IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO.

IN RE XXXX XXXX XXXX, Petitioner

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

The Petitioner is **XXXX XXXX XXXX**. The Honorable **JOE KENDALL,** Judge of the United States District Court for the Northern District of Texas is the trial judge and the judge against whom the Petition for a Writ of Mandamus is directed. The Honorable **WILLIAM F. SANDERSON, JR.,** United States Magistrate Judge for the Northern District of Texas, conducted preliminary proceedings in this case.

Petitioner is represented in the proceedings below by **F. CLINTON BRODEN.**

The Appellee, the United States of America, is represented in the proceedings below by Assistant United States Attorney **LYNN HASTINGS**. The United States Attorney for the Northern District of Texas is **PAUL COGGINS.**

BY:

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INTRODUCTION

Petitioner XXXX XXXX XXXX, pursuant to Fed. R. App. P. 21, applies to this Court for a Writ of Mandamus directing the Honorable Joe Kendall, District Judge for the Northern District of Texas, to vacate the Order entered in the instant case on July 11, 1994.

STATEMENT OF THE CASE

A. Proceedings Below

On June 9, 1994, Petitioner XXXX XXXX XXXX made his initial appearance before Magistrate Judge William F. Sanderson, Jr. pursuant to an indictment charging him with seven counts of wire fraud in violation of 18 U.S.C. ⁄ 1343 and one count of knowingly using one or more unauthorized access devices with the intent to defraud in violation of 18 U.S.C. ⁄ 1029(a)(2). See Appendix ("App.") at Tab 1. The government subsequently filed a motion for detention on the ground that there was a serious risk Mr. XXXX would flee and that no conditions of release would reasonably assure Mr. XXXX's appearance at court hearings. Id. at Tab 2. On June 10, 1994, a detention hearing was held before Magistrate Judge Sanderson and Mr. XXXX was released in the custody of his mother, Judy XXXX, and ordered to post ten percent of a $10,000 bond. Id. at Tab 3.

On June 30, 1994, Mr. XXXX served notice upon the government pursuant to Fed. R. Crim. P. 12.2(b) that he intended "to introduce expert testimony at his trial relating to a mental disease or other mental condition bearing on his guilt." Id. at Tab 4. On Friday, July 8, 1994, the government filed an opposed motion requesting its own psychological evaluation. Id. at Tab 6. Significantly, the government did not request that the evaluation be done on an inpatient basis. Nevertheless, on Monday, July 11, 1994, without giving Mr. XXXX an opportunity to file an opposition to the government's motion,[1] Judge Joe Kendall granted the motion and also ordered that Mr. XXXX be committed to the custody of the Attorney General or her authorized representative for purposes of conducting an inpatient evaluation. Id. at Tab 7. On July 12, 1994, Mr. XXXX was arrested by the United States Marshal's Service at his place of

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[1] Rule 5.1(e) of the Local Rules for the Northern District of Texas requires that parties in criminal cases file responses to opposed motions "within 10 days from the date the motion was filed."

employment and is currently being detained at the Mansfield Law Enforcement Center - a pretrial detention facility.

On July 12, 1994, Mr. XXXX filed a pleading styled "Opposition to Government's Motion for Psychiatric Examination, Motion to Reconsider Court's Order of July 11, 1994 and Motion to Stay Previous Order." Id. at Tab 7. On July 13, 1994, the undersigned counsel was informed that Judge Kendall was on vacation, but had received a copy of the pleading and informed his office that he would take no action.

Simultaneous to the filing of this petition, Mr. XXXX has filed a Motion to Stay Judge Kendall's July 11, 1994 Order.

B. Statement of the Facts

Upon information and belief, all of the allegations in the indictment against Mr. XXXX are based upon several "double charges" made to credit card numbers which Mr. XXXX obtained during the course of his ownership of Texas Spa Covers. It appears that several customers of Texas Spa Covers authorized an initial charge to their respective accounts, but that additional, unauthorized charges were also made to the accounts.

The government alleges that the double charges were as a result of an intent to defraud on the part of Mr. XXXX. Mr. XXXX's defense at trial will be that the double charges were honest business mistakes. As indicated by the Rule 12.2 notice given to the government, Mr. XXXX will also likely introduce testimony at trial to show that he is a manic depressive and is more likely to make mistakes of this sort when experiencing a manic phase. Since this type of testimony does not serve to excuse responsibility for an offense but is designed to prove that no offense took place in the first instance, it is not readily apparent whether notice of the testimony was required to be given pursuant to Fed. R. Crim. P. 12.2(b). Nevertheless, as noted above, Mr. XXXX provided such notice to the government out of an abundance of caution. See App. at Tab 4.

STATEMENT OF ISSUES

1. Can a District Court order that a defendant who is out on bond be committed for purposes of undergoing an inpatient psychiatric evaluation under 18 U.S.C. ⁄ 4242 without holding a full hearing?

2. Can a District Court require a defendant to undergo a psychiatric evaluation when the defendant does not intend to rely on the defense of insanity?

3. Assuming arguendo that a District Court can require a defendant to undergo a psychiatric evaluation when the defendant does not intend to rely on the defense of insanity, can the District Court nonetheless require the evaluation when the defendant will not offer psychiatric evidence as an excuse to the offense charge but rather for the purpose of showing that no offense took place?

RELIEF SOUGHT

In the first instance, Petitioner seeks a Writ of Mandamus directing the Honorable Joe Kendall to vacate his July 11, 1994 order insofar as it commits Petitioner to the custody of the Attorney General for the purpose of an inpatient psychiatric evaluation. In addition, Petitioner seeks a Writ of Mandamus directing Judge Kendall to vacate his July 11, 1994 Order insofar as it requires Petitioner to undergo any type of psychiatric evaluation.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE EXTRAORDINARY REMEDY OF A WRIT OF MANDAMUS IS APPROPRIATE IN THIS CASE.

As noted above, Mr. XXXX seeks a Writ of Mandamus in the first instance because the District Court committed him for the purpose of an inpatient psychiatric evaluation without any hearing or due process whatsoever. Obviously, because of the effect this commitment has upon Mr. XXXX's liberty interests, this portion of Judge Kendall's July 11, 1994 causeshim the most harm - irreparable harm. A person is entitled to a writ of mandamus when he can show he lacks alternative means to obtain relief and that he has a clear and indisputable right to the writ. See In Re American Airlines, Inc., 972 F.2d 605, cert. denied sub. nom., Northwest Airlines Inc. v. American Airlines, 113 S.Ct. 1262 (1993). In this case, Judge Kendall's commitment order is in blatant disregard of this Court's opinion in In Re Newchurch, 807 F.2d 404 (5th Cir. 1986). Indeed, Newchurch itself was a case brought under this Court's jurisdiction pursuant to a petition for a Writ of Mandamus. Id. at 408. See also Weber v. U.S. Dist Court for C.D. of Calif., 9 F.3d 76, 78 (9th Cir. 1993) (Mandamus appropriate where court lacked authority under Insanity Defense Reform Act of 1984).

Mr. XXXX also seeks a Writ of Mandamus based upon his contention that the District Court could not order him to undergo any psychiatric examination in this case, even an outpatient examination. A petition for a Writ of Mandamus on this issue, while less clear, is appropriate given the intrusive nature of such an examination. In Schlagenhauf v. Holder, 37 U.S. 104 (1964), the Supreme Court of the United States, finding that Courts of Appeals "had power to determine all issues presented by the petition for mandamus," held that a Writ of Mandamus was appropriate in a case in which a District Court ordered a mental and physical examination under the Federal Rules of Civil Procedure and where there were no guidelines as to when such examinations could be ordered. Id. at 110-113. In the instant case, the issue of when a psychiatric examination is appropriate under Fed. R. Crim. P. 12.2(c) and 18 U.S.C. / 4242 is an

issue of first impression in the Court of Appeals and no guidelines have been set in any Circuit. This case is the criminal procedure analog to Schlagenhauf and a Writ of Mandamus is appropriate for the reasons set forth below.

As noted above, Mr. XXXX attempted to allow Judge Kendall to correct his July 11, 1994 Order, but he effectively refused to do so when he informed his staff, from his vacation, that he would take no action.

II. IT IS CLEAR AND INDISPUTABLE IN THIS CIRCUIT THAT A DISTRICT COURT MAY NOT ORDER THAT A DEFENDANT WHO IS OUT ON BOND BE COMMITTED FOR PURPOSES OF UNDERGOING AN INPATIENT PSYCHIATRIC EVALUATION WITHOUT HOLDING A FULL HEARING.

The exact issue of whether a District Court can incarcerate a defendant for purposes of ordering a psychiatric evaluation pursuant to 18 U.S.C. ⁄ 4242 has already been decided by this Court in In re Newchurch, 807 F.2d 404 (5th Cir. 1986).

In Newchurch, the defendant had been charged with attempting to commit arson and malicious damage and had been released on a $5,000 unsecured bond. Id. at 406. The defendant later filed notice of his intention to rely on the defense of insanity and of his intention to introduce expert testimony relating to his mental condition pursuant to Fed. R. Crim. P. 12.2(a) and 12.2(b). Id. The government requested Mr. Newchurch to be committed to the custody of the Attorney General for purposes of an inpatient psychiatric evaluation. Id. at 406-07.[2]

Mr. Newchurch opposed the government's request for an inpatient evaluation although he conceded that an outpatient evaluation under 18 U.S.C. ⁄⁄ 4242 and 4247 was appropriate given that he intended to rely upon the defense of insanity. Id. at 408. Unlike in the instant case, the District Court in Newchurch held an evidentiary hearing on the government's motion. Id. at 407.

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[2] Significantly, the government did not request an inpatient evaluation in the instant case. See App. at Tab 5.

Nevertheless, following that hearing, the District Court in Newchurch committed Mr. Newchurch to the custody of the Attorney General for purposes of an evaluation. Id. at 407-08.

Mr. Newchurch filed a petition for a Writ of Mandamus requesting this Court to compel the District Court to vacate its commitment order. Mr. Newchurch correctly noted that the District Court's action would create a "chilling effect" for attorneys and parties if "attorneys must advise clients that in order to maintain an insanity defense, they must first go to prison for 30 to 45 days.'" Id. at 407. Mr. Newchurch's counsel also submitted affidavits of two psychologists "both of whom expressed the opinion that the incarceration of individuals for psychiatric examinations may lead to inaccurate results." Id.

This Court in Newchurch considered Mr. Newchurch's arguments "against the background of the constitutional protection for individual liberty" and the principle that "[a] person accused of a crime should not therefore be deprived of personal liberty unless his confinement is reasonably necessary to assure his presence at trial or to protect some other important governmental interest." Id. at 408-09. Against that "background," this Court found that the government's argument "that the decision to commit [a defendant for a psychiatric evaluation] should be for the district court's sole discretion" was "not well considered." Id. at 411.

> Read together, the provision that the court "may" commit a person to the custody of the Attorney General, the legislative statement that commitment should not be ordered if the examination can be conducted on an outpatient basis, and the provision that, if the defendant is committed, he shall be examined in the nearest suitable facility, all require that, before committing a defendant, the court determine, on the basis of evidence submitted by the government, subject to cross examination, and to rebuttal by the defendant, that the government cannot adequately prepare for trial on the insanity issue by having the defendant examined as an outpatient.

Id. (emphasis added). The Court then vacated the order committing Mr. Newchurch. Id. at 412.

The facts of the instant case are even more persuasive in favor of vacation of the commitment order than in Newchurch. In the instant case, unlike in Newchurch, the government did not request commitment. See App. at Tab 5. In the instant case, unlike in Newchurch, the defendant was given an opportunity to respond to the government's motion requesting an evaluation. In the instant case, unlike in Newchurch, no evidentiary hearing was held, let alone the type of full hearing envisioned by this Court.[3]

Since Newchurch has not been overruled by the United States Supreme Court or this Court sitting en banc, it is the undisputed law of the Circuit. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1121 n.8 (5th Cir. 1992). Therefore, given that the facts of this case are even more persuasive in favor of vacation than in Newchurch, this Court should direct Judge Kendall to vacate his July 11, 1994, commitment order.

III. A DISTRICT COURT MAY NOT REQUIRE A DEFENDANT TO UNDERGO A PSYCHIATRIC EVALUATION WHEN HE DOES NOT INTEND TO RELY ON THE DEFENSE OF INSANITY AND WHEN HE DOES NOT INTEND TO RELY ON PSYCHIATRIC EVIDENCE TO EXCUSE ESTABLISHED CRIMINAL CONDUCT.

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[3] The District Court in this case indicated "that it was the opinion of the Pretrial Services Officer, who interviewed the defendant, that he was a danger to the community...." See App. at Tab 6. The facts of this case belie that conclusion made by a nonjudicial officer. Significantly, the government did not allege that Mr. XXXX was a danger to the community when setting forth reasons to justify his detention in its Motion for Detention. See App. at Tab 2. Moreover, Magistrate Judge Sanderson conducted a full detention hearing in this case and found that Mr. XXXX should be released pending trial and no party appealed from that decision. See App. at Tab 3. In any event, an appeal would require a de novo review of the detention hearing. See, e.g., United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985). Finally, it is questionable at best whether a defendant charged with a non violent crime could be detained on a danger to the community basis. See United States v. Byrd. 969 F.2d 106, 110 (5th Cir. 1992).

A. A District Court Can Only Require a Defendant to Undergo a Psychiatric Evaluation if the Defendant "Intends to Rely on the Defense of Insanity."

It would appear that a clear reading of Fed. R. Crim. P. 12.2(c) in conjunction with 18 U.S.C./ 4242 allows the government to force a defendant to undergo a psychiatric evaluation only in cases in which a defendant "intends to rely on the defense of insanity." See 18 U.S.C./ 4242. Indeed, in a very recent case, Judge Reinhard of the Northern District of Illinois expressed severe doubts that Rule 12.2 and Section 4242 could be extended beyond their clear language. United States v. Bell, 1994 WL 210020, *1 (N.D. Ill. May 17, 1994) (attached hereto as Exhibit A). But see United States v. Banks, 137 F.R.D. 20, 21 (C.D. Ill. 1991); United States v. Vega-Penarete, 137 F.R.D. 233, 235 (E.D. N.C. 1991).

Fed. R. Crim. P. 12.2(c) provides:

> In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C./4241 [4] or 4242 (emphasis added).

[4] 18 U.S.C./4241 deals with a defendant's competency to stand trial. Mr. XXXX's competency to stand trial has never been raised as an issue in this

18 U.S.C./4242(a) then provides:

> Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c) (emphasis added).

Since Mr. XXXX does not allege that he was insane at the time of the alleged offense and he does not "intend [to] rely on the defense of insanity," a clear reading of the rule and statute would lead to the conclusion that Judge Kendall could not require Mr. XXXX to undergo a psychiatric examination even on an outpatient basis and that Mr. XXXX is entitled to a Writ of Mandamus vacating Judge Kendall's July 11, 1994, in its entirety. See Schlagenhauf, 379 U.S. at 110-13.

B. Assuming arguendo that a District Court can require a defendant to undergo a psychiatric evaluation when the defendant does not intend to rely on the defense of insanity, the District Court cannot require the evaluation when the defendant will not offer psychiatric evidence as an excuse to the offense charge but rather for the purpose of showing that no offense took place.

Even assuming arguendo that the government is permitted to request that a defendant undergo a psychiatric evaluation in cases where the defendant does not intend to "rely on the defense of insanity," the District Court's order requiring an evaluation is nonetheless inappropriate in the instant case given the limited purpose of the psychiatric evidence that will be offered at trial. In this case, Mr. XXXX does not offer psychiatric evidence to excuse his responsibility for an established offense. Rather, Mr. XXXX offers such evidence to support his defense that he made honest business mistakes and, therefore, that no offense was committed. Indeed, such evidence would be no different than offering evidence that Mr. XXXX's business

office was disorganized and that the ensuing chaos contributed to an honest business mistake of double charging.

Judge Reinhard's opinion in Bell, a case involving a battered wife defense, is directly on point. In Bell, the District Court noted that the battered wife syndrome "does not excuse criminal conduct because a defendant was incapable of formulating a requisite mental state. Rather, it presumes such mental state to exist, but offers a legally recognizable justification for the conduct." Id. at *1. That being the case, the District Court in Bell held that even if a psychiatric evaluation could be ordered under Rule 12.2(c) where the defendant does not "intend[] to rely on the defense of insanity," it could never be ordered when the psychological evidence would not be offered for the purpose of excusing criminal conduct. Id.

Just as in Bell, Mr. XXXX's manic depression in this case would not excuse fraud, if, in fact, fraud occurred. Rather, his manic depression explains "a legally recognizable justification for the conduct" at issue. It explains why Mr. XXXX might have committed honest business mistakes that other individuals might have caught. Therefore, even under an expansive reading of Rule 12.2, a government conducted psychiatric examination is simply not appropriate given the basis for the Rule 12.2 notice in this case and Judge Kendall erred in ordering such an evaluation.

CONCLUSION

Based upon the foregoing, Mr. XXXX respectfully requests this Court to issue a Writ of Mandamus directing the Honorable Judge Joe Kendall, District Judge for the Northern District of Texas, to vacate the Order entered in the instant case on July 11, 1994.

DATED: July 14, 1994.

Respectfully submitted,

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Attorney for Petitioner
XXXX XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on the _____ day of July, 1994, I caused a copy of the foregoing Petition for a Writ of Mandamus to be hand-delivered to the Honorable Joe Kendall, United States District Judge, 1100 Commerce Street, Room 15C40, Dallas, Texas and to Lynn Hastings, Assistant United States Attorney, 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO.

IN RE XXXX XXXX XXXX, Petitioner

MOTION TO STAY

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