indicted, his lawyer provided the United States with copies of Green's Army combat stress records. These records included Dr. E. B.'s combat stress unit intake forms, records of medical care, and a report of mental status evaluation. These documents contained statements of the defendant made in the course of obtaining treatment.

On May 15, 2008, the defendant filed two notices under Federal Rule of Criminal Procedure 12.2. The first notice informed the United States pursuant to Rule 12.2(a) that "at the trial of this action [Green] intends to rely or may rely upon the defense of insanity at the time of the offenses. . . ." Notice of 5/15/08, Doc. No. 130. The second notice informed the United States that Green "intends to introduce or may introduce expert testimony relating to mental disease or defect and other mental conditions of the defendant bearing on the issue of his guilt . . . [and] punishment." Notice of 5/15/08, Doc. No. 131.

On September 15, 2008, Green's counsel provided a "preliminary disclosure" regarding Green's mental health defense. *See* Def. Letter of 9/15/08, at 1 (filed separately under seal). The letter also disclosed the names of seven expert witnesses defendant intends to call at trial, and included a short summary of their expected testimony.[1]

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1 Although defense counsel referenced and acknowledged the requirements under Rule 16(b)(1)(B) to disclose all results or reports of examinations, to date the United States has received copies of some, but not all, of the test instruments and responses for the tests given to the defendant, and reports written by two of the defendant's experts.

In preparing to meet a mental health defense, the United States must interview Dr. E. B. Dr. E. B., of course, will not discuss treatment of the defendant or divulge relevant confidential communications in the absence of a court order or waiver of privilege. The undersigned Assistant United States Attorney has verbally requested that defense counsel verify or otherwise affirm Green's waiver of the psychotherapist-patient privilege with regard to his sessions with Dr. E. B. Green's counsel, however, has, to date, declined to acknowledge that the privilege has been waived, despite Green's Rule 12.2 notices and subsequent expert witness disclosure which clearly place Green's mental health at issue in the case.

II. A Defendant Waives the Psychotherapist-Patient Privilege When He Places His Mental Health at Issue.

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court recognized a federal common law psychotherapist-patient privilege. The Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Id*. at 15. However, there is no doubt that the psychotherapist-patient privilege can be waived. *Id*. at n.14 ("[l]ike other testimonial privileges, the patient may of course waive the protection").

In the Sixth Circuit, "placing one's mental health at issue constitutes a waiver of the [psychotherapist-patient] privilege." *Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007), *cited in Simon v. Cook*, 2008 WL 244504 (6th Cir. 2008); *see also Schoffstal v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000). A defendant waives the psychotherapist-patient

privilege by raising his mental condition as an element of his defense. *United States v. Sturman*, 1998 WL 126066, *3 (S.D.N.Y. 1998); *McKenna v. Cruz*, 1998 WL 809533, *2 (S.D.N.Y. 1998), citing 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §§ 504.01, 504.07(7) (2d ed. 1997) (citing Supreme Court Standard 504)). Like the attorney-client privilege, a defendant's psychotherapist-patient privilege is waived upon pleading an insanity defense. *In re Lott*, 424 F.3d 446, 453 (3d Cir. 2005). "[A] patient voluntarily placing his . . . mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition." *McCormick on Evidence* § 103 (6th ed. 2006); *see also Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc.*, 967 F.Supp.2d 346 (C.D. Ill. 1997) (holding that when a patient puts her mental condition into issue, she waives the psychotherapist privilege); *Topol v. Trustees of Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) ("[h]aving placed her mental state in issue, plaintiff waived any applicable psychotherapist-patient privilege"); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Penn. 1997) ("a party waives the [psychotherapist-patient] privilege by placing her mental condition directly at issue").

III. Green Placed His Mental Condition at Issue When He Filed Notice Under Federal Rule of Criminal Procedure 12.2(a).

When the defendant filed notice under Rule 12.2(a) and evidenced his intent to rely on the defense of insanity, Green placed his mental condition at issue and "inject[ed] a new issue into the proceedings." *See United States v. Davis*, 93 F.3d 1286, 1295 n.8 (6th Cir. 1996). Furthermore, Green has gone beyond Rule 12.2(a) notice and provided mental health discovery identifying the expected testimony of seven mental health expert witnesses. It is apparent that Green's mental health will be at the forefront of this case at trial.

Therefore, the United States has a right and an obligation to prepare to meet this defense. The very nature of an insanity defense requires the United States to perform additional investigation and be prepared, if necessary, to rebut the defendant's claims. The defendant's failure to acknowledge that his psychotherapist-patient privilege has been waived merely serves to frustrate the United States in preparing to meet Green's defense and interview a relevant witness. *See McCormick on Evidence* § 103 (6th ed. 2006) ("Failure to find a waiver from assertion of a claim or defense predicated upon a physical or mental condition has the awkward consequence of effectively frustrating discovery on a central issue of the case . . . .").

Moreover, it is clear that Green's psychotherapist-patient privilege is waived for purposes of the Rule 12.2(c) mental examination, which consists of mandatory psychiatric testing upon government motion and subsequent disclosure of psychiatric reports. Fed. R. Crim. P. 12(c); 18 U.S.C. §§ 4242, 4242(a), 4247. Likewise, Green holds no privilege in his psychiatric-patient communications with his expert witnesses as Rule 16 mandates disclosure of all testing and reports.[2] Fed. R. Crim. P. 16(b)(1)(B).

If Rules 12.2 and 16 provide for disclosure of privileged information and thus discovery of confidential communications during psychiatric interviews months or years after the crimes of indictment, the Court should find waiver of privilege with respect to Dr. E. B. all the more compelling. The defendant's conversations with Dr. E. B. occurred within days of Green's alleged crimes and could not be more relevant to his mental health defense. To allow Green to interpose this privilege and shield the information known by Dr. E. B. at a time nearly

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2 Green admits as much in his September 15, 2008, mental health disclosure: "Obviously, to the extent that our experts are relying on communications with or data obtained from the defendant in rendering their opinions herein, any privileges otherwise pertaining to those data or communications may very well be deemed waived by the Court." Def. Letter of 9/15/08, at 2 (filed separately under seal).

contemporaneous to the charged offenses would allow Green to "hide behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice." *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Penn. 1997). This is especially true as the issue Green has injected into the case is his mental health "at the time of the offenses alleged." Notice of 5/15/08, Doc. No. 130.

Furthermore, aside from the fact that Green has placed his mental health at issue in this case and thus waived psychotherapist-patient privilege, the Sixth Circuit has also ruled that the privilege can be waived based on disclosure of privileged documents to unrelated third parties. *United States v. Bishop*, 1998 WL 385898 (6th Cir. 1998). Here, Green's counsel has already disclosed Green's otherwise privileged combat stress records to the United States. Once a patient has disclosed privileged information to a third party, the privilege regarding that information has been waived. *See United States v. Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994).

Finally, upon entry of the proposed order authorizing the United States to access Green's confidential communications to Dr. E. B. , it must be noted that the United States will comply with the evidentiary limitations on privileged information as outlined in Rule 12.2(c)(4). Accordingly, the United States will not seek to use Green's confidential communications to Dr. E. B., testimony based on his statements, or the fruits thereof, unless Green first raises the issue of mental condition at trial.

IV. Conclusion

Green has placed his mental health at issue in this case. Accordingly, he has waived his psychotherapist-patient privilege. The defendant's attempt to maintain this privilege and block the United States' access to information known by Dr. E. B. is without merit and contrary to law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 10, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren Wolff, counsel for defendant, Steven D. Green.

/s/ Marisa J. Ford
Assistant United States Attorney