

FILED

AUG 04 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
10-SO-01

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

IN RE:)
PROCEDURES FOR COMMITMENTS) STANDING ORDER
UNDER 18 U.S.C. § 4248) OF THE COURT

This order is hereby entered to provide a prehearing schedule for any case arising under 18 U.S.C. § 4248. Due to the number of § 4248 cases pending in this district, the court recognizes the need for the issuance of an order governing the administration and management of this litigation. With this in mind, the court hereby ORDERS:

1. **Application and Commencement of Deadlines.** The terms of this order shall apply to all cases arising under 18 U.S.C. § 4248. For all cases listed in Attachment A [cases seeking a hearing], the time periods set forth in this order (i.e., time periods for completion of discovery and motions practice, etc.) shall begin to run from the date of this order. For all cases listed in Attachment B [cases seeking further appellate litigation], the time periods set forth in this order shall begin to run from the conclusion of any appellate litigation, or from any subsequently filed motion for a hearing. For all other cases,¹ the time periods set forth in this order shall begin to run from the date counsel for the respondent enters a Notice of Appearance. The terms of this order may be modified in any individual case upon motion of the parties or otherwise for good cause shown.

2. **Initial Procedures.** In all commitment petitions under 18 U.S.C. § 4248 filed after the date of this order, the government shall electronically file the petition as a certificate of a sexually dangerous person, along with an attached certification of a sexually dangerous person as required

¹ This includes current pending cases in which counsel has not yet been assigned, and all subsequently filed cases.

by 18 U.S.C. § 4248(a), and an attached proposed order. Where the respondent was admitted to this district from another district by way of order under 18 U.S.C. § 4241, the government shall also electronically file a notice that the court which ordered the § 4241 evaluation has been notified of the pending action against the respondent in this district. The attached proposed order will order the appointment of counsel for the respondent, and the appointment of up to two additional mental health examiners of the respondent's choosing under 18 U.S.C. § 4247(b), and direct the filing of all future forensic reports under seal. In light of the provisions of this standing order, the parties will not be required to conduct an initial scheduling conference pursuant to Fed. R. Civ. P. 26(f), and upon the filing of a petition for commitment, or as otherwise appropriate in the cases listed in Attachments A and B, the court shall enter an individual scheduling order as set forth in Attachment C.

3. Motions Practice and Deadlines.

(a) *Motions to Dismiss or for Transfer of Venue.* Until such time as the final determination by an appellate court of “any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution[.]” United States v. Comstock, ___ U.S. ___, 130 S. Ct. 1949, 1965 (2010), counsel for the respondent shall file such motion(s) on these issues² in any subsequently filed cases within fourteen (14) days of entering a Notice of Appearance, along with any motion(s) for transfer of venue. In all cases listed in Attachments A and B, counsel shall file any motion(s) for transfer of venue or for dismissal on other grounds within forty-five (45) days. This deadline will not prevent counsel or the court from raising jurisdictional issues later in the proceedings.

² Counsel have already filed such motions in all cases listed in Attachments A and B.

(b) *Motions for Hearing.* Until such time as the final determination by an appellate court of “any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution[,]” (Sup. Ct. Slip Op. at 22), if an individual respondent would like to proceed with the litigation of the government’s petition for his commitment, counsel for the respondent shall inform the court of the respondent’s desire to proceed with a hearing by filing a motion for a hearing.³ Such motion shall be filed within fourteen (14) days of the date counsel for the respondent enters a Notice of Appearance, or in all cases as soon as practicable after the respondent informs his counsel of his desire to litigate the commitment petition.

(c) *Other Motions.* No motion shall be filed unless the motion includes a certification that the movant has conferred with opposing counsel in a good faith effort to resolve the matter without court action. Counsel are reminded of Local Civil Rules 7.1, 7.2, 7.4, 10.1, and 10.2, E.D.N.C., regarding this court’s motions practice, as well as Fed. R. Civ. P. 37(a)(2).

4. Discovery Practice and Deadlines.

(a) *Government’s Required Initial Disclosures.* In any case which is anticipated to proceed to hearing, counsel for the government shall provide to counsel for the respondent the following disclosures pursuant to Fed. R. Civ. P. 26(a)(1) within sixty (60) days. The specific descriptions of disclosures listed below do not relieve any party of disclosing other types of information as required in a particular case:

- (i) The report(s) from the examiner(s) designated by the government and any other expert report already obtained by the government for experts it intends to use in its

³ Counsel have already filed such motions in all cases listed in Attachment A.

case in chief.

(ii) All medical and psychological records in the possession of the Bureau of Prisons (“BOP”) or the government.

(iii) Sex Offender Data System (SODS) records in the possession of the BOP or the government.

(iv) The Central File for the respondent. The government will not be required to disclose the FOIA-exempt section of the Central File, unless that section was reviewed by the mental health examiner.

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

(vi) All documents reviewed by the examiners designated by the government or any other expert identified by the government.

(vii) Any other documents required under Fed. R. Civ. P. 26(a)(1).

(b) *Respondent’s Required Initial Disclosures.* Within sixty (60) days after the government provides its initial disclosures pursuant to the above paragraph, counsel for the respondent shall provide respondent’s initial disclosures under Fed. R. Civ. P. 26, which shall name all persons respondent anticipates calling at the hearing and shall also include copies of the following documents (except to the extent that they are the same documents produced by the government):

(i) The report(s) of the examiner(s) designated by respondent and any other expert report already obtained by the respondent for experts the respondent intends to use at hearing. Any reports from examinations done pursuant to Fed. R. Civ. P. 26(b)(4)(B) do not need to be produced.

(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(a) or (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 phone 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).

(iii) All documents reviewed by additional mental health examiners designated by the respondent or any other expert identified by the respondent.

(c) *Rebuttal and Surrebuttal Reports.* The parties may file one rebuttal or surrebuttal report “solely to contradict or rebut evidence on the same subject matter . . . within 30 days after the other party’s disclosure” as provided in Fed. R. Civ. P. 26(a)(2)(C)(ii).

(d) *Filing of Reports.* Each party shall electronically file with the court, under seal, a copy of any examiner’s report when the party delivers the report to opposing counsel. The reports must contain the information required in 18 U.S.C. §§ 4247(a)(6) and (c), as well as the witness’s qualifications, preferably in the form of a curriculum vitae.

(e) *Access to Respondent and Records.* It is necessary that respondent’s counsel and additional mental health examiners have access to the respondent and the respondent’s records in order to evaluate the respondent and prepare for the hearing. To ensure the necessary access, the

BOP will appoint a person to serve as a contact to coordinate visits of counsel and additional mental health examiners and 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.

(f) *Scope of Identification of Witnesses.* Neither party must list in its initial disclosures a full list of every individual who may have discoverable information. Rather, each side must list only those individuals it anticipates it may call as a witness at the hearing, along with a concise description of what that person is expected to testify about at the hearing.

(g) *Limitations on Expert Discovery.* Absent an order of the court, both parties will be limited to two (2) expert witnesses. Neither party will, without the consent of counsel for the other party, communicate with the examiner(s) designated by the other party, other than as provided by the Rules of Civil Procedure. Counsel for the government may communicate with the additional mental health examiner(s) concerning payment of fees, scheduling of visits and other similar logistical issues, but not about the substance of the examination or evaluation, except as provided herein.

(h) *Document Production.*

(i) 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.

(ii) As required by Fed. R. Civ. P. 5.2 and this court's CM/ECF Policy K, the parties

shall redact all documents produced in discovery to remove Social Security numbers, dates of birth, names of minors, and identifying information concerning victims.

(iii) If either party contends that showing sensitive information to the respondent (rather than to his counsel) would be harmful to the respondent or others, counsel for the party may designate such document(s) as “Attorney’s Eyes Only” on the face of the document(s). Any document(s) so marked shall not be shown to the respondent without the consent of opposing counsel or an order of this court. However, such document(s), along with any other documents produced in discovery, may be shown to any expert examiner upon the examiner’s signing of the confidentiality agreement in Attachment D. It is counsel’s responsibility to file Attachment D with the court if an expert examiner signs it. Any violation of the confidentiality agreement may subject the person signing the agreement to sanctions by the court, including contempt.

(i) *Electronic Discovery.* Electronic discovery is not ordinarily necessary in cases arising under 18 U.S.C. § 4248. Absent an order of the court, neither party must make any special effort to retain or restore electronically stored information, other than the efforts the party normally makes in the ordinary course of business.

(j) *Additional Discovery.* For a period of sixty (60) days following the parties’ initial disclosures, the parties may engage in any other discovery allowed by the Rules of Civil Procedure. Absent an order of the court, the parties shall limit any depositions to expert witnesses and the respondent. Discovery shall end at the conclusion of this sixty (60) day period, absent an order of the court. Any motion to compel must be filed prior to the expiration of the discovery period.

Counsel are reminded of Local Civil Rule 26.1(d), E.D.N.C., regarding the expedited briefing schedule this district employs in discovery disputes.

5. Referral to Magistrate Judges.

Title 28, United States Code, Section 636(b)(3) provides that United States magistrate judges “may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States[.]” In other civil matters, this district routinely refers to magistrate judges discovery matters and pre-hearing conferences, as well as “the hearing and determination of all pre-hearing procedural and discovery motions, in accordance with Local Civil Rule 72.3(b).” L. Civ. R. 72.2, E.D.N.C. In addition, “[w]here designated by a judge, the magistrate judge may conduct additional pre-hearing conferences and hear motions and perform the duties set forth in Local Civil Rules 72.3(c), 72.3(d), 72.3(e) and 72.3(f).” It appears that it would not be inconsistent with the Constitution and laws of the United States to assign those duties to magistrate judges as they arise in these cases.

The district judges may in their discretion refer to the magistrate judges of this court such prehearing matters as set forth above, to conduct hearings as necessary and enter reports and recommendations for *de novo* review by a district judge. Pursuant to 28 U.S.C. § 636(c) and L. Civ. R. 72.2(b)(1), E.D.N.C., if the parties consent to hearing of the government’s petition by a magistrate judge, the parties shall file a notice indicating such consent as soon as practicable.

6. Final Prehearing Conference. 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 fourteen (14) days after the close of discovery, any objections pursuant to Fed. R. Civ. 26(a)(3) within twenty-one (21) days after the close of discovery, and file a joint (or separate) final prehearing order(s) within twenty-

eight (28) days after the close of discovery. No final prehearing conference will normally be required unless the parties cannot agree on a final prehearing order or if 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 L. Civ. R. 16.1(d) and 72.2(a), E.D.N.C., and enter a final prehearing order. The district judge assigned to the case will then set a date for hearing.

7. Conditional Release. In the case of a conditional release under 18 U.S.C. § 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 4th day of August, 2010.

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
Chief U.S. District Judge

ATTACHMENT A
(cases currently seeking a hearing)

<u>United States v. Combe</u>	5:07-HC-2025
<u>United States v. Antone</u>	5:07-HC-2042
<u>United States v. Brown</u>	5:07-HC-2062
<u>United States v. Frank</u>	5:07-HC-2062
<u>United States v. Griffis</u>	5:07-HC-2131
<u>United States v. Turner</u>	5:07-HC-2167
<u>United States v. Horn</u>	5:07-HC-2177
<u>United States v. Kopp</u>	5:07-HC-2185
<u>United States v. Fiscus</u>	5:07-HC-2204
<u>United States v. Edwards</u>	5:08-HC-2095
<u>United States v. Castrejon-Alvarez</u>	5:08-HC-2101
<u>United States v. John King</u>	5:09-HC-2076

ATTACHMENT B
(cases seeking further appellate litigation)

<u>United States v. Comstock</u>	5:06-HC-2195
<u>United States v. Catron</u>	5:06-HC-2202
<u>United States v. Matherly</u>	5:06-HC-2205
<u>United States v. Vigil</u>	5:06-HC-2206
<u>United States v. Revland</u>	5:06-HC-2212
<u>United States v. Broncheau</u>	5:06-HC-2219
<u>United States v. Miller</u>	5:06-HC-2228
<u>United States v. Hass</u>	5:07-HC-2015
<u>United States v. Hicks</u>	5:07-HC-2020
<u>United States v. Brown</u>	5:07-HC-2026
<u>United States v. Bolander</u>	5:07-HC-2032
<u>United States v. Bilagody</u>	5:07-HC-2049
<u>United States v. Moore</u>	5:07-HC-2050
<u>United States v. McGreevy</u>	5:07-HC-2063
<u>United States v. Wade</u>	5:07-HC-2078
<u>United States v. Barrett</u>	5:07-HC-2097
<u>United States v. Brown</u>	5:07-HC-2100
<u>United States v. Neuhauser</u>	5:07-HC-2101
<u>United States v. Villegas</u>	5:07-HC-2113
<u>United States v. Mays</u>	5:07-HC-2123

<u>United States v. Burkhardt</u>	5:07-HC-2125
<u>United States v. Doggett</u>	5:07-HC-2129
<u>United States v. Sheradin</u>	5:07-HC-2139
<u>United States v. Tobey</u>	5:07-HC-2166
<u>United States v. Martin</u>	5:07-HC-2176
<u>United States v. English</u>	5:07-HC-2187
<u>United States v. Thorns</u>	5:07-HC-2198
<u>United States v. Andrews</u>	5:07-HC-2205
<u>United States v. Erwin</u>	5:07-HC-2206
<u>United States v. Galo</u>	5:07-HC-2207
<u>United States v. Walker</u>	5:07-HC-2209
<u>United States v. Pardee</u>	5:08-HC-2032
<u>United States v. Maranda</u>	5:08-HC-2033
<u>United States v. Seger</u>	5:08-HC-2034
<u>United States v. Caporale</u>	5:08-HC-2037
<u>United States v. Gloshey</u>	5:08-HC-2051
<u>United States v. Wilson</u>	5:08-HC-2060
<u>United States v. Boyd</u>	5:08-HC-2061
<u>United States v. Lange</u>	5:08-HC-2070
<u>United States v. Yates</u>	5:08-HC-2073
<u>United States v. Garcia</u>	5:08-HC-2086
<u>United States v. Katon</u>	5:08-HC-2099

<u>United States v. Weisenberg</u>	5:08-HC-2104
<u>United States v. Arrington</u>	5:08-HC-2106
<u>United States v. Sneezer</u>	5:08-HC-2107
<u>United States v. Aldrich</u>	5:08-HC-2108
<u>United States v. Riedel</u>	5:08-HC-2155
<u>United States v. Heyer</u>	5:08-HC-2183
<u>United States v. Conant</u>	5:09-HC-2015
<u>United States v. Hamelin</u>	5:09-HC-2028
<u>United States v. Cooke</u>	5:09-HC-2034
<u>United States v. Simpson</u>	5:09-HC-2075
<u>United States v. Hall</u>	5:09-HC-2083
<u>United States v. Blackledge</u>	5:09-HC-2118
<u>United States v. Seyler</u>	5:09-HC-2133
<u>United States v. Wright</u>	5:09-HC-2160
<u>United States v. Shelton</u>	5:09-HC-2161
<u>United States v. Whiterock</u>	5:09-HC-2163
<u>United States v. Maclaren</u>	5:09-HC-2164
<u>United States v. Mahto</u>	5:09-HC-2165
<u>United States v. Daniel King</u>	5:10-HC-2009

ATTACHMENT C
INDIVIDUAL SCHEDULING ORDER

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

UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
)	
v.)	SCHEDULING ORDER
)	
[RESPONDENT’S NAME],)	
)	
Respondent.)	

This case comes before the court for the entry of a Scheduling Order pursuant to the court’s Standing Order on cases arising under 18 U.S.C. § 4248, 10-SO-XX. The court has appointed counsel for respondent.

The following deadlines and other provisions shall apply:

1. Counsel for respondent shall file any motion(s) to dismiss or for transfer of venue by [14 days in new cases, 45 days in current cases].

2. Counsel for respondent shall file any motion for hearing by [14 days], or as soon as practicable after the respondent informs his counsel of his desire to litigate the commitment petition.

3. Counsel for the government shall serve the government’s initial disclosures pursuant to Paragraph 4(a) of 10-SO-XX on respondent (including any report(s) from examiner(s) designated by the government and any other expert report already obtained by the government for experts it intends to use in its case in chief) by [60 days].

4. Counsel for the respondent shall serve respondent's initial disclosures pursuant to Paragraph 4(b) of 10-SO-XX on the government (including any report(s) of examiner(s) designated by respondent and any other expert report already obtained by the respondent for experts the respondent intends to use at hearing) within sixty (60) days of receiving the government's initial disclosures.

5. The parties shall have sixty (60) days after the respondent provides his initial disclosures to conduct additional discovery. Pursuant to Fed. R. Civ. P. 26(a)(2)(C)(ii) and Paragraph 4(c) of 10-SO-XX, the parties may file one rebuttal or surrebuttal report within 30 days of the other party's disclosure.

6. 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 fourteen (14) days after the close of discovery, any objections pursuant to Fed. R. Civ. 26(a)(3) within twenty-one (21) days after the close of discovery, and file a joint (or separate) prehearing order(s) within twenty-eight (28) days after the close of discovery. No prehearing conference will normally be required unless the parties cannot agree on a prehearing order or if otherwise ordered by the court. A magistrate judge shall review the proposed prehearing order(s), conduct a prehearing conference as necessary pursuant to the provisions of L. Civ. R. 16.1(d) and 72.2(a), E.D.N.C., and enter a final prehearing order.

7. The hearing date will be set in a separate order by [the district judge assigned to the case].

8. Paragraph 4(h)(iii) of the Standing Order on cases arising under 18 U.S.C. § 4248, 10-SO-XX ("the Standing Order"), provides for the designation of certain documents as "Attorney's Eyes Only." Any document(s) so marked shall not be shown to the respondent without the consent

of opposing counsel or an order of this court. However, such document(s), along with any other documents produced in discovery, may be shown to any expert examiner upon the examiner's signing of the confidentiality agreement attached to the Standing Order. It is counsel's responsibility to file the confidentiality agreement with the court if an expert examiner signs it. Any violation of the confidentiality agreement may subject the person signing the agreement to sanctions by the court, including contempt.

9. Supplementation under Fed. R. Civ. P. Rule 26(e) must be made promptly after receipt of the information by the supplementing party or its counsel but in no event later than [180 days]. The parties are cautioned not to be dilatory in pursuing discovery.

10. The parties are reminded that on consent of all parties and with the concurrence of the District Judge this case may be referred to a Magistrate Judge for hearing, with a peremptory hearing setting and the right of direct appeal to the Fourth Circuit. A copy of the consent form may be obtained from the court's website, www.nced.uscourts.gov. If all parties wish to exercise this option, it shall be done as soon as possible. The parties are free to withhold consent without adverse substantive consequences. The consent form shall not be filed with the court unless all parties to the cases involved have consented.

This, the ___ day of _____, 20__.

[magistrate judge]
United States Magistrate Judge

ATTACHMENT D
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 4(h)(iii) of the Standing Order on cases arising under 18 U.S.C. § 4248, 10-SO-XX (“the Standing Order”), as well as the 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 the scheduling order. I understand that any violation of the Standing Order or the scheduling order may subject me to sanctions by the court, including contempt. I shall not disclose any document(s) marked “Attorney’s Eyes Only” to the above-named respondent or to anyone else other than those specifically authorized by the Standing Order and the scheduling order. I shall not copy

or use such documents except for the purposes of this action and pursuant to the terms of the Standing Order and the scheduling order. 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 the scheduling order. I understand that this confidentiality agreement will be filed with the court.

Executed on _____
(Date) (Signature)