IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

GOVERNMENT'S SUPPLEMENTAL MOTION AND INCORPORATED MEMORANDUM REGARDING MENTAL HEALTH EVIDENCE

The United States respectfully re-submits its previously filed motion captioned "Government's Motion and Incorporated Memorandum Regarding Mental Health Evidence" (docket number 93, filed April 8, 2002) and hereby supplements that motion with the following:

As a result of the Fourth Circuit's Opinion on April 22, 2004, this case is again a capital prosecution. United States v. Moussaoui, 365 F.3d 292, 317 (4th Cir. 2004). Like most capital cases, the mental condition of the defendant is likely to play a significant role during the penalty phase. 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. 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). Indeed, defense counsel has repeatedly indicated that much of their mitigation case rests upon the statutory mitigating factors set forth in 18 U.S.C. § 3592(a)(1) (Impaired capacity) and

(a)(6) (Disturbance). See, e.g., Defense Fourth Circuit Brief (docket no. 03-4162) at 43 n. 20 ("At least three statutory mitigators are plainly at issue in this case. First, there is the question whether Moussaoui had an 'impaired capacity' pursuant to 18 U.S.C. § 3592(a)(1) or a 'mental or emotional disturbance' pursuant to 18 U.S.C. § 3592(a)(6).").

Anticipating the significance of mental health evidence in this case, the Government moved on April 8, 2002, for discovery as to any mental health evidence that the defense may seek to introduce. See Docket No. 93. This motion has not yet been ruled upon.

Since the filing of the motion, we have notified the Court that 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. (Emphasis added).

Section (c)(1)(B) then provides in relevant part: "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) of Rule 12.2 establish a protocol for handling the results of examinations performed pursuant to this rule. 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).

The modification to Rule 12.2 follows a body of case law, most notably Judge Payne's decision in United States v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997), that has uniformly held that the Government 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 Government 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, 144 (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).[1]

The Government's use of this material would, of course, be limited. The Government

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[1] Since the modification of Rule 12.2, the lone constitutional attack upon the rule 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 Government.

would not introduce mental health evidence during its case-in-chief in the penalty phase. Instead, the Government would use this evidence only to rebut any mental health evidence introduced by the defendant in his case-in-chief. If the defendant does not introduce mental health evidence, neither would the Government. By this motion, the Government merely seeks discovery of the defendant's mental evidence in order to rebut this anticipated evidence.

Importantly, the Government's discovery rights – including its right to examine the defendant -- exist 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. Thus, for example, the defense may not present the expert testimony of Dr. Amadour, who might testify based upon his observations of defendant, or other witnesses who provide their lay observations of defendant's mental health, without first providing notice under Rule 12.2(b), and then having defendant submit to an examination by a Government expert. Simply put, defendant's recalcitrance does not defeat the Government's discovery rights.

The Government respectfully requests the Court to order the defendant to provide discovery as to his mental health evidence in a manner consistent with the procedures set forth in Rule 12.2 and Beckford. Such procedures will protect the defendant's constitutional rights while also ensuring that the Government's discovery rights are met. Specifically, the Government requests the Court to enter an order: (1) requiring the defendant, if he intends to introduce evidence of the defendant's mental health or capacity during the trial, to file a notice of intent not later than 20 days after the return of the mandate from the Fourth Circuit specifying: a) the mental health experts who will testify or whose opinions will be relied upon and their

qualifications, b) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions; (2) requiring the defendant, if he gives notice of intent to raise a mental health defense, to submit to an examination by an expert or experts of the Government's choosing; and (3) requiring the exchange between defense and Government experts of all materials upon which they may rely to form the basis of their opinions, including all medical records and other records. In the interim, the Government further requests that the Court instruct the defense that its mental health witnesses may have no contact with the defendant because, to do otherwise would compromise this procedure. Therefore, the Government respectfully requests the Court to endorse the attached proposed order regarding mental health evidence, which adopts the Beckford procedures and proposes a schedule that will ensure that all mental health evidence issues are resolved well in advance of trial.

Respectfully submitted,

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