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APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:17-HC-2162-D

UNITED STATES OF AMERICA

v.

OLIVER LEE WHITE

MOTION TO DISMISS CERTIFICATE OR,
IN THE ALTERNATIVE, TO HOLD A
COMPETENCY HEARING

FILED UNDER SEAL

Filed: 12/20/2017

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APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

vs.

OLIVER LEE WHITE,

Respondent.

5:17-HC-2162-D

NOVEMBER 29, 2018

MOTION TO HOLD THE CASE IN ABEYANCE
AND COMPTENCY HEARING

BEFORE THE HONORABLE JAMES C. DEVER,
III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS

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[Testimony of Dr. Hans Stelmach, pp. 27:23-28:13]

* * *

BY MS. LITTLE:

Q. So I'm going to -- I'm going to ask you again.
Based on your evaluations, your meetings -- the two
meetings you had with Mr. White, your discussions
with his family, your review of all of the prior

medical reports, do you believe that he is competent to proceed in this 4248 proceeding?

A. I do not believe he's competent.

Q. All right.

MS. LITTLE: Thank you, Your Honor.

THE COURT: Thank you. Anything else?

MS. LITTLE: No further questions.

MR. DODSON: No, Your Honor. Thank you.

THE COURT: Thank you. Thank you, Doctor. Please watch your step stepping down.

(The witness left the stand.)

* * *

[Testimony of Raymond Tarlton, pp. 31:22-32:14]

* * *

Q. Based on your interactions with Mr. White, do you have an opinion as to whether he understands what's going on in this 4248 proceeding?

A. Yes, I have an opinion, Your Honor.

Q. What is it?

A. That he does not have a rational understanding of what's going on in these proceedings.

Q. How about his ability to assist a lawyer in defending against particularly prong one?

A. My opinion is that he would not be able to effectively assist counsel in defending against prong one, especially in allegations about historical conduct.

Q. How about you as the guardian *ad litem*; could you shed any light on historical facts or data that may -- things that may have occurred in places -- in states in the western part of the United States?

A. That would be impossible for me, Your Honor. I have no personal knowledge of those events.

* * *

[Closing Argument of Robert Dodson, pp. 37:23-44:21]

* * *

[THE COURT:] But my question for you would be -- one of the cases I cited is *Jackson v. Indiana*, a case from the Supreme Court in 1972. And the description of the Petitioner in that case is, quote:

“Petitioner, Theon Jackson, is a mentally defective deaf mute with a mental level of a preschool child. He cannot read, write, or otherwise communicate except through limited sign language. In May 1968, at age 27, he was charged in the Criminal Court of Marion County, Indiana, with separate robberies of two women. The offenses were alleged to have occurred the preceding July. The first involved property (a purse and its contents) and the value of four dollars. The second concerned five dollars in money. The record sheds no light on these charges since, upon receipt of

not-guilty pleas from Jackson, the trial court set in motion the Indiana procedures for determining his competency to stand trial.”

And ultimately he never -- he never did stand trial, but he was committed under Indiana law.

So just so I'm clear, if we changed the facts of this case and you had an individual who was like Petitioner Theon Jackson, a mentally defective deaf mute with a mental level of a preschool child who could not read, write, or otherwise communicate except through limited sign language, who had been charged but never convicted of two acts of attempted sexual violence, and it would be the Government of the United States' position that that person could be committed under the Adam Walsh Act?

MR. DODSON: Well, I would just point out, Your Honor --

THE COURT: No, no. Just yes or no, and then you can explain. It would be the Government's petition -- position let's sort of get to where the rubber meets the road --

MR. DODSON: Sure.

THE COURT: -- on the legal argument. And the facts in *Jackson* are where the rubber meets the road.

MR. DODSON: Sure.

THE COURT: So there is no limiting principle, that competency is completely irrelevant, always, for

every individual, no matter how mentally impaired they are due to an intellectual disability?

MR. DODSON: For those individuals facing commitment under 18 U.S.C. 4246 --

THE COURT: No, no.

MR. DODSON: -- or 4248?

THE COURT: No, no. Answer my question about 4248. It would be -- it is completely -- I mean, again, that -- the answer to my question has to be, "Yes, Judge. No matter how intellectually impaired, no matter if the person has the intellectual ability of a one-year-old child."

MR. DODSON: Yes.

THE COURT: It would -- and now here is my follow-up question. How would that individual ever complete successfully the commitment and treatment program that exists at Butner that I described in my order? How would that person or a person with a kindergarten-level -- and I'm familiar with kindergartners and first-graders and second-graders; interacted with a lot of them in my life. How on Earth could that person ever complete the program that is designed to help those who are committed?

MR. DODSON: Yes, Your Honor. A couple of things, with the Court's indulgence.

The answer to your question is yes. We believe it's written into the statute that way. It's the very reason why the statute was in place to begin with, the insanity -- both the Insanity Defense Reform Act,

which contains 4246, and the Adam Walsh Act, for this very purpose: So that people who repeatedly molest children and cannot be dealt with in a criminal system, that there is a safety net for public safety reasons. And this is the very definition of that. Someone who repeatedly has contact with criminal courts, deemed not competent to stand trial --

THE COURT: So the Government's position is, I have to presuppose that you've proven prong one.

MR. DODSON: No, that's not the Government's position at all.

THE COURT: Well, but that's the premise of your argument, isn't it? Tell me how that's not the premise of your argument. The premise of your argument is he has committed acts of child molestation.

MR. DODSON: Right.

THE COURT: The premise of the argument -- therefore, commit him, Judge, for his life, for safety.

And yet this proceeding -- the first question that I have to answer and that you have to prove by clear and convincing evidence is that he, in fact, did that. So your argument presupposes that conclusion, doesn't it?

MR. DODSON: Yes. That is the very argument.

THE COURT: Okay.

MR. DODSON: We absolutely have.

THE COURT: I just want to make sure I understand --

MR. DODSON: Yeah.

THE COURT: -- the argument. The argument is presuppose that the Government has proven prong one.

MR. DODSON: No, not -- not that we have proven it, but that we can prove it.

THE COURT: But that's what you're saying. You're saying that's why we have this law. And I'm saying, hmm. I don't read the law quite that way.

MR. DODSON: Well, but that --

THE COURT: I'm trying to understand the argument.

MR. DODSON: Sure. And I'm trying to give it to the Court in the fact that we're not asking you to find that prong one has already been met. We're asking you to allow us to get to a place where we can put on evidence that prong one's met. But we're being stopped at the point where the Court could potentially say, Well, he's not competent to even allow the Government to get to a point to where we can prove that prong one has been met. And we believe we can prove it with many -with more than clear and convincing evidence, Your Honor.

THE COURT: But do you agree that, as part of the structure of the Act, that he has a right by statute and certainly in the cases that I've cited -- the Constitution of the United States -- to defend himself?

MR. DODSON: Absolutely.

THE COURT: Right?

MR. DODSON: Yes.

THE COURT: And you agree that he doesn't have the capacity as an individual to defend himself, right?

MR. DODSON: Right.

THE COURT: And that the guardian *ad litem* can't help him to defend himself, right, for the reasons Mr. Tarlton said? Mr. Tarlton wasn't in Montana or Arizona or New Mexico or wherever the alleged event -- right? He has no -- he has no ability to sort of say, "I was with him. I can give you historical information."

MR. DODSON: Well, the Government's not going to concede that point, but I will say that it --

THE COURT: Well, tell me, if you don't concede it, tell me how Mr. -- Mr. Tarlton testified to the contrary.

MR. DODSON: Sure.

THE COURT: You had an opportunity to cross-examine him.

MR. DODSON: Sure.

THE COURT: So tell me how -- tell me how on Earth, under what theory could Mr. Tarlton assist counsel in defending Mr. White against the factual evidence that allegedly underlies prong one?

MR. DODSON: Well, we don't believe that that's the determining factor. I mean, the bottom line and the bigger picture -- and I don't mean to be evasive or obtuse -- but the bigger picture to get to the Court's point is the Government believes it can commit under 4248 an incompetent person whether or not they have a guardian *ad litem*, whether they had a guardian *ad litem*. This is the very point. Congress put in that individuals who are not competent to stand criminal trial are subject to 4246 and 4248.

And I know that there has been much argument over that phrase, but it's the Government's position that this is why the Act was imposed so that individuals who are dangerous -- and 4246 includes sexual dangerous as does 4248 -- that they are subject to that.

So if it were the case that no incompetent person could ever be subject to 4248, why would it then be that when someone is found not competent under 4241(d), why then would they be subject to 4248(d)?

THE COURT: But you would agree that the order I wrote actually draws a distinction.

MR. DODSON: Yes. We recognize it.

THE COURT: Right?

MR. DODSON: Yes.

THE COURT: And that in the 184 cases that we have had in this district that you're familiar with, that I'm familiar with, that counsel is familiar with

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for Mr. White, that we've never had this issue. And that in nearly every case, prong one is not disputed.

And even if someone said, "Well, I'm going to dispute it," a certified copy of a judgment of conviction of child molestation is -- you know, an analog would be the forgone conclusion doctrine. I mean, it's proven.

And then we get to the two medical questions. But that's not this case. Right?

MR. DODSON: Yes.

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APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA

vs.

OLIVER LEE WHITE

5:17-hc-02162-D

TRANSCRIPT OF RULING ON
SECTION 4248 HEARING

December 6, 2018

In Raleigh, North Carolina

Before James C. Dever, III, District Judge

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PROCEEDINGS

THE COURT: Good afternoon. Welcome to the United States District Court for the Eastern District of North Carolina.

I'm going to announce my findings and conclusions in connection with the competency hearing that was held.

The United States seeks to have the Court commit Oliver Lee White as a sexually dangerous person under 18 U.S.C. Sections 4247 and 4248. White has never been convicted of any crime and contests all three elements under the Adam Walsh Act. See this Court's order at Docket Entry 103.

On November 29th, 2018, the Court held a competency hearing concerning White. The Court has considered the entire record, the arguments of counsel, and all evidence. The Court now makes these findings of fact and conclusions of law.

The Court finds that Oliver Lee White is not competent to proceed in this proceeding under 18 U.S.C. Sections 4247 and 4248, cannot be restored to competency by a medication or therapy, and contests

all three elements under 18 U.S.C. Sections 4247 and 4248.

Given these unique facts and the governing law, the Court grants respondent Oliver Lee White's motion to dismiss this proceeding and dismisses the action without prejudice. White remains subject to the ongoing proceeding under 18 U.S.C. Section 4246.

As for the factual background in this case, on May 26th, 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.

On December 22nd, 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.

Pursuant to the deferred prosecution agreement, White was to reside with his mother, Peggy White, and have no contact with minors. On December 22nd, 2009, the District of Montana dismissed the indictment without prejudice. The Court released White to his family.

On April 18th, 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. White's mother, Peggy White, and her partner, Susan Kelly, were named as codefendants and charged with misprison of felony. White's

criminal defense attorney requested a competency examination for White.

On May 30th, 2013, Doctors had 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. The Honorable Donald Molloy, United States District Judge in the District of Montana, requested an evaluation of White under 18 U.S.C. Section 4246. On September 11th, 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, thus, White should not be committed under 18 U.S.C. Section 4246.

On October 7th, 2013, Judge Molloy ordered that the six criminal charges against White be dismissed without prejudice unless the United States objected. On October 10th, 2013, the United States moved to dismiss the criminal charges against White without prejudice. Judge Molloy, released White to his family.

On July 22nd, 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. On September 28th, 2016, the Honorable Susan Watters, United States District Judge in the District of Montana, ordered White to be evaluated in order to determine whether White was competent to stand trial.

On November 28th, 2016, the medical evaluator concluded that White was not competent to stand trial. On January 11th, 2017, Judge Watters conducted a competency hearing and ordered that White be evaluated and that attempts be made to assist White in attaining competency. If competency could not be restored, Judge Watters ordered the facility's director to file a certificate pursuant to 18 U.S.C. Section 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 the property of another.

On July 26th, 2017, the BOP evaluators opined that White did not meet criteria for civil commitment under 18 U.S.C. Section 4246; however, during 2017, BOP evaluators also evaluated White under 18 U.S.C. Section 4248 and prepared a report dated August 18th, 2017.

On August 30, 2017, pursuant to 18 U.S.C. Section 4248, the United States filed in this court a certificate of sexually dangerous person concerning White. In its certification, the United States cited 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. The United States also cited 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. The certification identified no convictions for sexually violent conduct or child molestation or

attempted sexually violent contact or attempted child molestation.

After the certification of August 30th, 2017, there is -- doctors examined and evaluated White. These evaluations noted White's intellectual disability. They're in the record. See report of Fabian M. Saleh, Docket Entry 11-1; report of Joseph J. Plaud, Ph.D., docket entry 12; Report of Amy Phenix, Docket Entry 21-1; report of Luis Rosell, Docket Entry 25.

Two evaluators questioned White's ability to understand and meaningfully participate in the proceeding under 18 U.S.C. Section 4248. See report of Dr. Rosell at Docket Entry 25, page 11. Doctor -- excuse me -- see report of Dr. Plaud, Docket Entry 12 at page 16.

On November 28th, 2017, White filed a motion to appoint a Guardian Ad Litem. In support, White argued that his mental condition rendered him incompetent to assist counsel in the matter.

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

On December 20th, 2017, White filed a motion to dismiss the certificate against him or, in the

alternative, to hold a competency hearing. The government opposed the motion.

In April 2018, the government, again, evaluated White pursuant to 18 U.S.C. Section 4246. See Docket Entry 51.

On April 30th, 2018, Dr. Evan DuBois concluded that White did not meet criteria for commitment under 18 U.S.C. Section 4246. See Docket Entry 51 at page 13 and at page 14.

On May 14th, 2018, United States Magistrate Judge Gates granted White's motion for a Guardian Ad Litem, and recommended denying his motion to dismiss or in the alternative for a competence hearing. Thereafter, Raymond Tarlton was appointed as a Guardian Ad Litem.

On September 11th, 2018, this Court entered an order declining to adopt the M and R of United States Magistrate Judge Gates. See Docket Entry 95.

In that order the Court granted White's motion for a competency hearing and scheduled the hearing for November 29th, 2018. The Court also ordered an examination of White under 18 U.S.C. Section 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 proceeding under 18 U.S.C. Section 4248 against him or to assist properly in his defense.

The Court ordered that the report be served on counsel for White, counsel for the United States, and White's Guardian Ad Litem, Mr. Tarlton.

In this Court's Order of September 11th, 2018 the Court explained the textual rationale for this Court's authority to order such an examination and report, to hold such a competency hearing, and to provide relief if the Court found White to not be competent. See Docket Entry 95 at pages 7 and 8.

The government moved for reconsideration, White responded in opposition and the government replied. See Docket Entries 98, 100, and 101.

On November 26th, 2018, the Court entered the detailed 20-page Order denying the government's motion for reconsideration. See Docket Entry 103.

The Court explained the textual rationale within 18 U.S.C. Sections 4247 and 4248, for concluding that this Court could receive a report concerning White's competency, could hold a competency hearing concerning White, and could provide relief to White if the Court found White not to be competent. See Docket Entry 103, at pages 2 through 11.

The Court also explained that if the Adam Walsh Act did not permit the -- excuse me -- if the Adam Walsh Act did permit the trial and commitment of an incompetent person who contests all three elements under the Adam Walsh Act, and such a proceeding would not comport with procedural due process as applied to that person. See Docket Entry 103, at pages 10 through 20.

On November 29th, 2018, the Court held a competency hearing. The Court heard the testimony of Dr. Hans Stelmach. Dr. Stelmach's CV is at Docket Entry 104. He is a board-certified psychiatrist and an expert witness in forensic psychiatry. The Court also received his initial report concerning White's competence to be deposed. See Docket Entry 89. And Dr. Stelmach's supplemental report concerning White's competence to proceed in this Section 4248 proceeding. See Docket Entry 110.

The Court also received the report of Dr. Justin Rigsbee of the Bureau of Prisons concerning White's competence to proceed in this Section 4248 proceeding. See Docket Entry 102.

The court also received the testimony of Guardian Ad Litem Raymond Tarlton.

The Court credits the testimony and supplemental report of Dr. Stelmach, as described in detail at Docket Entry 110. Dr. Stelmach opined that Mr. White is a 31-year-old Native American man with fetal alcohol syndrome and a major intellectual disability.

Dr. Stelmach interviewed White on August 10th, 2018 and October 1st, 2018. Dr. Stelmach attempted to explain the limits of confidentiality pertaining to the evaluation with White, specifically, that information from the assessment would be relayed to his attorney and summarized in a written report. The report could then be shared with the Department of Justice and the Judge. The Doctor might be asked to testify on the contents of his findings and implications. The Doctor informed

White that he did not have to answer any questions if he was unwilling or unable to do so. White was not able to verbalize a simple understanding as to the nature, purpose, and limits of confidentiality pertaining to the assessment.

However, he agreed to proceed with the interview. Although White, according to Dr. Stelmach, appeared to put forth effort, he was considered an unreliable historian based on his significant intellectual disability. White stated to Dr. Stelmach that he was at Butner for a four-month period to restore competency to go to court.

Dr. Stelmach opined that White was unable to retain the concepts that they were discussing and instead regurgitated past information about a four-month study that was not accurate. Mr. Stelmach recounted in his report materials that were available for review and that he did review in preparation for his opinion. This information is recounted at Docket Entry 110, pages 2 and 3. Part of what he had with respect to his supplemental report was the forensic evaluation of Dr. Rigsbee, dated October 22nd, 2018.

Dr. Stelmach's report recounts the background, history, and psychological development of White. White was born in Crow Agency, Montana. His mother was a teenager when she became pregnant with him. White was born prematurely and diagnosed with fetal alcohol syndrome due to intrauterine alcohol exposure. White subsequently had both physical and intellectual development delays.

Peggy White and Gary Big Hair adopted White when he was five days old, due to his biological mother's inability to care for him due to alcohol and drug abuse. At age one, White had surgical intervention for either renal or liver dysfunction due to fetal alcohol syndrome. White was enrolled in special education classes and received a certificate of attendance after completing the 12th grade. White has been on disability, receiving supplementary social security income since he was a child and has never been gainfully employed. White has never been convicted of a crime.

White has been repeatedly evaluated as Dr. Stelmach recounts in his report and has been found to be intellectually disabled. Dr. Stelmach's report recounts that in 2012, White underwent a psychological evaluation, including an assessment under the Wechsler Adult Intelligence Scale, Fourth Edition. White scored in the first percentile on intelligence, meaning that 99 percent of the population would score higher than White with his full scale intelligence quotient of 56.

He also completed a Wide Range Achievement Test, Fourth Edition, and was determined to have first grade math level, a second grade spelling and sentence comprehension level, and a third grade reading level.

In 2016, White underwent intelligence testing by Dr. Pinuto (ph), on the WAIS 4, White obtained a full scale intelligence quotient of 55. White has had no incident reports at FMC Butner and is housed in an open mental health unit.

White told Dr. Stelmach that he was being held at FMC Butner for study for four months, there's a group, a four-month group. White was alert and oriented to person, place, year, and month and date, he knew his birthday but he could not tell Dr. Stelmach how old he was. He was unable to perform simple money calculations, for example, he could not subtract \$5 minus \$1, he did not know that there were four quarters in a dollar, but he did know the number of -- and he did not know the number of dimes or nickels in a dollar. He had limits on his attention, concentration, and memory. He could not answer most questions. He stated to the Doctor that he could not write or read. He often simply said, quote, hard for me to explain, can't think that well, hard to understand, I don't know what to do, end quote.

According to Dr. Stelmach, his thought process was clearly impoverished, his mood was confused, his affect was shallow, he denied having auditory or visual hallucinations.

White was administered questions from the competence assessment for standing trial for defendants with mental retardation, the so-called CAST-MR. The CAST MR was designed specifically to test the competency of individuals already diagnosed as mentally retarded to assist in their legal defense. The CAST-MR consists of three sections that evaluate the individual's understanding of basic legal terms, the respondent's ability to assist in their own defense, and open-ended questions regarding the respondent's specific case asked orally by the examiner.

The test questions have a high validity score and because the test is specifically designed for those who have already been diagnosed as mentally retarded, the test can provide an analysis into the minds of intellectually disabled persons that most other tests are not designed to reach since most other psychological tests and interviews are designed for individuals with normal intellectual functioning.

For portions of the assessment White was given two answers to each question and struggled to pick either answer. He was asked whether a witness is someone who sits on the jury or instead is someone who saw a crime. White was unable to choose between these two answers. He could not answer what happens when he goes to court. White could not define the role of the Judge. He could not decide if the Judge is a person who defends you or the person that decides the case. White could not determine the role of a jury, he could not decide if the jury was a group of people who decide on the facts of the case or if the jury were individuals that give answers for the other side.

Although White knew that his lawyer was a person named Jackie, he did not know any of his attorneys' last names. He could not tell if his lawyers were there to solve a crime or to take his side. White did not know the role of a prosecutor. He could not differentiate between whether the prosecutor is someone who attempts to defend him in court or tried to prove him guilty.

White could not tell the difference between a medical term or a legal process. When asked which of these more closely define the legal term for, quote,

hearing, end quote. White could not define a criminal sentence. He could not distinguish between whether the definition was the amount of money one would pay an attorney or the amount of time that he would spend in jail. White did not know whether a crime was when one goes to jail or when one breaks the law. White did not know what it means to be guilty. White could not tell the difference between whether guilty meant that the prosecutor proved that someone was guilty or that someone got arrested for something.

White did not know the meaning of innocent. He could not tell the difference between whether this meant that the prosecutors could not prove guilt or that someone who perpetrated a crime was sorry that it happened. White could not tell what penitentiary meant, that when one was found guilty, the Judge would order a sentence for that individual to serve or if people did not like that individual and they wanted to get rid of that individual and that they would send that individual away. He did not know if a penitentiary meant that he was in school or in prison.

White could not tell if a felony meant that a very serious crime had been committed or if a felony was a person who talks in court. White could not define a misdemeanor and he could not tell the difference if this meant that the crime committed was minor or a training program. He did not know the meaning of pleading guilty. He could not decide if guilt meant that someone said that they committed a crime or someone was acquitted of a crime. White did not know the definition of time served. White had difficulty choosing between whether or not this

meant how fast he was going or, instead, how long he had been in jail.

White did not know the definition of probation and could not distinguish between whether or not this meant that one reports to an officer instead of going to jail or rather one has to stay in jail for a very long time. White did not know the definition of a plea bargain and could not tell the difference between whether or not this meant to make a deal for a lesser sentence or instead to have a jury trial. White did not know the definition of acquitted and could not decide if this meant that one would be sent to jail or instead that one was found not guilty.

White did not know the definition of maximum sentence and could not choose between whether or not this meant the most time one can serve or rather the least time one can serve. White did not know the definition of a fine. White could not choose between whether or not this meant this was time served in jail or money paid to a court. White could not define a minimum sentence, White could not choose between if this meant the least time one would serve or the most time that one would serve.

White was unaware that he had a Guardian Ad Litem appointed despite being explained the role of a Guardian Ad Litem, he was unable to repeat or retain the definition or concept.

Mr. Tarlton credibly testified as an aside that he had met for approximately two hours or two occasions, one hour each time, with Mr. White. Mr. White, obviously, did not recall that.

Dr. Stelmach's report at Docket Entry 110, also discussed at length assessments under Adaptive Functioning Assessment. He administered the Vineland Adaptive Behavior Scale, Second Edition. This scale measures the personal and social skills of individuals from birth into adulthood because adaptive behavior refers to an individual's typical performance of the day-to-day activities required for personal and social sufficiency. These scales assess what a person actually does rather than what he or she is able to do.

A Vineland 2 assesses adaptive behavior in four domains: Communication, daily living skills, socialization, and motor skills. It also provides a composite score that summarizes the individual's performance across all four domains. Dr. Stelmach's report contains the results for White at pages 8 and 9.

The Vineland 2 indicated that White's adaptive behavior composite standard score of 22 summarizes his overall level of adaptive functioning. His level of adaptive functioning within the communication domain is low for his age group. He had an adaptive level of low for all three subdomains, receptive, expressive, and written. His expressive skills represent a strength, his receptive skills represent a weakness compared to his other communication skills. The report then goes on to provide further detail associated with this.

Dr. Stelmach also considered the report of Dr. Rigsbee, an evaluator at FMC Butner, Dr. Rigsbee's report is in the record, it's dated October 22nd, 2018. Dr. Rigsbee concluded that White is currently

suffering from a mental disease or defect which renders him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. As for White's prognosis, Dr. Rigsbee opined that White's prognosis with regard to restorability to competency is poor. As Dr. Rigsbee stated, an intellectual disability is a condition that is unamenable to change. While White has demonstrated cooperation with directions when given, he will continue to need assistance from others in order to manage his activities of daily living.

Dr. Stelmach's report contains two diagnoses. The first diagnosis is fetal alcohol spectrum disorder. As Dr. Stelmach explains, these disorders are a group of conditions that occur in a person whose mother drank alcohol during pregnancy. Problems may include an abnormal appearance, short height, low body weight, small head size and features, poor coordination, low intelligence, behavior problems, and problems with hearing or seeing.

Those affected are more likely to have trouble in school, legal problems, participate in high risk behaviors, and have trouble with alcohol or other drugs. The most severe form of the condition is known as fetal alcohol syndrome. Dr. Stelmach gives greater detail associated with this at page 10 of his report.

According to Dr. Stelmach's opinion in his report, at Docket Entry 110, page 11, White's primary psychiatric diagnosis is most likely a direct result of fetal alcohol syndrome, which reasonable medical certainty, Dr. Stelmach persuasively opined that White's primary psychiatric diagnosis as defined by

the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition, is intellectual disability, moderate to severe.

Intellectual disability, as Dr. Stelmach explained, is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits and conceptual social and practical domains. The following three criteria must be met: First, deficits in intellectual function, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. Confirmed by both clinical assessment and individualized standardized intelligence testing.

Two, deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility, without ongoing support, the adaptive deficit limit functioning in one or more activities of daily life, such as communication, social participation, and independent living across multiple environments, such as home, school, work, and community.

Three, onset of intellectual and adaptive deficits during the developmental period.

White has a full scale IQ of 55 or 56 and has struggled in school and in sustaining employment.

Dr. Stelmach's report provides a detail associated with all of these issues concerning this diagnosis and the Court credits the diagnosis of Dr. Stelmach that White has intellectual disability, moderate to severe,

as recounted at pages 12 and 13 of his report at Docket Entry 110.

In his final opinion and recommendations, Dr. Stelmach opines that White has major deficits in cognition that impairs decision-making, comprehension, and recall, all of which impact his decision capacity to manage affairs of person and property, impairs ability to give testimony, impairs ability to stand trial and assist in his own defense. Dr. Stelmach persuasively opines that White does not understand the nature of the proceedings against him under Section 4248.

White has poor recollection of chronological events, he has very poor recall overall and is easily confused. He repeats statements that were told to him in the past which are no longer factual, for example, his belief that he is presently at FMC Butner for four months of competency restoration. White's ability to differentiate between factual recall and statements that he has heard in a competency restoration class or when receiving discovery, for example, is impaired.

White lacks the ability to recall personal knowledge of events that he would need to convey to a Guardian Ad Litem for that Guardian Ad Litem to assist him in any way, particularly in defending against the first element in an Adam Walsh Act case under 18 U.S.C. Section 4248. White does not understand and lacks the ability to properly communicate historical facts accurately. He does not understand the role of a Guardian Ad Litem. White lacks the capacity to testify as a witness in a 4248 proceeding. The truthfulness of his testimony would be unreliable.

This impairment is not volitional, it is due to White's intellectual disability.

Dr. Stelmach persuasively opined that in his professional opinion, White is not able to understand the nature of the Section 4248 civil commitment proceedings against him, and is not able to assist counsel in defending these proceedings.

Dr. Stelmach also opines that in light of White's severe intellectual and adaptive functioning deficits, it is Dr. Stelmach's opinion that White is not competent to be a party to any litigation under any standard, civil or criminal.

As for Dr. Rigsbee's report, that too is in the record, at Docket Entry 102, as is Dr. Stelmach's initial report at Docket Entry 89. Dr. Stelmach's report at Docket Entry 89 also persuasively explained why White was not competent to give a deposition. He then, obviously, expounded that on his report at Docket Entry 110.

Dr. Stelmach also persuasively testified during the competency hearing why White could not be restored to competence through medication.

As for Dr. Rigsbee's report, the report is at Docket Entry 102, was filed with the Court on November 7, 2018, it's dated October 22nd, 2018. Dr. Rigsbee did not interview White as part of his evaluation but the lack of an interview is not material to his findings. Dr. Rigsbee's report records the material that he reviewed at pages 2 and 3, including the forensic evaluation authored by Dr. Stelmach, dated August 22nd, 2018, is in the record at Docket Entry 89.

Dr. Rigsbee's report recounts the mental status evaluation associated with Mr. White and also does a medical psychiatric review at pages 3 and 4. Dr. Rigsbee also recounts the variety of psychological testing that has been conducted on White over the course of a number of years.

For example, Dr. Rigsbee's report recounts that while White was at the FDC CTAC in Washington during 2012, he was administered the Wechsler Adult Intelligence Scale, Fourth Edition, an objective measure of intellectual functioning. The result of the WAIS 4 reflected that White was in the extremely low range of intellectual functioning, attaining an estimated full scale intelligence quotient and general ability index score of 61. These scores placed him in the first percentile indicating that 99 percent of the individuals his own age would score better than White. His score in the four indices were verbal comprehension, 63; perceptual reasoning, 67; working memory, 55; and processing speed, 62. Each of these index scores fell into the extremely low range of intellectual functioning and there was no significant difference between these index scores.

The results of the WAIS 4 were noted to be inaccurate as to White's true intellectual functioning according to Dr. Rigsbee. Dr. Rigsbee also recounted various other tests conducted on White over the course of a number of years, including a test by Dr. Weaver, O'Connor, Pinuto, and Ms. Corr (ph), where White was administered the WAIS 4 and the word reading subtest. On that WAIS 4 he obtained an FS IQ of 55, which fell into the impaired, extremely low range. Dr. Rigsbee's report then recounts the details

associated with that report and other neuropsychological testing done on Mr. White.

The report also recounts various assessments of individual adaptive functioning, and Dr. Rigsbee opined at page 6 that White's history, as reflected in the records he had reviewed, appeared to establish that White does have an intellectual disability. White -- excuse me -- Dr. Rigsbee opined that the intellectual disability was mild as between Dr. Rigsbee and Dr. Stelmach's. The report credits the opinion of Dr. Stelmach and finds that the intellectual disability of Mr. White is moderate to severe.

Dr. Rigsbee's report then ultimately answered the question the Court had asked to be assessed and Dr. Rigsbee opined as follows: That White's history reflects he has demonstrated only limited factual knowledge of the roles of trial participants, he has not demonstrated an understanding of the circumstances surrounding prior or current allegations, the adversarial nature of the proceedings or the possibility of any penalties if he is convicted. That's according to Dr. Rigsbee.

The results of prior evaluations suggest White would not demonstrate an understanding of the consequences in the event he is civilly committed under Section 4248. While he appears to have demonstrated the ability to remember certain facts surrounding legal proceedings, White has been unable to formulate a complete understanding of such facts, such as, what the members of a jury actually assess or what would occur in the event of a hung jury. Despite various attempts of providing

White with education on the trial process within the Bureau of Prisons, White continues to be unable to apply factual information about the court to his own legal situation. There does not appear to have been a noted improvement in his functional ability since his prior competency evaluations.

More recent forensic evaluations where he was examined under Section 4248 describe him as a low-functioning individual -- a low-functioning individual who had difficulties articulating basic current information, such as the reason why he was presently at FMC Butner.

Additionally, it was also conveyed he had poor social skills and needed others to help him function in an appropriately social manner. He requires the assistance of his peers to help him write letters and communicate with others, has problems with social judgment, demonstrates impairment in managing his finances, and has never lived independently.

According to Dr. Rigsbee, this evidence suggests that the features of his intellectual disability have not improved to the point where he would be able to understand the nature and consequences of the civil proceedings against him or properly assist in his defense. According to Dr. Rigsbee, it is his opinion that White is currently suffering from a mental disease or defect which renders him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Dr. Rigsbee also opined that White's prognosis with regard to restorability to competency is poor, as Dr.

Rigsbee opined, intellectual disability is a condition that is unamenable to change. Although White has demonstrated cooperation with directions when given, he will continue to need assistance from others in order to manage his activities of daily living.

In sum, White is currently suffering from a mental disease or defect, that is, 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.

White also suffers from fetal alcohol syndrome. 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.

The Court credits the testimony and reports of Dr. Stelmach and finds that White is presently suffering from mental disease or defect, that is, 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 this Section 4248 proceeding.

White also suffers from fetal alcohol syndrome. 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 26th, 2018, at Docket Entry 103. Competency is relevant in a Section 4248 proceeding

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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. See Docket Entry 103, at pages 2 through 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 Docket Entry 103, at pages 10 through 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 the Section 4248 proceeding and dismisses without prejudice this Section 4248 proceeding.

The government's case against White under 18 U.S.C. Section 4246 remains pending before the Honorable W. Earl Britt. See *United States v. White*, 5:18-hc-2295-BR, Eastern District of North Carolina.

I've signed an order incorporating by reference my findings and conclusions.

I thank counsel for their work in connection with the case.

Anything from the United States?

MR. DODSON: No, Your Honor. But, just to be clear, White is being remanded to custody pending the 46 proceeding?

THE COURT: Correct. He is Judge Britt's person now. This case -- he is not in my court under 4248 as of right now.

MR. DODSON: Understood. We just -- the government just wanted to ensure that if -- if such a ruling were coming from the Court, which sounds like it's not, we just request a stay of that so we can consider whether to appeal or consult the Department of Justice to get such authorization.

THE COURT: You mean, if he were getting out?

MR. DODSON: Right. So, I mean, we just want to make sure that any -- any release would be stayed pending --

THE COURT: Right. I didn't order him to be released. I said that he is now subject to the proceeding under 4246, so I would expect y'all to get on Judge Britt's docket.

MR. DODSON: Thank you, Your Honor.

THE COURT: I do thank y'all for your work.

Anything else, Ms. DiLauro?

MS. LITTLE: Can we heard very briefly?

THE COURT: Okay.

MS. LITTLE: This is maybe hyper-technical, but out of an abundance of caution, my understanding was that the last ruling from the Court has been that our motion to dismiss was dismissed without

prejudice, in the Court's Order at Docket Entry 95. In light of this Court's Order on competency, we would just ask that that motion be renewed so that it could be granted today.

THE COURT: Okay. It's -- it's -- well, I -- even though they removed the gavel, in my mind, it was still pending, and so to the extent that the clerk's office's removal of a gavel next to a motion means that it's not pending, I always considered it to be pending. That's why we were having this hearing.

MS. LITTLE: Thank you, Your Honor.

MS. MAHAN: Thank you, Your Honor.

MR. DODSON: Thank you, Your Honor.

(The foregoing proceedings concluded at 2:44 p.m.)

143a

APPENDIX K

[REDACTED]

144a
[REDACTED]

145a

[REDACTED]

146a

[REDACTED]

147a

[REDACTED]

148a

[REDACTED]

149a

[REDACTED]

150a

[REDACTED]

151a

[REDACTED]

152a

[REDACTED]

153a

[REDACTED]

154a

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155a

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156a

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157a

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158a

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