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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. KENNETH RAY THOMAS, Defendant.	NO. CR 10-00120-CAS **OPPOSITION TO GOVERNMENT'S EX PARTE APPLICATION FOR AN ORDER COMPELLING DEFENDANT TO SUBMIT TO MENTAL EXAMINATION; MEMORANDUM OF POINTS AND AUTHORITIES**

TABLE OF AUTHORITIES
FEDERAL CASES

TABLE OF AUTHORITIES (Cont'd.)

FEDERAL CASES

FEDERAL CONSTITUTION, STATUTES, AND RULES

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Defendant Kenneth Thomas, through his counsel of record, Deputy Federal Public Defender Carlton F. Gunn and Deputy Federal Public Defender Sonja Augustine, hereby opposes the government's Ex Parte Application for an Order Compelling Defendant to Submit to Mental Examination. This opposition is based on

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the attached memorandum of points and authorities, all files and records in this case, and such additional evidence and argument as may be presented regarding the application.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: February 1, 2011

By /S/
CARLTON F. GUNN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

One of the most fundamental principles of our Constitution is the Fifth Amendment privilege against self-incrimination. It provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. This includes, at least generally, being forced to be a witness against oneself by providing statements or information in pretrial or non-trial proceedings.

There are some narrow exceptions provided for in some rules of criminal procedure, and one of those rules is the rule which the government seeks to invoke here – Rule 12.2(c) of the Federal Rules of Criminal Procedure. But even that rule simply *permits* a court to order an examination such as that requested by the government; it does not *require* such an order. The rule also creates important limitations on the use of the fruits of such an examination and allows the Court to formulate appropriate procedures to protect against misuse of the rule.

Here, the Court should not order the compelled examination requested by the government, because the mental health testimony is being offered only as additional support for an independent affirmative defense and the complications and problems created by ordering an examination outweigh what is a lesser need on the part of the government. If the Court does order such an examination, it should impose some strict procedural limitations. Those should include (1) that the examiner not be government-retained but be designated by the Court; (2) that the designated examiner's report be filed with the Court under seal and be unsealed only if and when the defense actually calls its expert at trial; (3) that the prosecutor be walled off from any contact with the designated examiner so as to avoid the need for a hearing on

whether the prosecutor's trial preparation, trial strategy, or other approach to the case has been tainted by the examination; and (4) that there be no examination until the government concedes and/or the Court rules that the defense mental health testimony is admissible. Imposing these restrictions is not only permissible but advisable.

II.
ARGUMENT

A. THE COURT HAS DISCRETION TO SIMPLY DENY THE GOVERNMENT'S APPLICATION, AND IT SHOULD DO SO IN THE CIRCUMSTANCES OF THIS CASE.[1]

Initially, it is important for the Court to understand its authority under Rule 12.2(c) when the defense has not given notice under Rule 12.2(a) of an insanity defense but has merely given the more limited notice under Rule 12.2(b) of intent to introduce expert testimony "relating to a . . . mental condition of the defendant bearing on the issue of guilt." While Rule 12.2(c) provides that a court "must" order an examination when notice of an insanity defense is given under Rule 12.2(a), it provides only that a court "may" order such an examination when notice is given only under Rule 12.2(b). *See* Fed. R. Crim. Pro. 12.2(c)(1). It follows from this that a court may choose not to order an examination in a Rule 12.2(b) case if it believes that one is unnecessary or for other reasons inappropriate.

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[1] The defense also objects to the application of Rule 12.2(c) in a non-insanity case as a violation of the Fifth Amendment, for the defense is not aware of any Supreme Court decision upholding the constitutionality of the rule in this context. *But cf. United States v. Halbert*, 712 F.2d 388, 390 (9th Cir. 1983) (finding no Fifth Amendment violation in use of defendant statements made during compelled mental health examination where defendant had himself presented expert testimony supporting diminished capacity defense).

This discretion in the district court also makes the appellate cases of less interest, at least in many ways, than the district court cases. That is because the appellate cases are simply reviewing for abuse of discretion – or, in some instances, plain error, *see, e.g.*, *Halbert*, 712 F.2d at 389 – while the district court cases are making decisions without that broad allowance for reasonable differences of opinion.[2]

The government does cite two district court opinions, and at least one of those does support its request,[3] but it ignores other district court opinions which undercut its request. There are at least five published district court cases in which district courts have denied government requests for an evaluation under Rule 12.2(c) and/or the inherent authority which was recognized by some courts before Rule 12.2(c) was clarified in 2002. *See United States v. Towns*, 19 F. Supp. 2d 64 (W.D.N.Y. 1998); *United States v. Akers*, 945 F. Supp. 1442, 1444-49 (D. Colo. 1996); *United States v. Williams*, 163 F.R.D. 249 (E.D.N.C. 1995); *United States v. Marenghi*, 893 F. Supp. 85, 99 (D. Maine 1995); *United States v. Bell*, 855 F. Supp. 239 (N.D. Ill. 1994). As the Court explained in *Towns*, in following the district court in *Marenghi*, there can be good reasons for declining to exercise the discretion to order an examination.

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[2] The issue in *Halbert* was actually not whether the district court erred in ordering an examination but whether the expert who conducted the examination could testify about the statements made by the defendant during the examination. *See id.* at 389-90. In any event, the courts in *Halbert* and all of the other court of appeals cases the government cites were simply affirming district court orders granting government requests for examinations and/or allowing testimony based on such examinations, not reversing orders of denial. *See United States v. McSherry*, 226 F.3d 153, 156-57 (2nd Cir. 2000); *United States v. Lewis*, 53 F.3d 29, 35 n.9 (4th Cir. 1995); *United States v. Phelps*, 955 F.2d 1258, 1264 (9th Cir. 1992); *United States v. Byers*, 740 F.2d 1104, 1106-07 (D.C. Cir. 1984) (en banc); *Halbert*, 712 F.2d at 389-90.

[3] One of the opinions cited – *United States v. Polouizzi*, No. 06-CR-22 (JBW), 2007 WL 1040923 (E.D.N.Y. April 4, 2007) – does not analyze the question of whether an examination should be ordered – or even indicate whether the order in that case was opposed by the defense. That opinion simply considers whether (1) defense counsel should be permitted to be present at the examination and (2) whether the examination should be videotaped. *See id.*

> This Court is not convinced that the disadvantage asserted by the government in this case may not be overcome without compelling the defendant's examination. Although stated in connection with a discussion of the scope of authority under Rule 12.2, the court finds the sentiment expressed in *Marenghi* to be applicable with respect to the use of inherent authority under the circumstances present in this case:
>
> > This Court, however, is loathe to submit Defendant to a psychiatric examination against [his] will in the absence of express statutory or administrative authority. . . . The fact that such an examination will assist the Government, which has the greater burden of proof on the mens rea issue, does not provide a basis for this Court to help "even the playing field."

Towns, 19 F. Supp. 2d at 67 (quoting *Marenghi*, 893 F. Supp. at 98). While the *Marenghi* court based its ruling in part on a doubt that it had any authority at all to order an examination, the *Towns* court expressly recognized that it had the authority to order such an examination under its inherent powers, if not under Rule 12.2(c), *see Towns*, 19 F. Supp. 2d at 66 ("It is not disputed that the Court maintains inherent authority to direct such an examination.").[4]

These comments are particularly apposite in the present case, where the mental health testimony the defense will introduce neither goes to the elements of the offense

[4] All of these district court opinions were prior to the clarification of Rule 12.2(c) which is noted in the government's application, and some may have relied on the lack of clarity in that rule. But, as just noted, the *Towns* court expressly recognized the inherent authority case law and the other courts were presumably aware of that case law, *see, e.g.*, *Marenghi*, 893 F. Supp. at 99 (noting both lack of express statutory or administrative authority *and* absence of "evidence that such an examination would serve any purpose"); *Bell*, 855 F. Supp. at 242 (noting government's suggestion that court has inherent power).

nor is the sole basis of a defense, as it would be if the defense were insanity. This is not a case in which, as the government suggests, "[w]hether defendant possessed the requisite *mens rea* is the central issue in th[e] case," Application, at 5. Rather, it is a case where the mens rea – *i.e.*, intent and knowledge – is conceded, and it is only the affirmative defense of entrapment that is being raised. *Cf. United States v. Bell*, 855 F. Supp. at 240-41 (declining to compel defendant to submit to mental examination in part because defense was affirmative defense of duress, not defense "involv[ing] mental capacity").

The affirmative defense here also is not one like insanity, where the sole basis of the defense is mental health evidence and where it therefore might be true that denying an additional examination would, in the government's words, "deprive the government of the only adequate means to meet the defense expert testimony," Application, at 6.[5] This is a case where the comments of the district court in *United States v. Akers*, *supra*, apply:

> [T]he government can prepare to rebut the testimony of the defense expert witness in a variety of ways. The government may, *inter alia*, retain its own expert to review and assess the defense expert's report, to attend the trial, to testify about his/her evaluation of the report, and testify as to his/her observations of the defendant. It may also call lay witnesses to rebut the expert's testimony about any relevant characteristics of the defendant. Indeed, the

[5] The case the government cites in making this assertion – *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) – was an insanity case. *See id*. at 1106. Similarly, two other cases the government cites – *United States v. Phelps*, 955 F.2d 1258 (9th Cir. 1992) and *Ake v. Oklahoma*, 470 U.S. 68 (1985) – involved the question of insanity – presented in contexts that differ even more from the present case. *See Phelps*, 955 F.2d at 1260-61 (compelled mental examination of insanity acquittee at commitment release hearing); *Ake*, 470 U.S. at 70 (entitlement of defendant to appointed defense expert when seeking to investigate and possibly raise insanity defense).

> government's rebuttal of the defense expert's testimony is limited only by its own creativity and the application of the Federal Rules of Evidence.

Id., 945 F. Supp. at 1449.[6] *Compare United States v. McSherry*, 226 F.3d at 156 (noting district court's order of examination based "[o]n the facts of this case that are before me").

In addition to the lesser need for an examination in these circumstances, there are complications and other problems which denial of the application would avoid. First, it would avoid the need for a further delay in the trial, which seems inevitable if the Court grants the government's application.[7] Second, it would avoid the host of procedural complications and problems suggested by the issues raised in the next section of this memorandum.

Third, there is a greater concern – at least in the absence of the procedural limitations suggested below – that the government will use the examination – either intentionally or unintentionally – as a way of getting discovery in the form of a partial preview of Mr. Thomas's testimony. This is not a case like the typical insanity case – or even the typical diminished capacity case – in which there is no real defense independent of the mental health testimony which is required to be disclosed under the discovery rules. There will be other evidence as well – including most importantly Mr. Thomas's own testimony. The government is not entitled to have a preview of that evidence, and allowing a government examination may provide such a preview, at least without appropriate safeguards such as those argued for below.

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[6] The *Akers* court held this sufficient even where the defendant was denying the basic mens rea. *See id.* at 1445. The point seems even stronger when all the mental health expert is doing is supplementing an affirmative defense.

[7] Counsel for the government has already broached his perception of this in conversations with defense counsel.

In light of these complications, in the interest of avoiding further delay, and because the need for an examination is less in the case of mental health evidence which is not the entire defense but which simply contributes to an independent defense, the Court should deny the government's application.

B. IF THE COURT GRANTS THE GOVERNMENT'S APPLICATION, IT HAS DISCRETION TO IMPOSE PROCEDURAL PROTECTIONS, AND THERE ARE SEVERAL IT SHOULD IMPOSE IN THIS CASE.

Rule 12.2(c) does not provide any specific procedures for a court to follow when making an order for an examination in response to a notice given under Rule 12.2(b). The advisory committee notes make it clear that this omission was intentional, moreover, by stating that "[t]he 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)." Fed. R. Crim. Pro. 12.2 advisory committee note (2002 Amendments). The notes then go on to suggest that the court may nonetheless "certainly be informed by other provisions, which address hearings on a defendant's mental condition." *Id.*

Here, there are several procedural restrictions the Court should impose if it grants the government's request.

1. <u>The Examiner Should Not Be Government-Retained but Should Be Designated by the Court.</u>

The government's application seeks an examination "by a government-retained expert," Application, at 1, and its proposed order is for a "mental examination by the government," Proposed Order, at 2. This is not specifically provided for in Rule

12.2(c), however. And it is inconsistent with the procedure in other contexts, which, as noted above, the Court may look to for guidance.

Specifically, the government's proposal is inconsistent with the procedure in the insanity defense context. The governing provision in that context, as noted in both the advisory committee notes and Rule 12.2(c) itself, is 18 U.S.C. § 4242. *See* Fed. R. Crim. Pro. 12.2(c)(1)(B) ("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."); Fed. R. Crim. Pro. 12.2 advisory committee note (2002 Amendments) ("As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by 18 U.S.C. § 4242."). That statute provides that the examination be conducted pursuant to 18 U.S.C. § 4247(b), which in turn provides that "[e]ach examiner shall be designated by the court." The statute does not provide for "a mental health examination by the government" or an examination by a "government-retained expert."

If this limitation is placed on the examination in the insanity context, where expert mental health testimony is far more important to the government than in a case such as the present one, *see supra* pp. 7-8, the limitation should be placed on any examination which is ordered here.[8]

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[8] If the Court feels that it does not have sufficient experience with experts to designate one itself, it may direct the parties to consult and either reach mutual agreement or propose alternative experts.

2. The Designated Examiner's Report Should Be Filed with the Court Under Seal and Not Unsealed Unless and Until the Defense Actually Calls its Expert at Trial.

This last point leads to a second restriction which should be placed on the examination here, if one is ordered. That is that the designated examiner's report should be filed with the Court under seal and not unsealed unless and until the defense actually calls its expert at trial. While this is not required for mental health examinations in the insanity context, it is required for reports in another context, namely, the use of such examinations in a capital sentencing hearing. *See* Fed. R. Crim. Pro. 12.2(c)(2). And, once again, the advisory committee notes make clear the Court can look to other provisions for guidance. *See supra* p. 9.

This procedural limitation should be extended to the present case for three reasons. First, while this case is not a capital case, it is a case in which there is a 25-year mandatory minimum sentence if Mr. Thomas is convicted. Second, there is here, as in the capital sentencing context, a defense independent of the defendant's mental health condition, which makes it possible the defense might not present its expert at trial. Third, there is the possibility, as there may also be in the capital sentencing context, that the mental health examination will reveal information to the government that could affect the government's approach to other issues in the case. These concerns are generally not present in the insanity context, for insanity is usually the only defense in an insanity case.

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3. The Prosecutor Should Be Walled Off from Any Contact with the Designated Examiner so as to Avoid the Need for a *Kastigar* Hearing Regarding the Fruits of the Examination.

Rule 12.2(c) is a narrow, specialized exception to the general Fifth Amendment privilege against self-incrimination, i.e, the rule that a defendant cannot be compelled to give statements that may be used against him. To assure that the rule does not extend beyond what the Fifth Amendment allows, it provides:

> No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant [has introduced evidence under Rule 12.2(a) or Rule 12.2(b)].

Fed. R. Crim. Pro. 12.2(c)(4). *See, e.g., United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980) (reversing conviction because of improper use of statements made during examination compelled under Rule 12.2(c)). *See also United States v. Curtis*, 328 F.3d 141, 144 (4th Cir. 2003) (emphasizing limits on use created by rule). This is consistent with the general rule on compelled statements established by the Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), *see id.* at 461-62, and applied by both that Court and the courts of appeals to various forms of compelled statements, *see, e.g., United States v. North*, 910 F.2d 843 (D.C. Cir.), *withdrawn and superseded in part*, 920 F.2d 940 (D.C. Cir. 1990).

The fruits of compelled statements that cannot be used include not just obvious fruits such as other admissible evidence to which the statements lead investigators,

moreover. It may also include fruits in the form of "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003) (quoting *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) and *United States v. Crowson*, 828 F.2d 1427, 1430-31 (9th Cir. 1987)). The burden is on the govt to show a lack of taint, and courts typically hold what are often labeled "*Kastigar* hearings" to inquire into the possibility of such taint. *See, e.g.*, *United States v. Dudden*, 65 F.3d 1461, 1469 (9th Cir. 1995); *Crowson*, 828 F.2d at 1428-29.

Concern about such fruits, and about the need for such hearings is precisely the reason the advisory committee gave for creating the limitation in the capital sentencing context which is discussed in the preceding subsection. The committee noted, in language tracking the point made above, that "[m]ost courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence." Fed. R. Crim. Pro. 12.2 advisory committee note (2002 Amendments). The committee then went on to note that a hearing on this question "can consume time and resources." *Id.*

In addition to this drain on resources, there is also the risk of error in any factual inquiry the court might make in the *Kastigar* hearing it would have to hold. It would be far from an easy task for the Court to ascertain something as amorphous as whether the focus of the government's investigation, the prosecutor's interpretation of evidence, the prosecutor's cross-examination, and the government's general trial strategy or details thereof were influenced by exposure to the court-designated examiner's impressions, opinions, and/or conclusions. The risk of error would hurt the government if the Court made a mistake and found there was taint when in fact

there was not, but it would hurt Mr. Thomas if the Court made a mistake and found that there was not taint when in fact there was. Where constitutional rights are at stake in a 25-year mandatory minimum case, the Court should eliminate this risk by walling the prosecutor off.

4. There Should Be No Examination Until the Government Concedes or the Court Rules That the Defense Mental Health Testimony Is Admissible.

The government has indicated that it is going to seek to exclude – or at least limit – the defense mental health evidence. *See* Government's Reply to Defendant Kenneth Ray Thomas's Response to Government's Motion *in Limine* to Preclude the Admission of Irrelevant Evidence, at 4 n.2. Yet Rule 12.2(c) allows the government to offer evidence from an examination conducted under that rule only if the defense introduces expert testimony regarding the defendant's mental condition. *See* Fed. R. Crim. Pro. 12.2(c)(4).

This suggests the government application may be premature and that may warrant delaying a ruling on the application until the admissibility of the defense evidence is resolved. If the government's application is granted, the examination takes place first, and the defense evidence which justified the examination is then excluded, the government will have had its cake and eaten it too. While the government will not be able to introduce the evidence obtained through the examination, there will still be the amorphous, possibly difficult-to-identify taint if the report is not sealed and/or the prosecutor is not walled off from the expert. There will also be all the other disadvantages that arise from an examination, including the potential delay of trial, a second additional intrusion into Mr. Thomas's emotional and psychological privacy, and the time and resources the Court will have to devote to

considering and ruling on the application.[9]

III.

CONCLUSION

The Court should deny the government's application. If the Court disagrees and grants the application, it should place protective procedural limitations on the examination, including (1) that the examiner not be government-retained but be designated by the Court; (2) that the designated examiner's report be filed with the Court under seal and be unsealed only if and when the defense actually calls its expert at trial; (3) that the prosecutor be walled off from any contact with the designated examiner so as to avoid the need for a hearing on whether the prosecutor's trial preparation, trial strategy, or other approach to the case has been tainted by the examination; and (4) that there be no examination until the government concedes and/or the Court rules that the defense mental health testimony is admissible.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: February 1, 2011

By /S/
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SONJA AUGUSTINE
Deputy Federal Public Defender

[9] The Court does not need an examination by another expert to address the question of admissibility of the defense expert's testimony, because the question of *admissibility* is different from the question of whom the jury may end up believing. Whether or not another expert agrees with a defense expert does not affect whether the jury should hear the testimony and decide whom to believe.