UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:06CR-19-R

UNITED STATES OF AMERICA PLAINTIFF

v.

STEVEN D. GREEN DEFENDANT

UNITED STATES' MOTION
REGARDING MENTAL HEALTH EVIDENCE

The United States of America, by counsel, respectfully moves this Court to enter the attached Order regarding mental health evidence. In support of this motion, the United States represents:

1. This case is a capital prosecution. Like most capital cases, the mental condition of the defendant is likely to play a significant role during the penalty phase if the defendant is convicted of the capital offense. *See, e.g., United States v. Allen*, 247 F.3d 741, 773-75 (8th Cir. 2001); *United States v. Webster*, 162 F.3d 308, 338-40 (5th Cir. 1998); *United States v. Hall*, 152 F.3d 381, 399-400 (5th Cir. 1998); *United States v. Minerd*, 197 F. Supp. 2d 272, 274-76 (W.D. Pa. March 19, 2002); *United States v. Edelin*, 134 F. Supp. 2d 45, 49-54 (D.D.C. 2001); *United States v. Lee*, 89 F. Supp. 2d 1017, 1019 (E.D. Ark. 2000); *United States v. Chong*, 58 F. Supp. 2d 1153, 1159 (D. Haw. 1999); *United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1408-09 (D.N.M. 1996); *United States v. Vest*, 905 F. Supp. 651, 653 (W.D. Mo. 1995).

2. More importantly, mental health evidence will play a central role in this case, as the Defendant has filed a notice pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure stating that he intends to introduce expert testimony relating to mental disease or defect, not just bearing on the issue of punishment, but at the trial of this case bearing on the issue of his *guilt* for the offenses charged in the indictment. Notice of Intent to Introduce Expert Testimony Relating to Mental Disease or Defect, Doc. No. 131. Defendant's 12.2 notice, filed May 15, 2008, was filed pursuant to Rule 12. 2(b) of the Federal Rules of Criminal Procedure.

Fed. R. Crim. P. 12.2 has been modified specifically to address mental health evidence in capital prosecutions. Effective December 1, 2002, Rule 12.2(b) now provides:

> (b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must – within the time provided for filing a pretrial motion or at any later time the court sets – notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court, may, for good cause, allow the defendant to file the notice late, grant the parties additional trial preparation time, or make other appropriate orders.

Section (c)(1)(B) then provides in relevant parts: "If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court." Subsections (2), (3), and (4) establish a protocol for handling the results of examinations performed pursuant to this rule for purposes of a *capital sentencing*. Finally, failure to give notice under Rule 12.2(b) or to submit to an examination ordered pursuant to Rule 12.2(c) may result in the exclusion of "any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on

the defendant's guilt or the issue of punishment in a capital case." Fed. R. Crim. P. 12.2(d).

In short, where a Defendant files a notice pursuant to 12.2(b), the Court has discretion in the determination of whether to order the defendant to be examined under procedures ordered by the Court. Those procedures are intended to create a firewall protecting statements made by the defendant during a Court-ordered exam from being exploited by the United States during the guilt phase of a trial. The cases and procedures in this area of the law are largely made by the district courts, and are intended as a prophylactic protection against potential Fifth Amendment violations where a defendant seeks to offer mental health evidence during the penalty phase of a capital prosecution in mitigation of the death penalty. The results of the examination of the defendant by an expert for the United States are frequently sealed, and revealed only to the United States after the defendant is found guilty and decides to put on expert evidence during the penalty phase of the trial.

3. In this case, subsequent to the filing of the Notice of Intent to Introduce Expert Testimony filed with the Court, on September 15, 2008, Green provided to the United States his preliminary disclosure, pursuant to Rule 16(b)(1)(B) of the Federal Rules of Criminal Procedure, with the names and qualifications of expert witnesses the Defendant intends to call at trial. While the Defendant's 12.2 notice was couched in terms of disclosure pursuant to 12.2(b), his expert witness disclosure to the United States (a document not filed of record in this action), states, in pertinent part:

> ...the defendant has served notice that at the trial of this action he intends to rely *upon the defense of insanity at the time of the charged offenses* and that he intends to introduce expert testimony relating to mental disease or defect and other mental conditions bearing on the issues of guilty and punishment. To that end, the defense has caused certain physical and mental examinations of defendant to be made. Also, we have caused certain

scientific tests to be conducted, notably an MRI and neuropsychological testing. The defendant has identified to the United States seven expert witnesses he may call, four of whom were involved directly in the MRI and neuropsychological testing of the Defendant, and who are expected to testify that at the time of the offenses charged in the indictment, the defendant was suffering from multiple neurological brain impairments and disorders which made the defendant unable to understand the nature and quality or the wrongfulness of his acts at the time of the offenses charged.

In short, Defendant's disclosure to the United States of expert witnesses he intends to call at trial is couched in terms of a notice pursuant to Rule 12.2(a) of the Federal Rules of Criminal Procedure, that is, Notice of an Insanity Defense. Rule 12.2(a) provides:

> A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file of copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

Rule 12.2(c)(1)(B) provides that "[i]f the defendant provides notice under Rule 12.2(a), the court *must*, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242." (emphasis added). Where a defendant intends to present an insanity defense, the Court has no discretion. If the United States requests an opportunity to examine the Defendant, the Court must order the defendant to be examined. At this juncture, although Green has not technically filed a notice with the Court pursuant to Rule 12.2(a) that he intends to assert a defense of insanity at the time of the alleged offenses, he has timely notified an attorney for the government in writing of his intention to do so.

4. Since the modification of Rule 12.2, constitutional attacks upon the rule have failed. In *United States v. Taylor*, __ F. Supp. 2d __, 2004 WL 1327688 (N.D. Ind. June 10, 2004), the court held that, when the defendant indicates an intention to introduce mental health testimony, a court-ordered mental examination does not infringe upon the defendant's Fifth and Sixth Amendment rights because he has waived these rights by offering the evidence. *Id.* at *2-3. Thus, no constitutional barrier exists precluding the discovery sought by the United States.

5. The modification to Rule 12.2 follows a body of case law, mostly notably Judge Payne's decision in *United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997), that has uniformly held that the United States has the right to such discovery, including the testing of the defendant, to rebut the defendant's evidence. *See United States v. Webster*, 162 F.3d at 339-340; *United States v. Hall*, 152 F.3d at 398-400; *United States v. Beckford*, 962 F. Supp. at 760; *United States v. Haworth*, 942 F. Supp. at 1408; *United States v. Vest*, 905 F. Supp. at 653. These cases, and now Rule 12.2, stand for the proposition that when a defendant puts his mental health at issue in a capital prosecution, fundamental fairness dictates that the United States have equal access to the evidence – the defendant's mental health – as the defense. *United States v. Beckford*, 962 F. Supp. at 760 ("the Government's statutory right of rebuttal provides implicit authority to require notice, examination and discovery on mental health issues and conditions in order to make that rebuttal right a meaningful one."); *cf. United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003) (where defendant asserted entrapment defense grounded in his mental health, the Government had the right to examine the defendant and use the results of the examination to rebut his defense).

6. The United States' potential use of this material must be emphasized. The United States will not introduce mental health evidence during its case-in-chief in the penalty phase. Instead, the United States would only use this evidence to rebut any mental health evidence introduced by the defendant in his case-in-chief. If the defendant does not introduce the evidence, the United States will not introduce mental health evidence. The United States merely seeks discovery of the defendant's mental evidence in order to rebut this anticipated defense.

7. Importantly, the Government's discovery rights exist if the defense intends to introduce any evidence pertaining to the defendant's mental health, regardless of whether the defendant submits to an examination conducted by a defense expert. *See United States v. Hall*, 152 F.3d at 400; *United States v. Taylor*, 2004 WL 1327688 at *3; *United States v. Minerd*, 197 F. Supp.2d at 275-76; *United States v. Beckford*, 962 F. Supp. at 763; *United States v. Kaczynski*, 1997 WL 609991 at *3 (E.D. Cal. 1997) (regardless of government's access to medical records and life history witnesses, mental health examination "is the most trustworthy means for the government to verify [defendant's] claims and should provide it access to the same type and quality of information upon which the defendant intends to rely."). Thus, for example, the defense may not present expert testimony based upon his observations of defendant, or witnesses who provide their observations of defendant's mental health, without first providing notice under Rule 12.2(b) and then having defendant submit to an examination by an expert retained by the United States.

8. The United States respectfully requests the Court to order the defendant to provide meaningful discovery as to his mental health evidence in a manner consistent with the purposes of Rule 12.2. In this case, while Defendant has disclosed the identity of the mental health experts

he intends to call, their qualifications, and a narrative summary of the opinions or conclusions they are expected to offer, with the exception of a CD containing the MRI images of Green's brain, the United States has not been provided with copies of reports prepared by defendant's experts summarizing the bases and reasons for their opinions. In addition, the Defendant has disclosed that a battery of computerized neurocognitive tests were administered to Green. Specifically, on three separate dates, Green was administered a total of thirty-three psychological tests. The names of the tests, along with the raw score and T score for Green's performance on each test, have been produced to the United States, but the actual test documents, Green's responses, and other raw data have not been produced. Without the actual testing materials, the United States is significantly handicapped in discussing with its own experts the opinions offered by Green's experts, and in assessing whether the United States wants to request any additional testing or examination of the Defendant. The Defendant's preliminary expert witness disclosure contains summary statements regarding the experts' opinions, but falls short of the mark in providing meaningful discovery of the bases and reasons for their opinions.

For this reason, the United States requests the Court to enter an order: (1) extending the deadline for the filing of pretrial motions related to discovery and admissibility of the mental health evidence Defendant intends to introduce at trial on the issue of insanity, as well as for any additional testing which the United States may request, to December 31, 2008; and (2) requiring the exchange between defense and experts retained by the United States of *all materials upon which they may rely* to form the basis of their opinions, including all medical records and other record, on or before December 1, 2008..

Fed. R. Crim. P. 12.2 requires, in the plainest terms, that the defendant give notice and discovery to the United States whenever it plans to offer mental health evidence at trial, whether it be at the guilt or penalty phase. The Rule's "objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony." Fed. R. Crim. P. 12.2, Advisory Committee Notes, second paragraph. The Defendant has had at least a year, since the date the United States' filed its notice of intent to seek the death penalty in this case, to prepare his insanity defense. Since September 15, 2008, the United States has had a thirteen page narrative summary which purports to set forth the complex neuropsychological assessments of the Defendant's team of expert witnesses. At this juncture, the United States simply does not have enough meaningful discovery[1] to meet the Court's deadline for the filing of pretrial motions in this case.

[1]Because the expert testimony Green intends to offer in support of his insanity defense is based uopn complex and complicated neurological testing which has not been described in any pleading filed of record with the Court, and because the preliminary expert witness disclosure by Green's counsel to the United States is likewise not a matter of public record, it may be useful to the Court to conduct an *in camera* hearing with the parties regarding the specific nature of the evidence Green intends to offer in support of an insanity defense. Such a hearing may be useful in the event the parties are not able to reach an agreement on the extent of the information to which the United States is entitled to in discovery in order to prepare to rebut a mental health defense, while still protecting the rights of the Defendant in this information when the parties are still six months from trial.

For the foregoing reasons, the United States respectfully requests the Court enter the tendered Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 3, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren C. Wolff, counsel for Defendant, Steven D. Green.

/s/ Marisa J. Ford
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