

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL NO. 21-cr-28-16 (APM)</b>
	:	
v.	:	
	:	
<b>WILLIAM ISAACS,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	

**UNITED STATES' MOTION TO COMPEL PRODUCTION OF RECORDS AND FOR  
EXAMINATION BY GOVERNMENT EXPERT**

The United States respectfully moves the Court, pursuant to Federal Rules of Criminal Procedure 12.2(c) and 16(b), to compel Defendant William Isaacs to immediately (1) produce all records reviewed and created by the defense's expert and (2) make Defendant Isaacs available to be examined by the government's expert.

The government requests that the Court expedite consideration of this motion, because the trial will commence on February 1, 2023, in less than seven weeks (including the holidays), and the government's expert requires sufficient time to receive and review the records produced by the defense, conduct her own examination of the defendant, and prepare her own report, all to allow the parties sufficient time to litigate, in advance of the trial, the relevance and admissibility of the defense expert's testimony. Given the upcoming holidays and the government expert's schedule, the government requests that the defense be compelled to produce all records by Wednesday, December 21, 2022, and that the defendant sit for his examination on Friday, January 6, 2023.

On November 15, 2022, Defendant Isaacs noticed his intent to call Dr. Laurie Allyn Sperry as an expert regarding Autism Spectrum Disorder. ECF No. 757. Aside from Dr. Sperry's CV, that 3-page notice is the only document the defense has produced regarding this issue. However,

the notice stated that Dr. Sperry reviewed and relied upon several different records in reaching her conclusions, including but not limited to “the Defendant’s relevant medical, psychological, and educational records,” and the “recognized test(s)” (which were unnamed) that Dr. Sperry performed on Defendant Isaacs. While the notice also stated that she may offer more detailed testimony “based on the documents to be offered in evidence,” the defense has produced no such documents. Finally, the defense has not produced any report created by Dr. Sperry.

The government requested that the defense immediately produce all records reviewed and created by Dr. Sperry in reaching her conclusions. The government also requested that the defense make Defendant Isaacs available to be examined by the government’s expert. To date, the defense has not agreed to comply with either request.<sup>1</sup> Given how quickly trial is approaching, the government must now seek the Court’s intervention.

The defendant provided notice pursuant to Federal Rule of Criminal Procedure 12.2(b)(1), that he “intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of guilt.” Pursuant to Rule 12.2(c)(1)(B), “the court may, upon the government’s motion, order the defendant to be examined under procedures ordered by the court.”

The U.S. District Court for the Northern District of California recently granted a similar government motion, in *United States v. Holmes*, No. 18-CR-00258-EJD-1, 2020 WL 5414786 (N.D. Cal. Sept. 9, 2020). There, like here, the defense provided notice pursuant to Rule 12.2(b)(1), but the defense did not produce the records relied upon or created by its expert or

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<sup>1</sup> Counsel for Defendant Isaacs have cited the travel schedule of their expert and certain technological difficulties as the reason for their delay in providing full expert discovery. In light of the impending trial date, however, further delay is not acceptable.

consent to an examination of the defendant by a government expert. On the government’s motion pursuant to Rule 12.2(c)(1)(B), the court ordered both.

The court ordered the defense to produce to the government “medical records prepared or considered by [the defense’s expert] or those on which [the defendant] will rely in her case-in-chief at trial.” *Id.* at \*5. Here, the government seeks the same: those records that Dr. Sperry prepared or reviewed in reaching her conclusions, and those records upon which the defense will rely at trial. The *Holmes* court recognized that the defense is obligated to produce records that support its Rule 12.2(b) notice. *Id.* The court further recognized – and the defendant conceded – “that she is obligated to produce such information pursuant to Federal Rules of Criminal Procedure 16(b),” and it therefore granted the government’s request “for all reports, test results, raw testing data, and notes, for any and all examinations and interviews completed by” the defense’s expert.

As the *Holmes* court explained, Rule 12.2’s discovery requirements are designed to ensure that the government has adequate time and information to prepare to meet the potentially critical testimony of a defense expert who will testify that the defendant lacked the requisite mental state to commit the charged offenses:

Rule 12.2, in turn, serves this interest in an adversarial presentation on a defendant’s Rule 12.2(b) defense. The purpose of the Rule is to enable the Government to effectively “prepare for cross-examination of the defendant’s expert witnesses and to present any rebuttal witnesses to counter the defense expert’s testimony.” *United States v. Buchbinder*, 796 F.2d 910, 915 (7th Cir. 1986). First, the notice provision “give[s] the government time to prepare to meet the issue, which will usually require reliance upon expert testimony.” Fed. R. Crim. P. 12.2 advisory committee’s note to 1974 enactment; *see also LeCroy v. United States*, 739 F.3d 1297, 1305 n.6 (11th Cir. 2014) (explaining that Rule 12.2 “giv[es] the Government a chance to prepare its own mental-health evidence in

rebuttal,” as “the preparation of mental-health evidence frequently requires the use of expensive and time-consuming experts”). Then, recognizing that the government may require its own examination of the defendant in order to verify the defendant’s claims of a mental disease or defect, the Rule authorizes the Court to order such an examination. Fed. R. Crim. P. 12.2(c)(1)(B). Hence, although an examination is not mandatory in every case, one should be ordered if it is “necessary for the government fairly to rebut the defendant’s expert evidence,” *United States v. Davis*, 93 F.3d 1286, 1293 (6th Cir. 1996); cf. *Buchbinder*, 796 F.2d at 915 (finding the government had been prejudiced by lack of notice of the defendant’s intent to present expert testimony because it “did not have sufficient time prior to trial to have the defendant examined by its own expert witnesses”).

Of particular import here, the Supreme Court has recognized that where the defense expert’s evidence is based upon an examination of the defendant, “the only effective means of challenging that evidence [is] testimony from an expert who has also examined him.” *Cheever*, 571 U.S. at 94; accord *Hess v. Macaskill*, 67 F.3d 307 (9th Cir. 1995) (“The only way the state may rebut the defense [based on battered woman syndrome] is to conduct its own examination and present its own expert testimony.”); *United States v. Haworth*, 942 F. Supp. 1406, 1407–08 (D.N.M. 1996) (“The Government’s expert cannot meaningfully address the defense expert’s conclusions unless the Government’s expert is given similar access to ... an independent interview with and examination of the defendant.”). The Ninth Circuit has likewise held that, “[b]ecause the government has the burden of proof, it should have access to the same type and quality of evidence as the defense.” *United States v. July*, 958 F.2d 379 (9th Cir. 1992) (considering an examination ordered pursuant to the district court’s inherent powers, because the prior version of Rule 12.2(c) covered only claims of mental incompetency and insanity); see also *Hess*, 67 F.3d at 307 (“The state should be entitled to the same quality of evidence as the defense.”). In *July*, the defense expert “gave an opinion, based on psychological testing and a personal interview, that [the] defendant had symptoms consistent with [battered woman syndrome (“BWS”)]”; the government’s experts “were therefore entitled to examine July and conduct their own evaluation of her BWS claim.” *Id.*

*Id.* at \*2–3.

The decision in *Holmes* is consistent with other decisions granting the government’s request to conduct an independent examination of the defendant. For instance, in *United States v. Mogenhan*, 168 F.R.D. 1, 3 (D.D.C. 1996), the court ordered the defendant to sit for an

examination, holding that “the drafters of Rule 12.2(c) intended to permit the government to examine a defendant who intends to rely upon expert testimony regarding any mental condition. To do otherwise would deny the government of information necessary to prepare an adequate response.” The court explained that “that the only way both parties will be able to present fully informed arguments, and thus aid the court in its traditional gate keeping function [under *United States v. Childress*, 58 F.3d 693, 727–28 (D.C. Cir. 1995)], is to permit each side an opportunity to obtain its own evaluation of the defendant’s mental condition.” *Id.* at 3 n.3.

The same is true here. The government must be able to review the necessary records – all records relied upon and created by the defense’s expert, as well as those the defense intends to introduce at trial to support its Rule 12.2(c) notice – and conduct its own examination of the defendant. This will allow the parties to stand on equal footing in litigating the admissibility of Dr. Sperry’s proposed testimony. *See Childress*, 58 F.3d at 727-28 (holding that expert testimony about an abnormal mental condition is admissible only if it is relevant to negate the specific mental condition that is an element of the crime, and the court must “determine whether the testimony is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in reaching a decision on the ultimate issues”). And, if Dr. Sperry were to testify at trial, the government should be entitled to present rebuttal expert testimony on this topic.

Wherefore, the government respectfully requests that the Court order the defendant to immediately produce all records relied upon and created by Dr. Sperry in reaching her conclusions and all records the defense intends to introduce to support Dr. Sperry’s conclusions. The government also requests that the Court order the defendant to sit for an examination by the government’s expert on January 6, 2023, the only date in the immediate future that is available for

the government's expert. Finally, the government respectfully requests that the Court extend the deadline for the government to file a motion *in limine* objecting to the defense expert's testimony to January 13, 2023.<sup>2</sup>

Respectfully submitted,

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<sup>2</sup> Under the Court's Pretrial Scheduling Order, ECF No. 703, the government's notice is due on December 21, 2022.