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CLERK OF DISTRICT COURT
BUTLER COUNTY, IOWA

IN THE IOWA DISTRICT COURT FOR BUTLER COUNTY

STATE OF IOWA, Plaintiff,	)	No. FECR008809
vs.	)	ORDER FOR EXAMINATION
MARK DARYL BECKER, Defendant.	)	

1-13-10

This case pends before the Court on the State's Application for Examination of the Defendant by State's Experts, which was served on or about December 31, 2009.

By telephone conference call, the Court conferred with counsel about this issue, among others, with an eye toward getting ready for the trial scheduled for February 8, 2010.

In its application the State notes that the defense has retained experts Drs. Dan Rogers, Ph.D., and Phillip Resnick, M.D., who have examined the Defendant for purposes of asserting at trial claims of diminished responsibility and insanity.

With respect to those defenses, the State has retained Dr. Michael J. Taylor, M.D., and Dr. Michael K. Spodak, M.D. The State requests that the Defendant be ordered to submit to an evaluation by the State's experts at a time to be determined.

The Defendant has no objection to the evaluations as requested in the State's application provided that: (1) the evaluation by each doctor is separate; (2) the evaluations are held within the state of Iowa; and (3) the Defendant is provided a copy of any oral or written report by Drs. Taylor and Spodak. In reply to the Defendant's response, the State indicates that it plans to conduct the proposed examinations in Iowa and separately by each doctor. The State resists, however, the Defendant's request for

a copy of the experts' reports, claiming that the Defendant is not entitled to the reports either by the terms of the discovery agreement in this case or by the Iowa Rules of Criminal Procedure. In addition, at the time of the telephone conference, the State took the position that, because the doctors were rebuttal witnesses, the State did not have to disclose the specific substance of their testimony.

It is generally true that, if rebuttal testimony is appropriate, there is no problem with using undisclosed rebuttal witnesses. See 7 Ia. Prac., Evidence, Section 5.611:5 (2009 Ed.), by Adams and Weeg. As in most cases, there are exceptions to this general rule. For example, if a criminal defendant is required to disclose witnesses supporting an alibi or insanity defense, the State must disclose prior to trial its rebuttal witnesses on those issues. *Id.* See also *State v. Fechter*, 397 N.W.2d 711 (Iowa 1986). Consistent with the exception, the State has disclosed the names of its rebuttal witnesses.

Iowa Rule of Criminal Procedure 2.11(11) requires certain notices by a defendant with respect to the insanity defense. Rule 2.11(11)(b) provides:

> (1) *Defense of insanity and diminished responsibility.* If a defendant intends to rely upon the defense of insanity or diminished responsibility at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions, file written notice of such intention. The court may for good cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make other order as appropriate.
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> (2) *State's right to expert examination.* When a defendant has given notice of the use of the defense of insanity or diminished responsibility and intends to call an expert witness or witnesses on that issue at trial the defendant shall, within the time provided for the filing of pretrial motions, file written notice of the name of each such witness. Upon such notice or as otherwise appropriate the court may

> upon application order the examination of the defendant by a state-named expert or experts whose names shall be disclosed to the defendant prior to examination.

Accordingly, the rule requires the State to notify the Defendant of its expert only when the Court has appointed an expert to examine the Defendant. By this order I will appoint Dr. Taylor and Dr. Spodak to examine the Defendant. Pursuant to the rule, their names have been disclosed to the Defendant prior to the examination.

That Drs. Taylor and Spodak will be rebuttal witnesses does not protect them from disclosure of their identities or their opinions.

Moreover, I conclude that Iowa Rule of Criminal Procedure 2.14(2)(b)(2) allows for discovery (albeit discretionary) of the written reports of the doctors' evaluations. That rule provides:

> Upon motion of a defendant the court may order the attorney for the state to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations . . . made in connection with the particular case, or copies thereof, within the possession, custody or control of the state.

In the exercise of my discretion, I conclude that the Defendant is entitled to copies of any written reports of the doctors' examinations. As I mentioned at the time of the telephone conference, I believe that the best results in litigation are achieved when the parties have symmetry of information. By "symmetry of information," I mean that both parties are making their evaluations and decisions on the same database of available information.[1]

[1] Indeed, the law protects those who, because of their lot in life, are restricted in the amount of information they have in dealing with others. For example, where one party has superior information and superior bargaining power, preventing symmetry of information among the parties, the Court may by means of the notions of fraud, unconscionability, undue influence or the like, set aside a transaction between the

In 1973, in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, the Supreme Court of the United States positively sanctioned the concept of symmetry of information in the context of criminal litigation by noting the following:

> Notice of alibi rules, now in use in a large and growing number of states, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, E. G. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U.L.Q. 279; American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, 23-43; Goldstein, the State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. . . .

Although the Supreme Court in *Wardius* was talking about notice-of-alibi rules, the same principles apply to the notice of insanity defense rules. One could simply substitute "notice of insanity defense" rules for "notice of alibi" rules in the above quotation.

All of this is a long way of saying that the State is obligated to turn over to the Defendant any written reports of the psychiatric examinations. The Defendant has also requested a copy of any oral reports. By definition, however, there is not a copy of an oral report. Defendant would, of course, have the opportunity, if he wishes, to depose the State's experts.

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parties. While this is an example from the world of civil litigation, I am of the belief that better results obtain in criminal litigation as well when the parties have symmetry of information.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The State's Application for Examination of Defendant by State's Experts is granted.

2. The Defendant is ordered to submit to evaluations by Drs. Michael J. Taylor and Michael J. Spodak at a time to be determined.

3. The evaluation by each doctor shall be separate.

4. The evaluations shall be held within the state of Iowa.

5. The Defendant shall be provided a copy of any written report furnished by either Dr. Taylor or Dr. Spodak.

6. The Sheriff of Butler County, or his designee, is authorized and directed to transport the Defendant to the place of examination with either doctor.

Done and Ordered this 12th day of January, 2010.

Stephen P. Carroll
STEPHEN P. CARROLL
Judge of the Second Judicial District of Iowa

Clerk shall furnish copies to:
Greg Lievens, Esq. ✓
Scott Brown, Esq. ✓
Susan R. Flander, Esq. ✓ 1-13-2010
Butler Co. Sheriff ✓