

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

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KEVAN BRUMFIELD, )  
                                  ) Petitioner ) CIVIL ACTION NO. 04-787-D-M2  
                                  ) )  
vs. ) )  
                                  ) )  
BURL CAIN, ) )  
                                  ) Respondent )  
\_\_\_\_\_ )

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ALLOW VIDEO  
RECORDING OF RESPONDENT'S EXPERT'S EVALUATION**

Dr. Donald Hoppe has been retained by Respondent to evaluate Petitioner Kevan Brumfield in this habeas corpus action. Mr. Brumfield has alleged compelling facts demonstrating that he is mentally retarded in support of his claim that his sentence of death should be vacated pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Petitioner bears the burden of proving his claim.

Mr. Brumfield clearly understands and agrees with the State's right to rebut any evidence he may present regarding his mental retardation, and therefore, he has no objection to the scheduled evaluation. He also understands that mental health evaluations are best performed when there is no impediment or distraction to the evaluation process. As such, counsel does not wish to be present in the Death Row evaluation room where Dr. Hoppe will evaluate Mr. Brumfield. Instead, counsel seeks permission to be in the adjoining monitoring room with a video recorder. The monitoring room is a small room with a one-way mirror in the wall of the adjacent evaluation room. The evaluation room is equipped with audio capability such that a video/audio recording can be easily accomplished.

Mr. Brumfield makes the following arguments in support of this motion: 1) in order to assure that this evaluation is performed properly and that Dr. Hoppe's testimony is not inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), it is necessary that the evaluation be recorded; 2) the Fifth Amendment is directly implicated; and 3) the Sixth Amendment is directly implicated.

A. Daubert Concerns

*Daubert* controls the admissibility of scientific evidence. Whether a party seeks to admit evidence that is considered a "new" science, or scientific evidence that is generally admissible, the *Daubert* factors must be considered for admissibility purposes. For example, and in the present context, in order for Dr. Hoppe's testimony about his evaluation of Mr. Brumfield to be ruled admissible, the following factors must be considered: 1) were appropriate tests administered; 2) did the evaluator administer the appropriate tests properly; 3) did the evaluator score the appropriate tests properly.<sup>1</sup> These inquires are subsumed within the *Daubert* factors.

A video recording of the evaluation by Dr. Hoppe will necessarily aid Petitioner in determining whether a challenge to the admissibility of the testimony should be made.<sup>2</sup> Further,

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<sup>1</sup> In determining whether the expert's testimony constitutes reliable "scientific knowledge", *Daubert* provided a non-exclusive list of four criteria to examine: 1) whether the expert's theory or technique can be and has been tested; 2) whether the expert's theory or technique has been subjected to peer review and publication; 3) in the case of a particular scientific technique, the court should consider the known or potential rate of error along with the existence and maintenance of standards controlling the technique's operation; and 4) whether the expert's theory or technique enjoys general acceptance within a relevant scientific community. *Daubert*, 113 S.Ct. at 2796-97.

<sup>2</sup> Petitioner makes this argument out of an abundance of caution based upon another case. In *Frost v. Cain*, No. 7-95-996, a capital post conviction action in the 19<sup>th</sup> Judicial District Court, the Baton Rouge District Attorney employed the services of Dr. Hoppe to challenge Frost's claim that his counsel was ineffective for failure to present evidence of Post Traumatic Stress Disorder and depression. Dr. Hoppe evaluated Frost and Frost's attorney was allowed to witness the evaluation in the monitoring room, without the aid of a video recording. Following Dr. Hoppe's evaluation, Frost challenged the admissibility of Dr. Hoppe's testimony based upon *Daubert*. In particular, Frost challenged the admissibility of Dr. Hoppe's testimony because, *inter alia*, he did not administer testing appropriate to evaluate mental illness; he merely questioned Frost about legal and other matters. (Upon information and belief, the *Daubert* hearing did not occur based upon the state's withdrawal of Dr. Hoppe as their witness.)

by use of a video to document the evaluation, counsel will not be put into a potential conflict situation that could occur if he is a potential witness.

B. The Fifth Amendment Concerns

The interests at stake when a court compels a criminal defendant to submit to a mental examination are of paramount concern. The United States Supreme Court long ago recognized that court-ordered mental examinations of criminal defendants directly implicate the Fifth Amendment privilege against self-incrimination. See *Estelle v. Smith*, 451 U.S. 454, 463-64 (1981); see also *United States v. Malcolm*, 475 F.2d 420, 425 (9th Cir. 1973) (recognizing that “Fifth Amendment right looms as soon as the court, on its own motion or the prosecutor’s, orders the defendant to submit to the examination”). “The Fifth Amendment privilege is ‘as broad as the mischief against which it seeks to guard,’ *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.’” *Estelle v. Smith*, 451 U.S. at 467-68 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

*Estelle* establishes that a psychiatric interview by a representative of the prosecution is a critical stage of the criminal process at which a defendant has a right to counsel under the Sixth Amendment. 451 U.S. at 469-71. A defendant also has the benefit of the Fifth Amendment privilege against self-incrimination. The privilege will be subsequently waived to the extent that the defendant actually puts his mental condition into issue before the trier of fact, *Buchanan v. Kentucky*, *supra*, 483 U.S. at 421-25, at least as to matters other than “statements by petitioner dealing with the crimes for which he was charged.” *Id.* at 423. Since the waiver of the privilege, however, is not unlimited, the need for the guidance of counsel does not evaporate simply because the client and counsel have made a decision

that the client should submit to the adversary's examination.

These considerations led the court in *Thomas-Bey v. Smith*, 869 F.Supp. 1214, 1225-27 (D. Md. 1994), *aff'd mem.*, 67 F.3d 296 (4th Cir. 1995), to set aside a death sentence on account of ineffective assistance of counsel because the defendant's counsel did not attend the prosecution psychiatrist's interview of his client.

C. The Sixth Amendment Concerns

Petitioner also retains a Sixth Amendment right to counsel separate from his Fifth Amendment right to counsel. Even if a defendant may have waived his privilege against self-incrimination, that fact cannot destroy or impair his constitutional right to an attorney. To restrict a defendant's right to a lawyer upon his mental examination will frequently have the effect of substantially abridging, if not eliminating, every right he may have to the effective assistance of counsel in preparation of his defense. "The dangers inherent in subjecting the defendant to [a mental examination] without giving him the benefit of an attorney's advice are obvious. The often uneducated defendant will seldom understand the far reaching significance of the questions put to him by a trained psychiatrist. Questions calling for seemingly innocuous answers can be aimed at eliciting the most damaging responses. Without the benefit of counsel to advise him, it is quite likely that the accused will unknowingly provide the prosecution with sufficient evidence to secure his conviction . . . ." Note, *Pretrial Mental Examination and Commitment*, 51 Geo. L. J. 143, 162 (1969). See also *Lee v. County Court of Erie County*, 267 N.E.2d 452 (N.Y. 1971); *State v. Hutchinson*, 766 P.2d 447 (Wash. 1989).

The Court retains the discretion to establish safeguards to protect petitioner's Fifth and Sixth Amendment rights. As such, the Court may allow the evaluation to be videotaped or recorded. See, e.g., *Commonwealth v. Baldwin*, 686 N.E.2d 1001 (Mass. 1997).

WHEREFORE Petitioner respectfully requests that undersigned counsel be allowed to video tape Dr. Hoppe's evaluation.

Dated: March 8, 2009.

Respectfully submitted,

/s/ Nicholas J. Trenticosta  
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Counsel for Kevan Brumfield

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2009, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/EFC system. Notice of this filing will be sent to Ms. Monisa L. Thompson and Ms. Premila Burns, East Baton Rouge District Attorney's Office, 222 St. Louis Street, 5<sup>th</sup> Floor, Baton Rouge LA 70802, by operation of the court's electronic filing system.

s/ Nicholas J. Trenticosta  
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