

NOV 14 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
11-SO-4

DENNIS P. IAVARONE, CLERK
US DISTRICT COURT, EDNC
BY  DEP CLK

IN RE:
PROCEDURES FOR COMMITMENTS
UNDER 18 U.S.C. § 4248)

**STANDING ORDER
OF THE COURT**

This Standing Order is hereby entered to establish prehearing procedures for cases arising under 18 U.S.C. § 4248 (“§ 4248”). This Standing Order supersedes Standing Order No. 10-SO-01, which also dealt with prehearing procedures in § 4248 cases, on the terms provided herein. The court recognizes that there continues to be a need for a standing order on the administration and management of § 4248 cases given the continued pendency of numerous such cases before the court. But it also recognizes that the resolution of appellate proceedings pending at the time of the prior standing order and experience with these cases since entry of the prior order warrant the changes reflected herein. The court therefore ORDERS as follows:

1. Scope. The terms of this Standing Order shall apply to all cases arising under § 4248 commenced after entry of this Standing Order, and, insofar as just and practicable, to all cases pending at the time of its entry as determined by the court on a case-by-case basis. The terms of this Standing Order may be modified in any individual case upon motion of the parties for good cause shown or by the court on its own motion.

2. Interpretation. In light of both the nature of a § 4248 proceeding, which results in detention of a prisoner beyond the period of incarceration that would otherwise apply, and the history of proceedings in § 4248 cases in this court,¹ the prehearing schedule set forth herein has been

¹See United States v. Broncheau, 645 F.3d 676, 681, 687 n.10 (4th Cir. 2011).

designed specifically to assure that these cases proceed in the most expeditious manner practicable while providing the parties sufficient opportunity to prepare for the commitment hearing. The terms of this Standing Order, particularly the time periods specified for prehearing matters, will accordingly be narrowly interpreted and strictly enforced. All requests for extension of time periods specified in this Standing Order must be supported by a showing of good cause and diligence by the requesting party. Counsel for the parties are expected to undertake advanced planning at each stage of the prehearing schedule necessary to prevent avoidable delays (e.g., establishing tentative dates for depositions of examiners at the time they are proposed). Issues that have the potential to cause delay and that require court action to resolve shall be brought to the court's prompt attention by written motion, at regular or ad hoc status conferences the court may hold to help ensure the timely progression of cases, or at other court proceedings, as appropriate.

3. Commencement of Proceeding. The government shall commence a proceeding against a person under § 4248 by filing a certificate that the person is a sexually dangerous person in accordance with § 4248(a). The certificate shall be attached to a petition requesting civil commitment of the person under § 4248. The petition shall name the person as the respondent and be signed by counsel for the government. Counsel's signature shall be subject to the requirements of Rule 11 of the Federal Rules of Civil Procedure. The government shall serve the petition, including the certificate, on the respondent, the Office of the Federal Public Defender, and, if the respondent was committed pursuant to 18 U.S.C. § 4241(d) by a court other than this court, the clerk of the other court, in accordance with § 4248(a).

4. Scheduling Order. Promptly after the filing of the petition, the court will enter a scheduling order that provides for appointment of counsel for the respondent. The appointment of counsel will be subject to confirmation that the respondent seeks and is entitled to appointment of

counsel. The scheduling order will also set forth a prehearing schedule consistent with the prehearing procedures set forth below, but the terms of this Standing Order apply to individual cases in the absence of entry of a scheduling order. The parties shall not be required to conduct an initial scheduling conference pursuant to Fed. R. Civ. P. 26(f).

5. Mental Health Examinations of the Respondent.

(a) *Definition of "Examiner" and "Expert."* As used in this Standing Order, "examiner" refers to a person who performs a psychiatric or psychological examination of the respondent, as under 18 U.S.C. § 4247(b). "Expert" refers to a person who qualifies or purportedly qualifies as such under Fed. R. Evid. 702. "Examiners" are deemed to be "experts," but "experts" also includes persons who are not examiners.

(b) *Court-Selected Examiner.* Within 14 days after the filing of the petition, the court will enter an order appointing a licensed or certified psychiatrist or psychologist to conduct an examination of the respondent in accordance with 18 U.S.C. § 4247(b). The court will maintain a list of licensed or certified psychiatrists or psychologists from which it may make the appointment. The parties may from time to time submit names for inclusion on the list. Any such submission shall include for each person a curriculum vitae or comparable documentation demonstrating the person's qualifications and providing contact information for the person. The parties may also propose, by agreement or separately, examiners for appointment in a particular case. Any proposal for appointment of a person not already named in the court's list shall include a curriculum vitae or comparable documentation as described above. The court will in its discretion select and appoint, pursuant to 18 U.S.C. §§ 4248(b) and 4247(b), an adequately qualified examiner, who need not be one on the court's list or one proposed by the parties.

(c) *Additional Examiner Selected by the Respondent.* Within 30 days after the filing of the petition, the respondent may file a motion, pursuant to 18 U.S.C. § 4247(b), for the appointment of an additional examiner selected by the respondent. Any such motion shall include a certification that the expert has agreed to perform the examination and the proposed date for it, and the expert's curriculum vitae or comparable documentation demonstrating the person's qualifications and providing contact information for the person. The motion may also be supported by a memorandum, as appropriate. Upon finding that the proposed examiner is adequately qualified, the court will enter an order appointing him or her as an additional examiner selected by the respondent pursuant to 18 U.S.C. § 4247(b). In exceptional cases, the court may in its discretion appoint a second respondent-selected examiner under 18 U.S.C. § 4247(b) upon a timely motion by the respondent meeting the foregoing certification and documentation requirements and showing that the appointment is needed in light of the examinations of the respondent already ordered or completed and that the additional examination would not unduly delay the commitment hearing.

(d) *Non-testifying Examiner Retained by the Respondent.* The respondent may without undue delay move, ex parte and under seal if he chooses, for approval for an expert he has retained pursuant to Fed. R. Civ. P. 26(b)(4)(D) to conduct an examination of him. Any such motion shall include a certification that the expert has agreed to perform the examination and the proposed date for it, and the expert's curriculum vitae or comparable documentation demonstrating the expert's qualifications and providing contact information for the expert. The motion shall be supported by a memorandum showing that the examination is needed in light of any examinations of the respondent already ordered or completed and that the additional examination would not unduly delay the commitment hearing. Examiners retained pursuant to Fed. R. Civ. P. 26(b)(4)(D) and examinations and reports by them are not subject to the provisions of subparagraphs (b), (c), (e), (f),

(g), or (h), which apply to examiners appointed pursuant to 18 U.S.C. § 4247(b) and examinations and reports by them. Experts retained pursuant to Fed. R. Civ. P. 26(b)(4)(D) constitute such whether compensated under 18 U.S.C. § 3006A or from some other source.

(e) *Information Considered by Examiners.* The responsible counsel, as specified in subparagraph (g) below, shall serve on any examiner appointed under 18 U.S.C. § 4247(b) the parties' initial disclosures and, to the extent they are available before the examiner files his or her own report, the reports of any other examiners of the respondent appointed pursuant to 18 U.S.C. § 4247(b). The disclosures and reports shall be served on the examiner within 3 days after entry of the order appointing him or her, but if the disclosures or reports are not then available, within 3 days after the disclosures are made and the reports filed. The examiner may consider such other documents as he or she deems appropriate, provided that such documents are served on counsel for the parties at or before the time the examiner's report is filed.

(f) *Time for Examinations.* In accordance with 18 U.S.C. § 4247(b), an examination of the respondent ordered pursuant to that statute shall be conducted within 45 days after entry of the order appointing the examiner. An extension of up to 30 days may be granted upon a showing of good cause.

(g) *Reports of Examinations.* Each examiner appointed under 18 U.S.C. § 4247(b) shall prepare a written report on his or her examination of the respondent containing the information prescribed by 18 U.S.C. § 4247(c), as well as the examiner's curriculum vitae or comparable documentation demonstrating the examiner's qualifications. The report shall be filed within 14 days after the examination, under seal without further order of the court, with copies provided to counsel for each party. An examiner shall supplement the report (in the form of either a separate supplement to the prior report or an entire supplemental report) based on information received after the filing of

the report or otherwise as the examiner deems necessary in his or her professional judgment to make the report complete or to correct it. The supplement shall be filed promptly after the need for it arises and before the close of discovery. It shall be filed under seal without further order of the court, with copies provided to counsel for each party.

(h) *Communication with Court-Appointed Examiners.* Counsel for neither party may be present during any examination pursuant to 18 U.S.C. § 4247(b), absent court approval. Counsel may communicate with an examiner appointed pursuant to 18 U.S.C. § 4247(b) concerning payment of the examiner's fees, scheduling matters, service of documents on the examiner for review, requests by the examiner for extensions of time or other relief sought by the examiner to facilitate completion of his or her duties, the filing of the report of the examiner or addenda thereto, and other logistical matters, but may not communicate in writing, orally, or in any other manner with the examiner about the substance of the examiner's examination of the respondent, the report on the examination, or other matters relating to the merits of the proceeding against the respondent except during questioning at a deposition or hearing without leave of court. Communications by counsel with any person counsel is considering proposing for appointment as an examiner pursuant to 18 U.S.C. § 4247(b) are subject to the same foregoing limitations that apply to communications with examiners who have been so appointed, except that permissible topics also include the person's availability to serve as an examiner and the acquisition of the person's curriculum vitae or comparable documentation of the person's qualifications. The timely filing of motions for extensions or for other suitable relief sought by examiners appointed pursuant to 18 U.S.C. § 4247(b), the timely transmission of disclosures to such examiners, the timely filing of the reports of such examiners, and the timely completion of other such tasks shall be the responsibility of counsel

for the respondent, in the case of respondent-selected examiners, and of counsel for the government, in the case of other court-appointed examiners.

(i) *Payment of Examiners.* Pursuant to this court's Order of 19 May 2011 (D.E. 58 at 13–15) in United States v. Gloshey, No. 5:08-HC-2051-BR, the costs of any examiners appointed under this Standing Order pursuant to 18 U.S.C. § 4247(b) and any examiners retained pursuant to Fed. R. Civ. P. 26(b)(4)(D) shall be paid in accordance with the Guidelines for Administering CJA and Related Statutes applicable to cases under 18 U.S.C. § 4246, 7A *Guide to Judiciary Policy* § 320.20.60(g), (i), pending ultimate resolution of the allocation of responsibility for payment of such costs within the federal bureaucracy. The costs subject to payment include those for the examiner's examination, report, and deposition and hearing testimony.

(j) *Appointment and Approval Process as Exclusive.* Any examination of the respondent performed for purposes of the proceeding against him under § 4248 shall be performed only by an examiner appointed by the court under 18 U.S.C. § 4247(b) or by an expert retained under Fed. R. Civ. P. 26(b)(4)(D) performing the examination with court approval.

6. Initial Disclosures.

(a) *Government.* Within 14 days after the filing of the petition and subject to supplementation under Fed. R. Civ. P. 26(e), counsel for the government shall provide to counsel for the respondent the disclosures set out below. For purposes of this subparagraph (a), “the government” shall mean the U.S. Attorneys’ Office for the Eastern District of North Carolina and materials shall be deemed to be in the possession of the government if they are in the possession of a governmental investigative agency closely connected to the government.

(i) The names and addresses of each person the government anticipates calling as a witness at the commitment hearing, along with a concise description of the expected

testimony of the person, which information shall be in lieu of that required by Fed. R. Civ. P. 26(a)(1)(A)(i).

(ii) Any report on any psychiatric or psychological examination of the respondent in the possession, custody, or control of the Bureau of Prisons (“BOP”) or the government.

(iii) All medical and psychological records relating to the respondent in the possession, custody, or control of the BOP or the government.

(iv) Sex Offender Data System (“SODS”) records in the possession, custody, or control of the BOP or the government.

(v) The Central File for the respondent with the exception of the FOIA-exempt section unless that section is subject to disclosure under subparagraph (vii) below.

(vi) The Judgment & Commitment File for the respondent in the possession of the BOP.

(vii) All documents in the possession, custody, or control of the BOP or the government reviewed by any psychiatrist or psychologist who examined the respondent.

(viii) Any report by any expert that tends to show that the respondent is not a sexually dangerous person within the meaning of 18 U.S.C. § 4247(a)(5), and all documents reviewed by any such examiners or other experts.

(ix) Any other documents described in Fed. R. Civ. P. 26(a)(1)(A)(ii).

(b) *Respondent.* Within 45 days after the filing of the petition and subject to supplementation under Fed. R. Civ. P. 26(e), counsel for the respondent shall provide to counsel for the government the following disclosures to the extent not already provided by the government:

- (i) The names and addresses of each person the respondent may call as a witness at the commitment hearing, along with a concise description of the expected testimony of the person, which information shall be in lieu of that required by Fed. R. Civ. P. 26(a)(1)(A)(i).
- (ii) Copies of all mental health evaluation or treatment records relating to the respondent, but only to the extent they would be required to be produced under Fed. R. Civ. P. 26(b) if the government had sent a request for production of documents. In lieu of production, the respondent may identify with particularity the name, address, and telephone number of all mental health providers from whom he has received evaluation or treatment, along with any signed release as may be necessary, authorizing the provider(s) to release such records to the government. This paragraph is not intended to prevent counsel for the respondent from objecting to the disclosure of such records, or from filing a motion for a protective order pursuant to Fed. R. Civ. P. 26(c).

7. Expert Disclosures and Discovery.

(a) *Experts Covered.* The experts to whom this paragraph applies include those who are initially retained as non-testifying experts under Fed. R. Civ. P. 26(b)(4)(D), but who subsequently become testifying experts. In addition, this paragraph does not apply to examiners appointed under 18 U.S.C. § 4247(b) and their reports, which are governed by paragraph 5.

(b) *Required Disclosures.* Within 60 days after the filing of the petition and subject to the protections of Fed. R. Civ. P. 26(b)(4)(B) and (C) and supplementation under Fed. R. Civ. P. 26(e), counsel for each party shall provide to counsel for the other party to the extent not already produced to such counsel the following disclosures:

(i) A report by each expert whose testimony the party may use at the commitment hearing other than solely for impeachment, and all documents reviewed by each such expert.

(ii) Any other disclosures required by Fed. R. Civ. P. 26(a)(2).

(c) *Rebuttal and Surrebuttal Expert Reports.* Pursuant to Fed. R. Civ. P. 26(a)(2)(D)(ii), a party shall disclose any rebuttal or surrebuttal reports solely to contradict or rebut evidence on the same subject matter identified by the other party within 21 days after the other party's expert disclosures or 7 days prior to the close of discovery, whichever is earlier.

(d) *Filing of Reports and Records.* All psychiatric and psychological evaluations of the respondent and any other medical, psychiatric, or psychological records that are filed with the court, in support of a motion or otherwise, shall be filed under seal without further order of the court. The requirement to file documents under seal in this and any other provision of this Standing Order does not obviate service of such documents on opposing counsel.

8. Notice of Proposed Commitment Hearing Dates. Within 75 days after the filing of the petition, counsel shall file a joint notice of proposed commitment hearing dates signed by counsel. The notice shall provide at least three sets of dates, which should to the extent practicable be no later than 90 days after the deadline for dispositive motions, on which counsel, any court-appointed examiners, any other experts, and any lay persons the parties intend to call as witnesses can be available for the commitment hearing. The selection of dates shall reflect the expected length of the commitment hearing.

9. Discovery Period. The parties may engage in any discovery allowed by the Federal Rules of Civil Procedure, except as provided herein, beginning upon service of the petition on respondent. Discovery shall be commenced in time to be completed no later than 110 days after the filing of the

petition. This deadline may be shortened or extended by the court on motion of a party for good cause shown, pursuant to Fed. R. Civ. P. 16, or on the court's own motion. Absent an order of the court, the parties shall limit any depositions to expert witnesses and the respondent. Counsel are reminded of Local Civil Rule 26.1(d), EDNC, regarding the expedited briefing schedule applicable to discovery disputes.

10. Access to the Respondent and Records. It is necessary that the respondent's counsel and examiners have access to the respondent and the respondent's records in the possession of the BOP in order to evaluate the respondent and prepare for the commitment hearing. To ensure the necessary access, the BOP will appoint a person to serve as a contact to coordinate visits of counsel and examiners and to procure the necessary records. Absent institutional emergencies, the BOP shall make the respondent available at any reasonable time during the institution's normal business hours, upon at least 24 hours' prior notice. The failure of BOP to reasonably make the respondent available may result in discovery sanctions levied against the government, including striking witnesses.

11. Document Production.

(a) *Definition of "Documents."* The term "documents" as used in this Standing Order means "documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form" Fed. R. Civ. P. 34(a)(1)(A).

(b) *Bates Stamping.* All documents produced in discovery by either party, whether as part of the party's initial disclosures or otherwise, shall bear a unique "Bates" (or other similar) number assigned to it, and shall be produced electronically in either .pdf, .tif, or .tiff format, unless the parties mutually agree to a different format.

(c) *Certificate of Service.* All disclosures and other documents served shall be accompanied by a certificate of service, in accordance with Fed. R. Civ. P. 5(d)(1).

(d) *Rolling Production.* All documents shall be produced on a rolling basis—that is, they shall be produced as soon as practicable after they are ready for production without awaiting the preparation of other documents for production.

(e) *Redaction of Personal Identifiers.* As required by Fed. R. Civ. P. 5.2 and this court's CM/ECF Policy K, the parties shall redact all documents filed to remove Social Security numbers, dates of birth, names of minors, financial account numbers, home addresses, and identifying information concerning victims.

(f) *Confidential Information.*

(i) If counsel for a party in good faith believes that a document contains information that would present a risk of harm to respondent or others if shown to respondent, such counsel may designate such document on its face as "Attorney's Eyes Only." Any document so marked shall not be shown to the respondent without the consent of opposing counsel or an order of this court.

(ii) Presentence reports ("PSRs") not designated "Attorney's Eyes Only" may be shown to the respondent, but his attorney must retain all copies and may not leave the PSRs, or allow the PSRs to remain, in the possession of the respondent. Counsel for a respondent shall promptly retrieve from the respondent any PSRs that were previously provided to the respondent and that remain in the respondent's possession at the time this Standing Order is entered.

(g) *Confidentiality Agreement.* Before being shown any initial disclosures or any documents or information produced in discovery, an examiner or other expert, whether appointed by the court

or retained without court appointment, must sign a Confidentiality Agreement in the form appended to this Standing Order as Attachment A. An examiner or other expert may be shown documents designated as “Attorney’s Eyes Only” after execution of the Confidentiality Agreement. It is counsel’s responsibility to file Attachment A with the court after the examiner or other expert signs it; provided that, in lieu of filing, counsel may retain until the final resolution of the case, including all appeals, Confidentiality Agreements of non-testifying examiners or experts who permissibly have not otherwise been disclosed. Any violation of the Confidentiality Agreement may subject the person signing it to sanctions by the court, including contempt.

12. Motions Deadlines.

(a) *Discovery Motions.* Any motions for relief relating to particular disclosures, discovery requests or responses, or deposition notices, including motions to compel and for protective orders, shall be filed within 14 days after service of the disclosures, requests or responses, and notices prompting the motion, but in no event later than the close of discovery.

(b) *Dispositive Motions.* Any potentially dispositive motions shall be filed within 21 days after the expiration of the discovery period.

13. Prisoner Transport. The court recognizes the right of the respondents to waive their attendance at court proceedings given the non-criminal nature of § 4248 cases. Respondents who refuse to be transported from the Butner Federal Correctional Complex should not be compelled to leave. But the proceedings in their respective cases will go forward without them. It shall be the responsibility of counsel for each respondent to communicate this policy to his or her client.

14. Final Prehearing Disclosures. Unless there is a pending motion to compel, the parties shall serve final prehearing disclosures pursuant to Fed. R. Civ. P. 26(a)(3) within 7 days after the close of discovery and any objections pursuant to Fed. R. Civ. P. 26(a)(3) within 14 days after the

close of discovery. They shall file a joint (or separate) final prehearing order(s) within 21 days after the close of discovery. No final prehearing conference will be required unless the parties cannot agree on a final prehearing order or unless otherwise ordered by the court. The district judge assigned to the case, or, upon referral by the district judge, a magistrate judge, shall review the proposed final prehearing order(s), conduct a final prehearing conference as necessary pursuant to the provisions of Local Civil Rules 16.1(d) and 72.3(h)(2), EDNC, and enter a final prehearing order.

15. Referral to Magistrate Judges. In a case arising under § 4248, a magistrate judge shall have the same authority over non-dispositive and dispositive matters that is provided a magistrate judge in civil cases generally under L. Civ. Rules 72.1 to 72.4, E.D.N.C., and 28 U.S.C. § 636(a), (b)(1) and (3), (c). The authority of a magistrate judge shall include specifically and without limitation the authority (i) to conduct the commitment hearing and to submit to the presiding district judge a report containing proposed findings of fact and recommendations on disposition of the case on the merits, pursuant to Local Civil Rule 72.3(c)(1), (h)(10), EDNC, and 28 U.S.C. § 636(b)(1)(B), (b)(3), and (ii) to conduct the commitment hearing and to dispose of the case on the merits with consent of the parties, pursuant to Local Civil Rules 72.2(b) and 72.3(g), (h)(10), EDNC, and 28 U.S.C. § 636(b)(3), (c). If the parties consent to hearing and disposition of the case by a magistrate judge pursuant to Local Civil Rule 72.2(b), EDNC, and 28 U.S.C. § 636(c), they shall file a completed consent form as soon as practicable. The parties are free to withhold consent without adverse substantive consequences.

16. Conditional Release. In the case of a conditional release under § 4248(e), the proposed order allowing conditional release shall contain language stating that if a request to modify or terminate the conditions of release is made, the party so requesting shall submit adequate documentation supporting the request to the court, with copies to the Supervising U.S. Probation

Officer, the offices of the United States Attorney and counsel for the respondent, and the warden of the facility where the respondent was last housed prior to his conditional release.

SO ORDERED. This 14 day of November 2011.



JAMES C. DEVER III
Chief United States District Judge

ATTACHMENT A
CONFIDENTIALITY AGREEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
[CASE NUMBER]

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.)
)
[RESPONDENT'S NAME],)
)
Respondent.)

**CONFIDENTIALITY
AGREEMENT**

declares that:

I am currently employed by _____ located at _____.

_____ and my current job title is _____.

My office telephone number is _____.

I have read and I understand the terms of paragraph 11(e), (f), and (g) of the Standing Order on cases arising under 18 U.S.C. § 4248, 11-SO-4 ("the Standing Order"), as well as any scheduling order entered in the above-captioned case, pending in the United States District Court for the Eastern District of North Carolina. I agree to comply with and be bound by the terms of the Standing Order and any scheduling order herein. I understand that any violation of the Standing Order or any scheduling order herein may subject me to sanctions by the court, including contempt. I shall not disclose any document marked "Attorney's Eyes Only" to the above-named respondent or to anyone else other than those specifically authorized by the Standing Order and any scheduling order herein.

I shall not copy or use any such document except for the purposes of this action and pursuant to the terms of the Standing Order and any scheduling order entered herein.

I submit myself to the jurisdiction of the United States District Court for the Eastern District of North Carolina ("court") for the purpose of enforcing or otherwise providing relief relating to the Standing Order or any scheduling order herein. I understand that this Confidentiality Agreement may be filed with the court.

Signed this _____ day of _____, 20 ____.

Signature

Printed Name