IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 07-550-05
STEVEN NORTHINGTON	:	

SURRICK, J. **AUGUST 10, 2012**

MEMORANDUM

Presently before the Court are Defendant Steven Northington's Motion to Reconsider Transfer (ECF No. 555) and Motion for Stay (ECF No. 562). For the following reasons, Defendant's Motions will be denied.

I. BACKGROUND

The factual background of this case is more fully set forth in our July 12, 2012 Memorandum and Order granting the Government's request for mental health discovery. (*See* ECF Nos. 545, 546.) By way of general background, on May 9, 2012, a federal grand jury returned a seventeen-count Fourth Superseding Indictment against Defendant Steven Northington and three of his co-Defendants. Defendant was charged with conspiracy to participate in the affairs of a racketeering enterprise, in violation of 18 U.S.C. § 1962(d) (Count 1), two counts of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Counts 5 and 7), and tampering with a witness, in violation of 18 U.S.C. § 1512(a) (Count 8). (Fourth Superseding Indictment, ECF No. 480.) On March 14, 2011, the Government filed a notice of intent to seek the death penalty against Defendant. (ECF No. 198.)

On June 7, 2012, Defendant filed a notice pursuant to Rule 12.2(b) of the Federal Rules

of Criminal Procedure. (Rule 12.2(b) Notice, ECF No. 513.) His Rule 12.2(b) Notice states that "the defense may seek to introduce expert evidence relating to a mental condition of the Defendant bearing on the issue of punishment." (*Id.* at ¶ 1.)[1] On June 11, 2012, counsel for Defendant notified the Government that Defendant would likely be requesting a pretrial hearing pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).[2] Counsel also advised that the defense expert reports had not yet been finalized but that he expected to receive final reports in sixty days. (*See* ECF No. 533.) Counsel for Defendant subsequently provided the Government with a complete list of all psychological tests administered to Defendant, including the dates the tests had been administered. (*Id.*)

On June 14, 2012, a status conference was held to discuss the mental health testing of Defendant pursuant to his Rule 12.2(b) Notice. (June 14, 2012 Hr'g Tr. 1 (on file with Court).) At the conference, the parties discussed the scheduling of a competency evaluation of Defendant, as well as the scheduling of the Government's psychological testing of Defendant for purposes of

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[1] The Rule 12.2(b) Notice further states that Defendant "may offer testimony by one or more neuropsychologists, social psychologists and neuropsychiatrists . . . concerning cognitive and intellectual disabilities and brain damage and how these deficiencies combined with [his] social and institutional history to adversely affect his development and adjustment to living in his community and his reaction to and decision-making concerning the circumstances alleged in the Indictment . . . ." (Rule 12.2(b) Notice ¶¶ 2, 5.)

[2] An *Atkins* hearing is an evidentiary hearing conducted in order to determine whether the defendant is intellectually disabled and therefore ineligible to receive the death penalty. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that imposition of the death penalty against an intellectually disabled individual is unconstitutional); *see also United States v. Smith*, 790 F. Supp. 2d 482, 503 (E.D. La. 2011) ("The point of an *Atkins* hearing is to determine whether a person was mentally retarded at the time of the crime and therefore ineligible for the death penalty.").

rebuttal.[3] The Government stated at the conference that its experts require the results and reports of Defendant's expert before examining Defendant. (June 14 Hr'g Tr. 1 at 9-10.) The Government also stated that its experts were located at the Medical Center for Federal Prisoners ("MCFP") in Springfield, Missouri. (*See id*. at 7 ("The mental health experts who do these types of analyses for the government in these cases are in Springfield, Missouri. It's standard course that these individuals are sent to Springfield, Missouri for the analysis.").)

On June 18, 2012, the Government requested discovery of Defendant's mental health evidence. (*See* ECF No. 532.) Another status conference was held on July 2, 2012, at which counsel for Defendant agreed to immediately turn over all raw data and test results to the Government. Counsel also advised that expert reports were not yet available. The Government expressed concerns about the timing of its examination in light of the impending trial, which was scheduled for September 10, 2012. The parties agreed that an *Atkins* hearing would be necessary prior to the start of trial. The Government advised that, in order to get the examination accomplished in time to avoid a delay in trial, it would need to send Defendant to Springfield, Missouri where its experts were located. Defense counsel requested that Defendant be transferred to a Bureau of Prisons facility in West Virginia for the testing rather than Missouri.

On July 12, 2012, a Memorandum and Order were entered granting the Government's request for discovery of Defendant's mental health evidence. (*See* ECF Nos. 545, 546.) Pursuant to the Order, Defendant was to provide its expert reports to a firewalled attorney for the

[3] On July 3, 2012, an Order was entered appointing Dr. Pogos H. Voskanian, M.D. to conduct the competency evaluation and to submit a report to the Court. (ECF No. 542.) Shortly after the Order was entered, Dr. Voskanian conducted an evaluation of Defendant and submitted a report to the Court.

Government on or before July 25, 2012. (Discovery Order ¶ 3.)[4] On the date the reports were due, counsel for Defendant provided the firewalled attorney with three expert reports in support of Defendant's *Atkins* claim. (Def.'s Mot. Reconsider 1, ECF No. 555 (filed *ex parte*).) These reports were termed "preliminary reports" even though the Order provided that "final reports" would be provided. (Gov't's Statement, ECF No. 565.)

On July 25, 2012, an Order was entered directing that the United States Bureau of Prisons and the United States Marshals Service transport Defendant to the MCFP for psychological testing. (Transport Order, ECF No. 552.) Defendant's transport to the MCFP was ordered to facilitate the Government's testing of Defendant in response to Defendant's notice of intent to admit psychological testimony under Rule 12.2(b). (*Id.*) After the Transport Order was entered, defense counsel wrote a letter to the Court raising concerns with the Order. (Def.'s Mot. Reconsider 2.) Defendant's counsel expressed concern that the Government had filed no motion requesting the testing, and that no order governing the scope and parameters of the evaluation had been entered by the Court. (*Id.*) Counsel stated that he does not know the credentials or specialties of the Government's experts, and argued that testing should be strictly limited to the narrow issue of intellectual disability under *Atkins*. Finally, counsel expressed concern "that any stay beyond the few days required for testing will substantially inhibit the preparation of the guilt phase defense." (*Id.*)

On July 30, 2012, Defendant filed a Motion to Reconsider Transfer. (Def.'s Mot.

[4] Assistant United States Attorney Maureen McCartney was appointed as the firewalled attorney for the Government. (*See* ECF No. 544) As the firewalled attorney, Ms. McCartney was to receive and review all discovery related to Defendant's *Atkins* claim, including any expert reports.

Reconsider.) On July 31, 2012, a conference was held with counsel for the Government and counsel for all Defendants. The purpose of the conference was to discuss scheduling in light of the recent developments related to Defendant Northington. As a result of that conference, an Order was entered rescheduling the trial for January 7, 2013 with voir dire of prospective jurors beginning on November 5, 2012. (*See* ECF No. 560.) An *Atkins* hearing was scheduled for October 15, 2012. After the conference with counsel for all Defendants, a conference with just the Government and Northington's attorneys was held. Counsel for Northington again expressed concerns about the Transport Order. Specifically, counsel was concerned about the length of time that Defendant would stay at the MCFP, the scope of testing that would be administered to Defendant, and that the Government would be permitted to conduct twenty-four hour observation and monitoring of Defendant. Addressing counsel's concerns, the Government agreed to limit Defendant's stay at the MCFP to fifteen days, and to provide a list of the tests that would be administered to Defendant. Counsel for the Government advised that it would provide a list containing the names of the tests that its experts would administer, in addition to a list of potential additional tests. The Government explained that its experts often will need to administer additional tests based upon results or observations made during initial tests. Defense counsel also requested that the Government's examination be videotaped. The Government advised that it would consult with its experts with regard to this request.

Despite the agreement reached between the parties at the July 31 status conference, on August 1, 2012, counsel for Northington filed a Notice of Appeal of the Transport Order. (*See*

ECF No. 558.)[5] Defendant also filed a Motion for Stay of the Transport Order on August 2, 2012. (Def.'s Mot. Stay, ECF No. 562.) The Government filed a Response to the Motion for Stay on August 3, 2012. (Gov't's Stay Resp., ECF No. 563.) Defendant filed a Reply to the Government's Response on August 6, 2012. (Def.'s Reply, ECF No. 564.)

On August 7, 2012, the Government filed a Statement of Intent as to Psychological Testing of Defendant Northington Pursuant to Rule 12.2 Notice. (Gov't's Statement.) The Statement identifies the Government's experts as board-certified forensic psychologists, Dr. Robert L. Denney, Psy. D., and Dr. Lee Ann Preston Baecht, Ph.D. (*Id.* at 3.) The Statement also indicates that, although it is "optimal to allow for 30 days in which to observe and examine a defendant, [the experts] believe they can accomplish their testing within 15 days of Northington's arrival at Springfield." (*Id.* at 5.) In addition, the Statement indicates that the Government's doctors have advised that videotaping should not be done because it has a negative effect on testing, and that Defendant would have the ability to consult with his attorneys by telephone and through attorney visits while at the MCFP. (Gov't's Statement 6.) The Statement identifies the following areas for testing: intelligence (IQ); effort and malingering; learning and memory; achievement; attention; concentration; speed of mental processing; emotional testing; and administering measures of adaptive living. (*Id*. at 6.) The doctors will determine exactly which tests will be administered after they have had the opportunity to review Defendant's testing results. The Government will provide a list of the exact tests to the Court. The Government

[5] The Notice of Appeal was docketed at Case No. 12-3186. On August 6, 2012, the Clerk of the Third Circuit entered an Order indicating that "the order on appeal is not final and is not otherwise appealable at this time." *United States v. Northington*, No. 12-3186 (3d Cir.). The Order further directs the parties to file written responses addressing the issue of jurisdiction within fourteen (14) days of the order. (*Id.*)

requests that the names of the tests to be performed not be revealed to defense counsel unless their communications with Defendant are temporarily suspended. (Gov't's Statement 6 n.2.) The Government is concerned that if the names of the actual tests are revealed to Defendant, then Defendant could learn the questions on such tests, thus compromising the accuracy of the test results. (*Id.*)

II. LEGAL STANDARD

"Motions for reconsideration may be filed in criminal cases." *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003). The district court exercises broad discretion over motions to reconsider, especially as they pertain to interlocutory orders. *Anthanassious v. Palmer* (*In re Anthanassious)*, 418 F. App'x 91, 95 (3d Cir. 2011); *see also Bausch & Lomb Inc. v. Moria S.A.*, 222 F. Supp. 2d 616, 669 (E.D. Pa. 2002) (noting that a district court has inherent power to reconsider interlocutory orders "'when it is consonant with justice to do so'" (quoting *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973))).

The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Kabacinski v. Bostrom Seating, Inc.*, 98 F. App'x 78, 81 (3d Cir. 2004) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)). The Court may grant a motion for reconsideration if the moving party shows: (1) an intervening change in the controlling law; (2) the availability of new evidence which was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *United States v. Croce*, 355 F. Supp. 2d 774, 775 (E.D. Pa. 2005) (citing *Max's Seafood Cafe by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)). Motions to reconsider will only be granted for "compelling reasons such as a change in the law which

reveals that an earlier ruling was erroneous, not for addressing arguments that a party should have raised earlier." *United States v. Dupree*, 617 F.3d 724, 732 (3d Cir. 2010) (citations omitted).

III. DISCUSSION

A. Motion to Reconsider the Transport Order

Defendant offers four arguments in support of his Motion to Reconsider the Transport Order. First, Defendant argues that he was not given adequate notice of the nature and extent of the Government's proposed examination. Without such notice, Defendant contends that he has not had the opportunity to raise objections to certain aspects of the proposed testing. Second, Defendant argues that the Court lacks the authority to order a custodial examination of Defendant. Third, Defendant contends that he should not be transported out of the Federal Detention Center ("FDC") in Philadelphia because such transfer places his Sixth Amendment right to counsel at risk. Finally, Defendant argues that the Transport Order causes unfair prejudice to him since it gives the Government an advantage by permitting greater access to Defendant and more time to conduct a wider array of tests.

1. Notice of Government Testing

With respect to Defendant's argument that he had inadequate notice of the proposed testing, at the time that the Transport Order was entered, a formal motion by the Government requesting an examination of Defendant had not been filed. However, Defendant can hardly argue that he was not repeatedly put on notice that the Government intended to schedule psychological testing to address the *Atkins* claim. The Court held numerous lengthy status conferences with defense counsel and the Government, during which details related to the

Government's proposed examination were discussed. Defense counsel were given the opportunity to, and did in fact, share their input on these details. In fact, the Government advised Defendant of its need to send Defendant to the MCFP to facilitate testing over a month before the Transfer Order was entered. Moreover, implicit in the Court's Memorandum and Order granting the Government's request for mental health discovery was the Government's intention to schedule an examination, and the Court's approval of such examination. A firewalled attorney was appointed for the specific purpose of facilitating that examination and the transfer of expert discovery and reports. Under these circumstances, a formal motion by the Government was hardly necessary since all of the parties understood that an examination of Defendant by the Government's experts would take place and the Government had agreed to formally advise defense counsel and the Court of the names and qualifications of the experts and to provide a list of the tests to be administered.[6]

In any event, the Government has now provided notice to Defendant concerning the details of its intended examination. (ECF No. 565.) The Government has disclosed the names and specialties of its experts. It has indicated that the duration of the proposed testing will be fifteen days. It has provided a list of areas the experts will test, and has agreed to provide the names of the tests its experts will administer once Defendant is transferred to the MCFP.[7] To the extent that defense counsel has objections to any of the tests to be conducted, they may notify the

[6] To the extent that a formal motion is required, the Court considers the Government's Statement of Intent as formal notice of its request for an expert examination of Defendant.

[7] The Government's examination shall include tests that only relate to Defendant's claim of mental retardation. Moreover, the Government shall not administer any medications to Defendant in conjunction with the testing process without first getting approval from this Court.

Court and the objection will be addressed. Finally, Defendant's counsel will be notified of the date that testing will begin. We are satisfied that Defendant has had adequate notice of the Government's testing. Moreover, the Government has been directed to continue to keep Defendant and the Court advised concerning the details of its testing of Defendant.

2. Court's Authority to Order a Custodial Examination

Rule 12.2(c) explicitly gives the district court the discretion to decide the procedures governing the Government's examination of a defendant after that defendant has provided notice of his intent to rely on mental health evidence pursuant to Rule 12.2(b). *See* Fed. R. Crim. P. 12.2(c)(1)(B) ("If the defendant provides notice under Rule 12.2(b) the court may . . . order the defendant to be examined under procedures ordered by the court."); *see also* Fed. R. Crim. P. 12.2 advisory committee note ("The [2002] amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity) . . . . Accordingly, the court is given the discretion to specify the procedures to be used."). The Advisory Committee Notes further provide that, when the examination is ordered in conjunction with an intent to present expert testimony on a defendant's mental condition under Rule 12.2(b), the Court may be informed by statutory provisions addressing competency and insanity. *See* Fed. R. Crim. P. 12.2 advisory committee note (stating that Court may look to 18 U.S.C. § 4241). The statute addressing a defendant's competency to stand trial, 18 U.S.C. § 4241, states that a court may order a psychiatric or psychological examination pursuant to 18 U.S.C. § 4247(b). *See* 18 U.S.C. § 4241(b). Section 4247(b) states that "for purposes of an examination pursuant to an order under section 4241 . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to

the custody of the Attorney General for placement in a suitable facility." 18 U.S.C. § 4247(b).

The Court's authority to permit the Government to conduct an examination at the MCFP is expressly provided in the Rules. The Government has advised that the MCFP is a "suitable facility" for Defendant's evaluation. Evaluations of the type at issue in this case are generally conducted at this facility. Moreover, the forensic psychologists have advised the Government that testing conditions at the MCFP are optimal. Completing the testing at the MCFP is the most practical and efficient course at this juncture, particularly in light of the fact that the *Atkins* hearing is scheduled to take place in just over two months. We find that the MCFP is the most suitable place to conduct the Government's examination of Defendant in order to efficiently address Defendant's *Atkins* claim without any further delay of trial.

Defendant's reliance on *United States v. Rinaldi*, 351 F.3d 285 (7th Cir. 2003) and *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), is misplaced. In both *Rinaldi* and *Davis*, the circuit courts determined that each respective district court lacked the authority to order the commitment and examination of the defendant. *See Rinaldi*, 351 F.3d at 289; *Davis*, 93 F.3d at 1286. *Rinaldi* and *Davis* are inapposite because the defendants in both cases were released on bond pending trial and were thereafter ordered to surrender to a medical facility to undergo psychiatric evaluation. *See Rinaldi*, 351 F.3d at 287-88; *Davis*, 93 F.3d at 1288. Here, Defendant is in custody, both as a pretrial detainee in the instant case, and as a prisoner serving a nineteen-year sentence on a federal drug conviction and serving a life sentence on a state murder conviction.[8]

[8] In contrast to *Rinaldi* and *Davis*, the Tenth Circuit has recognized that district courts have discretion under Rule 12.2(b) to commit a defendant for evaluation in certain circumstances. *United States v. Visinaiz*, 96 F. App'x 594, 599-600 (10th Cir. 2004). Specifically, the Court stated that "where a district court finds the claimed mental condition to be complex, a greater examination might be warranted, whereas for minor conditions, a more

3. Sixth Amendment Concerns

Defendant argues that the Transport Order infringes upon his Sixth Amendment right to counsel. He contends that his access to legal counsel will be "severely restricted" while he is undergoing testing at the MCFP, which in turn will deprive him of the ability to effectively prepare his defense. Defendant's argument is unpersuasive. Trial has been continued for four months. Voir dire of prospective jurors will not begin until November 5, 2012, and opening statements will not begin until January 7, 2013. The Government's examination will last, at most, fifteen days. Defendant's stay at the MCFP will not inhibit counsel's trial preparations. Moreover, Defendant will have access to a telephone to call his legal counsel, and counsel will be permitted to visit with Defendant at the MCFP if they choose to do so. Finally, Defendant's Sixth Amendment argument is undermined by the request that he be transferred to West Virginia for the evaluation. West Virginia is many miles away from his attorneys, who are located in Norristown, Pennsylvania and Mickleton, New Jersey. In any event, we are satisfied that Defendant's ability to consult with his attorneys and prepare for his defense will not be impacted by his short stay at the MCFP.

4. Scope of Examination and Access to Defendant

Finally, Defendant argues that the Government's testing permits the Government to have greater access to Defendant. He contends that the Government should be afforded, at most, equal access, and the same testing conditions that were afforded to Defendant's experts. Defendant

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limited examination would suffice. Accordingly, the extensiveness of the examination may determine the length of such an examination." *Id.* at 599. We are satisfied that when a claim of intellectual disability is made and the issue of malingering is introduced into the analysis, as it is here, the claim is sufficiently complex to require a more extensive evaluation.

claims that the "Government's right to court-ordered testing is meant to create a level playing-field for the defendant's presentation of mental health evidence." (Def.'s Mot. Reconsider 7.) Defendant's concern is that the fact-finder will "inevitably give greater weight" to the opinions of the Government's experts as a result of this greater access to observe and evaluate defendant. However, the fact-finder at an *Atkins* hearing is the Court, not a jury. The Court is in a better position to take into account these concerns when weighing the opinions of the experts. Moreover, Defendant has failed to offer any legal support for the proposition that the Government's examination must mirror the Defendant's examination in terms of its scope, length and substance. Finally, Defendant overlooks the benefit that his experts have had in terms of considering mitigating evidence in their analysis. Such evidence includes free access to Defendant's family members and friends, teachers, employers and other associates. The Government's experts do not have the benefit of such evidence when examining Defendant and determining whether he is intellectually disabled.

We are satisfied that the entry of the Transport Order was perfectly proper. Accordingly, Defendant's Motion to Reconsider the Transport Order will be denied.

B. Motion for Stay

In addition to filing an appeal of the Transport Order, Defendant also seeks a stay of the Order pending resolution of the appeal by the Third Circuit. Defendant argues that an order committing him to a mental health facility prior to trial is an appealable order, and that therefore, a stay is appropriate. The Government responds that the Transport Order is not a final order subject to interlocutory appeal and that the Third Circuit lacks jurisdiction over the appeal. The Government further argues that because the Transport Order is not a final appealable order,

Defendant's Motion for Stay should be denied as frivolous.

Appellate courts have jurisdiction over appeals from "final decisions" of district courts. 12 U.S.C. § 1291; *see also United States v. Wecht*, 537 F.3d 222, 227-28 (3d Cir. 2008). Generally, in criminal cases, the final judgment rule is strictly applied and requires defendants to await conviction and sentencing before raising an appeal. *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984). However, the collateral order doctrine, which was established by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949), provides limited exceptions to the final judgment rule for interlocutory appeals. A collateral order is one that (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Wecht*, 537 F.3d at 228 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978)). If any prong of the collateral order doctrine is not satisfied, then appellate jurisdiction is improper. *Pierce v. Blaine*, 467 F.3d 362, 369 (3d Cir. 2006).

The Third Circuit has stated that "[a]s a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venan v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1983)). However, the district court retains jurisdiction if it determines that the appeal is "frivolous." *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980). The district court also retains jurisdiction when the appeal relates to a non-appealable order or judgment. *United States v. Wilkes*, 368 F. Supp. 2d 366, 367 (M.D. Pa. 2005) (citing *Mondrow v. Fountain House*, 867 F.2d 798, 800 (3d Cir. 1989)). Finally, the district court may

proceed in the face of an appeal if "the appeal is taken in bad faith and would result in unwarranted delay." *Id.* (citing cases).

The Transport Order was entered for the purpose of facilitating the Government's examination of Defendant in response to Defendant's *Atkins* claim. As we noted in our Memorandum addressing Defendant's obligation to disclose mental health discovery, the Federal Death Penalty Act, 18 U.S.C. §§ 3591, *et seq*., recognizes the Government's right to be afforded a "fair opportunity" for rebuttal. *See* 18 U.S.C. § 3593(c). This right would be seriously curtailed if the Government were not permitted the opportunity to examine Defendant. *United States v. Webster*, 162 F.3d 308, 339 (5th Cir. 1998) (acknowledging that the government's ability to conduct a psychiatric examination on defendant furthers the goals of providing the government with a fair opportunity for rebuttal and ensuring that the sentence rests on appropriate considerations).

In *Pierce v. Blaine*, 467 F.3d 362 (3d Cir. 2006), the Third Circuit addressed the issue presented by Defendant's Motion for Stay. In *Pierce*, the Court held that an order committing a habeas petitioner for a psychiatric evaluation was not a final order subject to appeal. 467 F.3d at 368-69. The petitioner in *Pierce* had been convicted in state court of murder and sentenced to death. His competency was raised by way of a habeas petition. The district court entered an order committing the defendant to a "long-term" evaluation to determine the petitioner's competency. *Id.* at 368. The Third Circuit determined that the collateral order doctrine did not apply and dismissed the appeal for lack of jurisdiction. *Id*. at 369-70. The Court's holding turned on the second prong of the collateral order doctrine, which looks to whether the commitment order resolved an *important* question completely separate from the merits of the

action. Distinguishing cases where commitment orders were found to be collateral and appealable, the Court emphasized a distinction between defendants who were in the custody of a prison facility when ordered to undergo an examination and defendants who were not in custody:

> Thus, *Deters*, *Weissberger*, *Rinaldi*, and *Davis* all involved individuals who were not in custody at the time of the commitment orders. The Court's analysis of the issue whether the commitment order was important and effectively unreviewable on appeal from a final judgment turned on a loss of liberty. There is nothing "important," as that term is understood under *Cohen*, about the issue raised by this appeal as [the defendant] is in custody as a death row inmate. The cases cited by the Commonwealth are not persuasive in the context of this case, because [the defendant] will be in custody in one place or another. Importance has a particular meaning under *Cohen*. It does not only refer to general jurisprudential importance. Rather, an issue is important if the interests that would potentially go unprotected without immediate appellate review are significant relative to efficiency interests sought to be advanced by adherence to the final judgment rule.

Pierce, 467 F.3d at 370-71 (internal quotations and citations omitted).

Defendant will not suffer a loss of liberty by being temporarily transferred to the MCFP for the Government's expert testing. He is already in custody on both federal and state convictions. Moreover, there are no other "important" interests at stake by this transfer that justify abandoning the final judgment rule. Defendant will continue to have access to his legal counsel, either by telephone or by attorney-client visits. His stay at the MCFP will only last fifteen days, after which time he will be returned to the FDC in Philadelphia. With the trial now postponed until January 2013, Defendant will have more than ample time to continue trial preparations. Defendant has failed to establish that the collateral order doctrine applies here. We reject Defendant's argument that the Transport Order constitutes an appealable order. As noted above, *see* supra § III.A.2., *Rinaldi* and *Davis* are easily distinguished. Those cases conclude that an order committing a defendant released on bail to an involuntary psychiatric evaluation was

reviewable under the collateral order doctrine.[9]

Like the Court *Pierce*, we are compelled to conclude that the Transport Order is a non-appealable order and that Defendant's appeal is therefore frivolous. *See Wilkes*, 368 F. Supp. 2d at 367. Accordingly, a stay of the Transport Order is not appropriate and will be denied. *See United States v. Stuler*, No. 08-273, 2009 U.S. Dist. LEXIS 38805, at *1 (W.D. Pa. May 7, 2009) (denying motion for stay where defendant's appeal to the Third Circuit related to a non-appealable order and was patently frivolous).

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[9] Defendant's argument that *Pierce* is not controlling is equally unavailing. Defendant claims that, in *Pierce*, the defendant was a habeas petitioner who unlike Defendant, had already been convicted and was no longer entitled to the presumption of innocence. The Third Circuit could have easily distinguished *Deters*, *Weissberger*, *Rinaldi*, and *Davis* on this basis. However, the Third Circuit took no issue with the procedural posture of the petitioner's case. Instead, the Court found determinative the distinction between defendants in custody when ordered to undergo an examination and defendants not in custody.

Defendant also claims that *Pierce* is distinguishable as it relates to the second prong of the collateral order doctrine. This prong requires that the order resolve an important issue completely separate from the merits of the action. In *Pierce*, the Third Circuit determined that the issue of defendant's competency was not completely separate from the merits of his case since competency was the primary basis for his habeas petition. Although we agree with Defendant that the determination of his claim of intellectual disability is separate from the issue of his guilt or innocence, Defendant's argument nonetheless fails to establish the second prong of the collateral order doctrine. The Transport Order does not *resolve* the issue of Defendant's claim of intellectual disability. It merely facilitates the Government's ability to conduct an examination in order to prepare for the *Atkins* hearing.

Finally, we reject Defendant's argument that the Transport Order is more harmful than the commitment order in *Pierce*. Contrary to Defendant's contentions, his temporary stay at the MCFP does not provide the Government with greater access to him or create a "serious imbalance in information" between the parties. Defendant's experts had the benefit of mitigation evidence, including the interviews of individuals in Defendant's life. Clearly, the Government does not have the same access. Transferring Defendant to Missouri for testing does not create a constitutionally significant imbalance.

III. CONCLUSION

For the foregoing reasons, Defendant Steven Northington's Motion to Reconsider Transfer and Motion for Stay are denied.

An appropriate Order will follow.

BY THE COURT:

R. BARCLAY SURRICK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 07-550-05
STEVEN NORTHINGTON	:	

O R D E R

AND NOW this 10th day of August, 2012, upon consideration of Defendant Steven Northington's Motion to Reconsider Transfer (ECF No. 555) and Motion for Stay (ECF No. 562), and all documents submitted in support thereof, and in opposition thereto, it is **ORDERED** as follows:

1. Defendant's Motion to Reconsider Transfer is **DENIED**.

2. Defendant's Motion for Stay is **DENIED**.

3. The Order to Transport Defendant to MCFP Springfield (ECF No. 552), which was entered on July 25, 2012, is amended to include the following:

   A. The U.S. Bureau of Prisons and the U.S. Marshals shall transport Defendant Steven Northington, Reg. No. 58967-066, to MCFP Springfield, in Springfield, Missouri forthwith, in order to facilitate psychological testing of Defendant by the Government. The Government shall advise counsel for Defendant of the date on which the testing will begin.

   B. Forensic psychologists Dr. Robert L. Denney, and Dr. Lee Ann Preston Baecht are permitted to conduct the psychological testing of

Defendant. The areas of testing permitted include: intelligence (IQ); effort and malingering; learning and memory; achievement; attention; concentration; speed of mental processing; emotional testing; and administering measures of adaptive living.

C. The Government shall immediately disclose to the Court and to counsel for Defendant the names of the tests that Drs. Denney and Preston Baecht will be administering to Defendant, to include any potential follow-up tests. Counsel for Defendant shall have five (5) days to file objections to a test or tests. No test that has been objected to by Defendant shall be administered to Defendant until the objection has been ruled upon. Counsel for Defendant shall not discuss with the Defendant the names or the nature of the tests that will be administered by the Government's experts.

D. The psychological testing of Defendant shall last no longer than fifteen (15) days, unless testing is delayed by reason of the filing of objections. After the testing is complete, Defendant shall be transported back to the Federal Detention Center in Philadelphia.

IT IS SO ORDERED.

BY THE COURT:

R. BARCLAY SURRICK, J.