IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:16-HC-2147-FL

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
SAMUEL [redacted]	)	
	)	
Respondent.	)	

Upon allowance June 11, 2021, of respondent's motion filed May 26, 2021, for hearing to review his civil commitment, two-day hearing convened on April 27, 2022. The matter is before the court for determination of whether respondent has shown by a preponderance of the evidence that he would not be sexually dangerous to others if released on a prescribed regimen of medical, psychiatric, or psychological care or treatment. For the reasons set forth below, the court finds respondent has met his burden, and orders him conditionally released.

STATEMENT OF THE CASE

On June 24, 2016, petitioner initiated this proceeding by filing certification of a sexually dangerous person and petition as to respondent, alleging he is subject to civil commitment pursuant to the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). See 18 U.S.C. § 4248(a). At the time of certification, respondent was serving 87 months' term of imprisonment following convictions for transportation of child pornography, in violation of 18 U.S.C. § 2252(a)(1); and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).

On February 8, 2017, respondent consented to civil commitment as a sexually dangerous person. That same day, the court found that respondent's decision to self-commit was knowing

and voluntary, and ordered him civilly committed to the custody of the Attorney General.

On May 26, 2021, respondent moved for discharge hearing pursuant to 18 U.S.C. § 4247(h), alleging that he would not be sexually dangerous to others if released on conditions requiring medical, psychiatric, or psychological care or treatment (the "conditions of release" or "conditions"). Petitioner did not oppose the request for hearing, but moved to reopen discovery for a period of 120 days prior to setting the hearing. On June 11, 2021, the court granted the motions for hearing and discovery.

The court convened two-day hearing on April 27, 2022. The parties' joint trial notebook, which was received into evidence, included respondent's certification as a sexually dangerous person, pre-certification evaluations, records from respondent's criminal case, records concerning respondent's conduct in Federal Bureau of Prisons ("FBOP") custody, the testifying experts' reports and curricula vitae, and respondent's civil commitment/treatment records. The court granted the parties' joint motion to allow the following witnesses to testify as experts: Dr. Amy Phenix, Ph.D. ("Phenix"), Dr. Justin Rigsbee, Ph.D., Psy.D. ("Rigsbee"), Dr. Joseph Plaud, Ph.D. ("Plaud"), and Dr. Luis Rosell, Ph.D. ("Rosell"). The foregoing experts and respondent testified at hearing. The parties also presented oral argument at the close of evidence, and the court took the matter under advisement.

STATEMENT OF THE FACTS

A. Personal and Family History

Respondent, now 40 years old, was born and raised in Pittsburgh, Pennsylvania. (Resp't Ex. 6 at 4). He has one older sister. (Id.). During childhood, respondent's father was physically

abusive to him and his mother. (Resp't Ex. 1 at 2). Respondent's parents divorced when he was 13 years old, and his mother raised him following the divorce. (Resp't Ex. 6 at 2). Respondent had a difficult time adjusting to the divorce, and he began acting out in school and at home, including physical violence directed to his mother and sister. (Resp't Ex. 1 at 2).

At age 16, respondent threw a screwdriver at his sister and caused a severe puncture wound on her back. (Id.). He was arrested and placed in a juvenile facility for three months, and then a group home until age 18. (Id.).

Respondent graduated high school in 2000. (Id.). He has attended some vocational training programs since high school graduation, including a program to become a medical assistant, but he has not completed these programs. (Resp't Ex. 6 at 4 at 4).

Respondent was homeless from approximately age 19 to 26. (Id.) During this time, he lived with friends, in shelters, or on the streets of Pittsburgh. (Id.). He has a very limited work history, primarily in the retail industry restocking inventory. (Id. at 5). Prior to the instant period of incarceration and civil commitment, respondent received disability benefits based on his mental health issues. (Id.). Respondent maintains contact with his mother, as well as some aunts, uncles, and cousins, all of whom are now living in Wilmington, North Carolina. (Id. at 4).

B. Mental Health/Substance Abuse History

Respondent has a history of alcohol abuse. He reportedly "drank heavily" between the ages of 26 and 28, and he has been arrested for "public drunkenness." (Resp't Ex. 1 at 3; Pet'r Ex. 29 at 31).

Respondent also suffers from significant mental health problems. At age 10, he was placed in psychiatric treatment to address anger management issues. (Resp't Ex. 1 at 6). As

noted above, respondent was placed in a group home between ages 16 and 18 to address anger and other emotional concerns. (Id.). And the record documents lifelong struggles with both anxiety and depression. (Resp't Ex. 6 at 5).

During his time in FBOP custody, psychiatrists diagnosed respondent with depressive disorder, adjustment disorder with mixed anxiety and depressed mood, borderline and antisocial personality traits, pedophilic disorder (provisional), other specified paraphilic disorder (provisional), frotteuristic disorder, major depressive disorder, and borderline personality disorder. (Pet'r Ex. 29 at 36). Respondent also has an extensive history of threatening suicide and self-harm. (Id. at 34; Resp't Ex. 6 at 10). Plaud summarizes that respondent "had hundreds of contacts with psychology staff since he began his incarceration [and] he has received twenty six suicide risk assessments and was placed on suicide watch six times." (Resp't Ex. 6 at 10). The self-mutilation has been noted as "superficial" and the respondent explains that he "never really wanted to kill myself, I just don't always know what to do." (Id.).

Currently, respondent is prescribed the antipsychotic olanzapine (Zyprexa) and the antidepressant citalopram (Celexa) to regulate his mood issues and sexual impulses, and naltrexone to assist with weight gain, which is a side effect of the Zyprexa. (Pet'r Ex. 27 at 7–8). Respondent is compliant with the medications and he reports they are helpful in regulating his mood and sexual impulses. (Id. at 7–8; Pet'r Ex. 29 at 7–8).

C. Sexual History

Respondent is heterosexual and he self-reports sexual attraction to adult women and pubescent adolescent females. (Resp't Ex. 1 at 3–4). He denies sexual behavior with males. (Id. at 3).

Respondent became interested in sex at approximately 14 years old, when he began viewing pornography in magazines and masturbating. (Id.). At approximately age 18, respondent began viewing child pornography over the internet and engaging in online chat room discussions with teenage girls. (Id. at 4). Over the course of the next 10 years, respondent at times viewed pornography as much as 30 hours per week. (Id.). He masturbated to the child pornography almost every time he viewed it. (Id.).

Between the ages of 24 and 28, respondent participated in online chat discussions with teenage girls approximately three times per week. (Id. at 5). During the chats, he sometimes convinced the minors to send him sexually explicit photographs. (Id.). Respondent also "lured six or seven underage females to have sex with him. He met the girls at the mall or had them over to his house where they engaged in sexual acts." (Resp't Ex. 6 at 7).

Between ages 24 and 26, respondent committed numerous acts of frotteurism: sexual rubbing of victims without their consent. (Resp't Ex. 1 at 5). He admits to walking up behind adult women and grabbing their breasts on the streets of Pittsburg once a week during this time period. (Id.; Resp't Ex. 6 at 3, 5). He also exposed his genitals to adult women on two different occasions between ages 25 and 26. (Resp't Ex. 6 at 7). Finally, respondent testified that he did not commit any frotteuristic behaviors for two years and nine months prior to his sentencing for the index child pornography offenses.

Respondent reports approximately eight different sexual partners, most of which appear to be the minors he lured for sex using the chat rooms. (Id. at 7). At age 26, he was involved in a six-month relationship with a 17-year-old female, and they had sexual intercourse on three occasions. (Id. at 6). During this relationship, respondent threw a large rock at her back because

he was jealous that she was talking to other men. (Id.). At age 27, respondent had an eight-month sexual relationship with a 26-year-old female. (Id.). During this relationship, respondent was arrested for simple assault, disorderly conduct-public drunkenness, and harassment following an incident where he punched, slapped, and threw his partner into a wall. (Pet'r Ex. 29 at 30–31). The responding officers documented that respondent was highly intoxicated at the time of the arrest. (Id.).

Currently, respondent masturbates approximately three to four times per week, typically to sexual fantasies of adult females. He has admitted masturbating to fantasies involving female FBOP staff members while in the CTP program. (Id. at 7, 9).

D. Adjudicated Child Pornography Offense

On July 9, 2009, at age 28, respondent was arrested and charged with transportation of child pornography (count one), receiving child pornography (count two), and possession of child pornography (count three), in the Western District of Pennsylvania. (Resp't Ex. 1 at 7; Pet'r Ex. 5 at 3). During an interview with FBI agents following his arrest, respondent admitted to receiving and sending child pornography. (Resp't Ex. 1 at 8). In particular, he received and/or downloaded nude images of underage females from various internet sites. (Id.). He copied the images and then sent them to third parties, including one of the investigating agents. (Id.). He further admitted to communicating with underage girls online, at times posing as 15-year-old male. (Id.).

The affidavit of probable cause indicated that respondent met at least one 17-year-old female from the online chat rooms and had sex with her. (Id.). Respondent further admitted travelling to meet at least 10 teenage girls he met in the chat rooms, but he denied sexual contact

with them. (Id.). He acknowledged viewing child pornography and participating in the chat rooms for at least five years prior to his arrest. (Id.). According to the FBI report, respondent communicated within at least 21 juvenile females and had conversations with an undercover agent posing as a 14-year-old. (Id.). He asked for nude pictures and described wanting to perform sexual acts on these minors. (Id.).

Respondent was placed on conditional pretrial release following his arrest. (Pet'r Ex. 5 at 3). He remained on pretrial release for approximately nine months prior to sentencing and complied with all conditions with one minor exception related to his electronic monitoring. (Id.).

On April 23, 2010, respondent pleaded guilty to counts one and three: transportation of child pornography and possession of child pornography, respectively. (Pet'r Ex. 5 at 3). That same day, the United States District Court for the Western District of Pennsylvania sentenced him to 87 months' imprisonment on count one. (Pet'r Ex. 6 at 2). The sentencing court did not impose a sentence on count three based on finding that it was a lesser-included offense of count one. Id. Respondent also was sentenced to 10 years' supervised release, with standard conditions as well as the following special conditions: 1) participation in mental health and/or sex offender treatment (including polygraphs), until such time as the court determines respondent can be released from the treatment program; 2) no association with children under the age of 18 except for family members or children supervised by adults approved by probation; 3) sex offender registration; 4) no possession of any materials depicting or describing child pornography; 5) installation of monitoring software on respondent's electronic devices and requirements that he consent to searches of such devices; and 6) warrantless searches of his residence, vehicles, papers,

computers and other electronic devices, and similar items. (Id. at 3–4).

E. Incarceration History

Respondent entered FBOP custody on May 20, 2010. (Pet'r Ex. 29 at 31). His first three years of incarceration were relatively unremarkable. (See id.). From 2014 through 2016, respondent was charged with numerous disciplinary offenses, including unauthorized contact with a 23-year-old female, refusing to work, stalking (two offenses), insolence toward staff, possession of unauthorized item (which included pornographic images of adults dressed to look younger), and self-mutilation. (Id. at 32–34). As noted above, respondent required extensive mental health treatment due to suicide threats, depression and anxiety, and self-mutilation. (Resp't Ex. 6 at 10–11).

On December 5, 2013, respondent was transferred to the Federal Medical Center in Devens, Massachusetts ("FMC-Devens"), in order to enroll in the FBOP's residential sex offender treatment program ("SOTP-R"). (Pet'r Ex. 29 at 31). During treatment at FMC-Devens, respondent participated in community meetings, community committees, discussion/self-study groups, psychotherapeutic process groups, and psychoeducational groups. (Id. at 36). Treatment staff documented his good attendance, noted that he engaged with several treatment-related issues, and took responsibility for his actions. (Id.). FBOP staff also administered a penile plethysmograph ("PPG") study. (Id.). The study indicated arousal to prepubescent, pubescent, post-pubescent, and adult females, with the most arousal to female teenagers. (Id.)

Respondent struggled during his time in the SOTP-R program. FBOP staff summarized his behavior as follows:

During the 15 weeks [respondent] was enrolled in the SOTP-R, he repeatedly

> violated SOTP-R rules and guidelines. He engaged in a pattern of harassing behaviors beginning in early [January 2014]. [Respondent's] behaviors were directed at two female SOTP-R staff members to whom he indicated he was sexually attracted. He engaged in unnecessary and frequent contact, threatened to drop out of the SOTP-R, threatened self-harm, and was insolent, stared [at the staff members], and lied.
>
> [Respondent] was counseled several times regarding his behaviors and ultimately issued a Behavior Management Plan. However, his harassing behaviors did not stop. On 02-04-14, [respondent] was issued an incident report for refusing a program assignment. He demonstrated a defiant attitude, had interpersonal conflicts with other SOTP-R participants, and showed poor program participation. [Respondent's] poor efforts in treatment groups ultimately led to his failing [a course titled] Challenging Criminal Thinking. Despite many clinical interventions, counseling, programmatic sanctions, and incident reports, he continued to exhibit disruptive behaviors with few efforts to change. [Respondent] was determined to be unsuitable for the FMC Devens compound due to his stalking of a female staff member and concerns he posed a threat. He was considered SOTP-R incomplete.

(Id. at 37). With respect to the inappropriate stalking of the staff member, another clinician wrote:

> [Respondent] started thinking of the staff member as his girlfriend. He was obsessed with her and found himself thinking about her all the time. [Respondent] would get jealous when other inmates would speak to the staff member. He knew his thinking wasn't right, but he felt he could not stop himself despite all the limits placed on him by SOTP-R staff. [Respondent] had similar feelings with females before. When someone was nice to him, he took it too far and made it unhealthy.

(Id. at 37–38). The same FBOP clinician also reported that respondent's "poor boundaries, emotional dysregulation, and lack of appropriate coping strategies were a significant cause for concern." (Id. at 38).

On November, 10, 2015, after his discharge from the SOTP-R and transfer to another federal prison, respondent was convicted again of stalking a female staff member. (Id. at 34). The disciplinary officer found respondent disregarded a warning to cease stalking the staff member by sliding an inmate request addressed to her under the door of the psychology services office.

(Id.).

In January 2016, following his (pre-commitment) transfer to FCC-Butner, respondent admitted that he was sexually attracted to one of his female therapists. (Resp't Ex. 6 at 11). He told her he loved her and cut himself in front her. (Resp't Ex. 1 at 10). FBOP staff issued a behavioral management plan and placed respondent in disciplinary housing for six months due to this behavior. (Id.; Resp't Ex. 6 at 11).

On November 7, 2016, respondent again was moved to disciplinary housing after he spit on a staff member. (Resp't Ex. 6 at 11). He was charged with "assault-minor" for this incident. (Id.)

F. Civil Commitment History

Respondent entered FCC-Butner's commitment and treatment program ("CTP") on or about September 15, 2016, before he self-committed. (Id. at 11). From September 2016 through the end of 2017, respondent participated in groups and individual therapy except for times he was sent to the "annex" housing unit for disciplinary issues. (See id.). However, he struggled with excessive masturbation – up to five times per day – and "fantasizing about/objectifying female staff members." (Id.). In May 2017, he was sanctioned for staring at a female staff member. (Id.). In July 2017, he was sanctioned for throwing food and spitting on a peer who cut in front of him in the food line. (Id.). At hearing, respondent testified that around this same period of time he began taking his new medications, Zyprexa, Celexa, and Naltrexone. And he reported that the medications made him calmer and helped with his anger.

In 2018, respondent continued to participate in treatment, including by taking groups in anger management, boundaries, autobiography, basic relationships, assertiveness, conflict

resolution, problem solving, cognitive distortions, good lives application, and sexual self-management. (Id.). He was rated as having "intellectual and emotional understanding" of the treatment goals of acceptance of responsibility and emotional control, and "superficial intellectual understanding" of other goals. (Id.). However, treatment staff reported respondent spent approximately 60 percent of the day sexually preoccupied, "fantasizing about various female staff and a newscaster on television." (Id.). A progress report noted that respondent "believed in his mind he has a life with them and will be with them once he is released." (Id.). In addition, respondent diligently completed his masturbation logs but he showed limited motivation to implement behavior strategies to manage his sexual impulsivity. (Id. at 11–12). On November 27, 2018, a staff member asked respondent if he believed he would reoffend if he were in the community, and he replied, "probably so." (Pet'r Ex. 24 at 3). Despite these challenges, respondent reported positive feelings about treatment and that he understood further work was necessary with respect to his participation in treatment and sexual preoccupation issues. (Resp't Ex. 6 at 12).

In 2019, respondent continued to participate in treatment, including community meetings, individual therapy, and various treatment groups. (Id.). On March 22, 2019, respondent reported lingering in areas where a new intern was present. (Id.). He described this behavior as "stalking" and further admitted fantasizing about the intern in a sexual way, although not as a girlfriend as he had done with past female staff members. (Id.). FBOP staff instructed respondent to work with two other peers to create an accountability plan and return the plan to the staff member in two hours. (Id.). He complied with this instruction. (Id.). At the subsequent meeting after respondent completed the accountability plan, the CTP acting clinical coordinator and the staff

member warned respondent to refrain from stalking the intern and directed him to disclose future issues to his peer accountability partners and his primary clinician. (Id.). Despite these interventions, within a few days respondent was observed to be present in the same area as the intern. (Id.). As a result, respondent was charged with stalking on April 5, 2019, and he was moved to a secure housing unit. (Id.).

Respondent was allowed to return to the Maryland unit, where active CTP participants reside, on September 29, 2019. (Id.). Through December 2019, he continued to report masturbating to sexual fantasies of female staff. (Id.). On April 17, 2020, a psychology intern documented that respondent was staring at her in an inappropriate manner. (Pet'r Ex. 29 at 10). When confronted, respondent admitted to staring at the intern on at least three previous occasions, and that he did not feel guilty about the behavior until the intern confronted him. (Id.). Treatment staff directed respondent to discontinue this behavior. (Id.). However, on April 28, 2020, the intern documented that respondent was making a great effort to stare at her. (Id.).

Despite these challenges, respondent continued to participate in Phase II of the CTP through the remainder of 2019 and into 2020, although treatment programming in 2020 was limited due to COVID-19 restrictions. (Resp't Ex. 6 at 12–13). Treatment staff reported that respondent demonstrated consistent application of emotional control, and intellectual and emotional understanding with consistency of application in therapeutic alliance, acceptance of responsibility (in sexual exploitation and sexual victimization), and group therapy behaviors. (Id. at 12). He was reported to display superficial understanding for goals of participating in the therapeutic community, sexual preoccupation, problem solving, financial management skills, and significant social influences. (Id.). Individual therapy sessions focused on improving self-esteem. (Id.).

Respondent received 100 percent participation marks for completing group sessions, and over 93 percent marks for participation and homework assignments during 2020. (Id. at 13). In September 2020, respondent reported that he was attracted to a new intern, but he was able to avoid stalking behavior. (Id.). In October 2020, he reported masturbating approximately two times per week to fantasies of prior girlfriends or women on television. (Id.).

In 2021, individual therapy sessions focused on respondent's "obsessive" thoughts about female staff, and his ongoing struggles with low self-esteem. (Id.). He remained medication compliant. (Id.). Treatment staff identified goals that included communicating with peers and spending more time connecting with the therapeutic community, as well as working on his risk factors, which include stalking, obsession, and masturbating to female staff members. (Id. at 13–14). In June 2021, respondent admitted that he had engaged in sexual fantasies about a staff member. (Id. at 14). However, he reported that he did not masturbate to fantasies involving the staff member, and that he had "reminded himself that such behavior was harmful and that this person was not interested in a relationship with him." (Pet'r Ex. 27 at 4).

On June 29, 2021, respondent told his primary clinician that he was "feeling more depressed, down and belittling [him]self again." (Id.). He noted that he was not using the techniques that he had learned during group and individual sessions. (Id.).

On October 22, 2021, respondent reported to his primary clinician that he continued to struggle with attraction to a female staff member. (Id. at 5). However, he was using a three-by-five index card with written comments on it to distract himself from staring at her. (Id.). On November 15, 2021, the clinician reported that respondent's "focus on the female staff member still exists, but he maintains control over his behavior." (Id. at 6). In connection with this issue,

respondent stated, "I am not looking at her as much and not staring at her at all. I look away when I do look in her direction and then snap my rubber band or pull out my cards." (Id.).

On December 10, 2021, respondent's primary clinician reported the following:

> [Respondent] reported that he had to do an RSA [rational self-analysis technique] because he had a lapse. He was staring at two female staff members. He was caught by a treatment peer member staring. He spent about 15 minutes mentally beating himself up, but then said "it is just a lapse, I can overcome it." Now he is reportedly trying to participate more in process group. He brings up topics, but still doesn't give other peers feedback. He talks himself out of it. He finds himself having deviant thinking about once a week, but does not masturbate at that time. He will masturbate to healthy thoughts some other time during the week. He continues to work on being out of his cell more often. He was staring at female staff when he was waiting to go to chow. Someone pointed out what he was doing and he no longer waits in the front area anymore.

(Id.).

Respondent continued to participate in Phase II programming throughout 2021. (Resp't Ex. 6 at 14). As of April 2022, respondent was enrolled in the following groups: application process group, CTP community meeting, managing risk factors for sexual recidivism seminar series, advanced adult intimacy skills, and social skills. (Id.; Pet'r Ex. 27 at 7). He completed groups in prerelease planning, sexual self-management, substance use prevention, human sexuality and intimacy skills II, and anger management. (Pet'r Ex. 27 at 7). His participation in group sessions ranges from being attentive without actively participating to actively engaging, and he has been submitting his homework for groups/assignments. (Id.).

Respondent also disclosed several issues regarding his sexual behavior and treatment struggles in the weeks leading up to the instant hearing. On February 28, 2022, respondent reported that he had received his annual forensic evaluation from Rigsbee and felt that it was "mostly bad." (Pet'r Ex. 16 a 3998). During process group, respondent disclosed that "I have

been isolating a lot and I masturbated twice since I got [the report]." (Id.).

On April 11, 2022, approximately two weeks before the instant hearing, a treatment note documented the following interaction during a "process" group:

> [Respondent] has been sitting in the dayroom to see if a psychologist on the lower compound will be walking by. He shared that he has been having fantasies about her, but has not masturbated to these fantasies. When prompted, [respondent] was able to identify thinking errors including, "she likes me," and "she won't mind that I'm fantasizing." Feedback included assistance with rational challenges to thinking errors, and encouragement to use tools and interventions that he has gained through sexual self-management. The group discussed which tools were effective before (thought stopping, positive self-talk, RSAs), and how to find motivation to use those tools. [Respondent] indicated he uses interventions about "50%" of the time he experiences deviant sexual fantasies.

(Id. at 4009).

Nevertheless, respondent also reported some progress in treatment during the weeks prior to the hearing. A treatment note from April 15, 2022 reads as follows:

> [Respondent] reported that he is still attracted to two female staff members on the compound. He sits in front and watches television, so he sees them sometimes which triggers his fantasies. He does not masturbate to these fantasies and has been utilizing his sexual self-management techniques including thought stopping, covert sensitization and positive thought rehearsal. He has also started sitting facing the wall instead of the windows, so he is less likely to notice people walking on the compound. He has asked for help in both his process group and the community meeting recently. We discussed potentially getting an accountability buddy.

(Id. at 4000). The treatment provider further noted that respondent remained compliant with his medications over the most recent 30-day review period, and that the medication regimen "is likely contributing to his current stable presentation." (Id.).

G. Release Plan

Upon release, respondent plans to reside in a halfway house arranged by FCC-Butner staff,

preferably in Wilmington, North Carolina, where his mother and other supportive family reside. Respondent cannot live with his mother due to housing restrictions related to his criminal history. In addition, respondent is requesting conditional release, and he recognizes that he will be subject to strict conditions requiring sex offender treatment, halfway house placement, polygraph exams, restrictions on internet use, and GPS monitoring. He testified credibly that he would comply with these conditions if released.

COURT'S DISCUSSION

A. Legal Standard

The Adam Walsh Act established a program for civil commitment of individuals in the custody of the Federal Bureau of Prisons, and others, who are determined to be "sexually dangerous person[s]." 18 U.S.C. § 4248(a), (d). An individual committed under the Act may request discharge hearing pursuant to 18 U.S.C. § 4247(h), provided the motion is not filed within 180 days of a court determination that he is sexually dangerous. At the discharge hearing, respondent must demonstrate by a preponderance of the evidence that he no longer is a sexually dangerous person, or will not be sexually dangerous if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment. 18 U.S.C. §§ 4247(h), 4248(e); see United States v. Shea, 989 F.3d 271, 276 (4th Cir. 2021) ("To obtain a discharge, the committed person carries the burden to show by a preponderance of the evidence that he is no longer sexually dangerous.").

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." 18 U.S.C.

§ 4247(a)(5). The phrase "sexually dangerous to others" means that "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).

Thus, at the initial commitment hearing, petitioner must show that respondent 1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation"; 2) currently "suffers from a serious mental illness, abnormality, or disorder"; and 3) "as a result of" such condition, "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. §§ 4247(a)(5), (6), 4248(d); see also United States v. Comstock, 560 U.S. 126, 130 (2010). To obtain discharge pursuant to § 4247(h), respondent must show by a preponderance of the evidence that one of the foregoing conditions no longer applies, or would not apply if the court released him on a prescribed regimen of medical, psychiatric, or psychological care and treatment. See 18 U.S.C. § 4248(e); Shea, 989 F.3d at 276. "The burden of showing something by a 'preponderance of the evidence,' . . . simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact's existence." Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S. 602, 622 (1993) (alterations omitted) (quoting In re Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring)).

B. Analysis

1 Prong One

The parties stipulate that prong one remains satisfied based on respondent's self-reported

offense conduct including the frotteuristic acts and sexual conduct with minors. That stipulation is true. (See, e.g., Resp't Ex. 6 at 6–7, 9). Prong one remains established in this case. See 28 C.F.R. § 549.92 (defining sexually violent conduct); 28 C.F.R. § 549.93 (defining child molestation).

2. Prong Two

Prong two addresses whether respondent currently suffers from a serious mental illness, abnormality, or disorder. 18 U.S.C. § 4247(a)(6); Comstock, 560 U.S. at 130. The parties also stipulate that this prong remains established. The experts opine that respondent's diagnosis of frotteuristic disorder satisfies prong two. (Pet'r Ex. 27 at 10–13; Pet'r Ex. 29 at 15–18; Resp't Ex. 6 at 17–18; Resp't Ex. 1 at 13). The Diagnostic and Statistical Manual of Mental Disorders defines frotteuristic disorder as follows:

> A. Over a period of at least [six] months, recurrent and intense sexual arousal from touching or rubbing against a nonconsenting person, as manifested by fantasies, urges, or behaviors.
>
> B. The individual has acted on these sexual urges with a nonconsenting person, or the sexual urges or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

(Resp't Ex. 6 at 17–18). In addition, the DSM-V includes specifier "in full remission" for this disorder, which requires at least 5 years "in an uncontrolled environment" in which the individual has not acted on frotteuristic urges with a nonconsenting person, and there has been no distress or impairment in social, occupational, or other areas of functioning. (Id. at 18).

The court agrees that respondent suffers from frotteuristic disorder based on his historical offense behavior of grabbing nonconsenting women's breasts on numerous occasions over at least a two-year period. (Resp't Ex. 1 at 5; Resp't Ex. 6 at 7). The disorder also has caused serious

functional impairment where it contributed to respondent's instant civil commitment. (See Resp't Ex. 6 at 17–18); see also United States v. Caporale, 701 F.3d 128, 137 & n.4 (4th Cir. 2012) (emphasizing the prong two requires evidence of serious functional impairment). In addition, the court does not credit Plaud's testimony that respondent meets criteria for the specifier "in full remission." Plaud acknowledged at hearing that respondent does not have at least 5 years in the community without acting on the frotteuristic urges, as required to demonstrate remission. (See also Resp't Ex. 6 at 18).

Phenix and Rigsbee also diagnosed respondent with other specified paraphilic disorder, sexually attracted to pubescent females, which is also known as hebephilia. (Pet'r Ex. 27 at 10; Pet'r Ex. 29 at 15–16); see also Caporale, 701 F.3d at 134 n.4 (recognizing hebephilia as a valid prong two disorder). Phenix described hebephilia as "intense and persistent sexual interest" in pubescent females that causes "significant clinical distress or impairment on social, occupational, or other important dimensions." (Pet'r Ex. 29 at 15–16). The court agrees with Phenix and Rigsbee's diagnosis of hebephilia based on respondent's historic sexual encounters with 15 to 17 year-old females and viewing child pornography involving adolescent females, and the resulting impairment in functioning including his arrest on the child pornography offense and his civil commitment. (See id. at 16).[1]

Where respondent's frotteuristic disorder and hebephilia satisfy prong two, the court does not consider whether the additional diagnoses offered by the experts independently satisfy prong

[1] Plaud and Rosell did not diagnosis hebephilia where they do not agree that it is a valid DSM-V diagnosis. Both experts testified the DSM-V authors declined to include the diagnosis in the most recent version of the manual. However, under the Adam Walsh Act the definition of "serious mental illness, abnormality, or disorder" is not limited to the diagnoses listed in the DSM-V. Caporale, 701 F.3d at 136–37.

two. The court observes, however, that all experts diagnosed respondent with borderline personality disorder. (Pet'r Ex. 27 at 10; Pet'r Ex. 29 at 17–18; Resp't Ex. 6 at 18–19; Resp't Ex. 1 at 13). Respondent's borderline personality disorder is relevant to prong three, and the court therefore summarizes the experts' findings with respect to this diagnosis as well. The DSM-V defines borderline personality disorder as follows:

> A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:
>
> 1. Frantic efforts to avoid real or imagined abandonment. (Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.).
> 2. A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.
> 3. Identity disturbance: markedly and persistently unstable self-image or sense of self.
> 4. Impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). (Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.).
> 5. Recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior.
> 6. Affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).
> 7. Chronic feelings of emptiness.
> 8. Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights).
> 9. Transient, stress-related paranoid ideation or severe dissociative symptoms.

(Resp't Ex. 6 at 18–19).

The experts all testified that respondent meets criteria for this disorder based on his behavior in the community and during his incarceration/civil commitment. The court agrees respondent meets criteria for this disorder. Respondent's interpersonal relationships show a clear

and pervasive pattern of instability. (Resp't Ex. 1 at 2, 3–5, 9–11; Resp't Ex. 6 at 4, 6–7, 10–14). He has engaged in frantic efforts to avoid abandonment, including by harassing FBOP staff and his prior girlfriends in the community when he perceives that they are rejecting him. (Resp't Ex. 1 at 3–5, 9–11; Resp't Ex. 6 at 6–7, 10–14). The record also establishes alternating extremes of idealization and devaluation in his relationships, a persistently unstable self-image, impulsivity in various areas that are self-damaging (including excessive alcohol use), recurrent suicidal gestures, affective instability due to marked reactivity of mood, and episodes of inappropriate, intense anger. (Resp't Ex. 1 at 2–12; Resp't Ex. 6 at 4–14). Plaud and Rosell emphasized at hearing that respondent's borderline personality disorder is an important interpretive "prism" through which the court should view respondent's behavior both institutionally and in the community. In addition, as discussed further below, the manifestations of respondent's borderline personality disorder have improved markedly since approximately April 2017, when respondent began taking his current medications, and through his continued participation in the CTP program.

3. Prong Three

To meet his burden on prong three, respondent must establish by a preponderance of the evidence that he no longer would have serious difficulty refraining from sexually violent conduct or child molestation if released on conditions. 18 U.S.C. §§ 4247(h), 4248(e); Shea, 989 F.3d at 276. "[T]he 'serious difficulty' prong of § 4248's certification proceeding refers to the degree of the person's 'volitional impairment,' which impacts the person's ability to refrain from acting upon his deviant sexual interests." United States v. Hall, 664 F.3d 456, 463 (4th Cir. 2012) (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997)). In other words, "civil commitment statutes [that] have coupled proof of dangerousness with the proof some additional factor, such as a 'mental

illness' or 'mental abnormality' . . . serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." Kansas, 521 U.S. at 358.

In evaluating the third prong, the court considers the following factors: 1) history of acting on pedophilic urges or deviant sexual interests; 2) continued high-risk behavior; 3) failures while on supervision; 4) resistance to treatment; 5) continued deviant thoughts; 6) cognitive distortions; 7) actuarial risk assessments[2] and dynamic risk factors; 8) impulsiveness; and 9) historical offenses. See United States v. Wooden, 693 F.3d 440, 459, 462 (4th Cir. 2012). The court also examines respondent's age, offense-free time in the community, ability to comply with institutional rules, commitment to controlling deviant behavior, respondent's testimony regarding volitional control, and supervised release conditions. Hall, 664 F.3d at 464–67. Ultimately, "the question of whether a person's ongoing volitional impairment is sufficiently severe [to justify civil commitment] 'turns on the significance of the factual information as viewed by the expert psychiatrists and psychologists.'" Shea, 989 F.3d at 280 (quoting United States v. Francis, 686 F.3d 265, 275 (4th Cir. 2012)).

Here, the court finds the testimony and opinions of Plaud and Rosell are entitled to greater evidentiary weight than the opinions of Phenix or Rigsbee. Plaud and Rosell opined that respondent would not be sexually dangerous if released on conditions primarily based on his progress in sex offender treatment, motivation to continue treatment when he is released,

[2] Notably, the majority of the experts did not score respondent on the Static-99 or related actuarial measures because respondent does not have a "category A" sex offense. (See, e.g., Resp't Ex. 1 at 14). Respondent's only adjudicated sex offenses involve child pornography, which are category B offenses. (Id.). "[O]ffenders who have category B offenses should not be scored [on the Static 99 or related actuarial tests]." (Id.).

improvement in his institutional behavior (particularly since beginning his medication regimen), the unique aspects of respondent's sex offense history, substance abuse treatment, and other protective factors unique to this case. (See Resp't Ex. 6 at 2–4; Resp't Ex. 1 at 19–20).

As to respondent's offense history, he engaged in sexual conduct with six or seven females ranging in age from 15 to 17, when he was between ages 20 and 28. (Resp't Ex. 6 at 7). The frotteuristic acts committed in his mid to late 20s, while clearly harmful and frightening experiences for the victims, did not progress beyond grabbing the victims' breasts in public and then running away. (Resp't Ex. 1 at 5; Resp't Ex. 6 at 7). Between ages 24 and 28, respondent solicited underage females ages 14 to 17 to send him child pornography, and also arranged to meet some of them for sexual encounters, although he only engaged in sexual contact with one of them. (Resp't Ex. 6 at 5–7). Finally, respondent exposed his genitals to two adult women between ages 25 and 26. (Id. at 7).

The offending patterns in this case took place at a time when respondent was relatively young, extremely immature, and suffered from untreated borderline personality disorder. The court therefore agrees with Plaud's assessment that "[t]here appear to be unique perpetrator-victim characteristics in [respondent's] sexual offense history, involving specific social influences and historic social immaturity and faulty decision making that can be effectively addressed through federal supervised release." (Resp't Ex. 6 at 3). Plaud also testified convincingly that respondent's offense history should be viewed through the prism of his personality disorder, which includes symptoms such as unstable relationships, persistently unstable self-image, and sexual impulsivity, which likely contributed to his sexual offending when these symptoms were left untreated. (See also id. at 18–19 (describing symptoms of borderline personality disorder)).

Respondent is a different person today than the young adult who committed these offenses. At hearing, respondent credibly testified that he understands the harm he caused his victims, feels remorse about his behavior, and is aware that, as a now 40-year-old man, he cannot have a meaningful relationship with an adolescent. As Plaud and Rosell explain, and as the record amply demonstrates, respondent has made significant progress in sex offender treatment, improved his ability to regulate negative emotions, and received both medical and psychotherapeutic treatment for his personality disorder. (See Resp't Ex. 1 at 19–20; Resp't Ex. 6 at 2–3). As a result, respondent's social and emotional maturity and the symptoms of his borderline personality disorder have improved significantly since his offending conduct approximately 13 to 15 years ago. The court therefore credits Plaud and Rosell's testimony that some of the risk factors that drove the sexual offending in the community – social and emotional immaturity, faulty decision-making, untreated borderline personality disorder – are not presently controlling respondent's behavior to the extent that he would have serious difficulty refraining from sexually violent conduct or child molestation if released on conditions.[3]

To the extent respondent's sexual attraction to pubescent females persists and remains a (permanent) risk factor, respondent has made sufficient progress in treatment on this issue to discharge safely into the community, with conditions. The treatment records establish that respondent can identify his deviant sexual arousal patterns and applying coping strategies. (See generally Pet'r Ex. 16). Indeed, respondent consistently discloses his sexual urges, processes them in group or with his individual clinician, and applies coping strategies to address them. (See

[3] Petitioner argues that respondent's institutional behavior does not reflect social or emotional maturity, or the ability to regulate his emotions consistently. The court addresses this argument below.

id.; see also Pet'r Ex. 27 at 6 (reporting that respondent employed various coping strategies to address sexual attraction to a female FBOP staff member and that he "maintains control" over his behavior)). The court agrees with Plaud and Rosell that respondent has engaged extensively in an intensive sex offender treatment program for over five years, and learned important strategies for preventing further sexual offenses and also for addressing his mental health and substance abuse issues. His progress in sex offender treatment is an important protective factor in this case, and support Plaud and Rosell's conclusion that respondent can continue treatment safely in the community. See also Wooden, 693 F.3d at 462 (suggesting treatment participation is a relevant protective factor).

As petitioner emphasizes, at hearing respondent was not able to articulate his precise risk factors for sexual reoffending or explain in detail the coping strategies he uses to manage them. As set forth above, the treatment records extensively document respondent's ability to identify his risk factors, deviant fantasies, and apply coping strategies to address these issues. The court therefore attributes respondent's difficulty articulating his offending patterns and coping strategies to his anxiety issues, communication style, fear of public speaking, and the highly stressful environment of live courtroom testimony.

Petitioner also attempted to discount Plaud and Rosell's opinions regarding respondent's progress in treatment on the basis of a recent treatment note where respondent stated that he applies the coping strategies he learned in treatment approximately 50 percent of the time when he experiences deviant sexual fantasies. (Pet'r Ex. 16 a 4009). In the court's view, this record reflects respondent's commitment to the treatment process. Respondent acknowledged sexual attraction to an FBOP staff member and that he had been sitting in areas where he could observe

her. (Id.). Before any further escalation of the behavior, including masturbation to fantasies involving her, he asked for the group's assistance about coping strategies that he can use to address the situation. (Id.). Respondent therefore worked to deescalate the "deviant" attraction to an adult FBOP employee by engaging in the treatment process.

Respondent's statement that he only uses the interventions from his sexual self-management group approximately 50 percent of the time does not establish he will have serious difficulty refraining from sexually violent conduct or child molestation, even when considered together with the other risk factors in this case. Importantly, a treatment note from four days after respondent's "50 percent of the time" comment establishes that respondent had not masturbated to fantasies of two female staff members to whom he felt attracted, "has been utilizing his sexual self-management techniques including thought stopping, covert sensitization, and positive thought rehearsal" and that he addressed the issue in two different therapy groups. (Id. at 4000). Respondent's documented behavior in treatment establishes extensive application of the coping strategies, suggesting the 50 percent comment is a product of respondent's low self-esteem or personality issues as opposed to an accurate reflection of his treatment progress.

But even considering the 50 percent comment in isolation, no expert suggested that respondent must apply self-management interventions for a specified percentage of the time in order to establish volitional control. As Plaud explained, respondent's sexual attraction to adult and pubescent females is a permanent feature of his psychological and physiological orientation, and it would be unrealistic to expect respondent to implement these interventions every time a deviant thought or fantasy crosses his mind. And more fundamentally, even assuming respondent implements coping strategies for deviant thoughts only 50 percent of the time, that fact does not

establish volitional impairment. The question ultimately is whether respondent can identify his deviant arousal and prevent same from spiraling into sexually violent conduct or child molestation. See Hall, 664 F.3d at 463 (explaining serious difficulty prong refers to "the person's ability to refrain from acting upon his deviant sexual interests") (emphasis added). A deviant thought or fantasy is at most a precursor to an offending cycle that may lead to overt acts of sexually violent conduct or child molestation. See id. at 466 (emphasizing respondent's testimony that he "has developed coping skills to keep him from acting upon his impulses"). And respondent's treatment progress to date, as Plaud and Rosell explain, shows that, to a reasonable degree of psychological and scientific certainty, respondent can apply sex offender treatment concepts to prevent deviant thoughts from spiraling into contact-based offenses. (See Resp't Ex. 1 at 19–20; Resp't Ex. 6 at 2–3).[4] Accordingly, the court credits Plaud and Rosell's testimony that the treatment progress to date is a protective factor in this case, notwithstanding respondent's comment that he applies sexual self-management interventions only half the time he has deviant fantasies.

Petitioner further argues that respondent engaged in maladaptive coping strategies after he received Rigsbee's annual forensic report, which recommended his continued civil commitment. During the group session where he discussed the report, respondent stated that he had "been isolating a lot and I masturbated twice since I got [the report]." (Pet'r Ex. 16 a 3998). Petitioner, supported by both Phenix and Rigsbee, argues this record shows respondent masturbated in response to negative emotions instead of implementing the coping strategies from his treatment. As Plaud and Rosell testified, however, treatment is not a linear process in which the individual

[4] In addition to the cited reports, Plaud and Rosell's testimony at hearing provides a more comprehensive explanation for their opinions.

can achieve perfection in managing his sexual impulses. Respondent himself recognizes that he will at times will have "lapses" such as the foregoing, but that a specific lapse does not have to lead to sexual offending. (See Pet'r Ex. 27 at 6 (respondent stating to himself that "it's just a lapse, I can overcome it")). And here, instead of continuing to isolate and masturbate in response to his disappointment about the review, respondent discussed the issue with his treatment provider and peers. Respondent's discussion of the issue in group therapy itself shows both motivation and progress in treatment.

Turning to respondent's motivation for treatment and to refrain from reoffending, it is significant that respondent volunteered for conditional release, just as he volunteered for his initial commitment under § 4248. Respondent's decision to self-commit for over five years of inpatient sex offender treatment, together with his extensive engagement in the CTP treatment program, suggests intrinsic motivation for change and that he will continue his sex offender and mental health treatment on conditional release.

Relatedly, conditional release will place substantial restrictions on respondent's behavior in the community, including requirements for initial placement in a halfway house, sex offender treatment, substance abuse and mental health treatment, and close monitoring by United States Probation. See Hall, 664 F.3d a 464–67 (relying on similar factors when affirming district court's determination that respondent was not sexually dangerous). Petitioner emphasizes that respondent has a history of non-compliance with probation or supervised release. (See, e.g., Pet'r Ex. 29 at 30–31 (documenting respondent's violations of probation)). But these issues occurred when respondent was in his mid-20s, at a time when he was socially immature and not taking medications. See id. Respondent is now 40 years old and demonstrates substantial motivation

for sex offender treatment and to comply with the conditions of release. Accordingly, the court does not consider respondent's supervision failures from 14 years ago a significant risk factor in this case.

In addition, petitioner noted deposition testimony in which respondent indicated he likely would violate conditional release if he became homeless. (See Pet'r Ex. 31 at 94). But respondent also stated that he did not believe becoming homeless would cause him to reoffend sexually. (Id.). In any event, the speculative concern that respondent may become homeless on conditional release, and that the stress of that situation would lead to reoffending, does not overcome the protective factors identified by Plaud and Rosell. If respondent does become homeless, he will have community support in the form of treatment providers and probation officers, and possibly family members if he can be placed in Wilmington, and the record establishes respondent will seek out assistance from these sources if necessary.

Plaud and Rosell also persuasively testified that respondent's medication compliance is an important protective factor in this case. As set forth above, respondent began his current medication regimen of Celexa, Zyprexa, and Naltrexone in approximately April 2017. Since that time, respondent's behavior has improved markedly: he has been cited for only one disciplinary infraction (stalking) since starting the medications, and treatment staff have documented "consistent application of emotional control." (Resp't Ex. 6 at 12–13). Respondent has not engaged in self-mutilation, threatened suicide in front of staff members, or otherwise displayed problems with anger management or emotional dysregulation since he started the medications. His self-reported excessive masturbation and sexual preoccupation have both decreased, and respondent has not been cited for any sexually inappropriate behavior since he started the

medications. As Plaud testified, respondent has been compliant with the medications and displays inherent understanding of the value of the medications and motivation to continue taking them in the community.

Phenix and Rigsbee both opined that respondent may struggle with medication compliance when he is discharged from FCC-Butner because the community will be stressful for respondent. The court found this testimony unsupported by the record of respondent's institutional compliance and treatment progress regulating his emotions. While the community is stressful for any civil detainee released after years of confinement, the court cannot assume that this fact will cause respondent to stop taking his medications when he is released, particularly where respondent will be monitored by probation and his treatment providers.

The court next considers respondent's dynamic risk factors. See Wooden, 693 F.3d at 462. Phenix and Rigsbee both relied on these factors in their risk analyses. (Pet'r Ex. 29 at 39–42; Pet'r Ex. 27 at 11–12). Phenix's report, however, simply reproduced the original risk assessment that she conducted in 2016, without meaningful consideration of whether these dynamic risk factors changed in the six years since her original report. (See Pet'r Ex. 29 at 39 (stating the risk evaluation was taken from the 2016 report)).[5] She made no effort to analyze the dynamic risk factors in light of respondent's five years of intensive sex offender treatment. (See id. at 18–19, 39–42). Accordingly, Phenix's risk assessment is based primarily on respondent's pre-commitment conduct, and it is not entitled to the same weight as the experts' opinions that

[5] Phenix's only reference to respondent's treatment progress in the "risk assessment" section of her report and the related addendum was that "[a]lthough [respondent] has made some progress, his score [on an instrument designed to measure dynamic risk factors] would not have appreciably changed because his dynamic needs remain incompletely treated." (Pet'r Ex. 29 at 18).

analyzed respondent's current risk level.[6] See United States v. Antone, 742 F.3d 151, 168–69 (4th Cir. 2014) (concluding Phenix's report could not establish volitional impairment where it focused "almost exclusively" on "pre-incarcerative acts").

Rigsbee identified several dynamic risk factors, including sexual preoccupation, some evidence for sexual preference for prepubescent or pubescent children, multiple paraphilias, offense-supportive attitudes, some evidence for lack of emotionally intimate relationships with adults, lifestyle impulsiveness, poor problem solving, resistance to rules and supervision, and some evidence of grievance/hostility. (Pet'r Ex. 27 at 12). Similar to Phenix's report, however, Rigsbee made no effort to analyze respondent's current risk in light of these factors, or address whether treatment has been effective with respect to these issues. He simply stated that these risk factors "are still applicable to [respondent]." (Id.).

The court instead credits Rosell and Plaud's opinions on the dynamic risk factors. They both testified persuasively that identifying historical evidence of dynamic risk factors – without any attempt to apply those factors to the respondent's present functioning and status a civil detainee – is a "meaningless" exercise. Indeed, respondent cannot change several of the risk factors identified by both Phenix and Rigsbee while he is confined. He cannot, for example, change the fact that he has shown lifestyle impulsivity in the community, or that he has a lack of emotionally intimate relationships with adults where he is confined and cannot engage in such relationships.

As Plaud and Rosell explained, to the extent the dynamic risk factors provide meaningful

[6] Phenix's hearing testimony also was not persuasive for similar reasons. While she did comment on several issues related to respondent's current treatment progress and his risk in the community, she did not explain why her assessment of the dynamic risk factors remained unchanged despite five years of intensive sex offender treatment and improved emotional and behavioral stability.

information about a respondent's volitional control,[7] the analysis should focus on those factors that can be measured and analyzed while respondent is confined. In this case, those factors are resistance to rules/supervision, sexual preoccupation, offense supportive attitudes, poor problem solving, and grievance/hostility. (See Pet'r Ex. 27 at 12). While respondent at times has shown evidence of some of these factors institutionally, the trajectory for many of them is towards sustained improvement. As to sexual preoccupation, for example, respondent readily admits continued fantasies involving adult FBOP staff, but he is exercising improved behavioral control over this issue. (See, e.g., Pet'r Ex. 16 at 4000 (reporting respondent "does not masturbate to [fantasies involving two FBOP staff members to whom he is attracted] and has been utilizing his sexual self-management techniques including thought stopping, covert sensitization, and positive rehearsal"). The court also finds no recent evidence of grievance/hostility thinking or offense supportive attitudes. And for the reasons discussed above, respondent's problem solving and resistance to rules/supervision has improved markedly during his time in the CTP. Accordingly, the court credits Plaud and Rosell's opinions that respondent's continuing issues with dynamic risk factors can be managed in the community and that these factors do not current establish a degree of volitional impairment that require ongoing civil commitment. See Hall, 664 F.3d at 463.

Finally, the court turns to respondent's institutional behavior. As set forth in detail above, respondent has "stalked" or harassed several female FBOP staff members, beginning in 2013 when he transferred to FMC-Devens and on an intermittent basis through April 2019 while in the CTP.

[7] Plaud and Rosell both testified that there is limited empirical support for the theory that dynamic risk factors appreciably increase the risk of reoffense beyond what can be measured with the actuarial measurements, with the possible exception of resistance to rules and supervise. (See also Resp't Ex. 1 at 14–15).

(See Pet'r Ex. 29 at 34, 36–38; Resp't Ex. 6 at 11–12). At both FMC-Devens and FCC-Butner, staff reported that respondent's behavior reflected distorted thinking that the staff members were interested in pursuing a relationship with him. (Pet'r Ex. 29 at 37–38; Resp't Ex. 6 at 11). These behaviors, however, did not involve sexual advances. Instead, respondent attempted to contact the staff members or lingered in areas where they may be present after FBOP staff instructed him to desist from this behavior. (See Pet'r Ex. 29 at 34, 36–38; Resp't Ex. 6 at 11–12). In addition, respondent has been observed staring at female FBOP staff members on numerous occasions, at times even after staff instructed him to cease the behavior. (Resp't Ex. 6 at 11, 14; Pet'r Ex. 29 at 10). At hearing, respondent admitted that at times he did not even realize he was staring until someone pointed it out to him. Finally, respondent was found in possession of pornographic images of adult women dressed to look younger, clothed female adolescents, and an FBOP intern, in approximately 2015 or 2016. (Pet'r Ex. 29 at 33–34).

Petitioner argues that respondent's institutional behavior, together with the other risk factors in this case, establish respondent remains sexually dangerous. The court cannot agree. Respondent has not been charged with any disciplinary offenses since 2019. And as discussed above, his emotional regulation, anger issues, stalking, suicidal gestures, and general behavioral stability all have improved markedly since he began the medications and started participating in the CTP. While it is true that respondent continues to struggle with staring at female FBOP staff, and he admittedly does not always use the coping strategies he learned in treatment, these factors do not outweigh the "panoply" of protective factors discussed herein and identified by Plaud and Rosell.

Having reviewed and fully considered all evidence presented at hearing, with particular

emphasis on the experts' reports and testimony, as well as respondent's testimony, and for the reasons set forth above, the court finds the opinions of Plaud and Rosell to be the more well-reasoned, plausible, internally consistent, and supported by the record with respect to prong three. The record demonstrates respondent is intrinsically motivated to work on controlling his deviant sexual urges, and he has learned how to apply important treatment strategies to control his deviant urges through his extensive participation in the CTP sex offender treatment. The medication compliance and psychotherapeutic work addressing his borderline personality disorder have produced substantial emotional control and ongoing behavioral stability. Respondent also credibly testified that he will participate in all treatment programs required by the conditional release order as well as all other conditions of release. The court agrees with Plaud and Rosell that these factors outweigh respondent's problematic institutional behavior, offense history, dynamic risk factors, ongoing sexual preoccupation, and prior failures on supervision. The court accordingly credits Plaud and Rosell's opinions and finds that respondent currently would not have serious difficulty refraining from sexually violent conduct or child molestation if released on conditions.

CONCLUSION

Based on the foregoing, the court finds by a preponderance of the evidence that respondent will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment. The court GRANTS respondent's motion for conditional discharge, but STAYS respondent's release from his civil commitment pending court approval of a conditional release plan. The parties are DIRECTED to file proposed conditional

release plan for the court's consideration within the next 60 days.

SO ORDERED, this the 13th day of May, 2022.

LOUISE W. FLANAGAN
United States District Judge