APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6181

UNITED STATES OF AMERICA,
Petitioner-Appellant,

v.

OLIVER LEE WHITE,
Respondent-Appellee.

Argued: May 8, 2019

Decided: June 18, 2019

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

James C. Dever III, District Judge

No. 5:17-hc-02162-D

Before NIEMEYER, DIAZ, and RICHARDSON, Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Diaz and Judge Richardson joined.

ARGUED: Benjamin M. Shultz, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Jaclyn Lee DiLauro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Joseph H. Hunt, Assistant Attorney General, Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Robert J. Higdon, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellant. G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellee.

NIEMEYER, Circuit Judge:

With its filing of a certificate in the district court that Oliver White is a "sexually dangerous person," the government commenced this civil proceeding under 18 U.S.C. § 4248 to commit White to the custody of the Attorney General. After ordering and receiving a mental examination of White, the district court found that White was "mentally incompetent to understand the nature and consequences of the section 4248 proceeding against him and to assist properly in his defense in the section 4248 proceeding" and therefore dismissed the proceeding. A proceeding under § 4248 would have required the government to prove that White (1) "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) "would

have serious difficulty in refraining from sexually violent conduct or child molestation if released." *Id.* § 4247(a)(5), (6). The district court held that § 4248 "permits a court to dismiss a section 4248 proceeding against an incompetent person who contests all three elements" and alternatively that "permitting such a [§ 4248 proceeding] and ensuing commitment would violate procedural due process as applied to that person."

On appeal, the government contends that the district court erred in both rulings, and we agree. We therefore reverse the district court's judgment and remand with instructions to conduct a hearing on the § 4248 proceeding initiated against White.

I

White, now 31, is an intellectually disabled Native American man who was born in Crow Agency, Montana. His biological mother could not care for him because she abused alcohol and drugs, and he suffered from fetal alcohol syndrome. With an IQ of 55 or 56 and elementary math and reading skills, he struggled in school and in gaining employment. As one doctor summarized, White's "thought process was clearly impoverished, his mood was confused, [and] his affect was shallow."

In 2009, when White was 21, a federal grand jury in the District of Montana indicted him for the sexual abuse of four female minors under the age of 12. The government, however, dismissed the charges as part of a deferred prosecution agreement in which White agreed to reside with his mother and have no further contact with minors.

In 2012, a federal grand jury in the District of Montana indicted White for a second time, charging him with abusive sexual assaults of female minors under the age of 12. After White was found incompetent to stand trial, the court dismissed the charges and released White to his family.

On July 22, 2016, for a third time, a federal grand jury in the District of Montana indicted White, charging him with aggravated sexual abuse of female minors under the age of 12. Again, after White was found incompetent to stand trial, the court dismissed the charges.

While White was in custody at the Federal Medical Center in Butner, North Carolina, for a mental examination in connection with the 2016 charges, the government filed a certificate in the district court under 18 U.S.C. § 4248(a), certifying that White was a "sexually dangerous person" and petitioned the court to commit White to the custody of the Attorney General. In its certificate, the government pointed to the past charged conduct and to psychological assessments of White to claim that White was a "sexually dangerous person" under § 4248.

After receiving the certificate, the district court directed the Federal Public Defender to represent White and appointed a licensed psychiatrist as a mental health examiner of White. White's counsel then filed motions for the appointment of a guardian ad litem, to dismiss the § 4248 certificate filed against him, and, in the alternative, for a competency hearing, contending that White's mental incompetence would preclude subjecting him to a § 4248 hearing.

The district court granted the motion to appoint a guardian ad litem and, before conducting a § 4248 hearing, ordered a competency hearing "to determine whether White is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceeding under 18 U.S.C. § 4248 against him or to assist properly in his defense." In ordering the competency hearing, the court overruled the magistrate judge, who recommended that White's motion for a competency hearing be denied because §§ 4241 and 4248 contemplate commitment for individuals in White's "exact situation."

After conducting the competency hearing, the court determined that "White [was] currently suffering from a mental disease or defect, . . . which render[ed] White unable to understand the nature and consequences of the § 4248 proceeding against him and to assist properly in his defense in the § 4248 proceeding." Given that White contested all three elements of § 4248 — (1) that he had previously "engaged or attempted to engage in sexually violent conduct or child molestation"; (2) that he "suffers from a serious mental illness, abnormality, or disorder"; and (3) that as a result, he "would have serious difficulty in refraining from sexually violent conduct or child molestation if released," 18 U.S.C. § 4247(a)(5), (6) — the court expressed concern, particularly because White contested the element requiring proof of prior conduct, that "the respondent face[d] the prospect of indefinite commitment arising from a trial focused on both his past conduct and present mental condition even though he lack[ed] the

capacity to understand the section 4248 trial or to participate rationally in his defense." Concluding that § 4248 allowed it to dismiss the § 4248 proceeding "against an incompetent person who contests all three elements" and alternatively that conducting a § 4248 proceeding would violate White's constitutional right to procedural due process, the court granted White's motion to dismiss the proceeding.

From the district court's judgment dated December 6, 2018, the government filed this appeal.

II

We address first whether § 4248 or any other related provision in Chapter 313 of Title 18 permits a district court to dismiss a § 4248 proceeding against a person because he is mentally incompetent.

Section 4248 was enacted in 2006 as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, to "protect children from sexual exploitation and violent crime," *id.,* in the context of a "growing epidemic of sexual violence against children," H.R. Rep. No. 109-218, pt. 1, at 20 (2005). The provision was included as an addition to Chapter 313 of Title 18 (18 U.S.C. §§ 4241-4248), which addresses "Offenders with Mental Disease or Defect." Section 4248 itself was included as "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades," and it "focuses directly upon persons who, due to a mental illness, are sexually dangerous." *United States v. Comstock,* 560 U.S. 126, 137, 141 (2010).

Section 4248 provides that after the government files a certificate with a district court that a person "is a sexually dangerous person," the court "shall order a hearing" to determine whether the person is indeed a sexually dangerous person. 18 U.S.C. § 4248(a). For a person to be found "sexually dangerous," the government must demonstrate that the person (1) has "engaged or attempted to engage in sexually violent conduct or child molestation"; (2) "suffers from a serious mental illness, abnormality, or disorder"; and (3) "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5), (6); *see also Comstock,* 560 U.S. at 129; *United States v. Antone,* 742 F.3d 151, 158 (4th Cir. 2014). If the court finds, "by clear and convincing evidence," that the person is a sexually dangerous person, then it must commit the person to the custody of the Attorney General, *id.* § 4248(d), who is charged to treat the person and release him if and when a court finds, by a preponderance of the evidence, that the person is no longer dangerous or no longer dangerous under prescribed conditions of release, *id.* § 4248(a), (d), (e).

Section 4248 makes no provision for the release of a person subject to a government certificate because the person is "mentally incompetent." Indeed, § 4241(d) indicates otherwise. Under that section, which addresses hearings for mental incompetency in the context of criminal proceedings, if the person is found mentally incompetent "to the extent that he is unable to understand the nature and consequences of the proceeding[s] . . . against him or to assist properly in his defense," the court must commit him

to the Attorney General for hospitalization. 18 U.S.C. § 4241(d). And if hospitalization does not sufficiently alleviate the condition — *i.e.,* if the person is unlikely to regain competency — "the defendant is subject to the provisions of . . . § 4248." *Id.* And § 4248 accordingly provides for civil commitment following a hearing if the court finds that the person is sexually dangerous. *Id.* Indeed, § 4248 explicitly recognizes its role following a hearing under § 4241 for mental incompetency. *See id.* § 4248(a) (addressing persons committed to the custody of the Attorney General "pursuant to § 4241(d)"). There is little doubt that § 4248 applies to persons found mentally incompetent under § 4241.

Of course, to read into these provisions a defense that a mentally incompetent person who is sexually dangerous cannot be committed to the custody of the Attorney General under § 4248 would defeat the core purpose of the statute — to protect the public from sexually dangerous persons. Under such a reading, a mentally incompetent person, who had raped women on three separate occasions, but never stood trial for the rapes because he was mentally incompetent, could not be removed from society under § 4248, thus leaving the public with the very risk that § 4248 was designed to eliminate. *See Comstock,* 560 U.S. at 141 (noting that § 4248 is designed to protect the public from mentally ill individuals who are sexually dangerous); *United States v. Comstock,* 627 F.3d 513, 520 n.2 (4th Cir. 2010) (recognizing that criminal defendants found mentally incompetent to stand trial are appropriately subject to § 4248 proceedings because they "may have committed the criminal offense due to their mental illness or incompetence").

Chapter 313 of Title 18 explicitly recognizes the problem of mentally incompetent persons who are dangerous to society, providing expressly for their commitment, whether they are simply dangerous persons (addressed by § 4246) or sexually dangerous persons (addressed by § 4248). In both circumstances, commitment is subject to the procedures and safeguards expressly provided in each of those sections.

In this case, the district court, after receiving the government's § 4248 certificate, determined to conduct an initial hearing to determine whether White was mentally competent. The government objected to such a hearing because the need to determine mental incompetency related legally only to criminal proceedings and a finding under § 4241 that one was mentally incompetent would not address any requirement for commitment under § 4248. The court overruled the objection and conducted a competency hearing, after which it concluded that White was indeed mentally incompetent. The court thereupon dismissed the § 4248 proceeding without a § 4248 hearing because, as it explained, White was unable to understand the nature and consequences of the proceeding and to assist properly in his defense. But in conducting a mental competency hearing and not a § 4248 hearing, the court failed to recognize that Chapter 313 authorizes a § 4248 hearing for persons found mentally incompetent under § 4241.

While all hearings under Chapter 313 are governed by § 4247(d) — *see, e.g.,* 18 U.S.C. § 4241(c); § 4246(c); § 4248(c) — a hearing to determine incompetency is authorized by § 4241, which the

district court did not explicitly recognize, although that was noted by the magistrate judge. And the court's conclusion that White's mental incompetence precludes his being subject to a § 4248 hearing is in tension with both § 4241(d) and § 4248(a). Section 4241(d) explicitly authorizes a § 4248 hearing for a person found mentally incompetent and whose condition has not improved with hospitalization. And § 4248(a) provides that § 4248 is applicable to persons found incompetent under § 4241(d). In short, if a person is found mentally incompetent under § 4241 and is not likely to get better, he still remains subject to confinement under § 4248 if he is found "sexually dangerous." *Id.* § 4248(a). With this interaction of § 4241 and § 4248, we cannot conclude that somehow § 4248 authorizes a court to dismiss a § 4248 proceeding because the person is mentally incompetent. There is simply nothing to suggest that a mentally incompetent person who is certified to be sexually dangerous must be released because "he is unable to understand the nature and consequences of the proceedings against [him] or assist properly in [his] defense." *Id.* § 4241(a). Indeed, to so conclude would eviscerate the core purpose of § 4248.

We therefore hold that Chapter 313 of Title 18, and § 4248 in particular, did not authorize the district court to dismiss the § 4248 proceeding against White on the ground that he was found to be mentally incompetent.

III

The district court separately worried whether the § 4248 proceeding against White would violate the

Due Process Clause in that White "face[d] the prospect of indefinite commitment" based on "both his past conduct and present mental condition even though he lacks the capacity to understand the [§ 4248 proceeding] or to participate rationally in his defense." In particular, the court focused on White's ability to defend against proof *of his prior conduct* under the statute's requirement that the government show that he had "engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. § 4247(a)(5). It stated:

> The central focus of the first element under the Adam Walsh Act looks back in time and requires the United States to prove by clear and convincing evidence at least one instance of actual or attempted sexually violent conduct or child molestation. In nearly every Adam Walsh Act case, the respondent does not contest the first element, and the United States simply presents a judgment of conviction from a criminal case where the respondent was convicted of actual or attempted sexually violent conduct or child molestation. In this case, however, White has never been convicted of any crime, much less actual or attempted sexually violent conduct or child molestation. Thus, . . . in this section 4248 proceeding, the United States will have to present witnesses and evidence concerning the first element. The United States also will present arguments to the court seeking to persuade the court that the United States has proven that White has engaged in at least one instance of actual or attempted

> sexually violent conduct or child molestation. Likewise, . . . White will have the opportunity to challenge the government's evidence and witnesses concerning the first element, present his own evidence and witnesses, and present arguments to the court seeking to persuade the court that the government has failed to prove that White has engaged in at least one instance of actual or attempted sexually violent conduct or child molestation.

(Footnote omitted). The court thus reasoned that an incompetent person contesting the prior-conduct element "effectively loses [his] statutory rights because he lacks the ability to rationally understand the proceeding against him or communicate with his counsel about the factual allegations at the heart of the first element's factual inquiry," concluding therefore that such a § 4248 proceeding "would not comport with procedural due process" and citing *Mathews v. Eldridge,* 424 U.S. 319 (1976). *Mathews* requires the application of a test weighing (1) White's liberty interest; (2) the risk of an erroneous deprivation of that interest under current procedures; and (3) the government's interest and burden of providing any additional procedure that would be required. *See id.* at 335.

White, of course, agrees with the district court, contending that committing him as an incompetent person who contests the prior conduct element violates his right to procedural due process. Applying the *Mathews* test, he describes his liberty interest as profound. He describes the risk of erroneous deprivation as "enormous" because, "in support of a meaningful adversarial process, the statute provides

that a respondent is entitled to counsel, and that he will have the 'opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.' But Mr. White cannot do any of those things." (Quoting 18 U.S.C. § 4247(d)). And addressing the government's interests, he argues that they are "not significant in this case" because the government "may not serve those interests by *assuming* that a person in Mr. White's position is sexually dangerous."

Thus, we are presented with the novel question of whether § 4248 violates the Due Process Clause insofar as it requires White, a mentally incompetent person, to defend against allegations of past bad sexual acts while he does not understand the proceedings and cannot assist in his defense.

It is, of course, well established that the Constitution does not permit a mentally incompetent person to be subject to a criminal trial, *see Indiana v. Edwards,* 554 U.S. 164, 170 (2008), or a mentally incompetent person to be indefinitely civilly committed solely on account of his incompetency, *Jackson v. Indiana,* 406 U.S. 715, 720, 738 (1972). But the Constitution *does* permit the indefinite civil commitment of a mentally incompetent person who is also dangerous. *See Greenwood v. United States,* 350 U.S. 366, 373-75 (1956). Nonetheless, particular aspects of civil commitment statutes have been subject to constitutional challenges over the years.

In *Addington v. Texas,* 441 U.S. 418 (1979), the Supreme Court held that the clear-and-convincing standard of proof, rather than the preponderance-of-

the-evidence standard, must be applied in a civil commitment proceeding. *Id.* at 427-33. Also, in *Comstock,* the Court held that Congress's enactment of § 4248 was authorized by the Constitution's Necessary and Proper Clause. *See* 560 U.S. 126. And on remand of *Comstock,* we held that § 4248's requirement that past bad sexual acts need only be proved by clear and convincing evidence rather than beyond a reasonable doubt, does not violate the Due Process Clause. *See Comstock,* 627 F.3d 513. But no court, as far as we are able to ascertain, has held that it is unconstitutional to subject an incompetent person to indefinite civil commitment under § 4248 when the person challenges all three elements for such commitment, especially the prior-conduct element.

The parties agree that the relevant analysis should be governed by *Mathews. See Addington,* 441 U.S. at 425 (applying the *Mathews* framework to the due process analysis of a civil commitment statute). *Mathews* holds that a due process challenge is governed by a three-factor balancing test, weighing (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation with the procedures presently used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens associated with additional procedures. *Id.* at 335.

When we consider the first of *Mathews'* three factors, there is no dispute that White's liberty interest is extraordinarily weighty. A civil commitment "for any purpose constitutes a significant deprivation of liberty." *Addington,* 441

U.S. at 425. We accept that proposition as foundational.

In a similar vein, when we consider the third *Mathews* factor, we agree with the district court that the government has an "important and substantial interest in delivering mental health care to sexually dangerous persons who are in federal custody and [in] protecting the public from such individuals." *See Addington,* 441 U.S. at 426 (recognizing that the State has a *parens patriae* interest in an individual's mental health and "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill"). Again, we accept this as a weighty factor.

But the dispute between the government and White in this case focuses on the second *Mathews* factor — whether, when a person is mentally incompetent, the process afforded in § 4248 allows too great a risk of an "erroneous deprivation of [the private] interest through the procedures used." 424 U.S. at 335.

To be sure, White as a mentally incompetent person, cannot be subject to *criminal* liability. But the procedures provided in this case are, we conclude, constitutionally sufficient to commit him in a *civil* proceeding. In a § 4248 proceeding, the government must, as White has repeatedly noted, prove that he previously engaged in sexually violent conduct or child molestation. And because that proof implicates historical facts, White's mental incompetency does indeed present him with a challenge in responding to the government's case because he is unable to assist in his defense.

Nonetheless, we conclude that the risk of an erroneous deprivation of White's liberty interest is substantially and adequately mitigated by the broad array of procedures required for a § 4248 commitment, particularly as they apply to incompetent persons.

First, the statute requires that White have counsel, and in this case, he was not only appointed counsel, he was also provided a guardian ad litem to look after his interests and assist his counsel. *See* 18 U.S.C. § 4247(d).

Second, the court must conduct a hearing, and White's counsel must be able to subpoena witnesses, present evidence, and cross-examine the government's witnesses at that hearing. *See id.* § 4248(a), (c); *id.* § 4247(d).

Third, the government must prove the necessary elements, including White's prior conduct, by clear and convincing evidence, a burden of proof greater than the preponderance-of-the-evidence standard that is routine in civil proceedings. *See id.* § 4248(d).

And *fourth,* the risk that an erroneous factual finding of prior sexual violence or child molestation will result in civil commitment is substantially mitigated by the personal observations and opinions of professionals that are required to prove that White is "sexually dangerous to others" in that he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released" — showings that the government is required to make. *Id.* § 4247(a)(5), (6).

In addition, any order of commitment under § 4248 is subject to correction by multiple mechanisms afforded by the statute. The government must file an annual report concerning White's mental condition with recommendations as to the need for continued commitment. *See* 18 U.S.C. § 4247(e)(1)(B). Moreover, White's counsel can seek a video recording of the interview of White upon which the annual report is based to assist in the district court's review of White's commitment following such reports. *See id.* § 4247(f). Also, White's counsel can, "at any time" after the first 180 days, file a motion to have a court determine whether he should be released. *See id.* § 4247(h). And as important, when the director of the facility to which White has been committed determines that he is no longer sexually dangerous, with conditions or not, the director *must promptly certify* that fact to the court. *See id.* § 4248(e). Finally, White retains the right to challenge the legality of his detention at any time by filing a petition for a writ of habeas corpus, which is explicitly preserved. *See id.* § 4247(g).

Under these procedures, it is difficult to conceive of circumstances where a person such as White would be wrongfully committed, although we recognize there is always some degree of risk inherent in any type of adversary proceeding, including a § 4248 proceeding. As we explained on remand in *Comstock,* the Supreme Court approved the constitutionality of the commitment scheme before it in *Addington* because "layers of professional review and the concern of family and friends provided continuous opportunities for an erroneous commitment to be corrected." 627 F.3d at 521 (cleaned up). And we

concluded that § 4248 "offers the same sort of professional review and opportunity for correction of an erroneous commitment" by mandating discharge "as soon as a person ceases to pose a danger to others." *Id.*

At bottom, while White's liberty interest is surely one of the most important to protect under the Constitution, the government's police power is also important when exercised to protect the public from persons found to be unable to control their sexual dangerousness. The balance struck by § 4248 in serving these interests is, we conclude, constitutionally sufficient under the Due Process Clause and *Mathews*.

Accordingly, we reverse the judgment of the district court and remand with instructions that the court promptly conduct a § 4248 hearing to determine whether White is sexually dangerous and therefore must be committed to the custody of the Attorney General.

REVERSED AND REMANDED
WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

5:17-HC-2162-D

UNITED STATES OF AMERICA,

Petitioner,

v.

OLIVER LEE WHITE,

Respondent.

Filed: 05/14/2018

MEMORANDUM AND RECOMMENDATION
(Under Seal)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:17-HC-2162-D

UNITED STATES OF AMERICA,

Petitioner,

v.

OLIVER LEE WHITE,

Respondent.

Filed: 09/11/2018

ORDER

Oliver Lee White ("White" or "respondent") is a 30-year old Native American man with intellectual disability. Three times in the last nine years, federal grand juries in the United States District Court for the District of Montana have indicted White and charged him with sexually assaulting numerous female children. In the first case, White and the United States entered a pretrial deferment agreement. In the latter two cases, doctors examined White and determined that he was not competent to stand trial due to his intellectual disability and that White could not be hospitalized pursuant to 18

U.S.C. § 4246. In each case, the District of Montana dismissed the criminal charges without prejudice.

On August 30, 2017, the United States certified White as a sexually dangerous person under 18 U.S.C. § 4248. See [D.E. 1]; see also [D.E. 2]. On December 20, 2017, White moved to dismiss the proceeding under 18 U.S.C. § 4248 and, alternatively, for a competency hearing to determine whether White is competent to proceed in his civil commitment hearing under 18 U.S.C. § 4248. See [D.E. 37].

On May 14, 2018, Magistrate Judge Gates issued a Memorandum and Recommendation ("M&R") and recommended that the court deny White's motion to dismiss and alternative motion for a competency hearing [D.E. 58]. On May 29, 2018, White objected to the M&R [D.E. 65]. On June 12, 2018, the government responded to White's objections [D.E. 69]. On June 18, 2018, White filed a motion to hold discovery in abeyance pending the court's ruling on the M&R [D.E. 70]. On June 25, 2018, the government responded in opposition [D.E. 73]. On June 25, 2018, White replied [D.E. 74].

The court has reviewed the M&R, the record, and White's objections de novo. See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); 28 U.S.C. § 636(b). As explained below, the court declines to adopt the M&R and grants White's motion for a competency hearing. Before that hearing takes place, the court orders an examination of White under 18 U.S.C. § 4247(b) in order to determine whether White is presently suffering from a mental disease or defect rendering him mentally

incompetent to the extent that he is unable to understand the nature and consequences of the proceedings under 18 U.S.C. § 4248 against him or to assist properly in his defense. Following the examination, a report shall be filed with the court and copies served on counsel for White and the United States Attorney and White's guardian ad litem. See 18 U.S.C. § 4247(c). The trial date of November 29, 2018, is postponed. Instead, on November 29, 2018, the court will hold a competency hearing. Pending the competency hearing, the court denies without prejudice White's motion to dismiss. The court denies in part White's motion to hold discovery in abeyance, but relieves White from being deposed or responding to written discovery.

I.

On May 26, 2009, a federal grand jury sitting in the District of Montana indicted White and charged him with four counts of aggravated sexual abuse of a minor. See [D.E. 37-5]. On December 22, 2009, the United States moved to dismiss the indictment without prejudice after entering into a pretrial deferment agreement with White in which the United States deferred prosecution for two years. See [D.E. 37-6]. Pursuant to the deferred prosecution agreement, White was to reside with his mother, Peggy White, and have no contact with minors. See id. On December 22, 2009, the District of Montana dismissed the indictment without prejudice. See [D.E. 37-7]. The court released White to his family.

On April 18, 2012, another federal grand jury in the District of Montana charged White with four counts of abusive sexual contact with minors and two

counts of attempted abusive sexual contact with minors. See [D.E. 37-2]. White's mother, Peggy White, and her partner, Susan Kelly, were named as co-defendants and charged with misprision of felony. Id. White's criminal defense attorney requested a competency examination for White. See [D.E. 37-4].

On May 30, 2013, doctors at FMC-Butner concluded that White lacked a rational and factual understanding of the criminal charges and proceedings against him and could not assist in his defense. See [D.E. 37-8] 4–6. The Honorable Donald Molloy requested an evaluation of White under 18 U.S.C. § 4246. See id. at 4. On September 11, 2013, doctors at FMC-Butner concluded that White's mental condition would not create a substantial risk of bodily injury to another person or serious damage to the property of another. See id. at 4–6. Thus, White should not be committed under 18 U.S.C. § 4246. On October 7, 2013, Judge Molloy ordered that the six criminal charges against White be dismissed without prejudice unless the United States objected. See [D.E. 37-10]. On October 10, 2013, the United States moved to dismiss the criminal charges against White without prejudice. See [D.E. 37-9]. Judge Molloy released White to his family. See [D.E. 37-10].

On July 22, 2016, another federal grand jury in the District of Montana charged White with aggravated sexual abuse of a child and attempted sexual abusive contact with a child. See [D.E. 37-11]. On September 28, 2016, the Honorable Susan B. Watters ordered White to be evaluated in order to determine whether White was competent to stand trial. See [D.E. 37-12].

On November 28, 2016, the medial evaluator concluded that White was not competent to stand trial. See [D.E. 37-13]. On January 11, 2017, Judge Watters conducted a competency hearing and ordered that White be evaluated and that attempts be made to assist White in attaining competency. See [D.E. 37-14]. If competency could not be restored, Judge Watters ordered the facility's director to file a certificate pursuant to 18 U.S.C. § 4246(a), stating whether White is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. Id. at 2.

On July 26, 2017, the BOP evaluators opined that White did not meet criteria for civil commitment under 18 U.S.C. § 4246. See [D.E. 94] 18. However, during 2017, BOP evaluators also evaluated White under 18 U.S.C. § 4248 and prepared a report dated August 18, 2017. See [D.E. 10-1].

On August 30, 2017, pursuant to 18 U.S.C. § 4248, the United States filed in this court a Certificate of Sexually Dangerous Person concerning White [D.E. 1]. In its certification, the United States cites "conduct underlying the current pending offenses" in the District of Montana to allege that White "previously engaged or attempted to engage in sexually violent conduct or child molestation." [D.E. 1-1] 2. The United States also cites "evidence that between 2007 through 2014, he engaged in several acts of abusive sexual contact/sexual assault/child molestation against several minors under the age of 12 years." Id. The certification

identifies no convictions for sexually violent conduct or child molestation. See id.

After the certification of August 30, 2017, Fabian Saleh, M.D. [D.E. 11], Joseph J. Plaud, Ph.D. [D.E. 12], Amy Phenix, Ph.D. [D.E. 21-1], and Luis Rosell, Psy. D. [D.E. 25] evaluated White. These evaluations noted White's intellectual disability. See Report of Fabian M. Saleh, M.D. (Oct. 12, 2017) [D.E. 11-1] 17 ("[I]t is my opinion . . . that Mr. White is a low-functioning individual who presents with a neurodevelopmental disorder best described as Intellectual Disability."); Report of Joseph J. Plaud, Ph.D. (Oct. 15, 2017) [D.E. 12] 16 ("Mr. White was properly oriented as to person and place, but had difficulties articulating basic current information, such as the current or past presidents of the United States, or the reason he was presently at FMC-Butner."); Report of Amy Phenix, Ph.D. (Nov. 12, 2017) [D.E. 21-1] 21-22 ("His intellectual functioning is very low. Mr. White has poor social skills, and he relies on others to help him function in a socially appropriate way. His peers help him write letters and communicate with others. Mr. White has difficulty with communication with others, and he has difficulty with social judgment. He has impairment in managing his finances, and he has never lived independently."); Report of Luis Rosell, Psy. D. (Nov. 20, 2017) [D.E. 25] 9 ("He demonstrated deficits in remote and recent memory. Consistent with previous testing, he demonstrated an inability to complete basic tasks related to reading or subtracting. This deficit is due to his global intellectual deficits, which affects his ability on a variety of domains . . . ."). Two evaluators

questioned White's ability to understand and meaningfully participate in the proceedings under 18 U.S.C. § 4248. See Report of Luis Rosell, Psy. D. (Nov. 20, 2017) [D.E. 25] 11; Report of Joseph J. Plaud, Ph.D. (Oct. 15, 2017) [D.E. 12] 16.

On November 28, 2017, White filed a motion to appoint a guardian ad litem [D.E. 28]. In support, White argued that White's "mental condition renders him incompetent to assist counsel in the current matter." Id. at 3.

On December 1, 2017, Judge Watters conducted a hearing in the District of Montana. See [D.E. 37-15]. Judge Watters found that White is not suffering from a mental disease or defect such that "his release would create a substantial risk of bodily injury to another person or serious damage to property of another" and declined to commit White under 18 U.S.C. § 4246. See id. On that same date, Judge Watters granted the government's motion to dismiss the criminal charges against White without prejudice. See id.

On December 20, 2017, White filed a motion to dismiss the certificate against him or, in the alternative, to hold a competency hearing [D.E. 37]. The government opposed the motion. See [D.E. 40].

In April 2018, the government again evaluated White pursuant to 18 U.S.C. § 4246. See [D.E. 51]. On April 30, 2018, Dr. Evan Du Bois concluded that White did not meet criteria for commitment under 18 U.S.C. § 4246. See [D.E. 51] 13; id. at 14 ("Given the overall presentation of Mr. White, including the extent of his cognitive deficits, it does not appear

that there is a clear causal relationship between his intellectual disability and risk for future sexual violence.").

On May 14, 2018, Judge Gates granted White's motion for a guardian ad litem [D.E. 60] and recommended denying his motion to dismiss or, in the alternative, for a competency hearing [D.E. 58]. Judge Gates concluded that the certification should not be dismissed because White's "exact situation is provided for in 18 U.S.C. §§ 4241(d) and 4248." Id. at 4. In support, Judge Gates cited 18 U.S.C. § 4241(d), which states: "If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248." 18 U.S.C. § 4241(d); see M&R at 3–4.

II.

Section 4241(d) discusses how a court shall proceed after a hearing to determine a defendant's competency. See 18 U.S.C. § 4241(d). If the court determines that a defendant "is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General." 18 U.S.C. § 4241(d). As discussed, on January 12, 2017, Judge Watters found that White was not mentally competent to proceed in his criminal case and complied with 18 U.S.C. § 4241(d) by committing

White to the custody of the Attorney General. See [D.E. 37-14].

The Attorney General then hospitalized White for evaluation and treatment. See 18 U.S.C. § 4241(d); [D.E. 37-14] 2. During that hospitalization, BOP examiners concluded that there was not a substantial probability that in the foreseeable future White will attain the capacity to permit the criminal proceedings to go forward. See [D.E. 94]. The BOP examiners also opined that White did not meet criteria for commitment under 18 U.S.C. § 4246. See id. at 18. On December 1, 2017, Judge Watters held a hearing, declined to commit White under section 4246, and dismissed the criminal charges against White without prejudice. See [D.E. 37-15].

The government cites the language at the end of section 4241(d) and states that this court need not hold a competency hearing concerning White's competency to proceed under 18 U.S.C. § 4248. See 18 U.S.C. § 4241(d) ("If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of section 4246 and 4248."). The court disagrees. Being "subject to the provisions" of section 4248 does not address whether this court can hold a competency hearing concerning White's competency to proceed under 18 U.S.C. § 4248. It also does not address whether the Fifth Amendment Due Process Clause permits the United States to proceed under section 4248 against a person who is not competent to understand the section 4248 proceeding and who contests all three prongs under section 4248. Cf. United States v. Comstock, 560 U.S.

126, 129-33, 137-49 (2010); Medina v. California, 505 U.S. 437, 446-53 (1992); Jackson v. Indiana, 406 U.S. 715, 720-39 (1972); Greenwood v. United States, 350 U.S. 366, 373-76 (1956); United States v. Wood, 741 F.3d 417, 423-25 (4th Cir. 2013).

Section 4248(b) expressly permits a court to order a competency evaluation under 18 U.S.C. § 4247(b) for a person facing civil commitment under 18 U.S.C. § 4248. See 18 U.S.C. § 4248(b) ("Prior to the date of the hearing, the court may 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)."). Section 4247(b), in turn, permits this court to order an examination under section 4241 to determine "whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4247(c)(4)(A). The court construes the word "proceeding" in section 4247 to include a section 4248 proceeding. Thus, this court orders an examination of White under 18 U.S.C. § 4247(b) to determine whether White is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings under 18 U.S.C. § 4248 against him or to assist properly in his defense in the section 4248 proceeding. Once the court receives the results of that examination, the court will hold a competency hearing on November 29, 2018.

III.

In sum, the court DECLINES to adopt the M&R [D.E. 58] and GRANTS White's motion for a competency hearing [D.E. 37]. Before that hearing takes place, the court orders an examination of White under 18 U.S.C. § 4247(b) to determine whether White is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings under 18 U.S.C. § 4248 against him or to assist properly in his defense in the section 4248 proceeding. Following the examination, a report shall be filed with the court and copies served on counsel for White and the United States Attorney and White's guardian ad litem. See 18 U.S.C. § 4247(d). The trial date of November 29, 2018, is postponed. Instead, the court will hold a competency hearing on November 29, 2018. Pending the competency hearing, the court DENIES without prejudice White's motion to dismiss. If the court determines that White is not competent to proceed under section 4248, White can renew his motion to dismiss. The court DENIES in part White's motion to hold discovery in abeyance [D.E. 70], but relieves White from being deposed or responding to written discovery requests.

SO ORDERED. This 11 day of September 2018.

/s/ James Dever
JAMES C. DEVER III
Chief United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:17-HC-2162-D

UNITED STATES OF AMERICA,

Petitioner,

v.

OLIVER LEE WHITE,

Respondent.

Filed: 11/26/2018

ORDER

On September 25, 2018, the United States moved for reconsideration of this court's order of September 11, 2018. See [D.E. 98]. In that order, this court granted Oliver Lee White's ("White" or "respondent") motion for a competency hearing, scheduled that hearing for November 29, 2018, and ordered "an examination of White under 18 U.S.C. § 4247(b) in order to determine whether White is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings under 18 U.S.C.

§ 4248 against him or to assist properly in his defense." [D.E. 95] 2. On October 15, 2018, White responded in opposition [D.E. 100]. On October 29, 2018, the United States replied [D.E. 101].

This court has the discretion to reconsider its order. See Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514-15 (4th Cir. 2003). As explained below, the court denies the government's motion for reconsideration.

I.

In this court's order of September 11, 2018, the court described the procedural history of White's criminal cases that repeatedly were dismissed without prejudice due to his incompetence, his evaluations under 18 U.S.C. § 4246 where doctors repeatedly concluded that he was not presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and his section 4248. case. See [D.E. 95] 2-7. The court then explained the textual rationale for concluding that this court could order a competency examination of White. See id. at 8. The court noted that 18 U.S.C. § 4248(b) expressly permits a court to order a competency examination under 18 U.S.C. § 4247(b) for a person facing civil commitment under 18 U.S.C. § 4248. See 18 U.S.C. § 4248(b) ("Prior to the date of the hearing, the court may 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).").

"Section 4247(b), in turn, permits this court to order an examination under section 4241 to determine 'whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.' [D.E. 95] 8 (quoting 18 U.S.C. § 4247(c)(4)(A)) (emphasis added). The court construed the word "proceedings" in section 4247(c)(4)(A) "to include a section 4248 proceeding." Id. Thus, the court ordered "an examination of White under 18 U.S.C. § 4247(b) to determine whether White is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings under 18 U.S.C. § 4248 against him or to assist properly in his defense in the section 4248 proceeding." Id.

In opposition to these conclusions, the government argues that 18 U.S.C. §§ 4247-48 never permit a court to order a competency examination or to hold a competency hearing in a section 4248 proceeding. See [D.E. 99] 5-6. The court rejects the argument that it can never order a competency examination in a section 4248 proceeding. Section 4248 states that "[p]rior to the date of the [section 4248 hearing to determine whether the person is a sexually dangerous person], the court may 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)." 18

U.S.C. § 4248(b). In turn, section 4247(c) permits the court to receive a psychiatric or psychological report. See 18 U.S.C. § 4247(c).[1] Section 4247(c) provides a

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[1] 18 U.S.C. § 4247(c) provides:

> Psychiatric or psychological reports.–A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include–
> (1) the person's history and present symptoms;
> (2) a description of the psychiatric, psychological, and medical tests that were employed and their results;
> (3) the examiner's findings; and
> (4) the examiner's opinions as to diagnosis, prognosis, and–
>
> (A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;
> (B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;
> (C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;
> (D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;
> (E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in

list of what the psychiatric or psychological report "shall include," but the word "include" reflects that "the list that follows is meant to be illustrative rather than exhaustive." Samantar v Yousuf, 560 U.S. 305, 317 (2010); see Burgess v. United States, 553 U.S. 124, 131 n.3 (2008). Thus, section 4247(c) permits a court in a section 4248 proceeding to order that a psychiatric or psychological report concerning a person in a section 4248 proceeding assess not only a person's sexual dangerousness, but also that person's competence to understand the nature and consequences of the section 4248 proceeding against him or to assist properly in his defense. Moreover, it is the government, not this court, that is seeking to ignore the plain text of 18 U.S.C. §§ 4247-48. Cf. Pereira v. Sessions, 138 S. Ct. 2105, 2118 (2018) ("Unable to find sure footing in the statutory text, the Government . . . pivot[s] away from the plain language and raise[s] a number of practical concerns. These practical considerations are meritless and do not justify departing from the statute's clear text."); Burrage v. United States, 571 U.S. 204, 218 (2014) (same). Furthermore, given the court's authority under 18 U.S.C. §§ 4247-48 to order a psychiatric or psychological examination and to obtain a psychiatric or psychological report concerning competency, the court rejects the government's

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> need of custody for care or treatment in a suitable facility; or
> (F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

18 U.S.C. § 4247(c) (emphasis added).

argument that the court cannot hold a competency hearing in a section 4248 proceeding. See Zadvydas v. Davis, 533 U.S. 678, 689, 696-97 (2001) (concluding that, to avoid constitutional doubt, a federal immigration statute contained an implicit reasonable time limitation for the detention of aliens ordered removed); United States v. Timms, 664 F.3d 436, 452 (4th Cir. 2012) (concluding that, to avoid constitutional doubt, the Adams Walsh Act implicitly permits a court to hold a probable cause hearing in a section 4248 case).

The government also argues that "section 4241 applies only in the criminal context" and that this court can never inquire into a person's "competence" to understand the nature and consequences of a section 4248 proceeding or to assist properly in his defense in a section 4248 proceeding. See [D.E. 99] 7-9. Assuming without deciding that 18 U.S.C. § 4241 applies only in the criminal context, the government's argument concerning section 4241 and competence ignores that being "subject to the provisions of section[] 4248"[2] does not prohibit a court from inquiring into whether a person is competent to understand the nature and consequences of the section 4248 proceeding against him or to assist properly in his defense when the person contests all three elements under the Adam

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[2] 18 U.S.C. § 4241(d) ("If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of section 4246 and 4248.").

Walsh Act. See 18 U.S.C. § 4247(b), (c).[3] Had Congress intended to preclude a court from ever examining such a person's competence to understand the nature and consequences of the section 4248 proceeding against him and to properly assist in his defense, Congress could have said so. It did not.

That Congress did not prohibit a court from ever inquiring into a person's competence to understand the nature and consequences of the section 4248 proceeding against him and to assist properly in his defense makes sense. The Supreme Court repeatedly has held that the "criminal trial of an incompetent defendant violates due process." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quotation omitted); see Medina v California, 505 U.S. 437, 446-53 (1992). Mental competence in a criminal case requires a person to have (1) a rational and factual understanding of the proceeding against him and (2) a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. See Indiana v. Edwards, 554 U.S. 164, 170 (2008);

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[3] In United States v. Broncheau, 645 F.3d 676, 683-87 (4th Cir. 2011), the Fourth Circuit held that the United States did not have to proceed first under 18 U.S.C. § 4241, rather than 18 U.S.C. § 4248, when seeking to commit a person as sexually dangerous where that person had not completed his sentence. In Broncheau, there were "no allegations or showings that any of the Respondents are unable to understand the nature and consequences of the proceedings against them or to assist properly in their defense." Id. at 686 (quotation and alterations omitted). Thus, Broncheau does not address the authority of this court to receive a psychiatric or psychological report under 18 U.S.C. §§ 4247-48 addressing White's competence in this section 4248 proceeding or to hold a competency hearing concerning White.

Drope v. Missouri, 420 U.S. 162, 171 (1975); Dusky v. United States, 362 U.S. 402, 402-03 (1960) (per curiam).

Of course, a section 4248 proceeding is a civil proceeding, not a criminal proceeding. See United States v. Comstock, 560 U.S. 126, 129-33, 142-46 (2010). Nonetheless, a civil proceeding under section 4248 is not an "ordinary civil matter." United States v. Searcy, 880 F.3d 116, 125 (4th Cir. 2018) (quotation omitted). Rather, the statutory procedures for a civil commitment hearing under section 4248 "differ substantially from those that apply to a run-of-the mill civil case in that they afford individuals rights traditionally associated with criminal proceedings, including the right to appointed counsel, the right to confront witnesses, and a heightened burden of proof." Id. Congress added these procedural safeguards because "a negative outcome in such a proceeding results in a 'massive curtailment of liberty' and requires due process protection. United States v. Wood, 741 F.3d 417, 423 (4th Cir. 2013) (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)). Moreover, if this court construed 18 U.S.C. §§ 4247-48 to prohibit a court from inquiring into a person's competence to understand the section 4248 proceeding and to assist properly in his defense when that person contests all three elements under the Adam Walsh Act, the statute would raise grave constitutional concerns. Cf. Comstock, 560 U.S. at 129-33, 137-49; Jackson v Indiana, 406 U.S. 715, 720-39 (1972); Greenwood v. United States, 350 U.S. 366, 373-76 (1956); Wood, 741 F.3d at 423-25. After all, "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights

deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf . . . ." Cooper, 517 U.S. at 354 (quotation omitted). The plain text of 18 U.S.C. §§ 4247-48 avoids these grave constitutional concerns. Cf. Clark v. Martinez, 543 U.S. 371, 381-82 (2005) (constitutional-avoidance canon provides a tool for choosing between competing plausible interpretations of a statute and choosing the statutory interpretation that avoids the constitutional problem); INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (same); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (collecting cases); Crowell v. Benson, 285 U.S. 22, 62 (1932); United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909); see also Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

The nature of the section 4248 proceeding bolsters the conclusion that a court can inquire into a person's competence where that person contests all three elements under the Adam Walsh Act. In a section 4248 proceeding, the court must hold "a hearing to determine whether the person is a sexually dangerous person." 18 U.S.C. § 4248(a). The Adam Walsh Act defines a "sexually dangerous person" as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." Id. § 4247(a)(5). "[S]exually dangerous to others" means "that the person suffers from a serious mental illness, abnormality, or disorder as a result of

which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." Id. § 4247(a)(6). In a section 4248 proceeding, the United States must prove three elements by clear and convincing evidence before the court can commit the person to the custody of the Attorney General. Id. § 4248(d); see Comstock, 560 U.S. at 130-32; United States v. Bell, 884 F.3d 500, 502-03, 508-10 (4th Cir. 2018); United States v. Perez, 752 F.3d 398, 407 (4th Cir. 2014); United States v. Antone, 742 F.3d 151, 158 (4th Cir. 2014); United States v. Heyer, 740 F.3d 284, 291-92 (4th Cir. 2014); Wood, 741 F.3d at 419; United States v. Bolander, 722 F.3d 199, 206 (4th Cir. 2013); United States v. Wooden, 693 F.3d 440, 442 (4th Cir. 2012); United States v. Francis, 686 F.3d 265, 268 (4th Cir. 2012); United States v. Hall, 664 F.3d 456, 461-63 (4th Cir. 2012). Specifically, the United States must prove: (1) the person has engaged in or attempted to engage in sexually violent conduct or child molestation; (2) the person suffers from a serious mental illness, abnormality, or disorder; and, (3) as a result of the serious mental illness, abnormality, or disorder, the person would have serious difficulty in refraining from sexually violent conduct or child molestation if released. See, e.g., Antone, 742 F.3d at 158-59.

The central focus of the first element under the Adam Walsh Act looks back in time and requires the United States to prove by clear and convincing evidence at least one instance of actual or attempted sexually violent conduct or child molestation. In nearly every Adam Walsh Act case, the respondent does not contest the first element, and the United

States simply presents a judgment of conviction from a criminal case where the respondent was convicted of actual or attempted sexually violent conduct or child molestation.[4] In this case, however, White has never been convicted of any crime, much less actual or attempted sexually violent conduct or child molestation. Thus, during the trial in this section 4248 proceeding, the United States will have to present witnesses and evidence concerning the first element. The United States also will present arguments to the court seeking to persuade the court that the United States has proven that White has engaged in at least one instance of actual or attempted sexually violent conduct or child molestation. Likewise, during the trial in this section 4248 proceeding, White will have the opportunity to challenge the government's evidence and witnesses concerning the first element, present his own evidence and witnesses, and present

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[4] The United States District Court for the Eastern District of North Carolina has resolved 184 Adam Walsh Act cases. The undersigned has presided in 56 Adam Walsh Act cases. As the Fourth Circuit explained in Timms, when the Adams Walsh Act was first implemented in 2006, "individuals were certified under § 4248(a) in various district courts around the country, depending on the location of that person's BOP place of incarceration." Timms, 664 F.3d at 439. "Early in the process, however, the BOP began transferring potential candidates for § 4248 civil commitment to the Federal Correction Institute in Butner, North Carolina ("FCI-Butner") for an initial assessment, such that § 4248 civil commitment actions are now being reviewed almost exclusively through that facility." Id. at 439-40 (footnote omitted). "As a result nearly all § 4248 civil commitment actions nationwide are now filed and adjudicated in the Eastern District of North Carolina, and then appealed to" the Fourth Circuit. Id. at 440.

arguments to the court seeking to persuade the court that the government has failed to prove that White has engaged in at least one instance of actual or attempted sexually violent conduct or child molestation.

When a respondent contests all three elements under the Adam Walsh Act (as White does), the statutory scheme permits a court to inquire into whether the respondent has (1) a rational and factual understanding of the section 4248 proceeding against him and (2) a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. See 18 U.S.C. §§ 4247-48. Absent such an inquiry, the respondent faces the prospect of indefinite commitment arising from a trial focused on both his past conduct and present mental condition even though he lacks the capacity to understand the section 4248 trial or to participate rationally in his defense. Permitting such a trial and ensuing commitment to occur would violate procedural due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976); see also Jackson, 406 U.S. at 731-39.

II.

In opposition to the court's conclusion that it can inquire into a respondent's competence in a section 4248 proceeding where respondent contests all three elements, the government argues that the first element in an Adam Walsh Act case does not require a prior criminal act. See [D.E. 101] 1-2; United States v. Comstock, 627 F.3d 513, 520 (4th Cir. 2010). The government also argues that the first element in an Adam Walsh Act case does not require

criminal scienter coupled with attempted or actual sexually violent conduct or child molestation. See [D.E. 101] 2; Kansas v. Hendricks, 521 U.S. 346, 362 (1997). Moreover, the government argues that "volitional impairment—not prior misconduct—is the gravamen of the civil commitment inquiry," that the Adams Walsh Act provides "the minimum safeguards required by the Fifth Amendment," and that those safeguards do not require that a respondent who contests all three elements be competent. [D.E. 101] 2-7.

The court agrees that the first element in an Adam Walsh Act case requires proof by clear and convincing evidence that respondent engaged in actual or attempted sexually violent conduct or child molestation but does not require a prior criminal act. See Comstock, 627 F.3d at 520; accord Allen v. Illinois, 478 U.S. 364,370-71 (1986). The court also agrees that the first element in an Adam Walsh Act case does not require proof of criminal scienter coupled with actual or attempted sexually violent conduct or child molestation. See Hendricks, 521 U.S. at 362. The court also agrees that "volitional impairment" is the focal point of the second and third elements in every Adam Walsh Act case, but the court does not agree with the government's implicit argument that the first element is irrelevant. See Bel, 884 F.3d at 508; Perez, 752 F.3d at 407; Anton; 742 F.3d at 158; Heyer, 740 F.3d at 291-92; Wood, 741 F.3d at 419-.24; Bolander, 722 F.3d at 206-07; Hall, 664 F.3d at 462-63. Rather, the first element is a required element of proof. More fundamentally, the court disagrees with the government's argument that the Adams Walsh Act does not require that a person

who contests all three elements in a proceeding under 18 U.S.C. § 4248 be competent. The court also disagrees with the government that if the Adam Walsh Act permits the trial and commitment under 18 U.S.C. § 4248 of an incompetent person who contests all three elements, then such a proceeding would comport with procedural due process.

A.

As for whether the Adams Walsh Act requires that a person who contests all three elements in a proceeding under 18 U.S.C. § 4248 be competent, this court already has explained the textual rationale permitting the court to receive a psychiatric or psychological report concerning competency in a section 4248 proceeding. See 18 U.S.C. §§ 4247-48. The court also has explained that the ability to receive such a report also gives the court authority to hold a hearing and to provide relief to an incompetent person who contests all three elements. See Zadvydas, 533 U.S. at 689, 696-97; Timms, 664 F.3d at 452.

B.

Alternatively, if the Adams Walsh Act permits the trial and commitment of an incompetent person who contests all three elements, then such a proceeding would not comport with procedural due process. See Mathews, 424 U.S. at 335; see also Jackson, 406 U.S. at 731-39. Comparing the process in a commitment proceeding under 18 U.S.C. § 4246 with a commitment proceeding under 18 U.S.C. § 4248 illustrates why procedural due process requires that a person who contests all three elements in a proceeding under 18 U.S.C. § 4248 be competent.

In a proceeding under 18 U.S.C. § 4246, the United States seeks to commit a person who allegedly is "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily to another person or serious damage to property of another." 18 U.S.C. § 4246(d).[5] At a section 4246 hearing, the person is represented by counsel and, "if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A." Id. § 4247(d). "The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." Id. At a section 4246 hearing, the United States must prove "by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another . . ." Id. § 4246(d). If the United States meets its burden of proof, "the court shall commit the person to the custody of the Attorney General." Id.

Once a person is committed under 18 U.S.C. § 4246, the "Attorney General shall make all reasonable efforts to cause . . . a State to assume . . .

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[5] The United States District Court for the Eastern District of North Carolina has resolved 507 cases under 18 U.S.C. § 4246. As with section 4248 cases, the Eastern District of North Carolina resolves such a large volume of section 4246 cases because section 4246 detainees are evaluated and treated at FCI-Butner. FCI-Butner is located within the Eastern District of North Carolina. See 28 U.S.C. § 113(a).

responsibility" for the person. Id. If notwithstanding such efforts, a State does not "assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until (1) such a State will assume such responsibility; or (2) the person's mental condition is such that his release or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another; whichever is earlier." Id.

Section 4246(e) permits the court to hold periodic hearings to assess whether the person has recovered from his mental disease or defect to such an extent to permit either his conditional or unconditional discharge. See id. § 4247(h). Moreover, a person committed under section 4246 can request such a hearing after being committed for 180 days. See id.

A commitment hearing under 18 U.S.C. § 4246 does not have as an element of proof the respondent's prior conduct. See 18 U.S.C. § 4246(d); United States v. Baker, 45 F.3d 837, 844-46 (4th Cir. 1995). Rather, the entire focus of the section 4246 hearing is the respondent's alleged "mental disease of defect" and whether "as a result of that mental disease or defect the respondent's release "would create a substantial risk of bodily injury to another person or serious damage to property of another." See 18 U.S.C. § 4246(d). Thus, section 4246 hearings focus on expert medical evidence concerning those two medical issues. See Vitek, 445 U.S. at 495 ("[T]he inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially

medical."); Baker, 45 F.3d at 844-45 (same); cf. United States v. Debenedetto, 618 F. App'x 751,752-54 (4th Cir. 2015) (per curiam) (unpublished); United States v. Soobrian, 571 F. App'x 256,256-57 (4th Cir. 2014) (per curiam) (unpublished); United States v. Conroy, 546 F. App'x 311,313-16 (4th Cir. 2013) (per curiam) (unpublished); United States v. Taylor, 513 F. App'x 287,288-92 (4th Cir. 2013) (per curiam) (unpublished).

Respondents in section 4246 proceedings often are so mentally ill that they are not "competent' under Dusky and its progeny to face criminal prosecution, but their lack of "competence" is not relevant to the two medical issues at the heart of every section 4246 proceeding. Those two issue are: (1) does respondent have a mental disease or defect; and (2) if so, as a result of that mental disease or defect, would respondent's release "create a substantial risk of bodily injury to anther person or serious damage to property of another." 18 U.S.C. § 4246(d); see Vitek, 445 U.S. at 489-90; Baker, 45 F.3d at 844-45.

In contrast to section 4246 proceedings, the first element in an Adam Walsh Act case is a backward looking factual inquiry into whether respondent has ever engaged in or attempted to engage in sexually violent conduct or child molestation. The next two elements in an Adam Walsh Act case then focus on two medical issues: (1) whether respondent has a serious mental illness, abnormality, or disorder; and (2) if so, as a result of that serious mental illness, abnormality, or disorder, would respondent have serious difficulty in refraining from sexually violent conduct or child molestation if released. See 18 U.S.C. §§ 4247(a)(5)-(6), 4248(a).

The goal of the factfinder as to the first element in a section 4248 trial "is to uncover the truth by examining rigorously the reliability of conflicting evidence presented and then engaging in extensive factfinding." Baker. 45 F.3d at 844. The statutory right to counsel, to cross-examine and confront witnesses, to summon witnesses, to present *evidence,* and to testify all enhance the reliability of the truth-seeking goal. See id.; 18 U.S.C. § 4247(d) (describing the statutory rights of a respondent in a section 4248 proceeding). When the first element in a section 4248 trial is contested, the factfinder must "determine the veracity of the testifying witnesses based, inter alia, upon the witnesses' demeanor while testifying." Baker, 45 F.3d at 844. Only if the United States proves this first element under 18 U.S.C. § 4248 does the court turn to the two medical issues at the heart of the second and third elements. Cf. id. at 844-4.5 (noting that commitment under the predecessor statute of 18 U.S.C. § 4246 focuses only on two medical issues and that the focus of such hearings concern expert testimony concerning those medical issues). Thus, the difference between a section 4246 proceeding and a fully contested section 4248 proceeding illustrates why procedural due process requires that a person who contests all three elements in a section 4248 proceeding be competent.

C.

If, as the United States contends, the Adam Walsh Act does not require a person who contests all three elements to be competent, this court must test that contention under Mathews v. Eldridge, 424 U.S. 319, 335 (1976), and its progeny. See, e.g., Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017); Connecticut

v. Doehr, 501 U.S. 1, 4,18 (1991); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-48 (1985); Santosky v. Kramer, 455 U.S. 745, 768 (1982); Little v. Streater, 452 U.S. 1, 13-17 (1981); Addington v. Texas, 441 U.S. 418, 425-33 (1979); Timms, 664 F.3d at 450-54; cf. Hamdi v. Rumsfeld, 542 U.S. 507, 532-33 (2004); Foucha v. Louisiana, 504 U.S. 71, 79, 86 (1992). The Supreme Court has identified the following three factors to consider in determining those procedural safeguard due a person whose interests are to be adversely affected by government action:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; cf. Vitek, 445 U.S. at 491-97.

1.

The first factor "is the nature of the interest affected by the government action." Baker, 45 F.3d at 844. An adverse outcome for an individual in a section 4248 hearing results in "a massive curtailment of [that person's] liberty." Humphrey v. Cady, 405 U.S. 504,509 (1972); Wood, 741 F.3d at 423; Timms, 664 F.3d at 450; Baker, 45 F.3d

at 843-44. The person is committed "to the custody of the Attorney General." 18 U.S.C. § 4248(d). "The Attorney General shall make all reasonable efforts to cause . . . a State to assume . . . responsibility" for that person. Id. If notwithstanding such efforts, no State "will assume such responsibility, the Attorney General shall place the person for treatment in such a suitable facility, until (1) such State will assume such responsibility; or (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment; whichever is earlier." Id.

The United States makes sex offender treatment available to those persons who are committed under the Adam Walsh Act. The treatment takes place at FCI-Butner and has four phases, and each phase builds on the earlier phase. Phase one is an orientation and assessment phase where psychologists gather information from and about the person and formulate an assessment. Phase two involves individual and group therapy and focuses on helping the person to acquire cognitive skills associated with conflict resolution, moral reasoning, and self control and seeks to decriminalize the person. Phase three is the core of the sex offender treatment. Phase three involves both individual and group therapy and focuses on increasing the cognitive and self-regulatory skills learned in phase two. For example, in phase three, the person will dismantle his sex offending behaviors, one event at a time. Phase three also requires the person to identify high-risk situations and triggers. Phase three is

critical to constructing a relapse prevention plan. Phase four involves relapse prevention planning and release planning and builds on phase three. Phase four also focuses on integrating and internalizing the person's knowledge, emotional understanding, and emotional insight. Phase four also focuses on housing, employment, financial management, and relationships. As with phases two and three, phase four involves individual and group therapy. Some men [6] have completed the treatment program successfully and have been released, but the treatment program takes years to complete.

Whether or not a person engages in sex offender treatment at FCI-Butner, a person committed under 18 U.S.C. § 4248 can request a discharge hearing 180 days after being committed. See 18 U.S.C. § 4247(d); United States v. Maclaren, 866 F.3d 212, 216-19 (4th Cir. 2017). To obtain a discharge hearing, the person must plausibly allege " factual matter, accepted as true, to state a claim for discharge that is plausible on its face." Maclaren, 866 F.3d at 218; see 18 U.S.C. § 4248(e). Essentially, the person must plausibly allege that he is no longer a sexually dangerous person. See Maclaren, 866 F.3d at 218. If the person obtains a hearing, the person must show by a preponderance of the evidence that he is no longer a sexually dangerous person or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment. See 18 U.S.C. § 4248(e); see, United

[6] To date, no women have been committed under the Adam Walsh Act.

States v. Wooden, 887 F.3d 591, 599-602 (4th Cir. 2018).

The government argues that the Adam Walsh Act's "post-commitment procedures afford additional protection" to a person and thereby obviate the need for a person who contests all three elements to be competent at his section 4248 trial. [D.E. 101] 4. However, an incompetent person who contested all three elements and got committed could not participate meaningfully in sex offender treatment, much less learn from it. Moreover, if the person were incompetent due to an intellectual disability, the person essentially would face lifetime commitment unless and until he (became competent. Cf. Jackson, 406 U.S. at 731-39. To such a person, the post-commitment procedures would not afford additional protection.

The private interest that is affected by commitment under 18 U.S.C. § 4248 is great. See Timms, 664 F.3d at 451; Baker, 45 F.3d at 844. Thus, the government's interest in committing an incompetent person who contests all three elements under the Adam Walsh Act "must be great, and the risk of an erroneous deprivation of liberty small for the government to prevail." Baker, 45 F.3d at 844.

2.

The court next considers "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Mathews, 424 U.S. at 335. As mentioned, the first element of the Adam Walsh Act requires the factfinder to uncover the truth concerning whether respondent has

attempted to engage in or engaged in sexually violent conduct or child molestation. Where a respondent lacks a criminal conviction for actual or attempted sexually violent conduct or child molestation, the factfinder must examine rigorously the reliability of conflicting evidence presented and engage in extensive factfinding. The Adam Walsh Act provides respondent a statutory right to counsel, to testify, to present evidence, to subpoena witnesses, and to confront and cross-examine witnesses who appear at the hearing. See 18 U.S.C. § 4247(d). A respondent's competence, however, is "rudimentary, for upon it depends" these statutory rights. See Cooper, 517 U.S. at 354 (quotation omitted). Simply put, an incompetent respondent who contests the first element in an Adam Walsh Act case effectively loses these statutory rights because he lacks the ability to rationally understand the proceeding against him or communicate with his counsel about the factual allegations at the heart of the first element's factual inquiry. Likewise, an incompetent respondent who contests the first element in an Adam Walsh Act case effectively loses the ability to testify, to advise counsel which witnesses to subpoena in his defense, and to advise counsel about potentially fruitful lines of cross-examination. Moreover, appointing a guardian ad litem does not cure these problems. Cf. [D.E. 101] 6 (suggesting that appointing a guardian ad litem for an incompetent respondent who contests all three elements in an Adam Walsh Act case provides a sufficient procedural safeguard to satisfy procedural due process). After all, a guardian ad litem is not effectively able to assist counsel in contesting the first element.

If the Adam Walsh Act permits the trial and commitment of an incompetent person who contests all three elements, then the risk of erroneous deprivation of that persons's liberty is extraordinary. Moreover, requiring a person who contests all three elements in a section 4248 proceeding to be competent would add substantial value to the procedural safeguards in the Adam Walsh Act. See 18 U.S.C. § 4247(d) (providing right to counsel, to testify, to present evidence, to subpoena witnesses, and to confront and cross-examine witnesses); 18 U.S.C. § 4248(d) (requiring the government to prove the three elements by clear and convincing evidence).

3.

Next, the court considers the government's "interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 335. Obviously, the government has an important and substantial interest in delivering mental health care to "sexually dangerous persons who are already in federal custody" and to protecting the public from such individuals. Comstock, 560 U.S. at 142. Moreover, section 4248 is "reasonably adapted to Congress's power to act as a responsible federal custodian." Id. at 143 (quotation and citation omitted).

However, requiring that a person who contests all three elements in an Adam Walsh Act case be competent will pose minimal fiscal and administrative burdens to the government. First, as the history of the Adam Walsh Act cases in the Eastern District of North Carolina reflects, the issue

of competence rarely arises in section 4248 cases. Moreover, the issue of competency coupled with a respondent who lacks a conviction for attempted or actual sexually violent conduct or child molestation, arises even less frequently. Indeed, to this court's knowledge, the issues presented in this Adams Walsh Act case have never arisen in the 183 other Adam Walsh Act cases in the Eastern District of North Carolina. Second, if the issue of competency does arise, the case will involve a person who faced federal criminal charges, received a competency evaluation under 18 U.S.C. § 4241, and was found incompetent to face criminal charges. The person will then be evaluated for commitment under 18 U.S.C. § 4246. If committed under section 4246, the person will receive treatment under section 4246 and the United States will not seek commitment under section 4248.

If not committed under section 4246, and the government seeks commitment under section 4248, and the person contests all three elements, and the person arguably is not competent to proceed in the section 4248 case, the court can receive a psychiatric or psychological report concerning the person's competence. See 18 U.S.C. §§ 4247-48. The court can then hold a competency hearing. If the person is found competent, the section 4248 case proceeds. If the person is found not competent, the court can notify the responsible state authorities about the procedural history of the case and permit responsible state authorities to decide whether to commit the person under applicable state law. For example, many states have their own versions of 18 U.S.C. § 4246, including statutes that permit the civil

commitment of seriously mentally ill persons or seriously developmentally disabled persons. Cf. Mont. Code Ann. § 53-20-121 et seq. (2017) (commitment of seriously developmentally disabled individuals); Mont. Code Ann. § 53-21-121 et seq. (2017) (commitment of seriously mentally ill individuals). Thus, the government's interest in delivering mental health care to an allegedly sexually dangerous person in its custody is substantial, but requiring that a person who contests all three elements be competent imposes little additional costs. See Mathews, 424 U.S. at 335. Furthermore, in analyzing the third Mathews factor, the court cannot presuppose that the person is a sexually dangerous person.

4.

Balancing the factors, the private interest that is affected by commitment under 18 U.S.C. § 4248 is extraordinary. Moreover, the government's interest in committing an incompetent person who contests all three elements is slight. Finally, the risk of erroneous deprivation of liberty is great when the government seeks to commit an incompetent person who contests all three elements under the Adam Walsh Act. Thus, if (as the United States asserts) the Adam Walsh Act permits the trial and commitment of an incompetent person who contests all three elements, then the Adam Walsh Act as applied to that incompetent person would violate procedural due process.

III.

In sum, the government's motion for reconsideration [D.E. 98] is DENIED. The

competency hearing scheduled for November 29, 2018, shall proceed.

SO ORDERED. This 26 day of November 2018.

/s/ James Dever
JAMES C. DEVER III
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:17-HC-2162-D

UNITED STATES OF AMERICA,

Petitioner,

v.

OLIVER LEE WHITE,

Respondent.

Filed: 12/06/2018

ORDER

The United States seeks to have the court commit Oliver Lee White ("White") as a sexually dangerous person under 18 U.S.C. §§ 4247-48. White has never been convicted of any crime and contests all three elements under the Adam Walsh Act. See Order [D.E. 103] (denying motion for reconsideration). On November 29, 2018, the court held a competency hearing concerning White [D.E. 107].

As explained in open court and incorporated by reference, the court has considered the entire record and the arguments of counsel. White is currently

suffering from a mental disease or defect (i.e., Intellectual Disability, Moderate to Severe), which renders White unable to understand the nature and consequences of the section 4248 proceeding against him and to assist properly in his defense in the section 4248 proceeding. See [D.E. 110] (report of Dr. Stelmach) (diagnosing White with Intellectual Disability, Moderate to Severe, and finding that White is not competent to proceed in a 4248 proceeding); see also [D.E. 89] (additional report of Dr. Stelmach); cf. [D.E. 102] (report of Dr. Rigsbee) (diagnosing White with Intellectual Disability, Mild, and finding that White is not competent to proceed in a section 4248 proceeding). White also suffers from Fetal Alcohol Syndrome. See [D.E. 110]; [D.E. 89]. Doctors cannot medicate White to attain competency, and multiple efforts to help White attain competency through therapy have not worked due to White's intellectual disability. See, e.g., [D.E. 102] 7-10. Nonetheless, the United States argues that a respondent's competency is never relevant in a section 4248 proceeding.

The court credits the testimony and report of Dr. Stelmach and finds that White is presently suffering from a mental disease or defect (i.e., Intellectual Disability, Moderate to Severe) rendering him mentally incompetent to understand the nature and consequences of the section 4248 proceeding against him and to assist properly in his defense in the section 4248 proceeding. White also suffers from Fetal Alcohol Syndrome. Moreover, the court rejects the government's argument that competency is never relevant in a section 4248 proceeding. As explained at length in this court's order of November 26, 2018

[D.E. 103], competency is relevant in a section 4248 proceeding where the respondent contests all three elements under the Adam Walsh Act. Furthermore, the Adam Walsh Act permits a court to dismiss a section 4248 proceeding against an incompetent person who contests all three elements. Id. at 2-11. Alternatively, if the Adam Walsh Act does not permit a court to dismiss a section 4248 proceeding against an incompetent person who contests all three elements under the Adam Walsh Act, then permitting such a trial and ensuing commitment would violate procedural due process as applied to that person. See id. at 10-20. Given that White is incompetent and cannot attain competency via medicine or therapy and that White contests all three elements under the Adam Walsh Act, the court grants White's motion to dismiss this section 4248 proceeding.

In sum, the court GRANTS White's motion to dismiss [D.E. 37] and DISMISSES WITHOUT PREJUDICE this section 4248 proceeding. The government's case against White under 18 U.S.C. § 4246 remains pending before the Honorable W. Earl Britt. See United States v. White, 5:18-HC-2295-BR (E.D.N.C.); see also 18 U.S.C. § 4246(a).

SO ORDERED. This 6 day of December 2018.

/s/ James Dever
JAMES C. DEVER III
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6181

(5:17-hc-02162-D)

UNITED STATES OF AMERICA,
Petitioner-Appellant,

v.

OLIVER LEE WHITE,
Respondent-Appellee.

ORDER

FILED: August 16, 2019

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Diaz, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

STATUTORY PROVISIONS INVOLVED

1. **18 U.S.C.A. § 4241 provides:**

Determination of mental competency to stand trial to undergo postrelease proceedings[1]

(a) Motion to determine competency of defendant.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the

[1] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of finding of competency.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the

defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

2. **18 U.S.C.A. § 4246 provides:**

Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding.--If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the

release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may 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).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until--

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.--When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that--

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the

court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall--

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.--The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed

regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.--If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) Definition.--As used in this chapter the term "State" includes the District of Columbia.

3. **18 U.S.C.A. § 4247 provides:**

General provisions for chapter

(a) Definitions.--As used in this chapter--

(1) "rehabilitation program" includes--

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect[2] a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) Psychiatric or psychological examination.--A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section

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[2] So in original. Probably should be followed by "to".

4242, 4243, 4246, or 4248, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial

risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or (F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.--(1) The director of the facility in which a person is committed pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental

condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) Videotape record.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.--Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.--Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.--The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this

chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

4. **18 U.S.C.A. § 4248 provides:**

Civil commitment of a sexually dangerous person

(a) Institution of proceedings.--In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may 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).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until--

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

(e) Discharge.--When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that--

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall--

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.--The director of a facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that he is sexually dangerous to others in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(g) Release to State of certain other persons.--If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is a sexually dangerous person, the Attorney

General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.