UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:22-cr-00201-WWB-LHP

EVAN EDWARDS
a/k/a Ian Heringa

GOVERNMENT'S RESPONSIVE MEMORANDUM ON THE APPLICATION OF RESTORATION PROCEDURES UNDER § 4241(d)

The United States of America by Roger B. Handberg, United States Attorney for the Middle District of Florida, by the undersigned AUSA, in accordance with this Court's Order (Doc. 105) (the "Order") hereby files this briefing, and states:

1. On July 2, 2023, the Bureau of Prisons issued a report pursuant to 18 U.S.C. § § 4241(b), 4247(b), (c) on the issue of defendant's competency to stand trial (the "Competency Report"). Sealed Doc. 98. After reviewing the Competency Report, neither party contests the finding that the defendant is not currently competent to stand trial.

2. Following issuance of the Competency Report, the defendant filed a renewed motion for release on bond and request for detention hearing. Doc. 99. The Government did not contest the defendant's release to family members with conditions, and the defendant has since been released.

3. On August 3, 2023, this Court held a status conference, at which time the parties expressed their disagreement on the appropriate next steps under § 4241. The

Court ordered briefing on the issue.

4. On August 31, 2023, the defendant filed his briefing on the issue, arguing that BOP has already resolved the issue of restorability due to its statement in the "Prognosis and Recommendations" section of the Competency Report, stating that, "a period of restoration to competency pursuant to Title 18, United States Code, Section 424l(d) is not indicated for Mr. Edwards…."[1]

5. As set forth below, the statutory framework of § 4241(d) and Eleventh Circuit case law mandate commitment of the defendant for restoration, regardless of whether his current condition is permanent.

I. The Court Must Commit the Defendant for Restoration Under § 4241(d)

The § 4241 statutory framework is clear that, following a finding of incompetence, the Court "shall" commit the defendant to the custody of the Attorney General and the Attorney General "shall" hospitalize the defendant for treatment in a suitable facility to attempt to restore the defendant to competence. *See* § 4241(d). Thus, in an instance where the Court finds the defendant incompetent to proceed, the express terms of the statute mandate commitment of the defendant for restoration. *See, e.g., United States v. Donofrio,* 896 F.2d 1301 (11th Cir. 1990) (finding that commitment under § 4241(d) is mandatory). Here, as explained below, commitment

[1] The full excerpt states, "Furthermore, his attending medical provider has opined that Mr. Edwards has suffered irreversible neurological damage. As such, a period of restoration to competency pursuant to Title 18, United States Code, Section 424l(d) is not indicated for Mr. Edwards as he is not expected to benefit from educational interventions in light of his neurological disorder. He would be best served within a structured setting where he has access to regular support to meet his basic needs."

of the defendant for restoration in accordance with this statutory mandate is required.

a. *The § 4241(b) Competency Report Does Not "Resolve" the Restorability Issue*

Here, the defendant mistakenly relies on the statement in the Competency Report (that "a period of restoration to competency pursuant to Title 18, United States Code, Section 424l(d) is not indicated for Mr. Edwards....") to distinguish *Donofrio* and draw the conclusion that the issue of the defendant's restorability is "resolved." This conclusion is wrong. First, the face of the Competency Report provides that the reason for the referral to BOP by the Court was for an evaluation under 18 U.S.C. § 4241(b) to determine "whether the defendant is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." *See* Competency Report, pg. 1. Thus, it is clear from the report that the evaluation conducted by the evaluating doctor was specifically in relation to the defendant's present competency to stand trial.

In fact, other than the barebones statement that "a period of restoration to competency...is not indicated," there is no other reference to efforts to restore, evaluation relating to restorability, nor treatment directed at restoration. Moreover, the defendant was evaluated only for 30 days at FMC Devens, which is the evaluation period set forth for a competency evaluation under § 4241(b) (a so-called "short-study"), not for the longer four-month restoration period contemplated by § 4241(d). *See United States v. Brennan*, 928 F.3d 210, 217 n.2 (explaining that the initial evaluation period under § 4241(b) is "necessarily temporally limited, constraining a medical professional's ability to evaluate and treat a mentally incompetent defendant"); *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000) (the evaluation of defendant's future competency "requires a more careful and accurate diagnosis before the court is faced with the serious decision whether to defer trial indefinitely and (quite often) to release the defendant back into society"); *United States v. Strong*, 489 F.3d 1055, 1062 (9th Cir. 2007) (evaluation of future competency requires a more "careful and accurate diagnosis" than the brief interviews and review of medical records that tend to characterize the initial competency proceeding") (citing *United States v. Ferro*, 321 F.3d 756, 762 (8th Cir. 2003).

Additionally, while the evaluating doctor opined in the § 4241(b) Competency Report that restoration to competency "is not indicated," she did not, and could not, make the appropriate determination under § 4241(d), that is: "to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward." *See* 18 U.S.C. § 4241(d); *Brennan*, 928 F.3d at 216 (explaining that only a court can decide issues of competency: "An arbiter must therefore interpret legal competency standards and apply them to the facts before her, a quintessentially judicial task. A medical professional cannot appropriately resolve such legal questions, and a defendant's competence is decidedly the province of the courts."). Thus, the defendant's reliance on the § 4241(b) report is misplaced, as it does not resolve the issue of restorability as required under § 4241(d).

b. *Controlling Eleventh Circuit Law Makes Restoration Mandatory*

The Eleventh Circuit in *Donofrio* has held, without ambiguity, that § 4241(d) is mandatory and that a court cannot circumvent hospitalization under that section, even if there is evidence suggesting that the defendant's condition is permanent. *United States v. Donofrio,* 896 F.2d 1301, 1302-1303 (11th Cir. 1990). The defendant in *Donofrio* was found incompetent to stand trial and the district court committed the defendant to the custody of the Attorney General for examination under § 4241(d). *Id*. While the defendant argued that he could not be held under § 4241(d), because the evidence at his competency hearing showed that his condition was permanent, the Eleventh Circuit disagreed. *Id*. As the Eleventh Circuit explained, the issue of the *permanency* of the defendant's condition was not an issue before the district court at that time. *Id*.

Ultimately, the Eleventh Circuit held in *Donofrio* that § 4241(d) was mandatory and the district court did not have the authority to circumvent the hospitalization. *Id*. "Once the court found by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to stand trial, then it was required 'to commit the defendant to the custody of the Attorney General.' The permanency of the condition would then be determined for later consideration by the court." *Id*. *See also United States v. Shawar*, 865 F.2d 856, 863 (7th Cir. 1989) (holding that § 4242(d) clearly provides that once a finding of incompetence to stand trial has been made, a defendant must be committed to the custody of the Attorney General, even in the case where the incompetent would not recover).

As in *Donofrio*, the permanency of the defendant's condition in this case is not yet an issue before this Court. The § 4241 framework provides a sequential roadmap for addressing competency issues. First, under § 4241(b) and (c), the Court is to address the issue of whether the defendant is presently competent to stand trial. If, under § 4241(c), the Court determines that the defendant is not competent, then the defendant must be hospitalized for potential restoration under § 4241(d). Only then, after restoration commitment under § 4241(b), would the permanency of the defendant's condition be an issue before the Court. These sequential steps must be followed even if there is evidence at the time of the competency determination that the defendant's condition, which renders him incompetence, is permanent. *See Donofrio,* 896 F.2d at 1302-1303; *Shawar*, 865 F.2d at 863 (finding that likelihood of recovery of defendant found incompetent to stand trial was not something to be considered in deciding whether to commit defendant for evaluation).

The Eleventh Circuit in *Donofrio* relied upon the Seventh Circuit's decision in *Shawar*. *See United States v. Shawar*, 865 F.2d 856, 863 (7th Cir. 1989). In *Shawar*, a psychiatrist opined that the defendant was not competent to proceed and that, because the condition rendering the defendant incompetent was mental retardation, rather than an illness, there was "no reasonable likelihood that he will ever regain competence with treatment." Based on that opinion and the opinions of two other doctors, the district court judge concluded that the defendant was, and always would be incompetent to proceed and dismissed the charges against him without prejudice. In reversing the district court's decision, the Seventh Circuit stated:

> Although the district judge obviously attempted to comply with what he felt to be the spirit of the statute, the statutory scheme established by Congress clearly mandates that a defendant found to be incompetent be placed in a mental hospital for observation….Based on the expert opinion, [the district judge] was satisfied that Shawar would never be competent and that treatment would not improve his condition. Thus, he determined…that it would be 'an empty exercise to commit Shawar to a federal facility for further test,' and read the statute to require that commitment only is mandatory if there is a possibility that the commitment will result in a change in the defendant's condition.
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> Although the position taken by [the district judge] was not unreasonable, the intent of Congress is clear. The statute plainly states that 'the court shall commit the defendant to the custody of the Attorney General [who] shall hospitalize the defendant for treatment….' The plain meaning of this phrase is, and we hold it to be, that once a defendant is found incompetent to stand trial, a district judge has no discretion in whether or not to commit him.
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> *Shawar*, 865 F.2d at 860-61.

The defendant in *Shawar* argued to the Seventh Circuit that, because there was already a finding that the defendant would not recover, the purpose of the statute was already fulfilled, and commitment was unnecessary. However, in rejecting the decision not to commit the defendant, the Seventh Circuit stated that the district judge, even if well-intentioned, misconceived the statutory scheme envisioned by Congress, and explained:

> Our reading of 18 U.S.C. § 4241(d) is not only that commitment is mandatory, but also that likelihood of recovery is not something to be considered by the district court in deciding whether to commit the defendant for the evaluation period. It is during the evaluation period that the Attorney General has up to four months to assess whether the defendant will regain competency to stand trial….In other words, the burden is ultimately on the Government to come forward with evidence on the likelihood of the defendant's recovery. The statue makes it clear, however, that once a defendant is found incompetent, the Government is entitled to an in-depth evaluation of him, in order to determine whether

he is likely to recover.

Shawar, 865 F.2d at 861. Thus, the case law is clear that the Court must follow the statutory scheme and does not have the discretion not to commit the defendant have a finding of incompetence.

Here, the defendant attempts to distinguish *Donofrio* (and all of the other cases requiring mandatory commitment) by claiming that the restorability issue has already been resolved by BOP. But that is not the case. At best, the § 4241(b) evaluator's comment in the Competency Report (that a period of restoration to competency was not indicated) is merely evidence that his condition may be permanent. However, at this point in the proceedings, the issue of permanency, as explained by *Donofrio* and *Shawar*, is not before the Court. Moreover, the Government has not been given the opportunity for the in-depth evaluation of the defendant to which it is entitled. A thirty-day short study, targeted at determining whether the defendant is competent to stand trial, is not tantamount to a four-month, in-depth evaluation focused on restoration. Thus, this Court should apply the holdings of *Donofrio*, which is controlling, and commit the defendant in this case for restoration under § 4241(d).

However, this Court need not rely solely on *Donofrio*. Several other Circuits have also held that commitment under § 4241(d) is mandatory. *See, e.g, United States v. Ferro*, 321 F.3d 756, 761 (8th Cir. 2003) (noting that although "[i]t is clear that the statutory scheme detailed by Congress in § 4241(d) provides the district court with the discretion to initially determine whether the defendant is competent to stand trial ... after determining that a defendant is incompetent ... a district court is required to commit the defendant to the custody of the Attorney General for a reasonable period of time to evaluate whether treatment would allow the trial to proceed"); *United States v. Filippi*, 211 F.3d 649 (1st Cir. 2000) (rejecting a Due Process attack when defendant claimed his condition was irreversible, and stating that statute establishes non-discretionary general rule of commitment without a "case-by-case choice by the district court as to whether to incarcerate once the incompetency finding has been made"); *United States v. Brennan*, 928 F.3d 210 (2d Cir. 2019) (committing the defendant for treatment and evaluation under § 4241(d), despite the results of a court-ordered psychiatric evaluation stating that his disorder was degenerative and not likely to significantly improve, because commitment to assess future competency was mandatory, and only the district court, not a forensic psychologist, could determine whether defendant would regain competency in the foreseeable future).

The defendant draws only one misplaced distinction to the plethora of cases calling for mandatory commitment under § 4241(d); that is, that here the restoration issue has somehow already been resolved by the § 4241(b) Competency Report. As discussed above, however, there has not been nor could not have been a resolution to this issue without an evaluation under § 4241(d) and a determination by the Court on the issue of permanent incompetence, neither of which has happened. Thus, this Court should follow the guidance of all the applicable case law and commit the defendant to the Attorney General, as is statutorily required.

II. Other Proceedings are Triggered Only After Restoration is Addressed

With regard to potential proceedings under 18 U.S.C. §§ 4246 and/or 4248, the statutory framework provides that those sections are triggered *after* the § 4241(d) commitment period. Specifically, Section 4241d provides that "[i]f, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248." *See also* §§ 4246 and 4248 (setting forth the procedures for BOP to issue a certificate of dangerousness). Based on this framework, the United States submits that, until restoration is addressed, the defendant is not yet subject to the provisions of §§ 4246 and 4248. Thus, at this time, no other proceedings are requested by the United States under §§ 4246 or 4248. If the BOP finds the defendant not restorable, and after screening him, determines him to be dangerous, then the United States and/or BOP will request the appropriate proceedings.

WHEREFORE, the United States submits that commitment under § 4241(d) is mandatory upon a finding of incompetence, and respectfully requests that the Court find the defendant not competent to proceed and commit him to the custody of the Attorney General under § 4241(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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