IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:18-HC-2263-H

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| UNITED STATES OF AMERICA,<br>Petitioner,<br><br>v.<br><br>DONALD JAY [redacted],<br>Respondent. | ) | **ORDER** |

The United States of America seeks to civilly commit Respondent, Donald Jay [redacted] ("[redacted]"), as a "sexually dangerous person" under the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"), 18 U.S.C. §§ 4247-4248. On October 31, 2018, the government commenced the instant litigation by filing a certificate of a sexually dangerous person with the court. At the time of such filing, [redacted] was in the custody of the Federal Bureau of Prisons ("BOP") in Butner, North Carolina, serving the remainder of a 30-day term of imprisonment for violating his conditions of supervised release, by use of methamphetamine and by the use of pornography, including sexually explicit images of minors. (Case CR05-0547-RBL W.D. Wash.). [redacted]'s projected release date was November 1, 2018.

The government filed a previous certificate of a sexually dangerous person against [redacted] on July 29, 2013. See United States v. [redacted] 5:13-HC-2168-D (E.D.N.C. July 29, 2013). An evidentiary hearing was held before Judge Britt on May 20, 2014, and on June 25, 2014, Judge Britt found Mr. [redacted] was not a sexually dangerous person and ordered he be released. Specifically, Judge Britt found that the government had not shown that [redacted] met the clinical definitions for pedophilia or antisocial personality disorder and therefore did not meet prong 2 of the analysis--that the person suffers from a serious mental illness, abnormality, or disorder. Mr. [redacted] was on supervision from July 9, 2014 until his arrest for violations on October 3, 2018.

In the instant matter, the court conducted an evidentiary hearing pursuant to 18 U.S.C. § 4247(d) on Wednesday, April 10, 2019. The court heard the testimony of [redacted] and five expert witnesses. The government presented the testimony of Dr. Trent Evans and Dr. Dale Arnold. Respondent presented the testimony of Dr. Karen Franklin, Dr. Joseph Plaud, and Dr. Rebecca Barnette. In addition, the court admitted into evidence various documentary exhibits offered by the parties, including the reports of forensic evaluations conducted by the expert witnesses. The parties have each filed proposed findings of fact and conclusions of law, and this matter is ripe for adjudication.

## BACKGROUND

### A. Confinement Status and Personal History

[redacted] was 38 years old at the time of the evidentiary hearing. He was certified while serving a 30-day sentence for violation of his supervised release. He is also subject to a two-year term of supervised release which was imposed at the time of the revocation by his sentencing judge.

[redacted] was born in 1980, the second of three sons born to the marital union of his parents. The family had significant financial problems and domestic discord during his formative years. His parents divorced when he was approximately 12 years old. [redacted] and his brothers resided with their mother. Both parents remarried.

### B. Sexual Offenses

In 1998, as a juvenile, he was charged with child molestation first degree and attempted child molestation first degree in state court in Washington. He was placed in the custody of Juvenile Rehabilitation Administration. The underlying conduct was abusing his 6 year old brother when he was 11 years of age. There is some evidence the abuse also included a friend of the brother and [redacted] s cousin. [redacted] was removed from the family home during the investigation and placed in the home of his mother's friend where he apparently abused two young boys who lived there. He was

then removed from that household and sent to foster care where he reportedly abused another foster child. Furthermore, there is some evidence in the record that respondent himself was the victim of sexual abuse as a child, apparently abused by the husband of his aunt.

[redacted] s adult federal offense occurred in 2004. The charged underlying conduct involved oral and anal intercourse with a 15-year-old boy on a military base. The PSR from that matter reveals [redacted] was living with various women whose husbands were deployed under the guise of offering babysitting services and household help to the women. During that time, [redacted] had sexual contact with the 15 year old son of one of the women (the charged conduct); had sexual contact with one of the wives while her husband was deployed; and took photos of the penis of a 7 year old child (uncharged). During the investigation, it was revealed respondent had lied to the various women about his sex offense history.

[redacted] received a sentence of 120 months for this offense. He spent three years in Protective custody in the BOP. While incarcerated, it appears he was victimized sexually by a group of inmates. As mentioned previously, the government filed the first certificate of sexual dangerousness prior to his release date on his federal conviction, but respondent was found not sexually dangerous by Judge Britt. Respondent was on supervised release

from July 2014 until his arrest on violations in October 2018. His period of supervision was scheduled to end in January 2019.

While the record shows [redacted] made some missteps during supervision, especially in the early stages, overall he did well. He was employed during most of the term of supervision, reported as instructed, and participated in sex offender treatment. His trouble on supervision began after he started dating a man who worked as a nanny (a strikingly similar scenario to [redacted] s employment during the conduct constituting his federal offense). This man encouraged [redacted] to begin using methamphetamines and ultimately showed some pornography, which purportedly included images of minors, to [redacted]. The drug use and the admitted viewing of pornography were the conduct underlying the revocation. However, there was no evidence presented, either in the record or at the hearing, that [redacted] had any sexual contact with a minor or had developed a pattern or practice of viewing pornography or child pornography.

The probation officer at his revocation hearing recommended to the sentencing court that he be revoked, sentenced to 30 days and then released to serve a new term of supervised release of 2 years. The probation officer noted that during his time of supervision, "[redacted] has displayed a significant period of compliance and made positive strides towards establishing a

positive support system within the community." Resp. Ex. 10 at 2-3.

## COURT'S DISCUSSION

The Adam Walsh Act authorizes the indefinite civil commitment of, inter alia, individuals in the custody of the Bureau of Prisons who are determined to be sexually dangerous persons. A "sexually dangerous person" is defined by statute as 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). "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).

To obtain an order civilly committing Smith pursuant to § 4248, the government must prove by clear and convincing evidence: (1) that Smith "has engaged or attempted to engage in sexually violent conduct or child molestation"; (2) that Smith currently "suffers from a serious mental illness, abnormality, or disorder"; and (3) that as a result of the serious mental illness, abnormality, or disorder, Smith "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5)-(6); United States v. Springer, 715 F.3d 535, 538 (4th Cir. 2013). 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,'" or "'evidence that proves the facts at issue to be highly probable.'" United States v. Hall, 664 F.3d 456, 461 (4th Cir. 2012) (quoting Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001)). "If the government fails to meet its burden on any of the three prongs, an individual may not be committed." Springer, 715 F.3d at 538.

**I. Sexually Violent Conduct or Child Molestation**

The parties stipulate that this prong has been established by clear and convincing evidence. Therefore, the court need not provide further analysis.

**II. Serious Mental Illness, Abnormality, or Disorder**

To meet its burden of establishing that [redacted] is "sexually dangerous to others," the government must also prove that he "suffers from a serious mental illness, abnormality, or disorder." 18 U.S.C. § 4247(a)(6).

The government has not shown by clear and convincing evidence that [redacted] suffers from pedophilic disorder. In the prior civil commitment hearing, Judge Britt found the government had not proven a serious mental illness by clear and convincing evidence. In the earlier case, Drs. Arnold, Barnette and Bard all testified that

[redacted] suffered from what is now known as pedophilic disorder as well as antisocial personality disorder, while Dr. Plaud testified that [redacted] did not suffer from either of those disorders or any other disorder. United States v. [redacted], 5:13-HC-2168-D (E.D.N.C. June 25, 2014) at DE 45. Judge Britt found Dr. Plaud's analysis to be most persuasive. Id.

In the instant matter, Drs. Franklin and Plaud both opined that [redacted] did not suffer from any serious mental illness, abnormality or disorder. Dr. Barnette, as she had in the first case, opined that [redacted] suffers from pedophilic disorder and antisocial personality disorder and now adds the additional diagnosis of stimulant use disorder and otherwise Specified Depressive Disorder with Anxious Distress. Dr. Arnold also continues to diagnose [redacted] with Pedophilic Disorder, but says the evidence is insufficient for Antisocial Personality Disorder now.

Despite Drs. Arnold and Barnette's continued diagnoses of pedophilic disorder, neither expert is able to point to recent evidence of recurrent or intense sexual fantasies, arousals, urges or behaviors regarding prepubescent minors. The evidence that they mention is murky at best, and does not, in this court's opinion, rise to the level of "recurrent" or "intense." Even where

[redacted] admits to fantasies involving minors, it is unclear whether the minors were prepubescent or post-pubescent.

Considering the record before the court including the expert reports as well as the testimony at the hearing, the court finds there is not clear and convincing evidence that [redacted] currently suffers from pedophilic disorder (or any other mental illness). The court finds the opinions of Drs. Franklin and Plaud more persuasive when viewing the entire history of Mr. [redacted].

**III. Serious Difficulty Refraining**

Having found the government has not met its burden at prong two, the court need not reach prong three. However, even if the court held that [redacted] suffered from a serious mental illness, the government has not shown by clear and convincing evidence that [redacted] would have "serious difficulty in refraining from sexually violent conduct or child molestation if released" as a result of that serious mental illness. 18 U.S.C. § 4247(a)(6).

Prong three requires the court to conduct a "forward-looking inquiry, which attempts to predict the inmate's 'ability to refrain from acting in accord with his deviant sexual interests.'" United States v. Wooden, 693 F.3d 440, 460 (4th Cir. 2012) (quoting United States v. Francis, 686 F.3d 265, 275 (4th Cir. 2012)).

The government need not establish that the person it seeks to commit will or is likely to reoffend. However,

> there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Kansas v. Crane, 534 U.S. 407, 413 (2002). "[I]f the person the government seeks to commit has developed the skills necessary to overcome [his inappropriate sexual urges] without [serious] difficulty," the government fails in meeting its burden as to this prong of the test. Id.

Drs. Franklin, Plaud and Barnette all opine that [redacted] would not have serious difficulty refraining. The four years [redacted] spent in the community, while not without issue, show that [redacted] would not have serious difficulty refraining. He made significant strides in gainful employment, in participating regularly in sex offender treatment, in gaining life skills, and in making meaningful connections with family and friends. Often the court does not have the benefit of evidence of how an offender will do in the community once released. Here, however, we have evidence that [redacted] attempted to comply with supervision and did not indicate signs of serious difficulty refraining.

The court finds, based on all the evidence presented to the court, both at the hearing and in the exhibits, that the government

has failed to establish, by clear and convincing evidence, that [redacted] will have serious difficulty in refraining from sexually violent conduct or child molestation if released.

**CONCLUSION**

For the foregoing reasons, judgment shall be entered against the United States and in favor of the respondent, DONALD JAY [redacted]. The stay of release imposed by 18 U.S.C. § 4248(a) is hereby LIFTED, and the United States shall forthwith release [redacted] from incarceration to serve his term of supervised release.

This 7th day of May 2019.

Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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