IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11111

In re: DERRICK ADRIAN JOHNSON,

Petitioner

A True Copy
Certified order issued Oct 26, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

Petition for a Writ of Mandamus to the
United States District Court for the
Northern District of Texas

Before DAVIS, HIGGINSON, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Derrick Adrian Johnson has filed in this court a pro se petition for a writ of mandamus and a motion requesting leave to file his mandamus petition in forma pauperis (IFP). The motion for leave to proceed IFP is GRANTED.

In his petition, Johnson challenges the pretrial denial of funds for a mental health expert to support his insanity defense, which he sought after a court-appointed psychologist concluded he did not meet the insanity criteria. The magistrate judge denied his most recent request for funds on August 2, 2018. On August 15, 2018, after a three-day trial, a jury found Johnson guilty of one count of bank robbery. Sentencing is set for November 26, 2018.

"Mandamus is an extraordinary remedy that should be granted only in the clearest and most compelling cases." *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987). A party seeking mandamus relief must show both that he has no other adequate means to obtain the requested relief and that he has a "clear and indisputable" right to the writ. *Id.* (internal quotation marks and citation

omitted). Mandamus is not a substitute for appeal. *Id.* "Where an interest can be vindicated through direct appeal after a final judgment, this court will ordinarily not grant a writ of mandamus." *Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir. 1992).

Johnson has not shown that he may not obtain relief on direct appeal following entry of final judgment. Mandamus relief is not appropriate. *See id.* The petition for a writ of mandamus is DENIED.

United States Court of Appeals for the Fifth Circuit

No. 18-11602

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DERRICK ADRIAN JOHNSON,

Defendant—Appellant.

Appeal from the United States District Court
Northern District of Texas
USDC No. 3:16-CR-349-1

ON PETITION FOR REHEARING

Before STEWART, CLEMENT, and COSTA, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file petition for rehearing out of time is GRANTED.

IT IS FURTHER ORDERED that Appellant's motion for leave to submit a handwritten petition for rehearing is GRANTED.

IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**CRIMINAL NO. 3:16-CR-349-N**
	§	
DERRICK JOHNSON	§	**(SEALED AND EX PARTE)**

ORDER

Defendant's *Ex Parte Filing Under 18 USC § 3006A(e) for Expert Services*, Doc. 110; *Ex Parte Defense Motion Under Rule 17*, Doc. 115; *Ex Parte – Motion for Special Expert Services Certification*, Doc. 116; and *Ex Parte: Petition for the Grant of Expert Services Under 18 USC § 3006(a)(e)*, Doc. 117, were referred to the undersigned magistrate judge for a hearing, if necessary, and determination, Doc. 121. An ex parte hearing was conducted on August 2, 2018, at which Defendant and stand-by counsel appeared. After considering the motions, related pleadings, oral argument and the applicable law, the motions are **DENIED**.

Defendant is charged by indictment with one count of bank robbery, Doc. 12. On February 15, 2017, Defendant filed notice under Federal Rule of Criminal Procedure 12.2 of his intent to assert an insanity defense, Doc. 41. In response, the Government filed a motion for a pretrial psychiatric or psychological examination of Defendant, pursuant to Federal Rule of Criminal Procedure 12.2(c)(1)(B) and 18 U.S.C. § 4242(a), Doc. 44. Subsequently, the district judge granted the Government's motion, Doc. 48, and ordered a psychiatric or psychological examination and report on the issue of whether Defendant was insane at the time of the alleged offense. *See* FED. R. CRIM. P. 12.2(c)(1)(B) ("If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined

under 18 U.S.C. § 4242."); 18 U.S.C. § 4242(a) ("the court . . . shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)"). The report concluded, *inter alia*, that, at the time of the alleged offense, while Defendant suffered from severe mental disease or defect, he was "wholly able to appreciate the nature and quality of his actions" and "retained the ability to appreciate the wrongfulness of his actions," and thus, was "criminally responsible for his alleged actions." Doc. 57 at 17-18.

Motion to employ a psychologist

Defendant seeks to now employ the services a psychologist, Tim F. Branaman, Ph.D., to provide "assessments and testimony. . ., as well as . . . insight into Defendant Johnson's 'mental health state' and 'motivation' regarding the charge against him." Doc. 116 at 1. Defendant seeks approval to employ Dr. Branaman at the cost of "$5000.00 for the examination, analysis and diagnosis; and $2,000.00 for assessment and testimony under an ex parte order as provided by 18 USC § 3006A(e)." Doc. 110 at 1.

Defendant averred during the hearing that Dr. Branaman was referred to him by a counselor—whom Defendant employed without first obtaining the permission of the Court—as one who can provide "treatment" for and diagnosis of Defendant's "fuge [fugue]" condition. Although Defendant initially indicated that he anticipated Dr. Branaman's treatment to be relevant to mitigation, he insisted that he was not seeking assistance of the psychologist in anticipation of sentencing, but instead for his defense at trial, to-wit: insanity. Defendant, under the apparent misapprehension that one of the psychologists who completed the evaluation at the request of the Court pursuant to Federal Rule of Criminal Procedure 12.2(c)(1)(B) and 18 U.S.C.

§ 4242(a) [Doc. 48] was employed on behalf of the prosecution, seeks the psychological services in question to rebut the "Government's expert."

"Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. § 3006A(e)(1). Prior approval must be obtained from the court if the cost for such service exceeds $800. 18 U.S.C. § 3006A(e)(2). A defendant seeking the appointment of an expert under the Criminal Justice Act must "'demonstrate with specificity' why the services are necessary." *United States v. Hardin*, 437 F.3d 463, 469 n.5 (5th Cir. 2006) (quoting *United States v. Gadison*, 8 F.3d 186, 191 (5th Cir. 1993)).

Having previously determined that Defendant qualifies for the appointment of counsel, the Court finds that Defendant is financially unable to obtain said services. Nonetheless, Defendant has failed to demonstrate that the engagement of Dr. Branaman for Defendant's stated purposes is necessary to his adequate defense—as is his burden. And though Defendant repeatedly invokes the holding in *United States v. Long*, 562 F.3d 325 (5th Cir. 2009), in support of his request, it does not support a different conclusion. While *Long* makes clear the proof necessary to warrant a jury instruction on the insanity defense, it does not explain or modify the court's statutory or constitutional obligation to provide expert services for an indigent defendant raising such a defense.

Although in the context of a capital offense, the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), is nonetheless instructive:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Id.

Here, Defendant's obvious aim is for the Court to authorize expenditures for an additional psychologist, whose opinions might contradict those expressed in the previous court-ordered evaluation that Defendant was not insane at the time of the commission of the alleged offense. However, as indicated previously, the law does not obligate the Court to provide Defendant, even though indigent, with access to the resources he desires, but only those necessary to his adequate defense. Under the circumstances of this case, Defendant has not demonstrated that evaluation by another psychologist meets the latter standard. Notably, the Court's findings herein do not preclude Defendant from obtaining such services at his own cost or, in the event he is convicted, requesting court approval to employ a mental health expert as it relates to sentencing mitigation.

Motion for the issuance of subpoenas

Relatedly, Defendant has requested that subpoenas be issued under the authority of Rule 17(b) to a Dallas branch of Bank of America for "[a]ny and all personnel records of contracted or employed security guards on or off duty on July 26, 2007," and to a Dallas branch of Bank of Texas for "[a]ny and all photos retained from the incident relating to July 26, 2007 (in particular

any photos of the suspect's face)[,] as well as the procedures in place regarding providing evidence to law enforcement."

"Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. FED. R. CRIM. P. 17(b). A subpoena under Rule 17 may also order the production of documents. FED. R. CRIM. P. 17(c).

Defendant has wholly failed to establish the necessity of the documents he seeks to his adequate defense. He persists in his efforts to make his claimed innocence of the 2007 bank robbery, of which he was previously convicted, the central issue in the defense of the charge in this case, and argues that the evidence he seeks to subpoena is necessary for that purpose. As the Court understands through pleadings and oral argument, Defendant contends that he suffered from mental defect at the time of the bank robbery charged in the indictment returned in this case, stemming from his wrongful conviction of the 2007 bank robbery and subsequent imprisonment, during which he was repeatedly assaulted. Contrary to Defendant's arguments, evidence that he was factually innocent of the previous bank robbery offense, is clearly irrelevant to the insanity defense he purportedly intends to mount in this case.

Even assuming for the sake of argument that the documents Defendant seeks are germane to whether he committed the 2007 bank robbery, they are extraneous to the issue of his sanity at the time of the commission of the bank robbery charged by the indictment returned in this case. At most, to support the insanity defense under the theory Defendant posits, he need only prove that he believed he was innocent, not that he, in fact, was innocent. Indeed, Defendant offers no other reason for the records he seeks than to attempt to show he was innocent of the 2007 bank

robbery; however, no matter his insistence, there is no legal basis to do so in the context of the pending charges in this criminal case or his proposed defense thereto. And as such, the records sought are not necessary for his adequate defense.

Accordingly, Defendant's *Ex Parte Filing Under 18 USC § 3006A(e) for Expert Services*, Doc. 110; Ex Parte Defense Motion Under Rule 17, Doc. 115; *Ex Parte – Motion for Special Expert Services Certification*, Doc. 116; and *Ex Parte: Petition for the Grant of Expert Services Under 18 USC § 3006(a)(e)*, Doc. 117, are **DENIED** for the reasons stated the herein and on the record at the hearing.

SIGNED August 2, 2018.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Within 14 days of being served with this pretrial order, a party may file specific written objections, upon which, the district judge "may reconsider" the matter "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(a). However, failure to timely object may bar an aggrieved party from attacking this order before the district judge.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 18, 2019

#36454-177
Mr. Derrick Adrian Johnson
USP Leavenworth
1300 Metropolitan, P.O. Box 1000
Leavenworth, KS 66048-1000

No. 18-11602 USA v. Derrick Johnson
USDC No. 3:16-CR-349-1

Dear Mr. Johnson,

Your court-appointed attorney has moved to withdraw as your counsel in the above case.

Under Anders v. California, 386 U.S. 738, (1967), you have the right to respond to your counsel's motion raising any points you choose showing why your appeal has merit and why the court should consider your case. You should state the facts and legal authorities why you think your conviction should be reversed. You have 30 days to respond. Your response may not exceed 30 pages. You need to send us 1 copy and an additional copy should be served on the United States Attorney.

If you do not file a response within 30 days, the court will review counsel's brief and decide whether the appeal is frivolous. If you want your case dismissed, please inform the court of this immediately.

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

cc: Mr. James Wesley Hendrix
Mr. Peter Christian Smythe

IN THE FIFTH CIRCUIT COURT OF APPEALS

IN RE: DERRICK JOHNSON
(3:16-CR-349)

18-11602

DEFENDANT'S RESPONSE TO COUNSEL'S ANDERS NOTICE

"A DEFENDANT WITHIN A CRIMINAL CASE HAS A CONSTITUTIONAL RIGHT TO RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL." - HUGHES V BOOKER 203 F.3D 894, 895 (5TH 2000) IT REQUIRES "COUNSEL..TO RESEARCH RELEVANT FACTS AND LAW, OR MAKE AN INFORMED DECISION THAT CERTAIN AVENUES WILL NOT BE FRUITFUL." STRICKLAND AT 688 "SOLID, MERITORIOUS ARGUMENTS BASED ON DIRECTLY CONTROLLING PRECEDENT SHOULD BE DISCOVERED AND BROUGHT TO THE COURT'S ATTENTION." - US V REINHART 357 F.3D 521 (5TH 2004) AT 525

THESE ARE FUNDAMENTAL ASPECTS OF LAW THAT SHOULD BE EASILY APPLIED WITHIN THIS ADVERSARIAL SYSTEM. MOREOVER, AS CITED ABOVE, THE STRICKLAND STANDARDS REQUIRE THEM.

WITH COUNSEL FILING AN ANDERS BRIEF REGARDING THIS APPEAL, MR. JOHNSON IS AT A LOSS IN UNDERSTANDING COUNSEL'S POSITION AND INTENT AS IT RELATES TO 18-11602. FOR THE ONLY COMMUNICATION DIRECTLY RELATED TO 18-11602 THAT MR. JOHNSON HAS HAD WITH MR. SMYTHE (AS COUNSEL) WAS A CORRECTION BY MR. JOHNSON OF COUNSEL'S MISUNDERSTANDING OF HIS APPOINTED CASE LOAD. THIS PUSHED BACK MR. JOHNSON'S CASE/APPEAL FILING OF ANY BRIEF THAT COUNSEL COULD HAVE FILED REGARDING THE CRIMINAL CASE PAST THE INITIAL APRIL TIMEFRAME ESTABLISHED BY THIS COURT FOR THE APPELLATE BRIEF SUBMITTAL; DUE DIRECTLY TO COUNSEL SMYTHE NOT ADDRESSING ANY ISSUE ON DIRECT APPEAL UNTIL HE WAS CONTACTED BY DEFENDANT/APPELLANT JOHNSON REGARDING THE PREVIOUSLY NOTED "MISUNDERSTANDING" OF COUNSEL'S CASE LOAD. MR.

JOHNSON ALSO, AFTER CONTACTING COUNSEL, FORWARDED A COPY OF THE PRO SE BRIEF ON APPEAL THAT DERRICK JOHNSON COMPOSED FOR THE FIFTH CIRCUIT'S REVIEW TO APPELLATE COUNSEL. THIS WAS DONE TO ASSIST COUNSEL IN ADVANCING THE ISSUES OF 3:16-CR-349, AS WELL AS TO ENSURE COMPLIANCE WITH THE FIFTH CIRCUIT'S POLICY REGARDING EXPEDITING CRIMINAL APPEALS. THOUGH DERRICK JOHNSON REQUESTED OF COUNSEL TO REVIEW THE ISSUES OF ARGUMENT, AND INFORM HIM OF THE MERIT (OR ANY LACK THEREOF) OF THOSE ISSUES, MR. JOHNSON'S ONLY SINGULARLY RECEIVED (EMPHASIS ADDED) RESPONSE TOWARD THESE ISSUES IS THE FIFTH CIRCUIT'S NOTIFICATION (IN JUNE OF 2019) OF COUNSEL'S ANDERS BRIEF/NOTICE... RECEIVED OVER (60) DAYS PAST THE APPEAL'S DUE DATE.

DERRICK JOHNSON CANNOT APPROPRIATELY ANSWER WHY 3:16-CR-349 IS CONSISTENTLY TROUBLED AND PLAGUED BY "MISUNDERSTANDINGS," "MISAPPLICATIONS OF THE LAW", AND 'MISASSERTIONS OF FACTS.' WHAT IS KNOWN IS THAT MR. JOHNSON CITED 18 USC §17 AS A DEFENSE FOR THE CHARGE AGAINST HIM. THE NORTHERN DISTRICT OF TEXAS-DALLAS SENT MR. JOHNSON TO BE EXAMINED BY F.B.O.P. DOCTOR TENILLE WARREN-PHILLIPS. DOCTOR WARREN-PHILLIPS ISSUED HER ASSESSMENT. MR. JOHNSON, SHORTLY THEREAFTER, WAS GRANTED THE RIGHT TO ACT PRO SE. AS SUCH, MR. JOHNSON FILED NUMEROUS REQUEST WITH THE DISTRICT COURT TO BE GRANTED FUNDS UNDER §3006A(E) FOR THE EMPLOYMENT OF A MENTAL HEALTH EXPERT. MR. JOHNSON, ALSO, SUPPLIED THE DISTRICT COURT WITH SUFFICIENT INFORMATION REGARDING THE REQUESTED SPECIALIST. THE DISTRICT COURT'S DENIAL, ISSUED ELEVEN-DAYS PRIOR TO TRIAL, DIRECTLY CONTRADICTS ESTABLISHED

AND RECENT SUPREME COURT PRECEDENCE.

IN AKE V OKLAHOMA 470 U.S. 68 (1985), THE HIGH COURT RULED THAT "...THE TESTIMONY OF PSYCHIATRIST CAN BE CRUCIAL AND A VIRTUAL NECESSITY IF AN INSANITY PLEA IS TO HAVE ANY CHANCE AT SUCCESS." AT 81 ALSO, MORE RECENTLY, "OUR DECISION IN AKE CLEARLY ESTABLISHED THAT, WHERE CERTAIN THRESHOLD CRITERIA ARE MET, THE [GOVERNMENT] MUST PROVIDE AN INDIGENT DEFENDANT WITH ACCESS TO A MENTAL HEALTH EXPERT WHO IS SUFFICIENTLY AVAILABLE TO THE DEFENSE AND (EMPHASIS ADDED) INDEPENDENT FROM THE COURT AND THE PROSECUTION) TO EFFECTIVELY ASSIST IN EVALUATION, PREPARATION AND PRESENTATION OF THE DEFENSE." MCWILLIAMS V DUNN 137 S.CT 1790 198 LED 341 (2017)

THUS, THE DENIAL OF THE EXPERT TO THE DEFENSE UNDER THE DISTRICT COURT'S MISAPPLICATION OF THE LAW, PERFORMED ELEVEN-DAYS PRIOR TO TRIAL WHILE DENYING A TRIAL CONTINUANCE, ARE STATED BY THE DEFENDANT/APPELLANT TO BE LEGAL GROUNDS FOR VACATING AND REVERSING THE CONVICTION OF 3:16-CR-349 WHICH HAS BEEN IGNORED BY APPELLATE COUNSEL PETER SMYTHE.

MOREOVER, THE COMMONLY RAMPANT MISCONDUCT OF THE GOVERNMENT ATTORNEYS AS DEFINED WITHIN THE ATTACHED BRIEF AT III (8-12) SERVE TO ILLUSTRATE A 'CUMULATION OF ERRORS' WHICH DID VIOLATE DERRICK JOHNSON'S CONSTITUTIONAL RIGHTS AND THUS DENIED HIM A FAIR AND HONEST TRIAL.

RESPECTFULLY SUBMITTED,
DERRICK JOHNSON

JUNE 26, 2019

IN THE FIFTH CIRCUIT COURT OF APPEALS

IN RE: DERRICK JOHNSON
3-16-CR-349

18-11602

APPELLANT REQUEST FOR LEAVE TO SUPPLEMENT APPEAL RECORD

APPELLANT, DERRICK JOHNSON, SUBMITS THIS REQUEST TO SUPPLEMENT HIS RESPONSE TO APPELLATE COUNSEL'S ANDERS BRIEF AND THUS STATES AS FOLLOWS:

ISSUES OF FACTS AND LAW

AFTER BEING SENTENCED BY DISTRICT JUDGE DAVID GODBEY ON DECEMBER 18, 2018, DERRICK JOHNSON SUBMITTED HIS NOTICE OF APPEAL AT SAID HEARING, AND FILED HIS INITIAL PRO SE BRIEF WITH THE FIFTH CIRCUIT IN JANUARY OF 2019. ALSO FILED IN JANUARY 2019 WAS DERRICK JOHNSON'S REQUEST FOR APPOINTMENT OF APPELLATE COUNSEL TO WHICH PETER C. SMYTHE WAS THUS APPOINTED ON JANUARY 25, 2019.

IN MARCH OF 2019, AFTER A BRIEF CONFERENCE, THE FIFTH CIRCUIT AND DERRICK JOHNSON WERE FORCED TO CONTACT COUNSEL SO AS TO CORRECT HIS MISUNDERSTANDINGS REGARDING HIS APPOINTED CASE LOAD. BECAUSE OF COUNSEL SMYTHE'S "BLUNDER", THERE WERE NO ACTIVITY PERFORMED REGARDING THE APPEAL OF 3-16-CR-349, THEREFORE, THE APRIL TARGET DATE FOR THE APPEAL BRIEF AS SCHEDULED BY THIS FIFTH CIRCUIT WAS PUSHED BACK. STILL, MR. JOHNSON SOUGHT TO AID MR. SMYTHE WITH THE LEGAL ISSUES OF 3-16-CR-349 OUT OF THE NORTHERN DISTRICT OF TEXAS-DALLAS AND FORWARDED TO COUNSEL A COPY OF HIS PRO SE BRIEF - EARMARKED WITH SAID ISSUES OF NOTE.

IN JUNE OF 2019, AFTER BEING TRANSFERRED FROM SEAGOVILLE FEDERAL DETENTION CENTER IN DALLAS TO LEAVENWORTH USP IN KANSAS, THE FIFTH CIRCUIT INFORMED MR. JOHNSON THAT COUNSE SMYTHE FILED AN ANDER'S BRIEF REGARDING HIS APPEAL TO WHICH MR. JOHNSON HAD NO COPY OF. STILL, AGAIN, MR. JOHNSON RESPONDED TO COUNSEL'S FILING WITH WHAT HE KNEW AT THAT TIME AND THE FACTS THERE-IN; AND THUS REQUEST TO SUPPLEMENT THOSE FACTS IN AN ANSWER TO COUNSEL SMYTHE'S RECENTLY ACQUIRED BRIEF AT THIS TIME. (SEE: AFFIDAVIT)

THE LAW

DERRICK JOHNSON WAS CHARGED WITH ONE COUNT OF VIOLATING 18 USC §2113(A). THE APPELLANT, WHOM UNFORTUNATELY HAS A HISTORY OF PSYCHOLOGICAL PROBLEMS, FILED NOTICE OF

INSTITUTING A DEFENSE UNDER 18 USC §17. THE DISTRICT COURT ORDERED DR. TENNILLE WARREN-PHILLIPS TO EXAMINE MR. JOHNSON AND SUBMIT AN ASSESSMENT. MR. JOHNSON, ACTING PRO SE, FILED UNDER §3006A(e) TO BE SUPPLIED FUNDS TO EMPLOY A MENTAL HEALTH EXPERT TO AID IN HIS DEFENSE. THIS REQUEST WAS PERFORMED IN MULTIPLICITY AND WAS ONLY ADDRESSED SOME ELEVEN-DAYS PRIOR TO TRIAL. IN SO RESPONDING, THE DISTRICT COURT DENIED THE REQUEST. THE PLAIN LANGUAGE OF THE RULINGS FROM THE UNITED STATES SUPREME COURT AND OUT OF THIS FIFTH CIRCUIT, CLEARLY ILLUSTRATES THE ERROR OF THE DISTRICT COURT, BUT ALSO THE INEFFECTIVENESS OF STATED COUNSEL AS WELL.

THE DISTRICT COURT'S DENIAL ON THIS ISSUE WAS THAT "..DEFENDANT'S OBVIOUS AIM IS FOR THE COURT TO AUTHORIZE EXPENDITURES FOR AN ADDITIONAL PSYCHOLOGIST, WHOSE OPINIONS MIGHT CONTRADICT THOSE ...IN THE PREVIOUS COURT-ORDERED EVALUATION." [EMAG. ORDER AT 4 DOC. 130] THE RULING WENT ON TO ADD, "[THAT] THE LAW DOES NOT OBLIGATE THE COURT TO PROVIDE THE DEFENDANT ...WITH ACCESS TO THE RESOURCES HE DESIRES, BUT ONLY THOSE NECESSARY TO HIS ADEQUATE DEFENSE." (Id)

SO ESSENTIALLY, A COURT ORDERED FEDERAL BUREAU OF PRISONS PSYCHOLOGIST ASSESSES THAT MR. JOHNSON DOES SUFFER FROM A MENTAL ILLNESS, BUT NOT SUCH TO MITIGATE GUILT; THE DISTRICT COURT ORDERS AT SENTENCING THAT MR. JOHNSON "PARTICIPATE IN MENTAL HEALTH TREATMENT" IN RECOGNITION OF MR. JOHNSON'S AILMENT; AND STATED APPELLATE COUNSEL TAKES NOTE OF ALL OF THESE FACTORS WITHIN HIS ANDERS BRIEF, BUT STILL "FINDS NO VIABLE ISSUES FOR DIRECT APPEAL" REGARDING THE 3006A

UNFORTUNATELY, THIS SCENARIO IS 'PAR FOR THE COURSE' WITHIN THE NORTHERN DISTRICT OF TEXAS DALLAS.

FIRST, THE UNITED STATES SUPREME COURT, IN AKE V. OKLAHOMA 470 US 68 (1985) AT 81, THE HIGH COURT MADE THIS STATEMENT OF FACT, THAT, "PSYCHIATRY IS NOT... AN EXACT SCIENCE." THEY FURTHER NOTED THAT, "...BECAUSE THERE IS often NO SINGLE, ACCURATE PSYCHIATRIC CONCLUSION ON LEGAL INSANITY IN A GIVEN CASE, JURIES REMAIN THE PRIMARY FACT-FINDERS ON THIS ISSUE." (Id)

"TO GET BEFORE THE JURY, WHEN A DEFENDANT DEMONSTRATES TO THE TRIAL JUDGE THAT HIS SANITY AT THE TIME OF THE OFFENSE IS TO BE A SIGNIFICANT FACTOR AT TRIAL, THE [GOVERNMENT] MUST... ASSURE THE DEFENDANT ACCESS TO A COMPETENT PSYCHIATRIST WHO WILL CONDUCT AN APPROPRIATE EXAMINATION AND ASSIST IN EVALUATION, PREPARATION AND PRESENTATION OF THE DEFENSE." McWILLIAMS V. DUNN 137 S. Ct. 1790 (2017) AT LEd HR2-137 S. Ct 1794. IS THIS SUPPOSE TO BE THE DUTY OF A COURT-APPOINTED FEDERAL BUREAU OF PRISONS PSYCHOLOGIST WHOSE MATERNITY LEAVE WAS THE SOURCE OF A CONTINUANCE REQUEST BY THE PROSECUTION?

More importantly, McWilliams at 1981 L.Ed 2d 353 states that, "As a practical matter, the simplest way [to meet these defense requirements] may be to provide a qualified expert retained specifically for the defense team." (emphasis added)

This ruling by the Supreme Court is a validation of this Fifth Circuit's order in US v. Theriault 440 F.2d 713 (5th 1971) where this Court stated that, "[The District Court] could not properly deny appointment of an expert sought under §3006A(e) on the basis that an earlier appointment had been made [under 18 USC §4241]". at 715 This is because, "The Court appoints a psychiatrist who examines the accused and reports to the Court. (i.e.: Warreal-Phillips)" But, "The §3006A(e) expert fills a different role. He supplies expert services 'necessary to an adequate defense', which embraces pretrial and trial assistance to the defense as well as availability to testify." (I.d. at 715)

"Unless a defendant is assured the assistance of someone who can effectively perform these functions, he has not (emphasis added) received the minimum to which [the law] requires." McWilliams at 347

Another issue of concern was the District Court's denial of a trial continuance after its extended delay in answering Mr. Johnson's 3006A(e) request. In Hintz v. Beto 379 F.2d 937, 941 (1967) This Fifth Circuit ruled that "...time for [trial] preparation, where mental competency is in question... would at least include a reasonable time within which to have a defendant examined and for trial preparation for such a defense." Mr. Johnson states that eleven days is not a "reasonable time-frame"

Lastly, Counsel Smythe's disregard of the repeated misconduct of the US Attorneys of the District of Texas-Dallas illustrates a kinship of character. The District Court's acceptance of the §3C1.1 penalty despite being shown an substance of activity warranting any 'obstruction of Justice', while deliberately disregarding the 3C1.1 note commentary 2 which states that, "A defendants denial of guilt (other than perjury) refuses to admit guilt or provide info to a probation officer... is not a basis for application of this provision..." illustrates, again, a willingness to deviate from established law.

With Mr. Johnson detailing the factual corruption of 3:07-CR-0257 and the testimony by Mr. Johnson in which District of Dallas prosecutors repeatedly, falsely state as being "...liers" - even within 3:16-CR-349 - inside of his initial pro se Appeal (dated as January 10, 2019 at III p.8); he states of the error in constant of being called a "...liar" by those who are verifiably and factually corrupt, themselves.

August 1, 2019

Derrick Johnson

In The Fifth Circuit Court Of Appeals

United States Of America

versus

Derrick Johnson

18-11602

Table of Authorities

Codes

Citations

US v Sanmiguel 910 F.2d 1234 (5th 1990)

US v Dunnigan 507 US 87 (1993)

US v Black 660 F.2d 1086 (5th 1981)

Procedures

Federal Rules of Criminal Procedure 12.2

United States Sentencing Guideline

§ 3C1.1

IN THE FIFTH CIRCUIT COURT OF APPEALS

UNITED STATES
vs
DERRICK JOHNSON

18-11602

Appeal Brief

(1)

Arguments For Appeal

In the early stages of 3:16-CR-349, the defense provided adequate notice of the intent to utilize 18 USC § 17 to challenge the underlying charge as required by F.R.C.P. 12.2. After said notice, the District Court ordered the transfer of the defendant, Derrick Johnson, to Federal Detention Center-Houston for a psychological examination under § 4242 which was subsequently completed by F.B.O.P. psychologist Doctor Jennifer Warren-Phillips The results of that examination: (i) that Mr. Johnson was competent to stand trial, and (ii) that Mr. Johnson was able to appreciate the wrongfulness of his actions, were reported to the District Court on June 5, 2017.

Following the release of the report, and after numerous issues of conflict and miscommunication, Derrick Johnson moved to proceed pro se, and was granted said status after a July of 2017 Faretta Hearing. Acting as such, Mr. Johnson then filed in the Fall of 2017/Winter of 2018 under 18 USC § 3006A(e) to be provided funds to employ mental health counselor Jeff Fletcher, and psychologist Dr. Tim Brauman, to conduct an examination of Mr. Johnson, as well as to aid in his defense. From the date of the initial filing through May of 2018, Derrick Johnson submitted several further pro se filings requesting for the grant of the funds, or for a disposition of said request. With - at that time - the Court directed August 13, 2018 trial date quickly approaching, the lack of any resolution to the issue was becomming prejudicial to other needed filings, as well as to his overall defense. (1) FOOTNOTE

In June of 2018, without a disposition regarding said request, Derrick Johnson filed for a Motion To Continue Trial which was denied on July 23, 2018 - three weeks before trial - with an alternate ruling by the District Court to finally refer the outstanding § 3006A(e) Motion to Magistrate Judge Renee Harris-Tolliver for resolution.

(1) Defense was unable to file for a handwritting expert under § 3006A(e).

On August 2, 2018 the Magistrate Judge, Renee Harris-Tolliver, denied Mr. Johnson's request for funds in stating that, "...Defendant's obvious aim is for the Court to authorize expenditures for an additional psychologist, whose opinions might contradict those in the previous court-ordered evaluation..." [Mag. Order at 4 Doc. 130] The Magistrate's denial further states that, "...the law does not obligate the Court to provide the Defendant- even though indigent- with access to the resources he desires, but only those necessary to his adequate defense." (I.D.) This denial was issued eleven days prior to trial.

On August 13, 2018 over Derrick Johnson's objections, District Judge David Godbey rejected Mr. Johnson's request for a verbal continuance, while also refusing to review the Magistrate's denial. Thus, Mr. Johnson proceeded to trial without the aid of two professionals whom were essential to his defense, or adequate time to adjust to the Magistrate's ruling and change strategies. The cumulative effect of these errors worked to deny Derrick Johnson his rights to a fair trial.

Standard of Review

Under US v Harbin 437 F.3d 463 (5th 2006), the Fifth Circuit reviews a denial of §3006A(e) experts for "...abuse of discretion." at 468 "A Court abuses its discretion when the Court makes an error of law, or bases its decision on a clearly erroneous assessment of the evidence." US v Larry 632 F.3d 933 (5th 2011) at 936 "A court, also, abuses its discretion while failing to consider the factors required by law." (See- US v Garza 593 F.3d 385, 388 (5th 2010))

Facts and The Law

I. Denial of §3006A(e)

The Criminal Justice Act of 18 USC §3006A(e), allows an indigent defendant to request the appointment of an expert or to receive other services that are necessary for an adequate

REPRESENTATION AFTER DEMONSTRATING TO THE COURT THAT THE SERVICES ARE NECESSARY.

MOREOVER, "[A] CRIMINAL TRIAL IS FUNDAMENTALLY UNFAIR IF THE STATE PROCEEDS AGAINST AN INDIGENT DEFENDANT WITHOUT MAKING CERTAIN THAT HE HAS ACCESS TO THE RAW MATERIALS INTEGRAL TO BUILDING AN EFFECTIVE DEFENSE." US v SHARP 704 F.3D 368 (5TH 2013) AT 405 CITING AKE v OKLA. 470 US 77 (1985) "UNDER AKE, THE GOVERNMENT MUST ASSURE THE DEFENDANT ACCESS TO A COMPETENT PSYCHIATRIST WHEN HE DEMONSTRATES TO THE TRIAL JUDGE THAT HIS SANITY AT THE TIME OF THE OFFENSE IS TO BE A SIGNIFICANT FACTOR AT TRIAL." SHARP AT 405 - AKE 470 US 83. "TO DEMONSTRATE REVERSIBLE ERROR ON THE BASIS THAT HE LACKED ADEQUATE FUNDS FOR EXPERT WITNESSES, A DEFENDANT MUST ESTABLISH A REASONABLE PROBABILITY THAT THE REQUESTED EXPERTS WOULD HAVE BEEN OF ASSISTANCE TO THE DEFENSE, AND THAT DENIAL OF SUCH EXPERT ASSISTANCE RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL." AT 704 F.3D 405

HERE, THE DEFENSE TIMELY FILED NOTICE OF MR. JOHNSON'S INTENDED DEFENSE UNDER §17. SUBSEQUENT TO THIS NOTICE, DERRICK JOHNSON WAS GRANTED THE LEGAL RIGHT TO ACT PRO SE. IN DOING SUCH, MR. JOHNSON SUBMITTED TO THE COURT ADEQUATE DOCUMENTATION REGARDING THE PERSONS AND THEIR PROFESSIONAL CREDENTIALS - IN MULTIPLICITY - RELATED TO HIS REQUEST UNDER §3006A(E) FOR FUNDING OF THESE DEFENSE EXPERTS. THE MAGISTRATE'S DENIAL, ELEVEN DAYS BEFORE THE START OF TRIAL, WAS AN OBVIOUS MISAPPLICATION OF THE LAW; AND THE DISTRICT JUDGE'S REFUSAL TO REVIEW SAID RULING A PATENT ABUSE OF JUDICIAL DISCRETION.

FIRST, AS SIMILAR TO THIS APPEAL, IN US v HAMLET 456 F.2D 1284 (5TH 1992) THE FIFTH CIRCUIT RULED THAT, "THE FACT THAT [THE DEFENDANT] WAS ACTING AS HIS OWN COUNSEL DOES NOT (EMPHASIS ADDED) REMOVE HIM FROM THE BENEFITS OF §3006A(E)." AT 1284; INSTEAD, "IT] HEIGHTENS THE COURT'S RESPONSIBILITY TO MAKE A CAREFUL EX-PARTE INQUIRY AND DETERMINATION OF THE NEED FOR SUCH SERVICES." (I.D.) "THAT.. THE ONLY EXAMINATION WAS CONDUCTED BY THE PSYCHIATRIST APPOINTED AT THE GOVERNMENT'S REQUEST.. ESSENTIALLY.. FAILS SHORT OF FULFILLING THE ROLE OF AN EXPERT SELECTED UNDER §3006A(E) WHOSE RESPONSIBILITY IS TO ASSIST THE DEFENSE." (I.D.)

(4) SUCH IS ALSO TRUE REGARDING THE APPOINTMENT OF A PSYCHOLOGIST BY THE DISTRICT COURT AS WELL. IN US v THERIAULT 440 F.2D 713 (5TH 1971) THIS FIFTH CIRCUIT REVERSED A JUDGEMENT OF CONVICTION WHERE THE DISTRICT COURT ERRED IN REFUSING TO EXAMINE PROPERLY THE STATUTE AUTHORIZING EMPLOYMENT UNDER §3006A(E) OF A DEFENSE PSYCHOLOGIST WHERE-AS WITH THIS CASE ON APPEAL-THE DISTRICT COURT DENIED THE REQUEST UNDER THE OPINION THAT A "PSYCHIATRIST [HAS ALREADY BEEN APPOINTED] BY A PREVIOUS [COURT] ORDER." THERIAULT AT 714 THIS FIFTH CIRCUIT RULED THAT, "[A DISTRICT COURT] COULD NOT PROPERLY DENY APPOINTMENT OF AN EXPERT SOUGHT UNDER [§3006A(E)] ON THE BASIS THAT AN EARLIER APPOINTMENT HAD BEEN MADE UNDER [§4242]." (I.D) THIS, AS STATED BY THIS COURT, IS BECAUSE, "THE [DISTRICT] COURT APPOINTS A PSYCHIATRIST WHO EXAMINES THE ACCUSED AND REPORTS TO THE COURT, AT 715 THIS EXPERT "ADVISES THE PARTIES OF HIS FINDINGS." (I.D) HOWEVER, "THE §3006A(E) EXPERT FILLS A DIFFERENT ROLE. HE SUPPLIES EXPERT SERVICES NECESSARY TO AN ADEQUATE DEFENSE, WHICH EMBRACES PRETRIAL AND TRIAL ASSISTANCE TO THE DEFENSE AS WELL AS THE AVAILABILITY TO TESTIFY. AT 715 (EMPHASIS ADDED)

CIRCUIT JUDGE WISDOM IN HIS CONCURRING OPINION, STATED OF A NEED TO GIVE MORE AID TO THE DISTRICT COURTS THAT MUST APPLY THIS STATUTE." THERIAULT AT 716. IN QUOTING PRESIDENT KENNEDY'S LETTER TRANSMITTING THE PROPOSED LEGISLATION, JUDGE WISDOM CITED THAT, "IN THE TYPICAL CRIMINAL CASE, THE RESOURCES OF THE GOVERNMENT ARE PITTED AGAINST THOSE OF THE INDIVIDUAL. TO GUARANTEE A FAIR TRIAL UNDER SUCH CIRCUMSTANCES REQUIRES THAT EACH ACCUSED PERSON HAVE AMPLE OPPORTUNITY TO GATHER EVIDENCE AND PREPARE AND PRESENT HIS CAUSE. WHENEVER THE LACK OF MONEY PREVENTS A DEFENDANT FROM SECURING ACCT. TECHNICAL EXPERT, AN UNJUST CONVICTION MAY FOLLOW." (I.D)

JUDGE WISDOM FURTHER STATED THAT, "THIS COURT HAS HELD THAT AN INDIGENT CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO COURT APPOINTED EXPERTS WHEN HIS CASE WOULD BE PREJUDICED BY THEIR ABSENCE." (CITING- BRADFORD v US 413 F.2D 467, 474 (5TH 1969)) AT 717

AS "LIKE FACTS WILL RECEIVE LIKE TREATMENT IN A COURT OF LAW," TAYLOR v CHARTER MED. 162 F.3D 829 (5TH 1998) AT 832, REGARDING THIS CASE ON APPEAL, THERE IS NO QUESTION RELATED TO HERRINK JOHNSON'S

DEFENSE OR THE TIMELINESS OF ITS FILING. THE DISTRICT COURT MOVED QUICKLY WITH AN EXAMINATION UNDER §4242. THE COURT-APPOINTED EXPERT PROVIDED HER OPINION AND REPORTED ASSESSMENT. AS "PSYCHIATRY IS NOT AN EXACT SCIENCE" - BRISENO V. COCKRELL 274 F.3D 204 (5TH 2001) AT 209, AND THE LAW RECOGNIZES THIS SUBSTANTIAL FACT, THE DEFENSE MOVED APPROPRIATELY FOR AN EXPERT AND INDEPENDENT EXAMINATION UNDER §3006A(E). THE EXTENDED DELAY IN ANSWERING SAID REQUEST (ELEVEN DAYS PRIOR TO TRIAL) IN CONJUNCTION WITH ITS ULTIMATE DENIAL UNDER THE OPINION THAT "[THE] DEFENDANT'S OBVIOUS AIM IS FOR THE COURT TO AUTHORIZE EXPENDITURES FOR AN ADDITIONAL PSYCHIATRIST, WHOSE OPINIONS MIGHT CONTRADICT THOSE EXPRESSED IN THE PREVIOUS COURT-ORDERED EVALUATION.." [MAG. ORDER AT 4] ILLUSTRATE A MANIFEST ERROR REGARDING SUPREME COURT AND FIFTH CIRCUIT PRECEDENT. AS A MANIFEST ERROR IS "ONE THAT IS PLAIN AND INDISPUTABLE, AND THAT AMOUNTS TO A COMPLETE DISREGARD OF THE CONTROLLING LAW." - SEC V. LIFE PARTNERS HOLDING 854 F.3D 765 (5TH 2017) AT 775; THE CONTROLLING LAW HERE CLEARLY STATES THAT "SIMPLY PUT, WHAT AKE AND ITS PROGENY GUARANTEE TO DEFENDANTS IS AN ADEQUATE OPPORTUNITY [FOR THEM] TO PRESENT THEIR CLAIMS FAIRLY WITHIN THE ADVERSARIAL SYSTEM" - US V. SNARR 704 F.3D AT 406 (5TH 2013) CITING AKE V. OKLA. 470 US 68 (1985) AT 77. THIS DID NOT HAPPEN WITH THIS CASE ON APPEAL.

DERRICK JOHNSON'S INDEPENDENT ASSESSMENT CONDUCTED BY MENTAL HEALTH THERAPIST JEFF FLETCHER TENTATIVELY IDENTIFIED (A) A PREVIOUSLY DIAGNOSED BI-POLAR DISORDER; (B) DEPRESSION AND EXTREME ANXIETY; AND (C) IN REVIEWING MR. JOHNSON'S MEDICAL RECORDS, INTERROGATION VIDEO, THE RELEVANT INCIDENT REPORTS AND STATEMENT-INTERVIEWS FROM MR. JOHNSON IN CONSOLIDATION WITH VARIOUS FACTS PROVIDED BY DEFENSE INVESTIGATOR WILLIAM ALBRIGHT REGARDING THE DAY IN QUESTION [INCLUDING THE GOVERNMENT PROVIDED LETTER IN WHICH THE WRITING DOES NOT CONFORM TO DERRICK JOHNSON'S NATURAL SCRIPT], MR. JOHNSON WAS STATED TO HAVE HAD A "FUGUE" DURING A "PSYCHOTIC EPISODE" CAUSED BY AN UNDIAGNOSED PARANOID DELUSIONAL DISORDER THAT WAS TRIGGERED BY EXTREME STRESS AND HIS LACK OF MEDICATION FOR OVER A WEEK BEFORE THE INCIDENT IN QUESTION.

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CONSEQUENT OF THESE FINDINGS, DR. TIM BRAUNAMAN OUTLINED A SERIES OF FURTHER TESTING AND ANALYSIS TO BE PERFORMED, AND A FEE SCHEDULE CONSISTING OF $1,500.00 FOR JEFF HESTHER AND $5,000.00 (PLUS EXPENSES) FOR DR. BRAUNAMAN. SUBMITTED TO THE COURT AS BEING CORE TO THE DEFENSE, THESE FEES WERE EVALUATED AS BEING "IN LINE" WITH PROFESSIONAL CONTEMPORARIES PERFORMING SIMILAR TASKS. MOREOVER, THE INDEPENDENT ASSESSMENT STANDS CONTRADICTORY TO FEDERAL BUREAU OF PRISON'S DOCTOR TENNILLE WARREN-PHILLIPS' CONCLUSIONS, WHOSE POSITION AND OPINION THE DISTRICT COURT AND THE PROSECUTION BASED THEIR LEGAL RELIANCE UPON.

IN U.S. V. PATTERSON, 724 F.2D 1128 (1984), THE FIFTH CIRCUIT REVERSED AND REMANDED THE CONVICTION STATING WHERE IN STATING WHERE "...THE GOVERNMENT'S CASE REST HEAVILY ON A THEORY MOST COMPETENTLY ADDRESSED BY EXPERT TESTIMONY, AN INDIGENT DEFENDANT MUST BE AFFORDED THE OPPORTUNITY TO PREPARE AND PRESENT HIS DEFENSE TO SUCH A THEORY WITH THE ASSISTANCE OF HIS OWN EXPERT PURSUANT TO SECTION 3006A(E). AT 1130 FURTHERMORE, "DENIAL OF A DEFENSE EXPERT CONSTITUTES REVERSIBLE ERROR." (I.D. AT 1130)

TO CIRCUMVENT THIS ESTABLISHED LAW, THE PROSECUTORS CHOSE NOT TO UTILIZE DR. WARREN-PHILLIPS' TESTIMONY DIRECTLY, INSTEAD CHOOSING TO REPEATEDLY REFERENCE HER OPINIONS AND ASSESSMENTS (INCLUDING THE EXAMINATION, ITSELF) TO CHALLENGE DERRICK JOHNSON'S ATTEMPTS TO ILLUSTRATE HIS MENTAL STATE TO THE TRIAL JURY, PARTICULARLY ON CROSS-EXAMINATION.

ESSENTIALLY, WITH THE LACK OF THE REQUESTED PROFESSIONALS, IT WAS LEFT TO MR. JOHNSON TO PERFORM THE TASKS LEGALLY OUTLINED AND SPECIFICALLY DESIGNED FOR PSYCHIATRIST WITHIN THE COURTROOM TO PERFORM, WHICH IS TO "...PRESENT MEDICAL INFORMATION AND OPINION ABOUT THE DEFENDANT'S MENTAL STATE AND MOTIVATION (EMPHASIS ADDED), AND TO EXPLAIN IN DETAIL THE REASON FOR HIS MEDICAL-PSYCHIATRIC CONCLUSIONS." U.S. V. LONG 562 F.3D 325 (5TH 2009) AT 333. THUS, THE DISTRICT COURT'S ACTIONS WERE PREJUDICIAL AND DEVIANT TO ESTABLISHED LAW.

II. DENIAL OF A CONTINUANCE FOR TRIAL

"THE FIFTH CIRCUIT REVIEWS A DENIAL OF CONTINUANCE FOR ABUSE OF DISCRETION, RESULTING