

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 MOTION AND INCORPORATED  
MEMORANDUM REGARDING MENTAL HEALTH EVIDENCE**

The United States respectfully requests the Court to endorse the attached proposed order regarding mental health evidence based upon the following:

On March 28, 2002, the Government filed its Notice of Intent to Seek a Sentence of Death thereby making this a capital prosecution. If the defendant is convicted of a capital offense, the Court will be required to conduct a penalty phase hearing during which the defendant will have an opportunity to put forward evidence in mitigation as well as evidence to rebut the Government’s aggravating factors. Mental health evidence often plays a significant role in the penalty phase of any capital prosecution. See e.g. United States v. Allen, 247 F.3d 741, 773-75 (8<sup>th</sup> Cir. 2001); United States v. Webster, 162 F.3d 308, 338-40 (5<sup>th</sup> Cir. 1998); United States v. Hall, 152 F.3d 381, 399-400 (5<sup>th</sup> Cir. 1998); United States v. Miner, \_\_\_ F. Supp. 2d \_\_\_, 2002 WL 424674 at \*2-3 (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). For the following reasons, the Government respectfully requests the Court to order the defendant to provide discovery as to any potential mental health evidence that he may put forth.

Before addressing the Government's right to such discovery, the Government's potential use of this material must be emphasized. The Government will not introduce mental health evidence during its case-in-chief in the penalty phase. Instead, the Government 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 Government will not introduce mental health evidence. The Government merely seeks discovery of the defendant's mental evidence in order to rebut this anticipated evidence.

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 by a date certain set by the Court 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.

Although the death penalty statute (18 U.S.C. § 3593) is silent as to discovery regarding the penalty phase, all of the Courts addressing this issue have ruled that the Government has the right to such discovery, including testing the defendant, in order 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 opinions have made clear that “[t]here is no doubt that a district court has the authority to order a defendant who states that he will use evidence from his own psychiatric examination in the penalty phase of a trial to undergo a psychiatric examination by a government-selected psychiatrist before the start of the penalty phase.” United States v. Allen, 247 F.3d at 773. In Webster, the Fifth Circuit ruled: “Allowing the court to require disclosure of the defendant’s expert’s reports and to compel the defendant to submit to a government psychiatric exam on the government’s motion constitutes a fair procedure for achieving these goals in a timely manner.” United States v. Webster, 162 F.3d at 340. The defendant cannot “offer expert testimony based upon his own statements to a psychiatrist and then deny the government the opportunity to do so as well in rebuttal.” Hall, 152 F.3d at 398. In Hall, the Fifth Circuit upheld the district court’s order compelling the defendant to undergo a psychiatric examination by a Government expert as a condition to the defendant being allowed to introduce psychiatric evidence at sentencing.

The Government directs the Court to the well-reasoned opinion issued by United States District Judge Robert E. Payne, another member of this Court, in United States v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997) and urges this Court to follow the procedures set forth in that opinion. In Beckford, the Court found that the Government had the right to discovery as to the defendant’s mental health evidence, but also employed detailed procedures to “strike the appropriate balance between the constitutional rights of the defendants, the Government’s rebuttal rights, and the interests of the Court and the litigants in fairness and judicial efficiency.”

Id. at 763. The Court in Beckford first required the defendants to file a notice indicating whether they intended to offer mental health evidence and, if so, to name the mental health expert, provide their qualifications and a “brief, general summary of the topics to be addressed that is sufficient to permit the Government to determine the area in which its expert must be versed.” Id. at 763-64. If a defendant filed such a notice, the Government then had the right to conduct a mental health examination of the defendant by a date certain. Id. at 764. The Government’s mental health expert was ordered not to discuss his evaluation with anyone until after the completion of the guilt phase of the trial and was further ordered to file his report under seal with the Court. Id. If the jury convicted a defendant of a capital offense, the defendant was then to file another notice confirming or disavowing his intent to introduce mental health evidence during the penalty phase. If the defendant confirmed his intention to introduce such evidence, the reports of all mental examinations were released to the Government. Id. Similar procedures were also employed in Haworth and Vest. Furthermore, the Eighth Circuit in Allen and the Fifth Circuit in Hall, although finding that the Beckford procedures were not required, noted the benefits of such procedures. United States v. Allen, 247 F.3d at 774; United States v. Hall, 152 F.3d at 399.

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 Beckford. Such procedures will protect the defendant’s constitutional rights while also ensuring that the Government’s discovery rights are met. Consequently, attached to this motion, the Government has submitted a proposed discovery order that mirrors that issued in Beckford on a schedule that will result on all mental health testing being concluded by July 31, 2002. The

Government notes that the Beckford protocol has since become the standard in federal capital cases throughout the country. See e.g. United States v. Miner, 2002 WL 424674 at \*2-3; United States v. Edelin, 134 F. Supp. 2d at 49-54; United States v. Lee, 89 F. Supp. 2d at 1019. Compare United States v. Allen, 247 F.3d at 774; United States v. Webster, 162 F.3d at 338-40; United States v. Hall, 152 F.3d at 399-400. Therefore, the Government respectfully requests the Court to endorse the attached proposed order regarding mental health evidence, which adopts the Beckford procedures while setting forth a schedule which will ensure that all mental health evidence issues are resolved well in advance of trial.<sup>1</sup>

Respectfully submitted,

PAUL J. McNULTY  
UNITED STATES ATTORNEY

By: /s/ \_\_\_\_\_  
David Novak  
Assistant United States Attorney

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<sup>1</sup>Mr. Zerkin has told the undersigned that he has not engaged in any mental health testing of the defendant yet, and he has no objection to this motion being heard on the same schedule as that established by the Court for all other penalty phase motions.

Certificate of Service

The undersigned hereby certifies that on the 8th day of April, 2002, a copy of the Government's motion was faxed and mailed to the following attorneys for the defendant:

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