IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Case No. 1:13CR00017
	:	
ALEN JOHANNES SALERIAN	:	Violations: 21 U.S.C. § 846
a/k/a ALLEN JOHANNES SALERIAN	:	21 U.S.C. § 841(a)(1)

SUPERSEDING INDICTMENT

INTRODUCTION

The Grand Jury charges that:

1. Title 21, United States Code, Section 812 establishes five schedules of controlled substances. Specific findings are required for a drug to be placed within each schedule.

a. Schedule I controlled substances, as defined in 21 U.S.C. § 812(b)(1), are drugs or other substances having "a high potential for abuse," and for which there is "no currently accepted medical use in treatment in the United States."

b. Schedule II controlled substances, as defined in 21 U.S.C. § 812(b)(2), are drugs or other substances with "a high potential for abuse," "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and abuse of which "may lead to severe psychological or physical dependence."

c. Schedule III controlled substances, as defined in 21 U.S.C. § 812(b)(3), are drugs or other substances with "a potential for abuse less than the drugs or other substances in schedules I and II," "a currently accepted medical use in treatment in the United States,"

and abuse of which "may lead to moderate or low physical dependence or high psychological dependence."

d. Schedule IV controlled substances, as defined in 21 U.S.C. § 812(b)(4), are drugs or other substances with "a low potential for abuse relative to the drugs or other substances in schedule III," " a currently accepted medical use in treatment in the United States," and abuse of which "may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III."

2. Oxycodone is an opioid pain medication and a Schedule II controlled substance. It is available in generic form and under brand names including OxyContin®, Percocet®, Roxicodone®, Roxicet®, and Endocet®. It is available in short-acting and extended-release formulations in dosages including 5 milligrams, 7.5 milligrams, 10 milligrams, 20 milligrams, 30 milligrams, 40 milligrams, and 80 milligrams.

3. Methadone is an opioid pain medication and a Schedule II controlled substance. It is commonly used as a pain reliever or as a part of a drug addiction detoxification and maintenance program. It is available in tablets containing dosages of 5 milligrams, 10 milligrams, and 40 milligrams.

4. Adderall® and Adderall XR® are brand-names of pharmaceutical drugs containing amphetamine, a Schedule II controlled substance. Adderall® and Adderall XR® are stimulants commonly used for the treatment of Attention Deficit Hyperactivity Disorder (ADHD). Adderall® is a short-acting formulation available in dosages of 5 milligrams, 7.5 milligrams, 10 milligrams, 12.5 milligrams, 15 milligrams, 20 milligrams, and 30 milligrams. Adderall XR® is an extended-release formulation available in dosages of 5 milligrams, 10 milligrams, 15 milligrams, 20 milligrams, 25 milligrams, and 30 milligrams.

5. Opana® and Opana ER® are semi-synthetic opioid pain medications consisting of oxymorphone, a Schedule II controlled substance. Opana® is a short-acting formulation available in dosages of 5 milligrams and 10 milligrams. Opana ER® is an extended-release formulation available in dosages of 5 milligrams, 10 milligrams, 20 milligrams, 30 milligrams, and 40 milligrams.

6. Vyvanse® is a brand-name pharmaceutical drug containing lisdexamfetamine, a Schedule II controlled substance. It is a stimulant commonly used for the treatment of ADHD. Vyvanse® is available in dosages of 20 milligrams, 30 milligrams, 40 milligrams, 50 milligrams, 60 milligrams, and 70 milligrams.

7. Methylphenidate is a stimulant and a Schedule II controlled substance. It is commonly used to treat ADHD and narcolepsy. It is available in generic form and under brand names including Ritalin®.

8. Dextroamphetamine is an amphetamine and a Schedule II controlled substance. It is commonly used to treat ADHD and narcolepsy. It is available in generic form and under brand names including Dexedrine® and Dextrostat®.

9. Fentanyl is a synthetic opioid and a Schedule II controlled substance. It is commonly used for the treatment of pain and as an anesthesia. It is available in the dosage forms of lozenges, transdermal patches, and injectable formulations. The transdermal patches are available in dosages ranging from 25 micrograms (mcg) to 300 micrograms (mcg).

10. Alprazolam is a depressant and a Schedule IV controlled substance. It is part of the benzodiazepine class of drugs. It is commonly used for the treatment of anxiety. It is available in generic form and under the brand name Xanax®.

11. ALEN JOHANNES SALERIAN, a/k/a ALLEN JOHANNES SALERIAN ("SALERIAN") is a medical doctor (M.D.) with a special in psychiatry.

12. Between 2001 and 2010, SALERIAN operated the Washington Center for Psychiatry located at 5225 Wisconsin Avenue, NW, Washington, D.C. In 2010, SALERIAN renamed his practice "The Salerian Center for Neuroscience and Pain" and moved the practice to 5028 Wisconsin Avenue NW, Washington, D.C.

13. G.S. is a Licensed Social Worker (L.S.W.) whose practice was located in the Washington Center for Psychiatry and then The Salerian Center for Neuroscience and Pain and who provided contract work for the centers.

14. At the Washington Center for Psychiatry and The Salerian Center for Neuroscience and Pain, patients were identified as either psychiatric patients or pain management by the color of the files in which their charts were placed. Pain management patients' files were maintained in a blue file jacket. Psychiatric patients' files were maintained in a green file jacket.

15. During the time relevant to this Indictment, office fees for pain management patients at the Washington Center for Psychiatry and The Salerian Center for Neuroscience and Pain were increased so that pain management patients were charged higher fees for office visits than psychiatric patients. In 2009, according to the practice's fee schedule, an "Initial Assessment" cost $290, and "Medication visits 10-15 minutes" cost $155. There was no separate cost listed for pain management patients. In 2010, according to the practice's fee schedule, the fee for a new psychiatric patient visit was $295, "Medication Visits 10-15 minutes" cost $160, and psychotherapy visits lasting 25-30 minutes cost $260. All appointments for pain management patients in 2010 cost $350. In 2011, the fee for a new psychiatric patient visit was increased to $310 and subsequent office visits cost $170. A new patient visit for a pain management patient was increased in 2011 to $1000, and the "monthly fee" was increased to $370.

16. During times relevant to this Indictment, pain management patients at the Washington Center for Psychiatry and The Salerian Center for Neuroscience and Pain were provided materials advising them monthly consultations were required, either in person or via telephone. Some patients were advised orally that every second, third, and fourth appointment could be conducted via telephone or via live Internet communication. Phone and Internet consultations were billed at the same rate as follow-up monthly office visits. Following a phone or Internet consultation, prescriptions were either available for pick-up at the Center or were sent to the patient or pharmacy.

COUNT ONE

The Grand Jury charges that:

1. The Introduction is realleged and incorporated by reference.

2. On or about and between 2007 and April 5, 2012, in the Western District of Virginia and elsewhere, ALEN JOHANNES SALERIAN, a/k/a ALLEN JOHANNES SALERIAN, knowingly conspired with persons known and unknown to the Grand Jury, to unlawfully distribute and dispense and cause the intentional and unlawful distribution and dispensing of OxyContin®, oxycodone, methadone, Opana ER® (oxymorphone), and fentanyl, all Schedule II controlled substances, without a legitimate medical purpose and beyond the bounds of medical practice, to individuals (known to the grand jury), whose patients files were color-coded to indicate they were pain management patients at the Washington Center for Psychiatry and/or The Salerian Center for Neuroscience and Pain, in violation of Title 21, United States Code, Section 841(a)(1).

3. All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(C).

COUNTS TWO – ONE HUNDRED FORTY FOUR

The Grand Jury charges that:

1. The Introduction is realleged and incorporated by reference.

2. On or about the dates set forth below, in the Western District of Virginia and elsewhere, ALEN JOHANNES SALERIAN, a/k/a ALLEN JOHANNES SALERIAN ("SALERIAN"), knowingly, intentionally and unlawfully distributed and dispensed and caused the intentional and unlawful distribution and dispensing of the below-listed schedule II controlled substances, without a legitimate medical purpose and beyond the bounds of medical practice, to the individuals (known to the grand jury) set forth below:

COUNT	DATE	# of PILLS	CONTROLLED SUBSTANCE	INDIVIDUAL
2	10/8/2009	120	OxyContin 80 mg	B.J.
3	10/8/2009	180	methadone 10 mg	B.J.
4	10/30/2009	120	OxyContin 80 mg	B.J.
5	10/30/2009	180	methadone 10 mg	B.J.
6	6/29/2010	150	OxyContin 80 mg	B.J.
7	6/29/2010	180	methadone 10 mg	B.J.
8	7/27/2010	150	OxyContin 80 mg	B.J.
9	7/27/2010	90	oxycodone 30 mg	B.J.
10	7/27/2010	180	methadone 10 mg	B.J.
11	5/10/2010	90	OxyContin 40 mg	B.M.
12	5/10/2010	90	methadone 10 mg	B.M.
13	6/8/2010	90	OxyContin 40 mg	B.M.
14	6/8/2010	90	methadone 10 mg	B.M.
15	7/6/2010	90	OxyContin 40 mg	B.M.
16	7/6/2010	120	methadone 10 mg	B.M.
17	7/12/2010	90	OxyContin 40 mg	B.M.
18	8/4/2010	90	OxyContin 40 mg	B.M.
19	8/4/2010	90	methadone 10 mg	B.M.
20	12/1/2010	240	oxycodone 30 mg	B.M.
21	12/1/2010	120	methadone 10 mg	B.M.
22	12/29/2010	330	oxycodone 30 mg	B.M.
23	12/29/2010	120	methadone 10 mg	B.M.
24	3/31/2009	120	OxyContin 80 mg	D.K.
25	3/31/2009	30	OxyContin 40 mg	D.K.
26	3/31/2009	240	methadone 10 mg	D.K.
27	4/27/2009	120	OxyContin 80 mg	D.K.

COUNT	DATE	# of PILLS	CONTROLLED SUBSTANCE	INDIVIDUAL
28	4/27/2009	30	OxyContin 40 mg	D.K.
29	4/27/2009	240	methadone 10 mg	D.K.
30	6/18/2009	30	OxyContin 40 mg	D.K.
31	6/18/2009	240	methadone 10 mg	D.K.
32	9/27/2010	195	oxycodone 30 mg	D.K.
33	9/27/2010	195	oxycodone 30 mg	D.K.
34	9/27/2010	240	methadone 10 mg	D.K.
35	11/1/2010	195	oxycodone 30 mg	D.K.
36	11/1/2010	195	oxycodone 30 mg	D.K.
37	11/1/2010	240	methadone 10 mg	D.K.
38	11/23/2010	195	oxycodone 30 mg	D.K.
39	11/23/2010	195	oxycodone 30 mg	D.K.
40	11/23/2010	240	methadone 10 mg	D.K.
41	12/13/2010	210	oxycodone 30 mg	D.R.
42	12/13/2010	90	methadone 10 mg	D.R.
43	10/20/2010	300	oxycodone 30 mg	E.B.
44	10/20/2010	150	methadone 10 mg	E.B.
45	2/15/2010	90	OxyContin 80 mg	J.C.
46	2/15/2010	30	OxyContin 40 mg	J.C.
47	2/15/2010	120	methadone 10 mg	J.C.
48	6/28/2010	90	OxyContin 80 mg	J.C.
49	6/28/2010	60	OxyContin 40 mg	J.C.
50	6/28/2010	270	methadone 10 mg	J.C.
51	7/22/2010	90	OxyContin 80 mg	J.C.
52	7/22/2010	60	OxyContin 40 mg	J.C.
53	7/22/2010	270	methadone 10 mg	J.C.
54	8/30/2010	90	OxyContin 80 mg	J.C.
55	8/30/2010	60	OxyContin 40 mg	J.C.
56	8/30/2010	270	methadone 10 mg	J.C.
57	3/24/2010	120	OxyContin 80 mg	J.R.
58	3/24/2010	310	methadone 10 mg	J.R.
59	4/13/2010	300	methadone 10 mg	J.R.
60	4/14/2010	120	OxyContin 80 mg	J.R.
61	4/14/2010	60	OxyContin 40 mg	J.R.
62	5/12/2010	120	OxyContin 80 mg	J.R.
63	5/12/2010	60	OxyContin 40 mg	J.R.
64	5/12/2010	300	methadone 10 mg	J.R.
65	6/10/2010	120	OxyContin 80 mg	J.R.

COUNT	DATE	# of PILLS	CONTROLLED SUBSTANCE	INDIVIDUAL
66	6/10/2010	60	OxyContin 40 mg	J.R.
67	6/10/2010	300	methadone 10 mg	J.R.
68	8/30/2010	480	OxyContin 80 mg	J.R.
69	8/30/2010	300	methadone 10 mg	J.R.
70	9/27/2010	240	oxycodone 30 mg	J.R.
71	9/27/2010	240	oxycodone 30 mg	J.R.
72	12/1/2010	480	oxycodone 30 mg	J.R.
73	12/1/2010	300	methadone 10 mg	J.R.
74	12/23/2010	480	oxycodone 30 mg	J.R.
75	12/23/2010	300	methadone 10 mg	J.R.
76	2/2/2011	480	oxycodone 30 mg	J.R.
77	2/2/2011	300	methadone 10 mg	J.R.
78	2/24/2011	480	oxycodone 30 mg	J.R.
79	2/24/2011	300	methadone 10 mg	J.R.
80	12/20/2010	390	oxycodone 30 mg	L.H.
81	12/20/2010	150	methadone 10 mg	L.H.
82	1/18/2011	390	oxycodone 30 mg	L.H.
83	1/18/2011	150	methadone 10 mg	L.H.
84	2/15/2011	390	oxycodone 30 mg	L.H.
85	2/15/2011	150	methadone 10 mg	L.H.
86	9/13/2010	90	OxyContin 80 mg	M.J.
87	9/13/2010	60	oxycodone 30 mg	M.J.
88	9/13/2010	120	methadone 10 mg	M.J.
89	9/30/2010	360	oxycodone 30 mg	M.J.
90	9/30/2010	120	methadone 10 mg	M.J.
91	10/1/2010	360	oxycodone 30 mg	M.J.
92	10/1/2010	120	methadone 10 mg	M.J.
93	10/29/2010	360	oxycodone 30 mg	M.J.
94	10/29/2010	120	methadone 10 mg	M.J.
95	6/18/2010	90	OxyContin 80 mg	M.L.2
96	6/18/2010	60	OxyContin 40 mg	M.L.2
97	6/18/2010	120	methadone 10 mg	M.L.2
98	7/16/2010	90	OxyContin 80 mg	M.L.2
99	7/16/2010	60	OxyContin 40 mg	M.L.2
100	7/16/2010	120	methadone 10 mg	M.L.2
101	9/20/2010	360	oxycodone 30 mg	M.L.2
102	9/20/2010	120	methadone 10 mg	M.L.2
103	7/6/2010	60	OxyContin 40 mg	P.M.

COUNT	DATE	# of PILLS	CONTROLLED SUBSTANCE	INDIVIDUAL
104	7/6/2010	280	oxycodone 30 mg	P.M.
105	7/6/2010	210	methadone 10 mg	P.M.
106	9/22/2010	360	oxycodone 30 mg	P.M.
107	9/22/2010	210	methadone 10 mg	P.M.
108	10/12/2010	360	oxycodone 30 mg	P.M.
109	10/12/2010	270	methadone 10 mg	P.M.
110	2/5/2010	90	OxyContin 80 mg	R.M.
111	2/5/2010	150	methadone 10 mg	R.M.
112	5/31/2010	90	OxyContin 80 mg	R.M.
113	5/31/2010	120	methadone 10 mg	R.M.
114	6/30/2010	90	OxyContin 80 mg	R.M.
115	6/30/2010	120	methadone 10 mg	R.M.
116	1/13/2010	150	OxyContin 80 mg	R.O.
117	1/13/2010	180	methadone 10 mg	R.O.
118	2/3/2010	150	OxyContin 80 mg	R.O.
119	2/3/2010	180	methadone 10 mg	R.O.
120	3/22/2010	150	OxyContin 80 mg	R.O.
121	3/22/2010	180	methadone 10 mg	R.O.
122	6/7/2010	150	OxyContin 80 mg	R.O.
123	6/7/2010	180	methadone 10 mg	R.O.
124	7/5/2010	150	OxyContin 80 mg	R.O.
125	7/5/2010	180	methadone 10 mg	R.O.
126	8/18/2010	150	OxyContin 80 mg	R.O.
127	10/7/2010	210	oxycodone 30 mg	R.O.
128	10/7/2010	210	oxycodone 30 mg	R.O.
129	10/7/2010	240	methadone 10 mg	R.O.
130	11/1/2010	240	oxycodone 30 mg	R.O.
131	11/1/2010	240	oxycodone 30 mg	R.O.
132	11/1/2010	240	methadone 10 mg	R.O.
133	11/30/2010	240	oxycodone 30 mg	R.O.
134	11/30/2010	240	oxycodone 30 mg	R.O.
135	11/30/2010	240	methadone 10 mg	R.O.
136	1/13/2012	55	Opana ER 20 mg	R.R.
137	7/17/2010	120	OxyContin 80 mg	S.H.
138	7/17/2010	120	OxyContin 40 mg	S.H.
139	7/17/2010	150	methadone 10 mg	S.H.
140	7/30/2010	120	OxyContin 80 mg	S.H.
141	7/30/2010	60	OxyContin 40 mg	S.H.

COUNT	DATE	# of PILLS	CONTROLLED SUBSTANCE	INDIVIDUAL
142	7/30/2010	150	methadone 10 mg	S.H.
143	10/19/2010	450	oxycodone 30 mg	S.H.
144	10/19/2010	150	methadone 10 mg	S.H.

3. On or about the dates set forth above, SALERIAN caused the above listed prescriptions to be sent to locations within the Western District of Virginia.

4. All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

NOTICE OF FORFEITURE

1. Upon conviction of one or more of the felony offenses alleged in this Indictment, the defendant shall forfeit to the United States:

a. any property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of said offenses, pursuant to 21 U.S.C. § 853(a)(1); and

b. any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of said offenses, pursuant to 21 U.S.C. § 853(a)(2).

2. The property to be forfeited to the United States includes but is not limited to the following property:

a. Money Judgment

i. A sum of United States currency to be determined, all interest and proceeds traceable thereto, in that such sum in aggregate was obtained directly or indirectly as a result of said offenses or is traceable to such property.

b. Specific Assets

i. The Salerian Center for Neuroscience and Pain;

ii. Medical license number MD7561, issued by the District of Columbia Health Professional Licensing Administration on October 10, 1974, with a current expiration date of February 28, 2013;

iii. Drug Enforcement Administration Physician Registration Number FS1343653;

iv. 2009 BMW, VIN WBAWL13599PX23877;

v. 2011 Honda Civic, VIN 19XFA1F88BE001868;

vi. 2011 Mazda 3, VIN JM1BL1W68B1364648;

vii. Funds seized from Bank of America account XXXXXXXXX9312, in the approximate sum of $118,885.97;

viii. Funds seized from Bank of America account XXXXXXXX9024, in the approximate sum of $13,113.16; and

ix. Funds seized from Bank of America account XXXXXXXX4949, in the approximate sum of $35,013.93.

3. If any of the above-described forfeitable property, as a result of an act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantial diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficult;

it is the intent of the United States to seek forfeiture of any other property of the defendant up to the value of the above-described forfeitable property, pursuant to 21 U.S.C. § 853(p), including but not limited to the assets described above.

A TRUE BILL, this 25th day of June, 2013.

Edith S. Bobko
Grand Jury Foreperson

Timothy J. Heaphy / SPK
TIMOTHY J. HEAPHY
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:13CR00017
	)	
v.	)	**OPINION AND ORDER**
	)	
ALEN JOHANNES SALERIAN,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendant.	)	

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for the United States; Glen Donath, Joshua G. Berman, and Jennifer Baker Loeb, Katten Muchin Rosenman LLP, Washington, D.C., for Defendant.

The defendant, Alen Johannes Salerian, has moved to dismiss the criminal charges pending against him. The defendant argues that because he is not mentally competent to stand trial, and there is no realistic prospect that he will become fit to stand trial, that the Indictment should be dismissed. The government opposes the motion because of the serious nature of the charges and because the relevant statutory language does not require dismissal. For the following reasons, I will grant the defendant's motion and dismiss the charges without prejudice.

I.

The defendant, now 68 years old, was a psychiatrist who practiced for many years in Washington, D.C. He was indicted in this court on April 16, 2013, charging him with unlawfully distributing controlled substances and conspiring to commit the same offense. See 21 U.S.C. §§ 841(a), 846. These charges stemmed from allegations that as a pain management specialist he unlawfully prescribed various drugs to persons in this judicial district.[1] The defendant's medical license in the District of Columbia was revoked on July 1, 2013.

The jury trial was scheduled to begin on February 10, 2014. Approximately two weeks before that date, the government received information that cast doubt on the defendant's mental competence, and moved for the court's consideration of his mental state. On February 3, 2014, a hearing was held on the government's motion. After additional briefing and analysis of the matter, the defendant was ordered to undergo a psychiatric evaluation.

The defendant was evaluated on March 10 and 14, 2014, on an out-patient basis by a psychologist who was agreed to by both of the parties. This evaluation found that the defendant was incompetent to stand trial, a finding that the defendant's counsel later agreed with. While the defendant himself maintained

[1] A Superseding Indictment was later returned, but will be referred to for convenience as the Indictment.

that he was, in fact, competent, the magistrate judge thereafter found that the defendant was not competent to stand trial.

On April 25, 2014, the magistrate judge ordered the defendant into the custody of the Attorney General for commitment to a mental health treatment facility. He was thereafter designated to the Federal Medical Center ("FMC") at Butner, North Carolina, for approximately four months so that a determination could be made as to whether his competence could be restored. On October 7, 2014, the FMC issued a 59-page report that addressed the defendant's behavior and mental state. This report discussed how the stress of his current situation was negatively impacting his physical and mental health, and found that his mental status had actually declined while he was at the FMC. The report further confirmed that he was not competent to stand trial.

The FMC report also proposed a treatment plan for the purpose of restoring the defendant's competence. The parties ultimately agreed upon a treatment plan for the defendant, and an Agreed Order for Treatment was entered on December 11, 2014. After four months of out-patient treatment, including antipsychotic medication, the defendant was again deemed to be incompetent in a psychiatric report dated August 18, 2015. This report concluded that it was unlikely that the defendant's competency would be restored to the point where he could stand trial.

Neither this report nor any of the other reports suggest that the defendant presents an immediate risk to himself or others.

Since then, the defendant has received no further treatment for the purpose of restoring his competency, and the government does not dispute that he is unlikely to ever be restored to competency. The defendant cannot engage in the illegal prescription of drugs because he no longer holds a medical license. He remains on bond and the Probation Office continues to monitor the defendant as if he was awaiting trial.

II.

The defendant has moved to have the Indictment dismissed because he argues there is no realistic prospect that he will regain his competency to stand trial. The government argues that I am not required to dismiss the defendant's charges and that I should decline to dismiss them because of the severity of the conduct alleged.

On the government's first point, the parties agree that I am not required to dismiss the Indictment. The relevant statutes set forth procedures that should be followed when there is a question about a criminal defendant's mental competency to stand trial, and allow for such a defendant to be committed when he poses a "substantial risk of bodily injury to another person or serious damage to property of another. . . ." 18 U.S.C. §§ 4241, 4246. However, neither statute directly

prescribes what should happen when a defendant has been declared incompetent and has no reasonable expectation of becoming competent, yet is not a substantial risk to the public.

In one of the only recent appellate cases on this issue, the First Circuit reviewed a request to dismiss an indictment against a defendant who was found to be both incompetent and dangerous. *United States v. Ecker,* 78 F.3d 726, 728-29 (1st Cir. 1996). He was committed because of his dangerousness, but could not be transferred to state custody (as otherwise required by § 4246) because the federal case remained pending. The defendant argued for the indictment to be dismissed because there was little likelihood that he would regain his competency. *Id.* at 728. The First Circuit concluded that the district court was not required to dismiss the charges, and affirmed the district court's decision to not dismiss them. However, the court did acknowledge, albeit in a footnote, that while § 4246 does not require charges to be dismissed because of mental illness, that the statute allows for charges to be dismissed because of such illness. *Id.* at 728, n.2.

The defendant argues that because I am permitted to dispose of the Indictment, that it is appropriate to do so here. Unfortunately, there is little case law that discusses when I should exercise my discretion in this situation. One district court has opined "it is not illogical to conclude that the very reason that case law on this precise issue is lacking is because the Government customarily

dismisses indictments against defendants who . . . will never regain competency." *United States v. Peppi*, No. 06-157 (AET), 2007 WL 674746, at *6 (D. N.J. Feb. 28, 2007). Another court has suggested that the decision should be left to the United States Attorney until there are concerns about due process violations. *See United States v. Wilson*, No. 09-00349-01-CR-W-DW, 2012 WL 2499506, at *3 (W.D. Mo. June 7, 2012). The government has cited to cases that demonstrate district courts refusing to dismiss indictments in similar situations because they were not required to dismiss them. *See, e.g., United States v. West*, No. 03-cr-000128-WYD, 2007 WL 1851305, at *1 (D. Colo. June 26, 2007).

After reviewing the procedural history and facts that relate to the defendant, I am convinced that the charges pending against him should be dismissed without prejudice. The original charges were filed almost three years ago, yet there is currently no realistic likelihood that the defendant will ever see his day in court. While the defendant is not competent to stand trial, he does not present any danger to himself or others. He is certainly not able to unlawfully prescribe controlled substances, as the government alleges he did in the past, because he no longer holds a medical license.

Given that the defendant is not pending trial in any genuine way, I find that the Bail Reform Act, which serves as the basis for his current supervision, no longer applies to him. *See* 18 U.S.C. § 3142(a); *Peppi*, 2007 WL 674746, at *4.

There is evidence from the psychiatric reports that the pending charges are causing the defendant extraordinary stress, which in turn is causing him mental and physical harm. Allowing the charges to stand serves no practical purpose, and I find that the defendant should not be forced to endure the additional turmoil that is caused by allowing them to continue.

IV.

For the foregoing reasons, it is **ORDERED** that the defendant's Motion to Dismiss (ECF No. 309) is GRANTED. A separate order will be entered dismissing the Indictment without prejudice.

ENTER: March 10, 2016

/s/ James P. Jones
United States District Judge