

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

vs.

NO.

**DEFENDANT'S OBJECTION TO PSYCHOLOGICAL EXAMINATION**

The Defendant, through his undersigned attorney, objects to his participation in any psychological/psychosexual examination prior to sentencing, and in support, submits the following:

1. On [REDACTED], the Defendant pled guilty as follows: Count One, using the internet to entice a minor under 18 U.S.C. § 2422(b); and, Count Four, possession of child pornography under 18 U.S.C. § 2252A(a).

2. At the change of plea hearing, the Court ordered that the Defendant participate in a psychological/psychosexual evaluation. At the time, counsel did not object to such an evaluation.

3. Subsequent to the change of plea, the undersigned counsel learned that the Defendant's participation in such a study could potentially produce information that could (1) increase his guideline range, and (2) subject him to civil commitment beyond his term of criminal imprisonment.

Increased Guideline Range

4. In Mitchell v. United States, 526 U.S. 314, 316 (1999), the Supreme Court held that a defendant maintains his Fifth

Amendment right against self-incrimination despite a guilty plea. The Court also held that a sentencing judge should not draw a negative inference from a defendant's assertion of this right. Id. at 331.

5. The Defendant asserts his Fifth Amendment right against compulsory disclosure of information that could increase his guideline range. Because the psychological exam is expected to be a thorough, searching evaluation of the Defendant's thoughts and actions, it is possible such could result in information that increases his punishment.

#### Civil Commitment

6. Of even greater concern to the Defense, information provided during a psychological examination could potentially expose him to a civil commitment under Title III of the Adam Walsh Child Safety and Protection Act, codified at 18 U.S.C. §§ 4247, 4248. The Defendant objects to participating in a psychological exam that could result in a civil commitment, potentially for life.

7. Under 18 U.S.C. § 4248(a), the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons has the power to certify as "sexually dangerous" anyone in BOP custody. See 18 U.S.C. § 4248(a). To initiate court commitment proceedings, the BOP must certify the inmate as a "sexually dangerous person" as specified in the statute. *Id.* The BOP reviews all sex offenders who are about to

be released to determine whether the inmate meets the statutory definition of a "sexually dangerous person."

8. To commit civilly an individual, the BOP need only provide evidence that the defendant is a "sexually dangerous person," which is defined as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. § 4247(5). A person is sexually dangerous to others if the "person suffers from a serious mental illness, abnormality or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. §4247(a)(6). The statute however, does not define key terms such as "sexually violent conduct," "child molestation," and "serious difficulty."

9. The Director of the Bureau of Prisons has established a Certification Review Panel (CRP), which includes the staff from the Correctional Programs Division, the Office of General Counsel and other correctional managers. The CRP reviews three elements during the certification process.<sup>1</sup> Under the Behavioral Element, the CRP considers all conduct, including an inmate's self-admissions. Under the Diagnostic Element, the CRP may consider existing diagnoses as well as any other possible diagnoses resulting from additional evaluations. These new diagnosis may include, but are not limited to, pedophilia, sexual disorder, antisocial personality

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<sup>1</sup>See BOP Certification Review Panel Guidelines (available at [http://www.fd.org/pdf\\_lib/Certification%20Review%20Panel%20Guidelines.pdf](http://www.fd.org/pdf_lib/Certification%20Review%20Panel%20Guidelines.pdf)).

disorder, or personality disorder. The CRP reviews the Risk Element and considers any available records including documented patterns of prior behavior, statements made during treatment, or other indicators which may suggest risk.

10. The Defendant objects to participation in a psychological examination that could result in a lengthy civil commitment. Everything he says during the exam could potentially be used to justify civil commitment.

Respectfully submitted, [REDACTED].

[REDACTED]  
Federal Public Defender

/s/ [REDACTED]  
Assistant Federal Public Defender  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Michael A. DeFranco.

Respectfully submitted, [REDACTED].

[REDACTED]  
Federal Public Defender

/s/ [REDACTED]  
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