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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH MANZANARES,

Defendant.

Case No. 1:17-cr-00010-TMB

**MOTION TO PROHIBIT THE
ACCESS AND DISSEMINATION
OF PROFESSIONAL VISITS AT
DETENTION FACILITY**

A period of excludable delay under 18 U.S.C. § 3161(h) will not occur as a result of the filing this motion. The Speedy Trial Act calculation, as of the date of the filing of this motion, shows that the 70-day mark would fall on July 14, 2019, leaving 387 days remaining from this date before trial must begin pursuant to the Speedy Trial Act.

I. Motion

Defendant, Kenneth Manzanares, through counsel, respectfully moves this Court to enter a protective order pursuant to Fed.R.Crim.P. 16(d), the court's inherent supervisory power, and the Fifth, Sixth, and Eighth Amendments to the United States Constitution to (1) prohibit the Government from accessing Mr. Manzanares's professional/legal visitation records, telephone calls, and correspondence at the

detention facilities at which the above-named defendant is housed (Lemon Creek Correctional Center) during the pendency of this matter; (2) prohibit Lemon Creek Correctional Center from disseminating the name or capacity of any member of Mr. Manzanares's legal team including, but not limited to, attorneys, paralegals, investigators, and experts, or the date or type of professional visit to the Government, or anyone, without a court order.

II. Legal Basis

A. The Government's Collection of this Visiting Information Violates Defendant's Sixth Amendment Right to the Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees the right not just to the assistance of counsel, but to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing". *United States v. Cronin*, 466 U.S. 648, 656 (1984). A defendant's right to effective counsel is violated when the Government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, at 686.

Mr. Manzanares's mental state at the time of the offense is likely a critical fact for either a resolution or a trial. As such, the defense is ethically and legally obligated to investigate their client's mental state. *See e.g., Douglas v. Woodford*, 316 F.3d 1079

(9th Cir. 2003) (Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired.)

Collecting Mr. Manzanares's legal visitation information compromises defense counsel's ability to provide effective assistance because it forces counsel to choose between maintaining the confidentiality of the defense strategies and conducting the investigation mandated by the Constitution. Allowing the Government access to this information provides it the ability to focus on defense strategies, potentially calling its own expert to exploit it at the trial and/or penalty phase. The Government has no right to such an advantage, and without the benefit of these visitation logs, it would not be privy to such information. *See e.g., State v. Mingo*, 77 N.J. 576, 392 A.2d 590, 592 (1978) (defense counsel cannot exercise the "full investigative latitude" required to ensure a defendant receives effective assistance if he must "risk a potentially crippling revelation" to the prosecution); *State v. Doe*, 161 N.J. Super. 187, 189-90; 391 A.2d 542 (1978) (notification of prosecutor every time confined defendant had need for a visit from an expert would have "chilling effect on the conduct of effective and complete defense investigations").

B. Due Process Requires that Mr. Manzanares's Contact with Experts Be Confidential

In *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985), the Supreme Court held that an indigent defendant whose mental state is at issue has a due process right to the assistance of a psychiatric expert in evaluating, preparing, and presenting the defense both at trial

and the sentencing phase. *Ake* clearly established that when certain threshold criteria are met, a defendant must be provided with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively “conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” *McWilliams v. Dunn*, 137 S.Ct. 1790, 198 L.Ed.2d 341 (2017); *Ake*, 470 U.S., at 83.

The logical thread is that the Government shall not be untimely and prematurely privy to defense experts – a practice that is undermined if the Government has the ability to obtain visitation logs. In *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), the Ninth Circuit held this right was not satisfied where the trial court appointed a psychiatrist to evaluate the defendant but ordered that the expert provide his report to the court. *Id.* at 1157. In reaching this conclusion, the *Smith* court indicated that the right to independent psychiatric assistance is not limited to presenting a defendant’s claims of mental impairment to the jury. Rather, the independent psychiatric expert performs multiple functions. First, the expert can help determine whether a mental health defense is warranted by the defendant’s circumstances. Second, the expert can testify, explaining the defendant’s mental health history and how that is relevant to the defendant’s mental condition. Third, the expert can assist in preparing cross-examination of the Government’s experts. *Id.* Even if the independent psychiatric expert reaches an unfavorable conclusion as to the particular defendant, defense counsel may wish to use the psychiatrist to assist in these other capacities. *Id.* at 1159.

"Competent psychiatric assistance in preparing the defense is a 'basic tool' that must be provided to the defense. . . . To impose such a condition as full disclosure takes away the efficacy of the tool." *Id.*, citation omitted. Accordingly, the Ninth Circuit stated that "[c]onfidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases." *Id.* at 1160.

Collection of information related to Mr. Manzanares's visitors further raises equal protection concerns. The Government is only able to access Mr. Manzanares's visitor logs because he is incarcerated. If Mr. Manzanares were out of custody, the Government would not be able to learn the identity of any experts with whom he met. Thus, Mr. Manzanares is being penalized unfairly because of his status as a prisoner. While there is a rational basis for the prison to collect this information, there is no rational basis to justify its dissemination to the Government, especially when such dissemination impacts other constitutional rights. *See State v. Doe*, 161 N.J. Super. 187, 188, 391 A.2d 542 (ruling that policy of requiring defense counsel to notify the prosecutor that defendant was to be visited by an expert was improper; no rational basis existed for the police that treated defendant's in custody differently from defendants out of custody); *see also Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985) (referencing equal protection concepts as to indigent defendants in its due process analysis regarding the right to independent psychiatric assistance).

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C. The Government's Access to the Identity of Mr. Manzanares's Visitors Violates the Attorney Work-Product Doctrine

In *United States v. Nobles*, 422 U.S. 225, 238 (1975), the Supreme Court explained the importance of the attorney work-product doctrine in criminal cases:

Although the work-product doctrine most frequently as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Although the Court noted that "at its core," the doctrine "shelters the mental processes of the attorney," the Court also recognized that the doctrine "is an intensely practical one" that recognizes the reality that attorneys must often rely on the assistance of other investigators and agents in preparing for trial. *Id.*

The selection by the defense of expert witnesses to consult with the defendant at Lemon Creek Correctional Center is precisely the type of mental process which the work-product doctrine is designed to shelter. Disclosure of the identity of those experts the defense concludes should be retained to meet with the defendant alerts the Government to theories and strategies counsel deem worthy of exploration.

D. The Government's Collection of the Defendant's Visitation Records Circumvents Various Protections under Federal Law Designed to Protect the Confidentiality of Defense Experts

Because motions for expert funding set forth defense work-product, strategies, and theories, such motions for experts should be made *ex parte* and may be sealed. *Ake*

v. Oklahoma, 470 U.S. 68 (1985). Similarly, the Criminal Justice Act, 18 U.S.C. §3006A (“Act”) specifically authorizes defense counsel for an indigent defendant to request the appointment of expert witnesses without disclosing the nature of that request to the Government:

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.

Criminal Justice Act §3006A(e). Thus, the Act calls for an *ex parte* application to protect the defense from premature disclosure to the prosecution of defense strategy. The Ninth Circuit has recognized that the appointed § 3006A(e) expert provides services necessary to an effective defense. *United States v. Bass*, 477 F.2d 723, 725-26 (9th Cir. 1973). The expert’s services embrace not just potential trial testimony, but also pretrial and trial assistance. *Id.*

Rule 16 of the Federal Rules of Criminal Procedure restricts the Government’s right to discovery regarding defense experts and similarly prohibits the Government from prematurely learning the identity and purpose of the same:

Expert witnesses. -- The defendant must, at the government’s request, give to the government a written summary of any testimony *that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial*, if –

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed.R.Crim.P. 16(b)(1)(C) (emphasis added). Thus, under Rule 16, the defense does not have to provide any information to the Government regarding its retention of non-testifying defense experts.

III. Relief Sought

Based on the foregoing analysis, defense counsel respectfully moves the Court to enter an order that: (1) prohibits the Government from accessing Mr. Manzanares's professional/legal visitation records, telephone calls, and correspondence at the detention facilities at which the above-named defendant is housed (Lemon Creek Correctional Center) during the pendency of this matter; and (2) prohibits Lemon Creek Correctional Center from disseminating the name or capacity of any member of Mr. Manzanares's legal team including, but not limited to, attorneys, paralegals, investigators, and experts, or the date or type of professional visit to the Government or anyone without a court order.

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DATED at Anchorage, Alaska this 21st day of June 2018.

Respectfully submitted,

/s/ Rich Curtner

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Certificate of Service:

I hereby certify that I electronically filed the foregoing, and any attachments, with the Clerk of court for the U.S. District Court for the District of Alaska by using the district's CM/ECF system on June 21, 2018. All participants in this case are registered CM/ECF users and will be served by the district's CM/ECF system.

s/ Jamie McGrady

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH MANZANARES,
Defendant.

Case No. 1:17-cr-00010-TMB-DMS
Proposed **ORDER**

After due consideration, and for good cause shown, the defendant's Motion to Prohibit Access and Dissemination of Professional Visits at Detention Facility, the motion is GRANTED.

IT IS ORDERED that (1) the Government is prohibited from accessing Mr. Manzanares's professional/legal visitation records, telephone calls, and correspondence at the detention facilities at which the above-named defendant is housed (Lemon Creek Correctional Center) during the pendency of this matter; and (2) Any/all Lemon Creek Correctional Center staff is prohibited from disseminating to the Government, or anyone, without a court order, the name or capacity of any member of Mr. Manzanares's legal team including, but not limited to, attorneys, paralegals, investigators, and experts, or the date or type of professional visit.

DATED this ____ day of June, 2018.

Timothy M. Burgess, Chief District Judge
UNITED STATES DISTRICT COURT