

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 6:17-cr-18-Orl-40KRS

NOOR ZAHY SALMAN

**UNITED STATES' UNOPPOSED MOTION FOR AN ORDER
FOR A MENTAL EXAMINATION OF DEFENDANT
PURSUANT TO FED. R. CRIM. P. 12.2(C)(1)(B)**

The United States of America, by W. Stephen Muldrow, Acting United States Attorney for the Middle District of Florida, through the undersigned attorneys, respectfully moves this Court, for an Order pursuant to Fed. R. Crim. P. 12.2(c)(1)(B) for a mental examination of the defendant under certain conditions. A proposed order is attached.

Counsel for the defendant, Charles D. Swift, Esquire, has advised the undersigned that the defendant does not oppose the relief sought in this motion.

I. FACTUAL BACKGROUND

The defendant has notified the government that she intends to present a defense “relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of guilt.” Fed. R. Crim. P.

12.2(b)(1). The government has not yet received the report of the defendant's expert regarding this issue, which is due to be produced on August 1, 2017.

Doc. 48.

The government has retained its own expert and now seeks an Order of this Court to allow for the mental evaluation of the defendant by that expert under conditions set forth herein. The government's expert hopes to conduct his evaluation the week of August 7, given the due date of September 1 for rebuttal expert reports. *Id.*

On July 24, 2017, the Court ordered the parties to confer regarding the conditions governing the government's mental examination of the defendant. Doc. 74. The government's proposed conditions are set forth herein, and the defendant does not oppose these conditions.

II. ARGUMENT

Pursuant to Fed. R. Crim. P. 12.2(c)(1)(B), the government, through its expert, is entitled to examine the defendant regarding the same issue she has given notice of her intent to raise. The government acknowledges that, pursuant to Fed. R. Crim. P. 12.2(c)(4), the government will be permitted to use the statements of the defendant and the fruits thereof only if the defendant herself introduces evidence about the issue.

The Rule gives this Court the power to set the conditions of the defendant's mental examination by the government expert. *Id.*

The government requests that the examination take place under the following conditions:

a. That the defendant will be examined by the government's expert without the presence of her counsel;¹ and

b. That portions of the defendant's evaluation by the government's expert will be video and audio recorded, in accordance with the expert's common practice and professional judgment.² Not all portions of the evaluation, however, will be recorded. For example, the government's expert is not in the practice of recording portions of his examination in which the defendant is taking testing measures that require filling in bubbles on a test form or otherwise completing a written test.

The only area on which the parties have not been able to fully consult relates to whether the defendant will seek to impose any restrictions on the

¹ A defendant has no right to the presence of counsel during an examination of this type. *Godfrey v. Kemp*, 836 F.2d 1557, 1563 n.4 (11th Cir. 1988) (citing *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979), *aff'd* 451 U.S. 454 (1981)). Instead the defendant is entitled to full notice of any proposed evaluation and should enjoy full "opportunity to consult with any attorney before a psychiatric examination" to decide whether to undergo such evaluation. *Godfrey*, 836 F.2d at 1563 & n.4. Here, this motion provides the defendant with the required notice, and she has enjoyed the full assistance of counsel in deciding whether to submit to the examination.

² See *United States v. Byers*, 740 F.2d 1104, 1171-72 (D.C. Cir. 1984) (suggesting, in dissent, that a video recording of a mental examination is "less disruptive (and perhaps even more effective) than the actual presence of counsel.").

content of the government expert's mental examination. The parties could not fully confer on this issue, as neither the lawyers for the government nor its expert has yet received and then had the chance to evaluate the report of the defendant's expert. To the extent the parties have a disagreement about this topic, counsel for the defendant will file a motion with this Court, pursuant to Doc. 74, setting forth their position on this topic as expeditiously as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Charles D. Swift, Esquire (counsel for Defendant)
Fritz J. Scheller, Esquire (counsel for Defendant)
Linda G. Moreno, Esquire (counsel for Defendant)

s/ Sara C. Sweeney

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