

*v. Edwards*, 554 U.S. 164 (2008) that the standard for competency to stand trial and the standard for competency to represent oneself were not equivalent, the criteria for evaluating the latter remain unspecified and thus presents a challenge for forensic psychiatrists.

## Application of Sexually Dangerous Person Laws to Individuals With No Prior Sexual Offending Conviction

**Nadia Gilbo, MD**  
Forensic Psychiatry Fellow

**Marina Nakic, MD**  
Assistant Professor of Psychiatry

Law and Psychiatry Division  
Department of Psychiatry  
Yale University School of Medicine  
New Haven, Connecticut

### An Intellectually Disabled Defendant Who Was Found Not Competent, Not Restorable, and Not Committable Can Be Subjected to Sexually Dangerous Person Commitment Proceedings

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In *United States v. White*, 927 F.3d 257 (4th Cir. 2019), the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the district court's dismissal of a federal sexually dangerous person civil commitment proceeding against a defendant who was found not competent and not restorable due to an intellectual disability, not committable, and had never been convicted of any sexual offenses. The Fourth Circuit held, first, that the statute authorized commitment in such circumstances and, second, that it did not violate the Due Process Clause because procedural safeguards are sufficient to protect the individual's liberty interests.

#### Facts of the Case

Oliver White, a Native American man diagnosed with intellectual disability, was indicted by multiple federal grand juries in Montana for abusive sexual contact and aggravated sexual abuse of females under the age of 12 in 2009, 2012, and 2016. In 2009, as

part of a deferred prosecution agreement, charges against Mr. White were dismissed on the condition that he reside with his mother and have no further contact with minors. While detained for his 2012 charges, Mr. White was found not competent to stand trial due to his intellectual disability and to not meet federal statutory criteria for civil commitment. The court dismissed the charges against him and released him.

During pretrial detention for his 2016 charges, Mr. White was again found not competent to stand trial, not restorable, and not civilly committable. This time, the government filed a certificate under 18 U.S.C. § 4248 (2012), asserting that Mr. White was a sexually dangerous person based on his prior conduct and petitioned the district court to commit him to the custody of the attorney general.

Federal statute 18 U.S.C. § 4248 was enacted by Congress as part of the Adam Walsh Child Protection and Safety Act and added to a set of federal prison-related mental health statutes authorizing civil commitment of federal prisoners deemed sexually dangerous. Commitment requires proof by clear and convincing evidence that the prisoner engaged or attempted to engage in sexually violent conduct; has a serious mental illness or disorder; and, if released, would have serious difficulty refraining from sexually violent conduct.

In response to governmental action, Mr. White's counsel moved for the appointment of a guardian *ad litem*, dismissal of the § 4248 certificate, and, alternatively, for a competency hearing, contending that Mr. White's mental incompetence should preclude a § 4248 hearing.

In April 2018, Mr. White was again found not committable based on dangerousness. In May 2018, a magistrate judge granted Mr. White a motion for a guardian *ad litem* and issued a Memorandum and Recommendation recommending that the court deny Mr. White's motion to dismiss the § 4248 proceedings or, alternatively, hold a competency hearing. In September 2018, following *de novo* review of the Memorandum and Recommendation, the district court granted Mr. White's motion for a competency hearing and, pending a hearing, denied the motion to dismiss. In December 2018, the district court found Mr. White not competent and granted his motion to dismiss. The court held that § 4248 allowed it to dismiss proceedings against an incom-

petent person who contests all three elements under § 4248. The court also held that requiring an incompetent person to contest the prior conduct element would violate his due process rights because he would lack the ability to understand the nature of the proceeding and to assist counsel. The government appealed.

#### Ruling and Reasoning

The U.S. Court of Appeals for the Fourth Circuit reversed the district court judgment and remanded with instruction to conduct a § 4248 hearing. The court first addressed whether § 4248 or any other provision of Chapter 313 of Title 18 permits dismissal of § 4248 proceedings against a person found incompetent. The court stated that another section, § 4241, provides that if the person is found mentally incompetent, the court must commit him to the attorney general for hospitalization. If the person is unlikely to regain competency, § 4246 provides for civil commitment based on dangerousness alone, and § 4248 provides for civil commitment if the court finds that person is sexually dangerous. Therefore, the court ruled that no Chapter 313 of Title 18 provision authorized the district court to dismiss the proceedings against Mr. White.

The court next addressed whether § 4248 violates due process as it requires a person who is mentally incompetent to challenge allegations of past sexual misconduct. While acknowledging that the Constitution does not permit an incompetent person to be subjected to a criminal trial or to be indefinitely committed based solely on incompetence, the court distinguished persons who are incompetent and sexually dangerous. The risk of erroneous deprivation of such a defendant's liberty interest is "substantially and adequately mitigated" by due process protections (*White*, p 265). Mr. White had counsel and a guardian *ad litem* to look after his interests, and the government had to prove its case by clear and convincing evidence. The risk of erroneous factual finding is substantially mitigated by the fact that the court must find sufficient proof, based on the observations and opinions of professionals, that Mr. White is sexually dangerous. Also, the commitment order is subject to correction by requiring the government to submit annual reports, and Mr. White must be released when no longer sexually dangerous.

#### Discussion

Since 1990, twenty states and the District of Columbia have enacted civil commitment statutes for sex offenders, collectively known as sexually violent person (SVP) laws. Civil commitment of SVPs provides a legal mechanism for the confinement of individuals who committed sexual offenses to a treatment facility after incarceration if a court determines that the individual is likely to engage in future sexual violence due to a mental abnormality or personality disorder. In 2006, the Adam Walsh Child Protection and Safety Act authorized civil commitment of certain sex offenders by the federal government. Under § 4248, the U.S. Attorney General or any authorized official in the Department of Justice or Bureau of Prisons can initiate a civil commitment process by certifying an individual as a sexually dangerous person. Initiation of § 4248 does not depend on a prior state or federal conviction for a sex crime. Thus, the court must find, retrospectively, that the individual engaged or attempted to engage in sexually violent conduct or child molestation, and prospectively, that he is sexually dangerous to others.

The constitutionality of SVP laws has been upheld by the Supreme Court, but SVP proceedings are distinct from traditional civil commitment schemes. Under SVP laws, the commitments may be indefinite, and the committed person has the burden of petitioning for review of the commitment. The American Psychiatric Association has opposed SVP laws since their enactment, citing the potential abuse of individual civil rights and the involvement of psychiatry in potentially indefinite preventive detention (Zonana H, Abel G, Bradford J, *et al*: Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association. Washington, DC: American Psychiatric Association, 1999).

Diagnosing and assessing future risk presented by a convicted sexual offender is a complex task. The assessment commonly includes an interview with the defendant, who may have valid concerns about self-incrimination, and reviewing evidence presented at the original trial for the sexual offense, victim statements, and behavior while incarcerated. Evaluating a not-competent, not-restorable, and not-committable intellectually disabled individual raises ethics concerns for psychiatrists who choose to participate in federal SVP proceed-

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ings, particularly because a criminal conviction for a sexual offense is not required and the defendant may face possible indefinite commitment. Statements that treatment, rather than confinement, is the purpose of SVP laws is unconvincing when the defendant is found not-competent and not-restorable due to an intellectual

disability that no amount of treatment can affect. An additional concern for the mental health professional is the law's distinction between dangerousness and sexual dangerousness. There is no such distinction in the clinical practice of psychiatry. A diagnosis of a sexual disorder should not imply criminal sexual offending.