

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

LARRY LUJAN,

Defendant.

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Cause No. CR 05-924 RB

**STIPULATED ORDER SETTING FORTH THE CONDITIONS UNDER WHICH
DEFENDANT MAY BE EXAMINED BY THE GOVERNMENT'S MENTAL
HEALTH EXPERT**

On January 14, 2008, the Court issued a Memorandum Opinion and Order which, in part, set forth the conditions and contents of any notice Defendant may choose to give, all pursuant to the provisions of Fed.R.Crim.P. Rule 12.2. The Court's Order also addressed the timing and coordination of testing by the government's expert, and directed that the specific procedures under which government mental health testing be resolved either by agreement of the parties, or at a hearing to be held at a later date. (Doc. 228, pp. 11-23.)

At the direction of the Court, the government has previously identified Assistant United States Attorney Howard R. Thomas as its firewall attorney, who has since been replaced by Assistant United States Attorney Jack E. Burkhead. Mr. Thomas has met with counsel for Mr. Lujan, and Mr. Burkhead has further consulted with them, and the parties have previously filed documents containing their respective positions, together with proposed orders, outlining the procedure upon which such mental health testing shall take place. The parties have reached agreement regarding all issues relating to the Rule 12.2 examination of Mr. Lujan, and the procedure

by which the results of all testing may be disclosed. Based upon the proposed memoranda and orders submitted by the parties, and pursuant to a stipulation reached between them , the Court now enters the following Order:

1. Jack E. Burkhead is hereby designated as “firewall” counsel in this case. Mr. Burkhead, together with legal assistant Therese Young, shall be subject to the firewall restrictions hereinafter set forth. Any material subject to Rule 12.2, received or created by firewall counsel or by firewall team’s 12.2 expert, shall be maintained in a locked file cabinet available only to these two individuals. Computer generated documents subject to Rule 12.2 will be stored on a separate network drive, access to which shall be given only to these two individuals.

2. All documents, records, and information disclosed by Defendant to the firewall team and all documents, records, and information obtained from or developed by any expert working with them, are subject to the following restrictions:

a. The documents, records and information shall be disclosed only to the firewall team, provided that no such individual has been in the past or will be in the future associated in any way with this case, including the decision to authorize seeking the death penalty against Defendant, any expert working with the firewall team, and that expert’s support staff. Each of the foregoing persons is an “Authorized Individual” for purposes of this Order.

b. The documents, records and information shall not be disclosed, directly or indirectly, to United States Attorney Kenneth J. Gonzales or his successor; or to Maria Ysabel Armijo or Mark A. Saltman, Assistant United States Attorneys, or to any other attorney, staff member, agent, expert, or consultant working on this case in any capacity including in a supervisory capacity.

c. The foregoing documents, records, and information shall be used by each Authorized Individual solely for the purpose of this case. Each Authorized Individual shall not divulge the documents, records or information to anyone who is not an Authorized Individual.

d. Any submissions to the Court referring to these documents, records, or information shall be filed under seal and served only on defense counsel and the firewalled attorneys.

e. Each Authorized Individual of the Firewall Team, not including experts, shall file under seal, a statement under oath representing that he or she has read this Order and recognizes that a willful violation of it may be deemed a civil or a criminal contempt.

f. If an Authorized Individual learns of a possible violation of this Order, he or she shall inform the Court and defense counsel promptly.

g. Should the firewall team find that an inquiry, contact or request must be made to the trial team in this case, each such inquiry, contact or request must be memorialized in writing, through letter with a copy or copies filed with the Court under seal until the Rule 12.2(c)(2) disclosures are made, at which time a copy or copies of such correspondence will be delivered to the defense team. The firewall team agrees to maintain a contact log which will memorialize any and all contacts with the trial team including but not limited to email, telephonic and written formats and will contain a description of such inquiry, contact or request. A copy of the log will be provided to the Court, for *in camera* examination, together with the Rule 12.2(c)(2) disclosures pursuant to the schedule set out in Paragraph 8 below. The

Court may, in its discretion, release all or any portion of such log to defense counsel if the issue or need arises. Any oral communication between firewall counsel and the trial team, pertaining to any material which is subject to Rule 12.2 disclosure, must be through pre-arranged call and recorded by electronic means or court reporter's transcript.. Copies of any such recordings or transcripts must also be delivered to the Court, *in camera*, and released or retained by the Court under the above stated conditions. All provisions in this paragraphs shall become effective from and after the date the stipulated order is entered.

3. If the government chooses, it may have Defendant examined by a one mental health professional of its choosing.¹ The government's examination shall take place in the facility where Defendant is confined, or at such other place as the parties may agree upon, and may take place on two successive days. If certain testing cannot be reasonably administered at Defendant's place of confinement, or if the parties cannot agree upon a substitute location, the government retains the right to request modification of this Order.

4. The sole purpose of the government's examination shall be to confirm or rebut mental health evidence presented by Defendant. The government's expert will not administer multiple tests designed for the purpose of measuring a single mental function. Further, any government expert will not subject Defendant to testing of a different nature than the testing performed by the defense experts, however the government's expert is not confined to administering the exact tests performed by the defense expert, so long as the testing is not of a different nature, or testing different mental health areas.

¹ Government has been advised by its expert that he customarily utilizes a "Neuropsych Technician" to assist in the testing process.

5. The firewall attorney shall provide defense counsel with at least ten (10) days advance notice of the name and profession of the government expert who will examine Defendant with respect to his mental condition, and the tests that the expert expects to perform. If Defendant objects to the use of any expert, or to a particular test, defense counsel shall diligently attempt to resolve the objection with firewall counsel. If resolution cannot be reached, Defendant shall file an objection with the Court before the end of three (3) business days after receiving notice of the expert or test from the firewall attorney, and the Court shall set the matter for a hearing.

6. The government shall hire a videographer who will video and audiotape the mental health examination. The videographer will not remain in the room during the examinations but he or she will enter the room as necessary to check on the equipment and to replace any tapes, compact diskettes, or DVDs. An agreed upon system will be devised to keep interruption of actual testing at a minimum. For example it is contemplated that tapes may be replaced during scheduled breaks in the testing process.

7. Both a defense representative and the Firewall attorney may observe the examination by the government's expert by remote feed. The defense representative shall observe the examination in an unobtrusive manner, but there must be the ability to communicate with the examiner if the defense representative believes that Defendant's constitutional rights are being violated. Should the defense representative be unable to resolve the matter informally to the satisfaction of defense, the representative may seek an appropriate remedy from this Court. If the Firewall attorney believes defense counsel, through repeated interruptions for example, has interfered with the testing process, then Firewall attorney may seek an appropriate remedy from this Court.

8. The Firewall attorney will provide the Court with copies under seal of the government's expert's notes of interviews, notes of testing, testing booklets, score sheets, and testing material and

videotape of the examination no later than five (5) days after testing is completed, unless additional time is needed, in which case firewall counsel shall request, in writing, additional time. The parties shall file a written stipulation if an agreement as to additional time is reached. This material shall be provided to the defense team no later than 20 days prior to the start of trial in this case. The defense team may petition the Court for earlier release of this material if it is necessary to further the defense evaluation of Mr. Lujan. The Defense expert will provide all of the same material created in his examination directly to government's expert within ten days of receipt of government's documentation, unless defense sooner withdraws its notice to provide mental condition(s) as mitigating factors in the penalty phase of the trial, if any. The government's trial team shall not receive copies of this material until such time as Mr. Lujan may be found guilty at trial and he has reaffirmed his intention to introduce mental health evidence at the penalty phase of the trial.

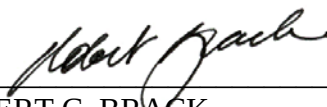
9. If Defendant is found guilty of a capital crime, the results and reports of the government's examination will be disclosed to defense counsel. Within twenty-four (24) hours of receiving these results and reports, Defendant must provide written notice to the United States and the Court as to whether he reaffirms his intent to rely on mental health evidence during the penalty phase.

10. If Defendant reaffirms his intent to rely on mental health evidence during the penalty phase, then the firewall restrictions under paragraph 2 of this Order will no longer apply. The results and reports of the government's examination may then be provided to the government's trial attorneys. Defendant will also immediately disclose to the United States' trial attorneys the results and reports of any examination(s) on mental condition conducted by Defendant's expert about which Defendant intends to introduce expert evidence.

11. Defendant may elect, at any time before presenting mental health evidence, to withdraw his intent to rely on mental health evidence, at which point the United States has no right to use its mental health rebuttal evidence.

12. Failure of Defendant to provide the required mental health evidence notices or to participate in a court-ordered examination may result in forfeiture of the right to present mental health testimony at the penalty phase of the trial. However, Defendant shall have the opportunity to remedy, to the satisfaction of this Court, any alleged violation of this order in the event such an issue arises, and before he forfeits his right to present mental health evidence at the penalty phase of these proceedings.

IT IS SO ORDERED.



ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE