

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal Action No. 1:18-cr-123-02 (RDA)
	)	
ELMER ZELAYA MARTINEZ,	)	
	)	
Defendant.	)	

Order

This matter comes before the Court on the parties' Motions to Set Rule 12.2 Procedures ("Motions"). Dkt. Nos. 584 and 585. Considering the Motions, the parties' Responses, Dkt. Nos. 597 and 598, Defendant Elmer Zelaya Martinez's ("Defendant") Reply, Dkt. 626, oral argument that occurred on July 22, 2020, and Federal Rule of Criminal Procedure 12.2, the Court hereby ORDERS the following:

1. If Defendant intends to introduce expert evidence relating to a mental disease or defect, or any other mental condition of the Defendant (hereinafter "mental health testimony"), at the penalty phase, the Defendant must file written notice thereof not later than December 4, 2020, as the parties previously agreed. Dkt. 562. The Defendant's notice shall include the professional qualifications of any mental health professional who will testify as an expert, 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, and the specific types of testing to be administered.
2. The Court will not appoint a "firewalled prosecutor" in this case considering that Defendant objects and that the Government is not so entitled.

3. If the Defendant files a notice that he plans to introduce such mental health testimony at the penalty phase, the Government may have the Defendant examined by a mental health professional selected by the Government. The Government's examination shall take place not later than seventy-five (75) days after the filing of the Defendant's notice, presuming that the Defendant is made available to the Government during that time. The Government's examination shall be audio recorded.
4. At least fourteen (14) days before any mental health testing is conducted by any expert for the Government pursuant to paragraph 3, the Government shall file a notice wherein it identifies by name and professional qualification its proposed mental health expert and shall provide to counsel for the Defendant a list of tests its expert wishes to perform. Within one week of receiving the Government's notice, the Defendant shall identify any such tests to which he objects. If a dispute arises which the Government and the Defense cannot resolve, the parties shall notify the Court and a hearing will be held. No mental health testing may occur until any disputes have been resolved by the Court. In the event of such an unresolved conflict, nothing in this paragraph shall create a preference in favor of the Government or a burden on the Defendant at a hearing conducted pursuant to this paragraph.
5. The report of that examination and the expert report of any examination initiated by the Defendant shall be filed under seal with the Court before the commencement of jury selection. The mental health professional conducting the examination for the Government shall not discuss Defendant's examination with

anyone who is not a mental health professional or member of the mental health professional's staff, unless and until the results of the examinations are unsealed and released to counsel for the Government and counsel for the Defendant following the guilt phase of the trial.

6. The results of any examination by the Government's expert(s) shall be released to the Government only in the event that the jury reaches a verdict of guilty on a capital charge as to the Defendant, and only after the Defendant confirms his intent to offer mental health or mental health testimony in mitigation. To that end, not later than one business day after the return of such a verdict, the Defendant shall file a pleading confirming or disavowing his intent to introduce mental health testimony at the penalty phase. If, in that manner, the Defendant withdraws his previously-tendered notice, the results of any such mental health examinations concerning the Defendant will not be released to the Government and will remain under seal. The reports of the Government's expert(s) shall be released to the Defendant immediately after the filing of the Defendant's pleading confirming the earlier notice. Not later than one business day after the release of the Government's reports, the report of the Defense expert shall be released to counsel for the Government, or the Defendant shall file a notice of withdrawal of his intent to introduce mental health evidence.
7. Even if the Defendant confirms his intent to offer mental health evidence, the Defendant may withdraw a notice of intent to raise a mental health issue at any time before actually introducing expert evidence on it, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any

facts disclosed only therein nor the fruits thereof shall be admissible against the Defendant.

8. Failure of the Defendant to provide notice or to participate in a Court-ordered examination or to confirm his first notice may result in forfeiture of the right to present mental health testimony at trial.
9. The Government shall provide Defendant within ten (10) days of this Order with all documents in its possession pertaining to any mental health examination performed on the Defendant that has not previously been provided. The Government shall provide the Defendant with any such records that it obtains during the course of the prosecution of this case, up to and including the penalty phase, not later than five (5) days after the Government receives such records.
10. Within ten (10) days after the Government's mental health expert has completed Defendant's examination, the mental health experts for both the Government and the Defendant shall provide each other (but not counsel) with the following materials:
 - a. All raw data (to include any data needed to score and/or interpret a particular test) pertaining to any mental health test administered to the defendant during the testing by the mental health experts;
 - b. All documents pertaining to any mental health or physical examination conducted on the defendant prior to the retention of the defendant's mental health expert(s), which the mental health expert relies upon to any extent for his report.

- c. Nothing herein shall be construed to require disclosures not required by Fed. R. Crim. Pro. 16.

The records addressed in this report shall be treated by the Government's mental health expert in the same fashion as provided in paragraph 6 of this Order. Additionally, the Government shall not use in its case-in-chief during the penalty phase of this prosecution any document described in paragraph 9 that the Government received from the Defendant or the Defendant's mental health expert.

It is SO ORDERED.

Alexandria, Virginia
August 26, 2020

/s/ 

Rossie D. Alston, Jr.
United States District Judge