FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff,
vs.
JOSE I. SANTOS,
Defendant.

CRIMINAL ACTION NO. 11-146A

ORDER DENYING MOTIONS FOR APPOINTMENT OF FORENSIC EXPERT AND EXPERT IN CHILD WITNESS SUGGESTIBILITY, AND TO COMPEL ADVANCE DISCOVERY OF WITNESS STATEMENT

I. INTRODUCTION

THIS MATTER came before the Court on November 17, 2011, for a hearing on Defendant's motions for appointment of defense experts in forensics and child witness suggestibility, and to compel advance discovery of witness statements. The CNMI ("Government") was represented by Assistant Attorney General Eileen Escudero Wisor. Defendant Jose I. Santos ("Santos" or "Defendant") appeared with Public Defender Douglas Hartig. Based on the pleadings, the papers on file and arguments of counsel, the Court DENIES all three motions.

II. BACKGROUND

Defendant was charged with two counts of Sexual Abuse of a Minor in the First Degree in violation of 6 CMC §1306(a)(1), and made punishable by 6 CMC §1306(b). (Information at 1-2.)

On May 16, 2011, Mrs. Rozelyn Martin questioned her 8 year-old daughter ("PMT") if she had been sexually abused by Defendant, based upon information provided by Mrs. Martin's cousin. (Decl. of Probable Cause in Supp. of the Issuance of an Arrest Warrant.) In response, PMT revealed that Defendant sexually abused PMT several times. (*Id.*) Immediately thereafter, Mrs. Martin escorted her daughter to the Criminal Investigation Bureau Office where PMT disclosed details regarding her encounters with Defendant. (*Id.*) Specifically, PMT explained that Defendant engaged in vaginal and anal sexual intercourse with PMT, and instructed her not to tell anyone about their encounters. (*Id.*)

Still on May 16, 2011, Dr. Chad Lowe examined PMT at the Commonwealth Health Center using the "Sexual Assault Evidence Collection Kit," and confirmed that PMT was subject to vaginal and anal penetration. (*Id.*) As provided by the parties at the hearing on November 17, 2011, Dr. Grant similarly examined PMT and also found evidence of sexual abuse.

Defendant requests the Court to provide him with a forensic expert to assist in his defense. During oral argument, Defendant claimed that he needs the assistance of an expert to evaluate Dr. Lowe's and Dr. Grant's examinations of PMT and their conclusions.

In addition, Defendant requests the Court to provide him with a Government paid expert in child witness suggestibility. The complaining witness is a minor who may be vulnerable to suggestion or coercion. Therefore, Defendant requests the appointment of an expert to determine whether the allegations of sexual assault have been implanted through improper interview techniques.

Lastly, Defendant moves the Court to compel advance disclosure of witness statements. Because the complaining witness allegedly provided several statements to the Government, and her credibility is at issue, Defendant asserts that early disclosure of those statements is necessary to avoid delaying the proceedings.

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III. APPOINTMENT OF DEFENSE EXPERTS IN FORENSICS AND CHILD WITNESS SUGGESTIBILITY

A. Standard

Article I, Section 4 of the Constitution of the Commonwealth of the Northern Mariana Islands provides that "[i]n all criminal prosecutions, certain fundamental rights shall obtain." Among these rights is that "[t]he accused has the right to assistance of counsel, and if convicted, has the right to counsel in all appeals." NMI Const. art. I, § 4(a). This section is based on the Sixth Amendment to the United States Constitution. *Commonwealth v. Perez*, 2006 MP 24 ¶ 11 (stating that the "Sixth Amendment to the United States Constitution applies to the Commonwealth"); *see also Commonwealth v. Suda*, 1999 MP 17 ¶ 10. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defense." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

The effective assistance of counsel guarantee of the due process clause requires, when necessary, the appointment of investigative services for a criminal defendant. *Perez*, 2006 MP 24 ¶ 11 (citing *Ake v. Oklahoma*, 470 U.S. 78 (1985)); *see also Williams v. Stewart*, 441 F.3d 1030, 1053 (9th Cir. 2006) (citation omitted).

B. Discussion

At issue is whether it is necessary for the Court to provide an indigent defendant with experts to (a) evaluate medical findings of sexual abuse and (b) to determine whether a child victim has been subject to suggestion or coercion through improper interview techniques.

In the case of *Commonwealth v. Perez*, our Supreme Court adopted a two-part test a defendant must satisfy for the Court to appoint expert assistance. 2006 MP 24 ¶ 14. Under this test, the burden is on the defendant to establish (1) the existence of a reasonable probability that an expert would be of assistance to the defense and (2) the denial of expert assistance would result in a fundamentally unfair trial. *Id.*

In order to satisfy the *Perez* test, the defendant must offer a "particularized showing" why the appointment of a defense expert is necessary for a fair trial. *Id.* ¶ 24; *Husske v. Commonwealth*, 252 Va. 203, 211 (Va. 1996). General assertions that an expert would be beneficial or necessary to present an adequate defense are insufficient. *Id.* (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985)). Although all criminal defendants are entitled to effective assistance of counsel, "due process does not require the government automatically to provide indigent defendants with expert assistance upon demand." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987). Such a rule would leave room for abuse and a substantial burden on the government. *Perez*, 2006 MP 24 ¶ 12. In order to balance the defendant's rights against those of the taxpayers, the defendant must prove the existence of a reasonable probability that the defense experts would be of assistance, and the denial of which would result in a fundamentally unfair trial. *Id.*

a. Forensic Expert

1. *Reasonable Probability of Assistance*

During oral argument, Defendant claimed that he needs the assistance of a forensic expert in order to determine whether Dr. Chad Lowe and Dr. Grant ("the Doctors") properly examined the alleged victim and whether they properly found signs of anal and vaginal penetration. Despite the availability of the Doctors for interviewing, defense counsel admitted that he made no effort to inquire about their examinations and conclusions in the instant case. Defense counsel claimed such an inquiry would be meaningless because he never attended medical school, and thus, is unaware of the pertinent questions to ask.

The Court recognizes that "defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide;" however, "defense counsel is obligated to inform himself about the scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." *Moore*, 809 F.2d at 712.

Defense counsel failed to inform himself whatsoever about the Doctors' medical reports, and provided the Court with mere hope or suspicion that the reports are inaccurate or omit important information. "To demonstrate a particularized need, an indigent defendant must offer more than a '[m]ere hope or suspicion that favorable evidence is available.'" *Dowdy v. Commonwealth*, 278 Va. 577, 595 (Va. 2009) (quoting *Husske*, 252 Va. at 212); *see also Commonwealth v. Sanchez*, 268 Va. 161, 166 (2004) ("[C]onclusory assertions" that expert testimony regarding scientific testing may show the presence of errors that "*could have had* a significant impact" were not "'particularized' because they indicate[d] nothing more than [the defendant's] 'hope or suspicion.'").

Defendant can point to no particular facts or evidence to refute the Doctors' findings of sexual abuse. In addition, Defendant offers no reason to question the credibility or qualifications of the Doctors. Therefore, Defendant failed to prove the existence of a reasonable probability that a forensic expert would find error in the Doctors' medical reports, or otherwise be of any assistance to the defense. The first prong of the *Perez* test is not satisfied.

2. *Fundamental Fairness*

Under this prong, the Court must determine whether denial of a court appointed expert would result in a fundamentally unfair trial.

Defendant argues that it is fundamentally unfair for the Government to be able to make use of expert analysis and testimony when Defendant does not have access to the same. However, "[t]he state need not provide indigent defendants all the assistance their wealthier counterparts might buy; rather, fundamental fairness requires that the state not deny them 'an adequate opportunity to present their claims fairly within the adversary system.'" *Moore*, 809 F.2d at 709 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)). Defense counsel has had ample time to interview the Doctors and to educate himself about the medical reports. Moreover, Defendant will have the opportunity to cross-examine the Government's expert witnesses at trial.

Defendant next argues that fundamental fairness entitles him to appointment of a forensic expert due to the difficulty of a lawyer challenging complicated scientific evidence. This type of argument has been rejected by the majority of the state courts.[1] *People v. Leonard,* 224 Mich. App. 569, 583 (Mich. Ct. App. 1997); *Husske*, 252 Va. at 213. The defendant in *Leonard* requested the appointment of an expert to challenge extremely complicated DNA evidence presented by the government. 224 Mich. App. at 583. The court held that, consistent with the decisions of the United States Supreme Court, an indigent defendant is not entitled to an expert whenever scientific evidence is presented by the government. *Id.* In ruling against the defendant, the court found his request for appointment of an expert to be general and conclusory, thus failing to state a "particularized" need. *Id.* at 584.

Similarly here, Defendant did not state a particularized need for an expert. During oral argument, defense counsel merely asserted that an expert is needed to evaluate the Doctors' medical findings of vaginal and anal penetration committed against the alleged victim. Even if such findings are of a highly technical nature, Defendant is not entitled *per se* to the appointment of an expert. *See id.*; *see also Vickers v. Arizona*, 497 U.S. 1033 (1990). Defendant did not prove that the denial of expert assistance would result in a fundamentally unfair trial, thus failing to satisfy the second prong of the *Perez* test.

b. Expert in Child Witness Suggestibility

Defendant's request for appointment of an expert in child suggestibility fails to satisfy either of the two prongs of the *Perez* test for reasons similar to those discussed above. Defendant contends that an expert is necessary to effectively present his argument that the sexual assault allegations *could be* the product of coercive, or otherwise improper, interview techniques. (Mot. To Appoint Expert in Child Witness Suggestibility.) This argument is nothing more than "mere hope or suspicion," which does not constitute the requisite

[1] Only two courts have held that the due process requirement confers a right upon a defendant to be provided an expert to challenge DNA evidence presented at trial. *Dubose v. State*, 662 So. 2d 1189, 1197 (Ala. 1995); *Polk v. State*, 612 So. 2d 381 (Miss. 1992).

showing of a particularized need for an expert. *Dowdy*, 278 Va. at 595; *Sanchez*, 268 Va. at 166.

Defendant's citations to several cases and journals showing that courts tend to "recognize and permit" testimony from experts in child witness suggestibility is equally unpersuasive. (Mot. to Appoint Expert in Child Witness Suggestibility.) The issue at hand is not whether the Court should "recognize and permit" such expert testimony, but rather, whether to provide Defendant with a Government paid expert. Even assuming that an expert in child witness suggestibility would be beneficial, due process does not entitle Defendant to such an expert at the Government's expense. *Ross*, 417 U.S. at 612. Defendant must meet his burden in satisfying the two prongs of the *Perez* test, which Defendant failed to do.

IV. ADVANCE DISCOVERY OF WITNES STATEMENTS

A. Standard

The United States Supreme Court held that the defense has a right to inspect all statements and materials relating to the trial testimony given by government witnesses. *Jencks v. United States*, 353 U.S. 657 (1957). This rule of law is known as the Jencks Act, embodied in Com. R. Crim. Pro. 26.2(a) that provides:

> *After* a witness other than the defendant *has testified on direct examination*, the court, on motion of a party who did not call the witness, shall order an attorney for the government or the defendant and his/her attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter which the witness has testified.

Id. (Emphasis added).

Rule 26.2(a) clearly states that discovery of witness statements is conducted *after* the witness has testified. Nevertheless, a party must be afforded "a reasonable opportunity to examine [the witness' statement] and prepare for its use in the trial." *United States v. Holmes*, 722 F.2d 37, 40 (4th Cir. 1983). If counsel reasonably requests additional time to

review the statement, the court "may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial." Com. R. Pro. 26.2(d).

B. Discussion

The Court must determine whether to compel the disclosure of the alleged victim's statements prior to any testimony. As Defendant correctly pointed out, disclosure of Jencks material is ordinarily conducted "after a witness has testified." (Mot. to Compel Production of Witness Statements Pursuant to Rules 12(I) and 26.2 Together With Mem. of Law in Supp. Thereof.) Thus, only in exceptional circumstances is it appropriate to compel early disclosure.

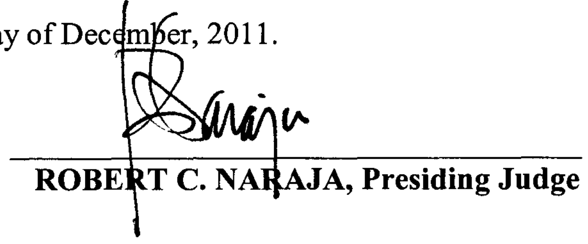
Defendant argues that early disclosure of Jencks material is warranted by attempting to analogize the instant case with *Holmes*. (*Id.*) This argument is without merit. In *Holmes*, the Fourth Circuit Court of Appeals held that the trial court abused its discretion in denying defense counsel a reasonable time to review witness statements and materials, based on two unusual circumstances. 722 F.2d at 41. First, the government disclosed thousands of pages of testimony to defense counsel the day prior to trial. *Id.* Second, the charges were vague, making the "need for careful study of Jencks Act materials greater than in the usual case where greater specificity of the charge is alleged." *Id.*

The instant case contains no unusual circumstances. The charges are straightforward and specific – sexual abuse of a minor consisting of vaginal and anal penetration. Furthermore, the Government submitted that it has produced all discovery in its possession to date and will continue to do so in accordance with its duty under Com. R. Crim. P. 16(c). (Mot. and Mem. in Supp. of Opp'n. to Def.'s Mot. to Compel Advance Disc. of Witness Statement and to Compel Disc.) If at the time of trial, the Government produces a voluminous amount of Jencks material, the Court may order a recess to grant defense counsel a reasonable amount of time for examination and preparation in accordance with Rule 26.2. Early disclosure, absent a showing of unusual circumstances, would contravene the clear language of Rule 26.2. *See Commonwealth v. Kaipat*, Crim. No. 93-0174 (NMI Super. Ct. 2005).

VI. CONCLUSION

For the forgoing reasons the Court hereby DENIES the Defendant's Motion for Appointment of a Forensic Expert, and DENIES the Defendant's Motion for Appointment of an Expert in Child Witness Suggestibility, and DENIES the Defendant's Motion to Compel Production of Witness Statements.

IT IS SO ORDERED this 1st day of December, 2011.



ROBERT C. NARAJA, Presiding Judge