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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMESON ASHLEY,

Plaintiff,

v.
CITY AND COUNTY OF SAN
FRANCISCO, MICHAEL HENNESSEY,
individually and in his official capacity as
Sheriff of the San Francisco County Sheriff's
Department; and DOES 1 to 30,

Defendants.

Case No.: CV-12-00045-JST (KAW)

ORDER RE 12/13/2012 AND 4/19/2013
DISCOVERY LETTERS PERTAINING TO
RULE 35 MENTAL EXAMINATION

Before the Court are the joint discovery letters filed on December 13, 2012 and April 19, 2013. (Dkt. Nos. 62 & 81). While there is no dispute that Plaintiff Jameson Ashley has put his mental state in controversy and that good cause exists to conduct a Rule 35 independent medical examination (IME), the parties disagree as to the length of the mental examination, the contents of the examination, the presence of a third party during the examination, and whether the examination may be tape recorded.

Upon review of the joint letters, the Court finds this matter suitable for resolution without further briefing and without oral argument pursuant to Civil Local Rule 7-1(b), and orders Plaintiff to undergo a 5-hour examination, subject to the conditions set forth below. There shall be no third-party observer present, but the parties may audio record the interview portion of the examination. In addition, Plaintiff's mother may be present outside of the examination room, and Plaintiff may consult with her during breaks as necessary.

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1 **I. LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 35(a), when the mental or physical condition of a
3 party is in controversy, the court may order the party to submit to a physical or mental
4 examination by a suitably licensed or certified examiner. The order may be made only on a
5 motion for good cause. Fed.R.Civ.P. 35(a).

6 **II. BACKGROUND**

7 On October 21, 2010, Plaintiff Jameson Ashley was arrested on the Golden Gate Bridge
8 for trespassing and was transported to the San Francisco County Jail. (12/13/2012 Joint Letter,
9 “First Joint Letter,” Dkt. No. 62, at 1, 4.) Plaintiff was then transferred to San Francisco General
10 Hospital for evaluation pursuant to a 5150 order. (4/19/2013 Joint Letter, “Second Joint Letter,” at
11 2.) Within 72 hours, he was sent back to jail, where he was placed in psychiatric housing for
12 observation and treatment. (5/1/2013 Joint CMC Statement, Dkt. No. 82, at 6.). Plaintiff was
13 detained for 47 days, during which he was allegedly mute, and remained so until two months after
14 his release. (Second Joint Letter, at 5.)

15 On January 4, 2012, Plaintiff filed this action. (Compl., Dkt. No. 1.) On May 8, 2012, the
16 district court found Plaintiff incompetent to represent himself in this proceeding, and, pursuant to
17 Federal Rule of Civil Procedure 17(c)(2), appointed Plaintiff’s mother, Lisa Ashley, as his
18 Guardian ad Litem. (Dkt. No. 33.)

19 In September 2012, Plaintiff underwent a 5 hour deposition in this matter. On December
20 13, 2012, the parties filed the First Joint Letter regarding the Rule 35 independent mental
21 examination. On January 18, 2013, Plaintiff was taken to the emergency room at UC Davis
22 Hospital and involuntarily hospitalized at a psychiatric facility. (First Decl. of Michael Wilkes,
23 M.D., Dkt. No. 68.) As a result of Plaintiff’s hospitalization, the parties stipulated that no
24 determination regarding the terms of Plaintiff’s proposed IME should be made at this time, and
25 requested that the undersigned retain jurisdiction over the discovery dispute. (Order Granting
26 Stipulation, Dkt. No. 71.)

27 On April 8, 2013, the parties notified the Court that Plaintiff’s psychological condition had
28 shown some improvement and that he was now able to participate in an IME to support his suit.

1 (Dkt. No. 79.) On April 10, 2013, the Court ordered the parties to further meet and confer
2 regarding the proposed IME, and to file a subsequent joint letter along with current declarations
3 from their respective medical experts attesting to the facts presented in the new joint letter. (Dkt.
4 No. 80.)

5 On April 19, 2013, the parties filed an updated joint letter outlining virtually identical
6 disputes as filed in the original letter.

7 III. DISCUSSION

8 Since the parties agree that Plaintiff's mental state is in controversy and that good cause
9 exists to conduct a Rule 35 mental examination, the Court will only address the issues in dispute.

10 A. Length and Scope of the Examination

11 The parties disagree as to the length and scope of the IME. Defendants propose a five
12 hour examination to be performed by Dr. Joanna Berg, Ph.D, a licensed psychologist, consisting
13 of a 2.5 hour interview and 2.5 hours of psychological testing. (Second Joint Letter, at 2-3.)
14 Plaintiff seeks to limit the length to no longer than one and one half hours. (Second Joint Letter, at
15 1.) In support of this request, Plaintiff submitted a declaration from Dr. Michael Wilkes, M.D.,
16 who is Plaintiff's treating physician. (*See* Decl. of Michael Wilkes, M.D., "Second Wilkes Decl.",
17 Dkt. No. 81, Exh. 2.) Pursuant to Rule 35, the court may specify the scope and length of the
18 examination. *See* Fed. R. Civ. P. 35.

19 Defendant contends that one and one half hours is insufficient given that Plaintiff "claims
20 that his pre-existing psychological problems were exacerbated by his arrest and lengthy
21 incarceration." (Second Joint Letter, at 5.) Dr. Berg states that she needs approximately five
22 hours to conduct a forensic psychological evaluation consisting of a comprehensive clinical
23 interview and a standard battery of psychological testing to form adequate psycho-diagnostic
24 opinions. (Decl. of Joanna Berg, Ph.D., "Berg Decl.", Dkt. No 81, Exh. 1., at 1-2, 4.) Dr. Wilkes
25 states that "[t]he proposed 5 hour psychological examination would, in my opinion, be
26 counterproductive and would jeopardize [Plaintiff's] recovery, which is still in its very early
27 stages." (Wilkes Decl., at 1.) The Court notes that Dr. Wilkes' training is in internal medicine,
28 rather than psychology, and his declaration provides no justification as to why he is of the medical

1 opinion that “it is not advisable for Mr. Ashley to submit to a lengthy examination, including an
2 extensive battery of diagnostic tests, at the present time” nor why Plaintiff “could tolerate an
3 examination of approximately one hour in length.” *Id.* As a result of Dr. Wilkes’ broad and
4 unsupported statements of medical opinion, the Court will afford less weight to his opinions.

5 Plaintiff’s mental state and whether his incarceration impacted him psychologically are the
6 primary issues in this litigation, so Defendants have a right to assess his intellectual abilities and
7 his mental state to confirm his diagnosis, to determine the severity of any psychological disorders,
8 and to come to a conclusion as to whether his incarceration contributed to his current mental state
9 or if his diagnosis was likely preexisting. In order to make those determinations, Dr. Berg seeks to
10 administer Wechsler Adult Intelligence Scale IV (WAIS IV), Rorschach Inkblot Test, Minnesota
11 Multiphasic Personality Inventory 2 (MMPI-2), and the Millon Clinical Multiaxial Inventory III
12 (MCMI-III). She states that “these four tests are used together to reach a consistent,
13 comprehensive picture of an individual’s emotional, intellectual and personality functioning”
14 thereby “ensur[ing] a more accurate psychological diagnosis and ultimately a more accurate
15 forensic psychological opinion.” (Berg Decl., at 3.) These are all standard tests that have been
16 found by numerous courts, including those in the Northern District, to be proper tools for
17 psychological assessment. *See, e.g., Ayat v. Societe Air France*, 2007 WL 1120358, at *7 (N.D.
18 Cal. April 16, 2007); *Gavin v. Hilton Worldwide, Inc.*, 2013 WL 1402350, at *7 (N.D. Cal. Apr.
19 5, 2013).

20 By contrast, Plaintiff objects to the scope of “the proposed testing procedures in their
21 entirety on the grounds that they are unduly burdensome given the unique circumstances of this
22 case” and Plaintiff’s previous schizophrenia diagnosis. (Second Joint Letter, at 6.) Instead,
23 Plaintiff proposes that Dr. Berg “review the videotape of Plaintiff Ashley’s deposition and the
24 subpoenaed medical records” to form her medical opinions. (Second Joint Letter, at 6-7.) Dr.
25 Berg states that watching Plaintiff’s videotaped deposition is not an adequate substitution for a
26 clinical evaluation, because “[n]o narrative information is allowed, and it is designed to gather
27 specific sets of facts, not clinical information.” (*Id.* at 3.) Regardless, Defendants have the right
28 to perform their own assessment, because one of the purposes of Rule 35 is to level the playing

1 field in cases where physical or mental condition is at issue, because “[a] plaintiff has ample
2 opportunity for psychiatric or mental examination by his/her own practitioner or forensic expert.”
3 *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995). The Court notes that
4 Plaintiff has not objected to Dr. Berg’s qualifications nor claimed that she is not “a suitably
5 licensed or certified examiner.” *See* Fed. R. Civ. P. 35(a)(1).

6 The Court is convinced that the proposed five hours of testing, split evenly between the
7 interview and standard psychological testing, is necessary to obtain an accurate diagnosis. In fact,
8 the courts in this district routinely permit mental examinations of five hours or longer. *See, e.g.,*
9 *Ayat*, 2007 WL 1120358, at *9 (eight hours); *Gavin*, 2013 WL 1402350, at *7 (five to six hours
10 with the ability to extend if testing is not completed).

11 The examination shall be conducted over two to three days with Plaintiff being given
12 breaks as needed. Dr. Berg shall have the discretion to allocate the interview and testing portions
13 over that time period, so long as Plaintiff does not undergo more than 2.5 hours in a single day.
14 Should Plaintiff require frequent breaks, the time limits may be reasonably extended to account
15 for the amount of time necessary to stop and restart the interview and/or testing portions. Further,
16 in the unlikely event that Plaintiff reacts so negatively that the examination itself causes him
17 psychological harm, the Court trusts that Dr. Berg will end the examination as sworn in her
18 declaration. (Berg Decl., at 4.)

19 **B. Presence of a Third Party in the Examination Room**

20 Defendants argue that the presence of a third party witness, particularly Plaintiff’s mother,
21 would interfere with the exam. These concerns are legitimate and courts in this district have
22 rejected the presence of a third party observer. *Ayat*, 2007 WL 1120358, at *7.

23 Courts in other districts have also denied requests to have a third party observe a mental
24 examination because, “[t]hird party observers may, regardless of their good intentions,
25 contaminate a mental examination.” *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 609-10
26 (C.D.Cal.1995) (citations omitted); *see also Holland v. United States*, 182 F.R.D. 493, 495
27 (D.S.C.1998) (majority of federal courts have rejected the notion that any third party should be
28 allowed to observe a Rule 35 examination). The *Ragge* court acknowledged that the potential for

1 a third party observer to interfere with, or even contaminate, a mental examination is recognized
2 in California Code of Civil Procedure Section 2032(g)(1), which provides for the presence of a
3 third party observer at a physical examination, but not at a mental examination. *Id.* at 610. In
4 denying the party’s request for an observer, the court took into consideration that the examining
5 doctor did not propose to use any unorthodox or potentially harmful techniques in his
6 examination. *Id.* Like the examining doctor in *Ragge*, Dr. Berg proposes to use tests that are
7 routinely administered to obtain a “comprehensive picture of an individual’s emotional,
8 intellectual and personality functioning.” (Berg Decl., at 3.)

9 The court in *Tomlin v. Holecek*, 150 F.R.D. 628 (D.Minn.1993), detailed a split of
10 authority that exists regarding this issue. The court refused to allow the presence of counsel, a
11 third party, or tape recorder during a psychological exam because it would: (1) potentially
12 invalidate the examination results; (2) fail to provide a “level playing field,” as plaintiff was not
13 required to tape record his examinations with his own health care providers; and (3) create an
14 adversarial environment during an evaluation that should be neutral.

15 Based on the facts and the prevailing authority in this district, a third party observer shall
16 not be present during Plaintiff’s mental examinations, but Plaintiff’s mother may be present
17 outside of the examination room, and he may consult with her during breaks as needed.

18 **C. Audio Recording the Examination¹**

19 The presence of an audio recording device also has the potential to contaminate the mental
20 examination, but has been permitted by federal courts in this district and California law
21 affirmatively allows the practice. *See, e.g., Gavin*, 2013 WL 1402350, at *7; *see also* Cal. Civ.
22 Proc. Code § 2032.530. Other courts have not permitted audio recordings for fear of invalidating
23 testing results and failing to provide a “level playing field,” as plaintiff is not required to record
24 his own examinations with his own health care providers. *Tomlin v. Holecek*, 150 F.R.D. 628, 632
25 (D. Minn. 1993); *see also Ayat*, 2007 WL 1120358, at *7-8 (denied plaintiff’s request to audio
26 record mental examination).


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28 ¹ The Court uses the term “audio recorder” or “audio recording device” in lieu of “tape recorder”
to allow for an array of recording devices, such as voice recorders utilizing mp3 technology.

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The parties shall meet and confer as to the date, time, and location of the examination,
which shall be scheduled based on the earliest availability of Dr. Berg.

IT IS SO ORDERED.

Dated: May 30, 2013


KANDIS A. WESTMORE
United States Magistrate Judge