

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:13-HC-2168-BR

UNITED STATES OF AMERICA,)
)
Petitioner,)
) ORDER
v.)
)
DONALD JAY [REDACTED])
)
Respondent.)

On 29 July 2013, petitioner United States of America (“the government”) initiated this proceeding seeking to have respondent, Donald Jay [REDACTED] (“[REDACTED]”) civilly committed as a sexually dangerous person under the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”), codified at 18 U.S.C. §§ 4247-4248. Pursuant to 18 U.S.C. § 4247(d), the court conducted an evidentiary hearing in this matter on 20 May 2014.

I. BACKGROUND

[REDACTED] was thirty-three years old at the time of the evidentiary hearing. On 24 August 1998, at age seventeen, [REDACTED] was found guilty of Child Molestation in the First Degree and Attempted Child Molestation in the First Degree in the juvenile court of Pierce County, Washington. (Gov’t Exs. 3 at 5-6; 5 at 2; 7 at 13-14; 9 at 10-11 ¶¶ 37-41; 14; 16; 17.) He was committed to the custody of the Department of Social and Health Service, Juvenile Rehabilitation Administration for thirty to forty weeks on the charge of Child Molestation in the First Degree and thirty days on the charge of Attempted Child Molestation in the First Degree. (Gov’t Exs. 7 at 13; 9 at 10 ¶ 37; 14.) The victims were [REDACTED] younger brother and a friend of [REDACTED] younger brother. (Gov’t Exs. 3 at 5-6; 5 at 2; 7 at 13-14; 9 at 10-11 ¶¶ 38-41.) At

times in the past, ██████ admitted that he sexually abused his younger brother over the course of several years. (See, e.g., Gov't Exs. 7 at 14; 9 at 11 ¶ 41.) More recently, however, ██████ has maintained that he molested his younger brother on only one occasion when ██████ was sixteen years old. (See, e.g., Gov't Exs. 3 at 5; 25 at 24:2-3, 27:6-22, 56:3-57:1; Resp't Ex. 2 at 6.)

During his confinement after being adjudicated on the above charges, ██████ participated in sex offender treatment¹ and admitted to having sexually molested a number of other prepubescent males² when he was a teenager. (Gov't Exs. 3 at 6; 5 at 2; 7 at 20; 9 at 27 ¶ 112; 18; 25 at 49:15-54:3; Resp't Proposed Findings of Fact and Conclusions of Law, DE # 31, at 3 ¶ D.) The exact number of ██████ child victims is unclear. At the hearing, ██████ admitted to having six or seven victims, although he may have had as many as eighteen victims. (See, e.g., Gov't Exs. 3 at 6; 5 at 2; 7 at 20, 22; 9 at 16-17 ¶¶ 59-73; 18.) ██████ was not criminally charged with regard to any of these other acts of child molestation because he was granted prosecutorial immunity in relation to any sexual misconduct that he disclosed during his participation in sex offender treatment. (Gov't Exs. 3 at 6; 5 at 3; 7 at 20; 9 at 17 ¶¶ 65, 70; Resp't Proposed Findings of Fact and Conclusions of Law, DE # 31, at 3 ¶ D.)

As a juvenile, ██████ was additionally arrested for taking a motor vehicle without the owner's permission and was convicted of Possession of Stolen Property, Third Degree, after

¹ ██████ may have participated in sex offender treatment on other occasions. (See, e.g., Gov't Exs. 3 at 8; 25 at 61:3-62:5; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 33, at 17 ¶ 2; Resp't Proposed Findings of Fact and Conclusions of Law, DE # 31, at 3 ¶ D; but see Gov't Ex. 7 at 9 (while housed at a federal facility in Arizona, ██████ agreed to participate in the Sex Offender Treatment Program, "but was noted to have withdrawn one month later without receipt of any services").)

² The court notes that when ██████ was between the ages of twelve and thirteen years old, he did have one female victim who was seven or eight years old. (Gov't Exs. 7 at 20; 9 at 17 ¶ 73; 25 at 17:14-19:8.) All of his other victims were prepubescent males. (See, e.g., Gov't Ex. 5 at 2-3 ("Except for one female victim (age 7 or 8), the rest of Mr. ██████ known victims were males between the ages of five and 13."))

stealing a cellular telephone. (Gov't Exs. 5 at 6; 7 at 10; 9 at 10, 12 ¶¶ 35-36, 42-43.) As an adult, ██████ has been convicted of theft on three occasions, all of which occurred in 1999. (Gov't Exs. 5 at 6; 7 at 11; 9 at 12-14 ¶¶ 44-50; 25 at 67:22-71:1, 75:13-76:8, 77:15-21.) He has also been convicted of Failure to Register as a Sex Offender on three occasions, in 2000, 2001, and 2004. (Gov't Exs. 5 at 6; 7 at 11-12; 9 at 14-15 ¶¶ 51-57; 22; 24 at 1, 3-4; 25 at 79:3-8, 83:25-84:2, 86:17-22.) He violated his adult probation on numerous occasions (e.g., failure to report, failure to notify of a change of address, failure to pay legal financial obligations, failure to comply with treatment), which led to modifications of his sentences. (Gov't Exs. 7 at 12; 9 at 13 ¶ 46; 25 at 60:8-14.) Records further indicate that ██████ has a history of using alcohol, illegal drugs, inhalants, and prescription drugs but that he has been inconsistent in reporting the extent of his substance use over time. (Gov't Exs. 5 at 7; 7 at 7; 9 at 27 ¶¶ 113-16.)

On 30 March 2005, ██████ was indicted for Sexual Abuse of a Minor, and he pled guilty to the charge on 19 January 2006. (Gov't Exs. 7 at 15, 19; 9 at 2 ¶¶ 1-2.) With regard to this offense, ██████ became friendly with a number of women who were living at a military housing unit in Fort Lewis, Washington. (See, e.g., Gov't Exs. 3 at 7; 5 at 3; 7 at 15; 9 at 3-5 ¶¶ 10-12.) ██████ assisted them with childcare, cleaning, and other tasks while their spouses were away. (Id.) On or about 23 December 2004, a digital camera was found in one of the homes, and it was learned that ██████ had taken pictures of a seven-year-old boy's penis while the boy was sleeping and that he had downloaded child pornography. (Gov't Exs. 3 at 7; 5 at 3; 7 at 15, 18-19; 9 at 3, 7-8 ¶¶ 8-9, 18, 20.) It was also learned that ██████ had engaged in sexual contact with a fifteen-year-old boy. (Gov't Exs. 3 at 7; 5 at 3; 7 at 19; 9 at 7 ¶ 19.) ██████ was not criminally charged with taking the photos of the seven-year-old boy's penis, which he admitted

doing, or for possessing child pornography, which he also admitted. (Gov't Exs. 3 at 8; 5 at 3; 7 at 18-19; 9 at 7-8 ¶¶ 18, 20.) Rather, he was only charged with having sexually abused the fifteen-year-old boy. On 16 March 2007, ██████ was sentenced to one hundred twenty months imprisonment and a five-year term of supervised release. (Gov't Exs. 3 at 8; 7 at 19; 8.)

While in the custody of the federal Bureau of Prisons ("BOP"), ██████ was sanctioned on 12 March 2010 for Possessing a Dangerous Weapon. (Gov't Exs. 3 at 8; 5 at 6; 7 at 21.) In 2013, he was accused of taking a medication not prescribed by staff. (Gov't Ex. 3 at 3, 10; Resp't Proposed Findings of Fact and Conclusions of Law, DE # 31, at 3 ¶ C.) On 29 July 2013, ██████ was certified as a sexually dangerous person pursuant to 18 U.S.C. § 4248. (DE ## 1, 1-1.)

II. DISCUSSION

The Adam Walsh Act provides for the civil commitment of "sexually dangerous person[s]." 18 U.S.C. § 4248. Under 18 U.S.C. § 4247(a)(5), a "sexually dangerous person" is one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." A person is "sexually dangerous to others" if he "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); see also United States v. Francis, 686 F.3d 265, 274 (4th Cir. 2012).

Under the Adam Walsh Act, the government has the burden of proving that ██████ is a sexually dangerous person by clear and convincing evidence. 18 U.S.C. § 4248(d). "The clear and convincing evidence standard is an 'intermediate standard,' lying somewhere 'between

preponderance of the evidence and proof beyond a reasonable doubt.” United States v. Hunt, 643 F. Supp. 2d 161, 179 (D. Mass. 2009) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)). “Clear and convincing evidence is evidence ‘of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable.’” United States v. Springer, 715 F.3d 535, 538 (4th Cir. 2013) (quoting Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001)); see also Hunt, 643 F. Supp. 2d at 179 (The government must produce “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” (alteration in original) (quoting Black’s Law Dictionary 596 (8th ed. 2004))).

Thus, in order to prove that [REDACTED] is a “sexually dangerous person,” the government must prove three elements by clear and convincing evidence: (1) that [REDACTED] engaged in or attempted to engage in sexually violent conduct or child molestation; (2) that [REDACTED] suffers from a serious mental illness, abnormality, or disorder; and (3) that, as a result of the serious mental illness, abnormality, or disorder, [REDACTED] would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released. See 18 U.S.C. §§ 4247(a)(5)-(6), 4248; Francis, 686 F.3d at 274; United States v. Hall, 664 F.3d 456, 461 (4th Cir. 2012).

Four experts testified at the evidentiary hearing. Rebecca [REDACTED] Psy.D., and Dale R. [REDACTED] Ph.D., testified on behalf of the government. Leonard A. [REDACTED] Ph.D., testified as the court-selected examiner. (See DE ## 6, 7.) Joseph J. Plaud, Ph.D., testified on behalf of [REDACTED]

as an additional examiner selected pursuant to 18 U.S.C. § 4247(b).³ (See DE # 10.) ██████ was called as a witness during the government’s case-in-chief. Richard Peregrin also testified on behalf of the government.

A. Previously Engaging or Attempting to Engage in Child Molestation

The court finds that the first criterion for commitment under the Adam Walsh Act, that ██████ “has engaged or attempted to engage in sexually violent conduct or child molestation” in the past, is satisfied. 18 U.S.C. § 4247(a)(5). All of the experts in this case agree that ██████ has committed acts of child molestation, and ██████ does not dispute that the government has proven the first element. (See Resp’t Proposed Findings of Fact and Conclusions of Law, DE # 31, at 6.)

B. Serious Mental Illness, Abnormality, or Disorder

To meet its burden of establishing that ██████ is “sexually dangerous to others,” the government must also prove that ██████ “suffers from a serious mental illness, abnormality, or disorder.” 18 U.S.C. § 4247(a)(6). Three of the experts in this matter, Drs. ██████ ██████ and ██████ opined that ██████ suffers from pedophilia/pedophilic disorder,⁴ sexually attracted to

³ Both Dr. ██████ and Dr. Plaud interviewed ██████ as part of their forensic evaluations. Drs. ██████ and ██████ did not interview ██████ but instead relied on a review of the relevant records in conducting their evaluations.

⁴ “Pedophilic disorder” is a condition described in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”), which was released in May 2013. In the prior manual, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (“DSM-IV-TR”), this same condition was labeled as “pedophilia.” The court notes that there is no difference between the DSM-IV-TR and the DSM-5 with regard to the diagnostic criteria for this disorder. “Only the disorder name will be changed from pedophilia to pedophilic disorder to maintain consistency with the chapter’s other listings.” American Psychiatric Association, <http://www.psychiatry.org/practice/dsm/dsm5>, under the “Paraphilic Disorders” heading (last visited June 25, 2014). Because the DSM-5 is the current operative manual, the court will use the term “pedophilic disorder” throughout this order when discussing whether such diagnosis is applicable to ██████. The court will use the term “pedophilia” when discussing cases that were decided when the DSM-IV-TR was the operative manual.

males, non-exclusive type.⁵ (Gov't Exs. 3 at 11-12; 5 at 8-9; 7 at 21-22.) These same three experts also diagnosed ██████ with antisocial personality disorder. (Gov't Exs. 3 at 12; 5 at 8-10; 7 at 21, 23.) In contrast, Dr. Plaud disagreed with the other experts in this case and concluded that ██████ does not suffer from any type of sexual disorder or any other mental illness, abnormality, or disorder. (Resp't Ex. 2 at 2, 11-14.)

The court first examines the issue of whether ██████ suffers from pedophilic disorder.

The DSM-5 lists the criteria of this disorder as follows:

- A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
- B. The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
- C. The individual is at least age 16 years and at least 5 years older than the child or children in Criterion A.

DSM-5 § 302.2 at 697.

Here, although Drs. ██████ ██████ and ██████ have labeled ██████ as a pedophile, this diagnosis is not supported by clear and convincing evidence. First, as Dr. Plaud pointed out at the hearing, ██████ was not old enough to meet the diagnostic criteria for pedophilic disorder at the time that some of his acts of child molestation were allegedly committed. For example, the government contends that ██████ began molesting his younger brother when ██████ was eleven years old and his brother was six years old. (See, e.g., Gov't Exs. 5 at 5; 7 at 22; 9 at 11 ¶¶ 39,

⁵ When an individual has pedophilic disorder of a non-exclusive type, it means that even though he is sexually attracted to children, he is attracted to adults as well. (Gov't Ex. 7 at 22.) See United States v. Johnson, 856 F. Supp. 2d 768, 770 (E.D.N.C. 2012) (“the ‘non-exclusive type’ specifier . . . describes those individuals with pedophilia who ‘are sometimes attracted to adults’” (quoting DSM-IV-TR § 302.2 at 571)), aff'd, 528 F. App'x 316 (4th Cir. 2013) (per curiam) (unpublished), cert. denied, 134 S. Ct. 326 (2013).

41; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 33, at 3 ¶ 2.) However, even if the court accepted the government's position with regard to this issue, much of this behavior cannot be considered in determining whether [REDACTED] suffers from pedophilic disorder because he was less than sixteen years old during the vast majority of the time that he was allegedly molesting his brother. DSM-5 § 302.2 at 697 (the diagnostic criteria for pedophilic disorder require that the offender must be at least sixteen years of age).

In other instances, the victims were thirteen years old and [REDACTED] was seventeen years old at the time the molestation allegedly occurred. (Gov't Ex. 9 at 16 ¶ 59 (describing [REDACTED] molestation of his cousin, L.J.P., and his step-cousin, J.M.); Gov't Proposed Findings of Fact and Conclusions of Law, DE # 33, at 6 ¶ 9.) Again, these acts of molestation cannot be considered in assessing the appropriateness of a diagnosis of pedophilic disorder because there must be at least a five-year difference in age between the victim and the offender in order to meet the diagnostic criteria. DSM-5 § 302.2 at 697. In addition, it is not clear whether other acts of molestation are able to be taken into account. For example, when [REDACTED] was either fifteen or sixteen years old, he allegedly molested his five-year-old cousin. (Gov't Ex. 9 at 17 ¶ 67; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 33, at 6 ¶ 9.) If [REDACTED] was sixteen years old when the molestation occurred, then it can be considered, but if he was fifteen, it cannot be considered. (See also Gov't Exs. 5 at 3 (Dr. [REDACTED] stating that [REDACTED] "repeatedly engaged in sexual contact with children . . . between the time he was 11 and 17 years old" (emphasis added)); 7 at 20, 22 (Dr. [REDACTED] stating that [REDACTED] disclosed "that when he was between the ages of 15 and 17" he molested additional undetected victims (emphasis added)).)

Drs. [REDACTED] [REDACTED] and [REDACTED] did not discuss any of these age-related distinctions in

their reports or in their testimony at the hearing. Rather, it appears that they improperly considered all of [REDACTED] sexual misconduct in formulating their diagnoses of pedophilic disorder. As a result, the court is very reluctant to rely on their opinions with regard to this issue. Moreover, as Dr. Plaud testified, the overwhelming majority of [REDACTED] sexual misconduct took place when he himself was a juvenile.⁶ Thus, the conduct occurred when the emotional and decision-making control centers of [REDACTED] brain had not yet reached maturity.⁷ [REDACTED] is now more mature at the age of thirty-three, and the court is unwilling to declare that he has ever suffered from pedophilic disorder when almost all of his alleged acts of child molestation were committed during a period of psychosocial immaturity.

Most importantly, the court discounts the opinions of Drs. [REDACTED] [REDACTED] and [REDACTED] because none of them point to any recent evidence of [REDACTED] having recurrent or intense sexually arousing fantasies, urges, or behaviors regarding prepubescent males. Their diagnoses of pedophilic disorder are based completely on [REDACTED] behavior from the time of his adolescence until he was twenty-three years old.⁸ (Gov't Exs. 3 at 11-12; 5 at 9; 7 at 22.)

⁶ [REDACTED] was not accused of, charged with, or convicted of molesting a child for a period of about six years, from the time that he was adjudicated on the charges of Child Molestation in the First Degree and Attempted Child Molestation in the First Degree in August 1998 until approximately July 2004, when the conduct underlying his federal offense began to occur (see Gov't Ex. 9 at 2 ¶ 1 ([REDACTED] was charged with Sexual Abuse of a Minor "on or about July through August 2004"). Although the court recognizes that he was incarcerated during much of this time period on charges of theft, failure to register as a sex offender, and probation violations (see, e.g., Gov't Exs. 7 at 11-12, 9 at 12-15 ¶¶ 44-57), the fact remains that the only accusations of child molestation that have been made against [REDACTED] as an adult relate to conduct that occurred in 2004 with a seven-year-old boy and a fifteen-year-old boy. [REDACTED] was also accused of possessing child pornography at that time. See discussion, supra, at 3-4.

⁷ At the hearing, Dr. Plaud testified that the National Institutes of Health has extended the analysis of the adolescent brain up to the age of twenty-five years old. See, e.g., <http://www.nimh.nih.gov/health/publications/teen-brain-still-under-construction/index.shtml> (last visited June 25, 2014) ("In key ways, the brain doesn't look like that of an adult until the early 20s.").

⁸ The court acknowledges that the record does contain some evidence to support the conclusion that [REDACTED] suffered from pedophilic disorder as a young adult. (See, e.g., Gov't Exs. 5 at 3 ("While in and out of community supervision and confinement facilities from the age of 18 to 22, Mr. [REDACTED] admitted he had ongoing sexual interests (continued...)

However, ten years have passed since then, and there is no evidence to support a diagnosis of pedophilic disorder during that decade.

For example, there is absolutely no evidence in the record which demonstrates that ██████ has engaged in sexual acts or acted out in a sexual manner during his most recent incarceration. Specifically, there is no evidence that ██████ has either collected or drawn pictures of young male children while in BOP custody. Although the government introduced evidence to show that ██████ wrote “various pornographic fantasy stories” in the past (Gov’t Ex. 9 at 3 ¶ 9; Gov’t Proposed Findings of Fact and Conclusions of Law, DE # 33, at 12 ¶ 22), he has not written any such stories about prepubescent males while he has been federally incarcerated. He has not been caught engaging in sexual behavior with anyone in his unit. Nor has he attempted to contact a prepubescent male by letter, telephone, or in any other manner. The court finds it significant that in the ten years following his most recent offense, ██████ sexual urges have not interfered with his daily functioning, and he has not acted on those urges.⁹

⁸(...continued)

for pre-adolescent boys.”), 9; 7 at 22 (discussing evidence of ██████ being in the presence of children and of his sexual attraction to prepubescent males from the time that he was nineteen years old through the age of twenty-three.) However, even if the court assumes without deciding that ██████ did meet the DSM criteria for pedophilic disorder during his early adulthood, such a determination would not require the court to conclude that ██████ suffers from a mental illness, abnormality, or disorder for the purposes of the Adam Walsh Act. “[T]he Supreme Court has said that courts are not bound by medical definitions in determining whether an individual suffers from a mental illness as a matter of law because ‘psychiatry . . . informs but does not control ultimate legal determinations.’” Springer, 715 F.3d at 546 (alteration in original) (quoting Kansas v. Crane, 534 U.S. 407, 413 (2002)); see also Kansas v. Hendricks, 521 U.S. 346, 359 (1997) (“Legal definitions . . . must take into account such issues as individual responsibility . . . and competency, [and consequently] need not mirror those advanced by the medical profession.” (citation and internal quotation marks omitted)); United States v. Caporale, 701 F.3d 128, 136 (4th Cir. 2012) (noting that “one will search § 4247(a)(6) in vain for any language purporting to confine the universe of qualifying mental impairments within clinical or pedagogical parameters” and, consequently, that “it has been left to the courts to develop the meaning of ‘serious mental illness, abnormality, or disorder’ as a legal term of art”).

⁹ The court mentions that while ██████ was in custody as a juvenile, he was observed masturbating in front of another youth and also wrote sexual letters to a peer-aged male. (See Gov’t Exs. 3 at 6; 5 at 6; 7 at 3.) Thus, while ██████ acted out in a sexual manner during his juvenile confinement, there is absolutely no evidence that he has engaged in comparable behavior over the course of the past ten years.

Furthermore, ██████ has consistently denied having any sexual attraction to prepubescent males during the period of his most recent incarceration.¹⁰ (See Gov't Exs. 3 at 10 (Dr. ██████ noting that “[w]hen asked, Mr. ██████ denied any interest or arousal to pre-pubescent children”), 11, 13; 25 at 140:14-16 (during his 20 November 2013 deposition, ██████ denied having sexual fantasies about boys aged thirteen or younger); Resp't Ex. 2 at 5 (Dr. Plaud noting that during their interview, ██████ stated “that his sexual preference is for male adults” and also stated “that at the present time he masturbates weekly, to sexual fantasies involving consensual sexual behavior with male adults”).)

Committing pedophilic acts and meeting the criteria for a diagnosis of pedophilic disorder are not necessarily coincident, and absent further evidence that ██████ currently demonstrates recurrent, intense, sexually arousing fantasies, urges, or behaviors involving prepubescent males, the court finds more convincing Dr. Plaud's opinion that ██████ does not suffer from pedophilic disorder.¹¹ (Resp't Ex. 2 at 2, 12.) As a result, the court finds that the

¹⁰ The court recognizes that ██████ has recently admitted that he is sexually attracted to pubescent and post-pubescent teenage males. (See Gov't Exs. 3 at 10 (Dr. ██████ noting that ██████ acknowledged “arousal to ‘juveniles, 13 and up,’ as well as adults from 18 to 45”), 11, 13; 25 at 140:17-25 (during his 20 November 2013 deposition, ██████ admitted to having sexual fantasies about boys between the ages of fourteen and fifteen “[m]aybe once every couple weeks”). Despite the fact that he has made such admissions regarding his current sexual attraction to pubescent and post-pubescent adolescents, the government does not contend that ██████ suffers from other specified paraphilic disorder, see DSM-5 § 302.89 at 705. Furthermore, none of the experts in this matter have diagnosed ██████ with other specified paraphilic disorder. Because the government has not argued that ██████ suffers from other specified paraphilic disorder, the court need not address the appropriateness of such a diagnosis.

The court also notes that the 2006 pre-sentence report states that ██████ “acknowledged he has an attraction to juvenile children” (Gov't Ex. 9 at 8 ¶ 20; see also Gov't Ex. 25 at 116:10-12.) However, ██████ statement does not provide clear and convincing evidence of a more recent sexual attraction to prepubescent males because the word “juvenile” can encompass prepubescent, pubescent, and post-pubescent children. Thus, ██████ may have been referring to pubescent and/or post-pubescent males when he made the acknowledgment. This conclusion is underscored by the fact that ██████ told Dr. ██████ that he is attracted to “juveniles” but then clarified his statement by adding the phrase “13 and up.” (Gov't Ex. 3 at 10, 11 (internal quotation marks omitted).) As a result, the court discounts the statement contained in the 2006 pre-sentence report in assessing whether ██████ suffers from pedophilic disorder.

¹¹ This case differs significantly from other Adam Walsh Act cases that have been decided by this court (continued...)

government has failed to meet its burden of showing by clear and convincing evidence that [REDACTED] suffers from pedophilic disorder.

The court next considers whether [REDACTED] suffers from antisocial personality disorder. Drs. [REDACTED] [REDACTED] and [REDACTED] have diagnosed [REDACTED] with this disorder, but Dr. Plaud does not believe that such a diagnosis is proper in this case. (Gov't Exs. 3 at 12; 5 at 8-10; 7 at 23; Resp't Ex. 2 at 2, 13.) As described in the DSM-5, antisocial personality disorder is characterized by a pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen and indicated by at least three of seven criteria, including: (1) failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for the safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen

¹¹(...continued)

where the respondent argued that it was not clear that he suffered from pedophilia, but the court found that such a diagnosis was warranted. In those cases, there was recent evidence which demonstrated the respondent's ongoing sexual attraction to prepubescent children. *See, e.g., United States v. Riedel*, 5:08-HC-2155-BR (E.D.N.C.), DE # 76, at 7-8 (during the commitment hearing, respondent admitted that he had "tendencies" toward sexual urges regarding prepubescent children and that those tendencies would "probably not" go away; respondent also acknowledged during an interview with an expert approximately fourteen months prior to the commitment hearing that he was experiencing fantasies about children and that his deviant fantasies were something that would always have to be managed); *United States v. Edwards*, No. 5-11-HC-2132-BR (E.D.N.C.), DE # 60, at 5 (during the commitment hearing, respondent admitted to being subconsciously aroused by thoughts of young boys and also admitted that he had fantasies of exposing himself to such children); *see also United States v. Wooden*, 693 F.3d 440, 452-53 (4th Cir. 2012) (finding that a record that contains "substantial evidence showing that [the respondent] was still having intense and recurrent sexually arousing fantasies and sexual urges about prepubescent children," including admissions made to a psychologist, admissions made during a polygraph examination, and admissions made during a deposition, in addition to hearing testimony that evinced common sex offender cognitive distortions, supported a finding that the respondent suffered from pedophilia (emphasis added)).

from another. DSM-5 § 301.7 at 659. Additionally, there must be evidence of conduct disorder prior to age fifteen. Id. Conduct disorder involves a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate social norms or rules are violated. Id. The specific behaviors characteristic of conduct disorder fall into one of four categories: (1) aggression to people and animals; (2) destruction of property; (3) deceitfulness or theft; or (4) serious violations of rules. Id.

The court finds that the government has failed to present clear and convincing evidence to show that ██████ currently suffers from antisocial personality disorder. As with their diagnoses of pedophilic disorder, the antisocial personality disorder diagnoses of Drs. ██████ and ██████ are based to a large extent on ██████ behavior from the time of his adolescence until he was twenty-three years old.¹² (Gov't Exs. 5 at 9-10; 7 at 23.) In contrast, Dr. ██████ who interviewed ██████ as part of his forensic evaluation, provided considerable testimony at the hearing regarding his belief that ██████ presently suffers from antisocial personality disorder. Dr. ██████ explained that ██████ acted in a manipulative manner during their interview. ██████ himself commented on his current lack of credibility given that he had lied to others in the past. (See also Gov't Ex. 3 at 12.) Dr. ██████ believes that ██████ does not tell consistent stories, that he presents in different ways at different times, and that his pattern of relating to others involves doing what is best for himself. Dr. ██████ also testified that ██████ failed to display empathy for his victims during their interview. (See also id. at 14 (██████ "never expressed any empathy for his victims or made any statements regarding the harm he caused to them or their families.")) In its closing argument at the hearing, the government asked the court to "heavily credit" Dr.

¹² The court notes that Dr. ██████ and Dr. ██████ did provide testimony at the evidentiary hearing regarding ██████ recent BOP infractions, and the court has considered that testimony.

██████ testimony.

However, even if the court were to fully credit the testimony of Dr. ██████ the evidence would only clearly support a finding that ██████ currently meets two of the criteria for a diagnosis of antisocial personality disorder: deceitfulness and lack of remorse. As the court has previously discussed, it is necessary for an individual to meet at least three of the seven diagnostic criteria in order to obtain such a diagnosis. See discussion, supra, at 12-13. There is little evidence in the record to show that ██████ presently meets any of the other diagnostic criteria. For example, he does not exhibit irritability or aggressiveness, nor has he done so throughout the course of his life. (See, e.g., Gov't Ex. 5 at 10 (Dr. ██████ noting that irritability and aggressiveness are not “prominent feature[s]” in ██████ personality).) Furthermore, as Dr. ██████ acknowledged on cross-examination, ██████ has worked as a shipping clerk in the logistics department of the BOP even though he does not have to maintain employment while in federal custody. Thus, the record does not clearly support a finding that ██████ is now demonstrating “[c]onsistent irresponsibility.” DSM-5 § 301.7 at 659.

Most importantly, ██████ has had few behavioral difficulties during his recent federal incarceration.¹³ Even Dr. ██████ admits that ██████ has not been a behavioral problem over the past ten years. (Gov't Ex. 3 at 8 (Dr. ██████ stating that ██████ “was sent to various federal facilities and apparently displayed no significant problems while incarcerated”), 12 (recognizing ██████ “limited history of disciplinary infractions while incarcerated”).) Although it appears that ██████ received two recent disciplinary infractions, one in 2010 and one in 2013, two write-

¹³ The court observes that although ██████ was housed in the Special Housing Unit (“SHU”) for an extended period of time when he first entered the BOP, it was not because he presented behavioral problems. Rather, he resided in the SHU because he requested protective custody status. (Gov't Exs. 3 at 8; 7 at 9, 21.)

ups in a ten-year period simply do not show that ██████ has “fail[ed] to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.”¹⁴ DSM-5 § 301.7 at 659.

Drs. ██████ ██████ and ██████ have attempted to account for this lack of evidence of current behavioral problems. At the hearing, all three of them testified in effect that ██████ is living in an “artificial environment” and that the structure of the institutional setting suppresses antisocial personality disorder in some people, including ██████. The court declines to credit this vague testimony which was not supported by data. An individual experiencing great difficulty conforming his conduct to the rules of society would likely exhibit the same pattern of bad behavior while incarcerated, but ██████ has not done so. See, e.g., United States v. Wilkinson, 646 F. Supp. 2d 194, 204 (D. Mass. 2009) (forensic expert in Adam Walsh Act case testified that “many inmates with Antisocial Personality Disorder have behavior problems in prison”). In contrast to many inmates, his conduct while incarcerated indicates that he does not have difficulty obeying general rules, even the strict regulations of the prison environment.

Moreover, the court is hesitant to accept the argument that the prison environment is suppressing ██████ antisocial personality disorder given the advisory language contained in the DSM-5 which states that antisocial personality disorder “may become less evident or remit as

¹⁴ Moreover, the court places very little weight on the infractions themselves. ██████ incurred the 2010 violation for possessing a dangerous weapon, *i.e.*, a sharpened toothbrush. (Gov’t Exs. 3 at 8; 5 at 6; 7 at 21; Resp’t Ex. 2 at 7-8.) At the hearing, ██████ convincingly testified that the only reason why he had the toothbrush in his possession was because he was afraid that he was going to be transferred out of a federal prison in Tucson, Arizona. He wanted to remain at that facility, and he thought that he could achieve that goal by obtaining the infraction for possession of a dangerous weapon. The court credits ██████ testimony with regard to this issue.

The 2013 violation appears to have involved ██████ taking medication that was not prescribed by BOP staff. (See, e.g., Gov’t Ex. 3 at 3, 10; Resp’t Proposed Findings of Fact and Conclusions of Law, DE # 31, at 3 ¶ C.) Although Dr. ██████ provided general testimony that this infraction was “very serious” in nature, almost no specific evidence was introduced at the hearing regarding the circumstances surrounding this violation. As a result, the court declines to give this infraction significant weight in determining whether ██████ currently suffers from antisocial personality disorder.

the individual grows older, particularly by the fourth decade of life. Although this remission tends to be particularly evident with respect to engaging in criminal behavior, there is likely to be a decrease in the full spectrum of antisocial behaviors and substance use.” DSM-5 § 301.7 at 661. The court acknowledges that [REDACTED] is thirty-three years old and has not yet reached his fourth decade of life. Nevertheless, the court cannot ignore the fact that the DSM-5 specifically indicates that antisocial personality disorder tends to remit over time.

Finally, Dr. Plaud is the only expert in this case who conducted personality testing in order to assess [REDACTED] current psychological status, and he has opined that a diagnosis of antisocial personality disorder is not warranted at this time. As Dr. Plaud has explained, [REDACTED] results on the International Personality Disorder Examination (“IPDE”) indicate that he does not presently evidence a pattern of personality functioning in which he has antisocial personality features. (See Resp’t Ex. 2 at 21-22.) Rather, the results of the IPDE demonstrate that [REDACTED] “may be prone to engage in histrionic behavior as well as socially avoidant behavior, reinforced through his long term of institutionalization.” (Id. at 22.) The court credits Dr. Plaud’s testimony with regard to this issue, particularly after observing [REDACTED] own testimony at the hearing.

Thus, absent more recent and pervasive evidence of deviant behavior, it is not clear that [REDACTED] currently has antisocial personality disorder.¹⁵ Moreover, even if [REDACTED] does suffer

¹⁵ At this juncture, the court notes its finding that there is clear and convincing evidence in this case which shows that [REDACTED] suffered from a conduct disorder prior to age fifteen. See DSM-5 § 301.7 at 659. He began stealing when he was in kindergarten. (Gov’t Exs. 3 at 4; 5 at 4; 7 at 4, 23.) [REDACTED] parents reported that he “was always stealing from friends or family members.” (Gov’t Ex. 9 at 23 ¶ 101.) According to his 2006 pre-sentence report, [REDACTED]

presented with numerous behavioral problems since he was very young. In 1989, he was referred to Pediatric Associates in Lakewood, Washington by Shining Mountain Elementary School

(continued...)

from antisocial personality disorder now, the government has not shown that the disorder is sufficiently severe to constitute a “serious” mental disorder within the meaning of the Adam Walsh Act. Although the government presented evidence to show that there is an increased risk of sexual recidivism when an individual is diagnosed with both pedophilic disorder and antisocial personality disorder (see, e.g., Gov’t Ex. 5 at 10), the court has previously determined that ██████ does not suffer from pedophilic disorder. See discussion, supra, at 7-12. As Dr. Plaud has pointed out, antisocial personality disorder in and of itself is “only weakly related to sexual offense recidivism.” (Resp’t Ex. 2 at 13.) Additionally, the court agrees with the analysis adopted by another judge in this district:

[T]he goal of § 4248 is to isolate sexually dangerous offenders. Even if [the respondent] has appropriately been diagnosed with antisocial personality disorder, the Court is reluctant [to] find that, in this instance where there is no companion diagnosis of a sexual disorder or paraphilia, a diagnosis of antisocial personality disorder, alone, rises to the level of a serious mental disorder that is a sufficient basis upon which to predicate civil commitment under the Adam Walsh Act.

United States v. Begay, 880 F. Supp. 2d 707, 711 (E.D.N.C. 2012) (emphasis in original); see also Wilkinson, 646 F. Supp. 2d at 208 (Adam Walsh Act respondent’s antisocial personality disorder did not “distinguish him from many other prisoners” where experts in the case estimated

¹⁵(...continued)

officials due to his negative behaviors and struggles with course work. ██████ was noted to have always had problems in school, even though he was labeled as being bright. He was noted to be disruptive in class and was disrespectful and disobedient toward his teachers at school as well as to his parents at home. He was noted to have poor attention, poor esteem, poor anger control and poor frustration tolerance. He was also noted to be impulsive, have excess activity level and difficulty getting along with others. ██████ was diagnosed with Attention Deficit Hyperactivity Disorder and Behavioral Disorder and was prescribed Ritalin.

(Id. at 23 ¶ 100; see also Gov’t Exs. 3 at 4; 5 at 4; 7 at 4, 23.) Furthermore, ██████ parents stated that he “had always been ‘somewhat of a management problem’ and had ‘somewhat of a deviant mind.’” (Gov’t Ex. 9 at 23 ¶ 101.) However, the existence of this evidence does not change the fact that the government has failed to prove that ██████ suffers from antisocial personality disorder at the present time.

that about a third of all prisoners have the disorder).

The government's evidence has failed to instill in the court "a firm belief or conviction, without hesitancy" that ██████ suffers from any mental illness, abnormality, or disorder. Springer, 715 F.3d at 538 (citation and internal quotation marks omitted). Accordingly, the court concludes that the government has failed to prove by clear and convincing evidence that ██████ has a serious mental illness, abnormality, or disorder for the purposes of the Adam Walsh Act. As a result, the government has necessarily failed to prove that ██████ is a sexually dangerous person.¹⁶

III. CONCLUSION

For the foregoing reasons, the government has failed to show by clear and convincing evidence that ██████ 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. Accordingly, the court concludes that ██████ is not a sexually dangerous person under the Adam Walsh Act and ORDERS that the government release ██████ forthwith to the custody and supervision of the appropriate United States Probation Officer. The

¹⁶ Because the court has concluded that ██████ does not have a serious mental illness, abnormality or disorder, the court need not address the Adam Walsh Act's volitional control prong. See Francis, 686 F.3d at 276 ("[T]he district court could have concluded that [the respondent] was not sexually dangerous based only on the government's failure to prove the mental illness element." (citing United States v. Comstock, 627 F.3d 513, 515-16 (2010))); Wooden, 693 F.3d at 450 ("[T]he district court could have rested its rejection of the government's petition solely on its determination that [the respondent] was not a pedophile . . .").

Clerk is DIRECTED to close this case.

The 25 June 2014.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is positioned above a horizontal line.

W. Earl Britt
Senior U.S. District Judge