

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
TO CONDUCT MENTAL EXAMINATION OF DEFENDANT**

The United States of America, by counsel, respectfully moves this Court to enter the attached Order to allow the United States' experts to conduct a mental examination of the defendant, Steven D. Green, pursuant to Fed. R. Crim. P. 12.2(c)(1)(B). The United States submits, in support of this motion, as follows:

1. Defendant has filed a notice pursuant to Fed. R. Crim. P. 12.2(a) stating his notice of intent to assert a defense of insanity at the time of the alleged offense.

2. The United States seeks an opportunity to examine the defendant pursuant to Fed. R. Crim. P. 12.2(c)(1)(B) which provides, in pertinent part:

If 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

Title 18, United States Code, Section 4242(b), similarly so provides, and states that any psychiatric or psychological report be filed with the court, pursuant to the provisions of 18

U.S.C. § 4247(b) and (c). Title 18, United States Code, Section 4247(b) provides:

A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court...

3. Based on the 12.2(a) notice filed by the Defendant, and on the preliminary disclosure of expert opinion which the Defendant has given the United States in support of his insanity defense, the United States has employed two mental health experts, Dr. Daniel A. Martell, a forensic psychologist, and Dr. Raymond Patterson, a forensic psychiatrist, to conduct an examination of the defendant and his records for the United States.

4. 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. 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. Miner*, 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. Failure to submit to an examination ordered pursuant to Rule 12.2 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 guilty or the issue of punishment in a capital case." Fed. R. Crim. P. 12.2(d).

Wherefore, the United States respectfully requests the Court to enter an order (1) requiring the defendant to submit to an examination by an expert or experts of the United States' choosing; and (2) requiring the exchange between defense experts and experts for the United

States of all materials upon which they may rely to form the basis of their opinions, including all medical records and other records of any kind.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ Marisa J. Ford
Marisa J. Ford
James R. Lesousky, Jr.
Assistant U.S. Attorneys
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5911

/s/ Brian D. Skaret
Brian D. Skaret
Trial Attorney
United States Department of Justice
Domestic Security Section
950 Pennsylvania Ave., NW, Ste. 7645
Washington, DC 20530
(202) 353-0287

CERTIFICATE OF SERVICE

I certify that on January 11, 2009, 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
Marisa J. Ford
Assistant U.S. Attorney