IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-hc-2188-BO

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

This cause comes before the Court following a hearing to review the commitment of respondent, James [redacted] as a sexually dangerous person under the Adam Walsh Child Protection and Safety Act of 2006. For the reasons that follow, the Court finds that respondent is no longer sexually dangerous and orders his release.

BACKGROUND

On August 21, 2015, Petitioner United States of America ("the government") initiated this proceeding seeking to have Respondent James [redacted] ("Respondent" or Mr. [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. DE 1. At the time the initial certificate was filed, Mr. [redacted] was completing a 108-month prison sentence for a felon in possession of a firearm conviction in the Southern District of Illinois. Pursuant to 18 U.S.C. § 4247(d), the Court conducted an evidentiary hearing on April 25 and 26, 2016 in Elizabeth City, North Carolina.

On May 10, 2016, the Court entered an order civilly committing Mr. [redacted] pursuant to the Adam Walsh Act. DE 39. Mr. [redacted] has been in civil confinement since that time.

On October 5, 2018, Mr. [redacted] voluntarily agreed to a number of sex-offender specific modifications to his unserved 36-month term of supervised released in the Southern District of Illinois. Resp. Ex. 1.

On July 14, 2019, Mr. [redacted] moved for a review of his continued confinement pursuant to 18 U.S.C. § 4247(h). DE 62. The government did not oppose the request for a review hearing. DE 65. On September 13, 2019, the Court granted the motion for a Section 4247(h) review hearing. DE 70. The hearing occurred on February 5, 2020, in Elizabeth City, North Carolina.

At the February 5, 2020 review hearing, the Court heard testimony from Mr. [redacted] Dr. Joseph Plaud, Dr. Heather Ross, and Dr. Christopher North. All three psychologists were qualified by the Court as expert witnesses and allowed to give their professional opinions. The Court also admitted, without objection, a number of exhibits as presented by the parties in a Joint Exhibit Binder. The parties filed proposed findings of fact and conclusions of law. DE 82, 87, 88. The Court ADOPTS the respondent's summary of the testimony and evidence offered at the hearing [DE 88, § II] as if it was fully set forth herein.

DISCUSSION

The Adam Walsh Act provides authority for the government to civilly commit sexually dangerous persons. The Act provides three criteria for the Court to determine whether a respondent is presently sexually dangerous. First, the person must have "engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. § 4247(a)(5). Of course, here, Mr. [redacted] has engaged in sexually violent conduct or child molestation, and this Court has already so found in its original 2016 commitment order. This criterion is unchanged.

Next, the person must "suffer from a serious mental illness, abnormality, or disorder as a result of which he would not have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4248(a)(6). Generally, the Court analyzes this definition in two parts—the mental disorder prong and the volitional control prong. Mr. [redacted] must prove by a preponderance of the evidence that he either (1) does not presently suffer from a mental illness, abnormality, or disorder, or (2) he would not have serious difficulty refraining from reoffending if released.

Following a careful review of the record as a whole, the Court finds that Mr. [redacted] has proven by a preponderance of the evidence that he does not presently suffer from a serious mental disorder and that he would not have serious difficulty in refraining from reoffending if released.

Serious Mental Illness, Abnormality, or Disorder

Dr. North and Dr. Ross opined that Mr. [redacted] suffers from pedophilic disorder. However, as the Fourth Circuit has articulated "[a] diagnosis of . . . is merely the starting point for the court to consider the true thrust of the § 4247(a)(6) inquiry—whether, on a case-specific basis, the respondent's underlying condition constitutes a serious functional impairment." *United States v. Caporale*, 701 F.3d 128, 137 n.4 (4th Cir. 2012). An examination of whether the diagnosis is causing a present serious functional impairment "requires consideration of the grip strength of the mental illness on the inmate—the extent to which the inmate is controlled by the illness." *United States v. Wooden*, 693 F.3d 440, 460 (4th Cir. 2012). In other words, this inquiry requires an examination of the person's functioning at the present time.

Viewed through the proper lens, the Court is persuaded by the opinion and evidence offered by Dr. Plaud. Dr. Plaud explained in his report and at the hearing that there is a critical

difference between a paraphilia (such as pedophilia) and a paraphilic disorder (such as pedophilic disorder). Quoting from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition or DSM-5, Dr. Plaud notes in his report:

> [A] paraphilic disorder is a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others. A paraphilia is a necessary but not a sufficient condition for having a paraphilic disorder, and a paraphilia by itself does not necessarily justify or require clinical intervention" (page 686). In the DSM-5, "Criterion A specifies the qualitative nature of the paraphilia (e.g., an erotic focus on children or on exposing the genitals to strangers), and Criterion B specifies the negative consequences of the paraphilia (i.e., distress, impairment, or harm to others)" (page 686).
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> As the DSM-5 specifically notes: "In keeping with the distinction between paraphilias and paraphilic disorders, the term diagnosis should be reserved for individuals who meet both Criteria A and B." In other words, it is clinically possible to have a paraphilia, but not a paraphilic disorder using the diagnostic criteria of the DSM-5.

Resp. Ex. 3 at 16–17.

Consistent with the above-noted distinction, the evidence in this case establishes that although Mr. [redacted] may presently suffer from pedophilia, and although he may have historically suffered from pedophilic disorder, "there is insufficient evidence at present that Mr. [redacted] has recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children[,]" and as such, a present diagnosis of pedophilic disorder is improper. Resp. Ex. 3 at 18.

The government's experts appear to have all but surrendered this point. Although they have diagnosed Mr. [redacted] with pedophilic disorder, Dr. North and Dr. Ross both admit that there is no contemporary evidence of Mr. Goodpasture's present sexual attraction to children. Dr. North and Dr. Ross conceded that there is no evidence Mr. [redacted] is presently sexually preoccupied nor that he manifests signs of sexual deviance, nor that he has attempted to collect pictures of children, write or obtain erotic literature about children, contact

children by mail, watch children on the television, or otherwise seek children out. Although "sexually suggestive" pictures were found in a locker that Mr. [redacted] shared with his cellmate in 2016, there is no evidence in the record that rebuts his sincere protestations that such pictures belonged to his cellmate, and not him. Dr. Ross's and Dr. North's diagnoses do not make sense in light of the relevant diagnostic and legal criteria, and the complete absence of evidence supporting a pedophilic disorder diagnosis at the present time.

All of the experts acknowledged, moreover, that the last evidence of Mr. Goodpasture's sexual conduct with a prepubescent child was in 1999, over 20 years ago. All of the experts similarly testified that impulses arising from pedophilia can weaken over time. Given the multiple decades that have elapsed since Mr. [redacted] last offense with a prepubescent child, Mr. [redacted] advancing age, and the likely waning of his sexual impulses generally, as well as the complete absence of evidence regarding any contemporary sexual preoccupation, the Court believes that the record establishes that Mr. [redacted] does not, at present, suffer from pedophilic disorder, even if there is historical evidence of such a paraphilia or paraphilic disorder. The Court finds that Mr. [redacted] has proven, by a preponderance, that any historical attraction to children he may have once had has now been muted to such an extent that it no longer constitutes a basis for a finding of pedophilic disorder, and therefore a finding of a "serious mental illness, abnormality, or disorder" is not justified at present.

Alternatively, the Court finds that even if a present diagnosis of pedophilic disorder is proper in Mr. [redacted] case, the total absence of any evidence that the disorder is impairing Mr. [redacted] present functioning leads this Court to find that such diagnosis is not "serious" within the meaning of the Adam Walsh Act. Stated differently, the Court finds that the "grip strength" of pedophilic disorder in Mr. [redacted] case is unquestionably weak at

present. This is a unique case in which a diagnosis of pedophilic disorder is legally and factually insufficient to establish a present "serious mental illness, abnormality, or disorder" given the complete absence of evidence that such disorder is in any way causing any impairment in Mr. [redacted]'s present functioning.

The Court has also considered the Antisocial Personality Disorder diagnosis offered by Dr. Ross and Dr. North. The evidence reflects that Mr. [redacted]'s antisocial tendencies are declining over time as he approaches his 60s. He has been employed consistently for years [Resp. Ex. 7] and he has received repeated satisfactory reviews from his supervisors [Resp. Ex. 8], a fact that Dr. Ross conceded could establish waning of the disorder. All of the incident reports that Mr. [redacted] has received since his commitment (inadvertent possession of matches related to Native American sweat lodge religious ceremony and lying about possessing shoes of another inmate) have been relatively benign. This evidence leaves the Court with the belief that any historical grounds for an antisocial personality disorder diagnosis have significantly eroded over time.

Drs. North and Ross agreed that Mr. [redacted] had not exhibited any outward signs of pedophilic disorder in the last 13 years. One reason that their opinions fail to carry the day is that they did not thoroughly address the dearth of evidence from the last 13 years of ongoing serious sexual deviance. Instead, Drs. Ross and North simply speculate that Mr. [redacted]'s pedophilic disorder is presently strong without pointing to any evidence in the record or scientific data to support their view. This Court cannot base a judgment of indefinite civil commitment on speculation, but that is all that Dr. North and Dr. Ross have offered on this issue.

The more thoroughly reasoned opinion of Dr. Plaud carefully examining the lack of current evidence of recurrent, intense fantasies is more persuasive than Drs. Ross's and North's

speculation. Mr. [redacted] has shown by a preponderance of the evidence that he does not suffer from a mental disorder that presently constitutes a serious functional impairment. He has carried his burden as to the mental disorder prong.

Serious Difficulty Refraining

Even if the Court were to find that Mr. [redacted] had pedophilic disorder and that it presently exhibited grip strength over him, the Court finds that Mr. [redacted] has shown by a preponderance of the evidence that he would not have serious difficulty refraining from sexually violent conduct or child molestation if released. The overwhelming weight of the evidence weighs in Mr. [redacted]'s favor. Indeed, all present evidence leads to the conclusion that Mr. [redacted] is not sexually dangerous.

The Court finds persuasive the lack of any sexual misbehavior for 13 years. Mr. [redacted] has not been cited for a sexual infraction of any kind or for possessing photographs of children of any sort. The Court credits the opinions of Dr. Plaud that this is indicative of either weak grip strength of Mr. Goodpasture's pedophilic disorder or of Mr. [redacted] having strong volitional control over his behavior. Without evidence of pedophilic misbehavior in 13 years, the Court cannot find that Mr. [redacted] presently has serious difficulty controlling his behavior.

Drs. Ross and North conceded that Mr. [redacted] did not have any problematic sexual misconduct, but their opinion simply pays lip service to this fact and does not fully accommodate it. For example, Dr. Ross continued to find relevant the presence of several dynamic risk factors–even without any current evidence to support their continued existence. Instead of acknowledging the absence of evidence of sexual risk, Dr. Ross merely notes that "dynamic risk factors . . . would be unlikely to change without some type of intervention, such as treatment."

Gov. Ex. 31 at 4. This fails to account for the absence of evidence of Mr. [redacted] inability to control his volition. The Court contrasts Dr. Ross's approach with the more nuanced approach of Dr. Plaud, who examined the risk factors, but then also examined their current strength and salience.

The Court also considered the issue of Mr. [redacted] s past denials and minimization of his offenses as a risk of future offending. Dr. Plaud testified that denial and minimization do not increase one's risk for sexual re-offense, and the Court accepts his opinion on this issue. The Court, however, does note that Mr. [redacted] displayed insight during the February 2020 hearing. Mr. [redacted] admitted to his past behavior and appeared to this Court to be genuine in his remorse. He explained how his father's sexual abuse of him as a boy led to him offending against several children as a young adult. Mr. [redacted] expressed extreme remorse about his past actions and demonstrated determination to break the cycle of abuse. He was emotional and ashamed of his past conduct. To the extent that the Court found his minimization a compelling factor in its 2016 opinion, the Court finds his minimization less problematic today. If anything, Mr. Goodpasture's acknowledgement of his past offenses appears to be a protective factor at this point in time.

Dr. Plaud considered Mr. [redacted] decision to decline sex-offender treatment while in the BOP and did not find it to be dispositive in this case. The Court credits Dr. Plaud that the literature is equivocal regarding the efficacy of sex-offender treatment, and further notes that the Fourth Circuit has recognized that there may be legitimate reasons one may decide to forego the non-confidential treatment program offered by the Bureau of Prisons. *United States v. Antone*, 742 F.3d 151, 167 n.12 (4th Cir. 2014) (explaining why it was understandable that Mr. Antone had chosen not to participate in treatment during civil commitment proceedings because "any

treatment received would be at the cost of providing the Government with additional fodder to use against him in those proceedings").

On the other hand, Drs. Ross and North stressed Mr. [redacted]'s lack of participation in sex-offender treatment as a reason—if not the primary reason—for their finding that he remains dangerous. The Court is not persuaded. Drs. North and Ross could not point to any legitimate reason why participation in the BOP sex offender treatment program was necessary to render Mr. [redacted] no longer dangerous. Both doctors acknowledged that they were not aware of any data, audits, or analyses regarding the effectiveness of the BOP's treatment programs. In fact, Dr. Ross testified that no such audit has ever occurred. On the other hand, Mr. [redacted] is required to attend sex offender treatment as a condition of his supervised release, and Dr. Ross conceded that some literature suggested that treatment in the community may actually be more effective than treatment in an institutional setting.

The Fourth Circuit's opinion in *United States v. Wooden*, 887 F.3d 591 (4th Cir. 2018) (*Wooden III*), supports this Court's conclusion on the treatment issue. In *Wooden III*, the Fourth Circuit upheld the district court's finding at a review hearing that a respondent was no longer sexually dangerous. Mr. Wooden had also not participated in sex-offender treatment. In finding that release was appropriate, the Fourth Circuit sanctioned the conclusion that successful completion of treatment is not a necessary precondition for release. Moreover, the government pointed again and again to Mr. Wooden's past pedophilic acts and behaviors and argued that "the absence of evidence of pedophilic urges does not mean that Wooden is not currently experiencing those urges." *Id.* at 607. The Fourth Circuit rejected the government's line of reasoning, explaining:

> "To accept the government's argument would effectively mean that an offender diagnosed with pedophilic disorder could never be released, as the government could

> always prove future impulse control problems by pointing to past failures to exercise control. The structure of the Act, which requires discharge if the inmate is no longer sexually dangerous, clearly shows that Congress believed that sexually dangerous predators could change and grow out of the sexually-dangerous classification."

Id. Here, the government asks the Court to do precisely what *Wooten III* rejected—to find Mr. [redacted] past offenses dispositive and ignore the lack of current evidence to the contrary.

In sum, the Court has considered the evidence and finds that Mr. [redacted] has met his burden of proving that he would not be sexually dangerous to others if released. He is now 57, in an age cohort associated with much lower rates of recidivism. He will be 60 by the time he completes his term of supervised released in Illinois. For the past 13 years in prison, he has been an example of good behavioral management. He has shown that he can conform his behavior to the rules of the institution. He is subject to conditions of supervised release that all of the experts characterized as "stringent," including one condition that will require him to live at a County Jail on a de facto work release program for several months. He displayed genuine remorse and insight into his offending and the link between his own victimization and offending at an early age. The Court concludes that the opinion of Dr. Plaud is complete, thorough, and carefully considers the current evidence. This opinion is persuasive. The opinions of Drs. North and Ross are based largely on speculation and surmise and are therefore unpersuasive.

Unconditional Release

Upon release, Mr. [redacted] is required to serve a three-year supervised release term in Illinois associated with his felon in possession offense in the Southern District of Illinois. As discussed above, in October 2018, Mr. [redacted] agreed to a number of sex-offender specific modifications to this supervision. These modifications were approved by the district court in Illinois. Resp. Ex. 1.

A conditional release is authorized only for those detainees who require medical care or treatment to keep them from being sexually dangerous. *Wooten III*, 887 F.3d at 609. Given the Court's findings, Mr. [redacted] release is unconditional with respect to this Court. Obviously, Mr. [redacted] must fully comply with his terms of supervised release in the Southern District of Illinois. This Court simply imposes no additional conditions.

CONCLUSION

For the above reasons, the Clerk is DIRECTED to enter judgment in favor of the respondent, James [redacted] and against the petitioner, the United States of America. The government is ORDERED to release the respondent.

SO ORDERED, this 4 day of March, 2020.

Terrence W. Boyle

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE