IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:16-HC-2097-BO

UNITED STATES OF AMERICA, Petitioner, v. MAURICE [redacted] Respondent.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner (the government) instituted this civil action pursuant to Title 18 of the United States Code, Section 4248(a), seeking to commit respondent Maurice [redacted] (respondent or Mr. [redacted] as a sexually dangerous person pursuant to the Adam Walsh Child Protection and Safety Act of 2006 (the Act). The government filed a certificate stating that mental health personnel for the Federal Bureau of Prisons (BOP) examined respondent and issued a preliminary determination that he was sexually dangerous within the meaning of the Act. [DE 1]. The certificate stayed respondent's release from federal custody pending a hearing to determine whether he qualifies for commitment as a sexually dangerous person. The government's petition was filed on May 5, 2016. Respondent's projected release date from BOP custody was June 28, 2016.

On January 18, 2017, the Court conducted an evidentiary hearing in this matter pursuant to 18 U.S.C. § 4247(d). Prior to and following the hearing, the parties filed proposed findings of fact and conclusions of law. [DE 41 and 45]. Pursuant to Rule 52(a)(1) of the Federal Rules of Civil Procedure, and after due consideration of the evidence presented and arguments of counsel, the Court ADOPTS sections I and II of respondent's findings of fact and conclusions of law as

filed on January 23, 2017, [DE 45], and incorporates those portions as if they were fully set forth herein.

For the reasons discussed more fully below, the Court now holds that the government has failed to satisfy its burden to show by clear and convincing evidence that Mr. [redacted] is sexually dangerous to others as defined by the Act.

DISCUSSION

To order the commitment of an individual pursuant to § 4248, a court must conclude, after an evidentiary hearing at which the government bears the burden of proof by clear and convincing evidence, that the respondent is a sexually dangerous person as defined by the Act. The government must show (1) that respondent "has engaged in or attempted to engage in sexually violent conduct or child molestation" and (2) that respondent "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. § 4248(d). "[C]lear and convincing has been defined as evidence of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, and, as well, as evidence that proves the facts at issue to be highly probable." *Jiminez v. DaimlerChrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001) (internal quotations, citations, and alterations omitted); *see also Addington v. Texas*, 441 U.S. 418, 423–24 (1979) (noting that the "clear and convincing" standard of proof is an "intermediate standard" that falls between a "mere preponderance of the evidence" and "beyond a reasonable doubt."). If the Court finds that the government has satisfied its burden, the individual must be committed to a suitable facility for treatment until he is determined to no longer be sexually dangerous to others. 18 U.S.C. § 4248(d).

1. **Whether the respondent has engaged or attempted to engage in sexually violent conduct or child molestation.**

The Court finds that the government has established by clear and convincing evidence that Mr. [redacted] has engaged in sexually violent conduct or child molestation in the past. Mr. [redacted] concedes that this element is satisfied. [DE 45 at 6.].

2. **Whether the respondent currently suffers from a serious mental illness, abnormality, or disorder.**

To meet its burden on this element, the government must prove by clear and convincing evidence that respondent "suffers from a serious mental illness, abnormality, or disorder." 18 U.S.C. § 4248(d).[1] Civil commitment is limited to individuals whose mental disorder renders them dangerous beyond their control. *United States v. Francis*, 686 F.3d 265, 275 (4th Cir. 2012). The determination of whether an individual's mental disorder rises to the level of a sexually dangerous person is fact specific as viewed by expert psychiatrists and psychologists. *Id.*

Four mental health professionals were accepted by the Court at the hearing as experts and allowed to testify as to their opinions about whether Mr. [redacted] meets the criteria for commitment under § 4248. Dr. Ross and Dr. Hastings were called by the government and Dr. Saleh and Dr. Plaud were called by respondent.

The Court at the outset addresses two diagnoses which Dr. Ross alone found applicable to Mr. [redacted] Dr. Ross found that Mr. [redacted] suffers from pedophilic disorder, nonexclusive type, sexually attracted to females and antisocial personality disorder. Pet.'s Ex. 4, p. 15. The Court affords Dr. Ross's diagnoses of pedophilic disorder and antisocial personality disorder little weight as no other testifying psychologist or psychiatrist made such diagnoses and the Court is persuaded that they are not well-supported by the American Psychiatric Association's *Diagnostic*

[1] The Court will refer to this criteria throughout this order as "serious mental disorder."

and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5). The DSM-5 requires that the following criteria be met to support a diagnosis of pedophilic disorder:

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

DSM-5 at 697. As noted by the other testifying experts, the record plainly does not support that Mr. [redacted] has had, over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children generally age 13 years or younger.

Further, in order to properly apply a diagnosis of antisocial personality disorder, an individual must be found to have evidence of conduct disorder prior to fifteen years of age. DSM-5 at 659. Again, as noted by the other testifying experts in this case, the record here lacks such evidence and a full diagnosis of antisocial personality disorder is not supported. Dr. Ross relied on evidence that Mr. [redacted] engaged in fights at school as well as evidence that Mr. [redacted] mother expressed concerns regarding his behavior to support her conclusion that conduct disorder was present prior to the age of fifteen, Pet.'s Ex. 4, p.16, but Dr. Hastings noted that Mr. [redacted] fighting, theft, and vandalism were "normative" and found no evidence of predatory behavior at an early age. Pet.'s Ex. 2, p. 23. The Court finds the opinions of the remaining experts persuasive that pedophilia and antisocial personality disorder are not appropriate diagnoses for Mr. [redacted]

The remaining diagnoses applied to Mr. [redacted] involve additional personality disorders. Dr. Hastings diagnosed Mr. [redacted] with other specified personality disorder (antisocial,

borderline, and avoidant features). Pet.'s Ex. 2, p. 23. Dr. Ross and Dr. Plaud[2] diagnosed Mr. [redacted] with borderline personality disorder. Pet.'s Ex. 4, p. 15; Resp.'s Ex. 5, p. 17. Dr. Saleh opined in his report that Mr. [redacted] "presents with traits of a personality disorder best described as Other Specified Personality Disorder." Resp.'s Ex. 1, p. 6.

> A personality disorder is defined by the DSM-5 as
>
> an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

DSM-5 at 645. Borderline personality disorder is characterized as a "pervasive pattern of instability of interpersonal relationships, self image, and affects," with the presence of additional indicators such as recurrent suicidal behavior, frantic efforts to avoid real or imagined abandonment, impulsivity in at least two potentially self-damaging areas such as spending or sex, and identity disturbance. DSM-5 at 663. A diagnosis of other specified personality disorder "applies to presentations in which symptoms characteristic of a personality disorder that cause clinically significant distress or impairment . . . are present but do not meet the full criteria for any" of the remaining disorders in the diagnostic class. *Id.* at 684.

The Court finds persuasive the testimony of the experts that Mr. [redacted] presents with traits or characteristics consistent with at least one personality disorder. However, whatever the appropriate diagnosis or label for Mr. [redacted] may be, the question for the Court is whether "on a case-specific basis, the respondent's underlying condition constitutes a serious functional

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[2] In his original report supplied in July 2016, Dr. Plaud opined that Mr. [redacted] satisfied the criteria for commitment. [DE 13]. Specifically, Dr. Plaud opined that Mr. [redacted] borderline personality disorder is a serious mental disorder, as a result of which Mr. [redacted] would have serious difficulty refraining from sexually violent conduct or child molestation if released. *Id.* p. 2. In August 2016, after further reflection and research, Dr. Plaud amended his report to conclude that Mr. [redacted] does not meet the criteria for commitment. [DE 25]. The Court accepts Dr. Plaud's amended findings and testimony in support thereof as offered at the evidentiary hearing.

impairment." *United States v. Caporale*, 701 F.3d 128, 137 n.4 (4th Cir. 2012). While the Court recognizes that a personality disorder may in some instances operate to sufficiently impair a respondent's functioning such that a serious mental disorder is present, it does not find that Mr. [redacted] personality disorder, however it may be properly labeled, presents as a serious mental disorder in this case.

The government's best evidence on this issue was that of Dr. Hastings, whose testimony the Court has considered thoroughly but by which it is not ultimately persuaded. As noted above, Dr. Hastings found Mr. [redacted] to have personality traits or features found in the antisocial, borderline, and avoidant personality disorder diagnoses. Indeed, the experts were able to agree that Mr. [redacted] has several antisocial personality characteristics, including a pattern of disregard for and violation of the rights of others, deceitfulness, manipulativeness, and irresponsibility, *see, e.g.,* Resp.'s Ex. 1, p. 7; Pet.'s Ex. 2, p. 23, and each found that Mr. [redacted] has a history of lying and is "a generally unreliable individual." Resp.'s Ex. 1, p. 6. Dr. Hastings further found Mr. [redacted] to have a degree of sexual preoccupation and noted that Mr. [redacted] is in a small category of persons with antisocial personality traits and sexual offenses in their history. Dr. Hastings also testified that he believes that it is Mr. [redacted] personality disorder that drives his sexual offending.

As argued by respondent, in order to satisfy its burden at step two, the government must show that a respondent's metal disorder is either the cause of or would prevent the respondent from controlling his sexually violent behavior. In other words, proof that Mr. [redacted] has committed sexual offenses in the past coupled with proof that he suffers from a personality disorder is not enough. This is because, in order to satisfy substantive due process requirements, a civil commitment statute must "require[] a finding of future dangerousness, and then link[] that

finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

In contrast to Dr. Hastings, Dr. Saleh found that he could not conclude to a reasonable degree of medical certainty "that Mr. [redacted] suffers from a condition (whatever label one were to give this condition) that would cause him an impairment in his ability to control his sexual impulses." Resp.'s Ex. 1, p.7; *see also id.*, p. 9 ("There is no evidence to suggest that Mr. [redacted] currently suffers from a mental illness that could increase his risk to reoffend sexually."). Dr. Saleh agreed that Mr. [redacted] has engaged in antisocial behaviors, but found no evidence that Mr. [redacted] suffers from volitional impairment. On cross-examination, Dr. Saleh testified that to view Mr. [redacted] behavior regarding the hostess to whom he made lewd comments in 2012, in which he returned to the restaurant over a period of three days looking for her, as evidence that Mr. [redacted] disorder is controlling his behavior is too simplistic. Dr. Saleh stated that he did not find any evidence that, as, for example, someone with a diagnosis of pedophilia might be, Mr. [redacted] would be driven to engage in sexually violent conduct because of his underlying personality disorder. The Court credits the opinion and testimony of Dr. Saleh on this issue and affords his conclusion great weight.

Dr. Saleh's conclusion is supported by the testimony of Dr. Plaud, who also found that Mr. [redacted] does not have a serious mental disorder. Dr. Plaud framed the issue as concerning choice behavior versus compulsive behavior, noting that the Act is concerned with compulsive behavior. Dr. Plaud noted further that while Mr. [redacted] personality disorder certainly contributed to his sexual offending, he could not find that it caused him to sexually offend. Even Dr. Hastings agreed that there is a less direct inference between steps two and three of the § 4248

inquiry when the respondent's underlying disorder is a personality disorder and not, for example, a paraphilic disorder.

The Court is persuaded by Drs. Saleh and Plaud that there is insufficient evidence to conclude that Mr. [redacted] personality disorder or disorders constitute a serious functional impairment in this case. The government has therefore failed to satisfy its burden at step two.[3]

3. Whether as a result of the illness, abnormality, or disorder, the respondent would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

In the alternative, if the Court assumes that the government has satisfied its burden at step two, the Court finds that the government has not met its burden to establish, by clear and convincing evidence, that Mr. [redacted] will have serious difficulty in refraining from sexually violent conduct or child molestation if released. As noted by the Fourth Circuit in *United States v. Hall*,

> [t]he "serious difficulty" prong of 4248's certification refers to the degree of the person's "volitional impairment," which impacts the person's ability to refrain from acting upon his deviant sexual interest. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (noting that statutory requirements that couple proof of dangerousness with proof of a mental illness or abnormality "serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); *id.* at 357 (noting that civil commitment statutes may "provide[] for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety . . . provided the confinement takes place pursuant to proper procedures and evidentiary standards") (internal citations omitted); *see also Kansas v. Crane*, 532 U.S. 407, 414 (2002) (noting that "our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior.").

[3] The disagreement among the experts on this point is also a sufficient basis for the Court to draw such a conclusion. *Compare United States v. Ofarrit-Figueroa*, 533 Fed. App'x 239, 245 (4th Cir. 2013) (where there is consensus among the experts that respondent suffers from serious mental disorder, but disagreement over precise diagnostic label, evidence is sufficient to support a finding that government had satisfied its burden at step two); *but see Francis*, 686 F.3d at 276 ("uncertainty ... regarding Francis' present mental condition demonstrates the government's failure to instill in the fact finder a firm belief that Francis presently suffers a serious mental illness or disorder.").

554. F.3d 456, 463 (4th Cir. 2012). When weighing the serious difficulty element, it is appropriate to consider the following factors: (1) failures while on supervision; (2) resistance to treatment; (3) continued deviant thoughts; (4) cognitive distortions; (5) actuarial risk assessments; (6) impulsiveness; and (7) historical offenses. *United States v. Wooden*, 693 F.3d 440 (4th Cir. 2012). As such, the Court considers static and dynamic factors, historical behaviors, and present impairment in order to adequately assess whether Mr. [redacted] will have a serious difficulty in refraining from sexually violent conduct or child molestation if released. This step of the § 4248 inquiry "will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413.

The Court begins its analysis with a review of Mr. [redacted] historical offenses. Mr. [redacted] has six criminal convictions which are material to this inquiry and which were discussed at length at the evidentiary hearing. A full review of these offenses is provided in the record, *see, e.g.,* Pet.'s Ex. 2, pp. 9-19. These offenses include sexual misconduct in 1992 when Mr. [redacted] was 23 years old; possessing depictions of a minor engaged in sexually explicit conduct in 1999 when Mr. [redacted] was 30 years old; unlawful sexual intercourse with a minor in 2000 when he was 32 years old; simple assault in 2007 when he was 38 years old; sexual penetration in 2009 when he was 40 years old; and engaging in lewd or dissolute conduct and failure to register as a sex offender in 2012 when he was 44 years old. *Id.*

The Court recognizes the seriousness of Mr. [redacted] past offenses, in particular the convictions of sexual misconduct in 1992 and sexual penetration in 2009, both of which plainly involved Mr. [redacted] engaging in sexual acts with nonconsenting victims. The Court also recognizes that while his additional convictions are troubling, it is to a lesser or different degree. For example, Mr. [redacted] apparent "relationship" with a sixteen year old called T.M., which

formed the basis of his convictions in 1999 and 2000, certainly violated state law, but the Court notes that it was a sustained relationship, with Mr. [redacted] even living with T.M. and her mother for a period of time. Mr. [redacted] 2007 conviction for simple assault involved unwanted touching and kissing of an employee at a truck stop and his 2012 conviction for lewd or dissolute conduct involved repeatedly bothering a sixteen-year old hostess at a restaurant and saying sexually inappropriate things. While the Court in no way minimizes such conduct, it nevertheless weighs differently in the Court's analysis of Mr. [redacted] past behavior. What is apparent is that between 1992 and 2009 Mr. [redacted] did not engage in overt sexually violent conduct with a nonconsenting victim. Such behavior weighs in favor of finding that Mr. [redacted] has the ability to engage in volitional control of his sexually violent impulses.

Each of the testifying experts in this case conducted some form of review or analysis of risk factors for sexual offense recidivism. Dr. Ross employed the Static-99R, an actuarial measure, which resulted in a score of six-to-seven for Mr. [redacted] placing him in the high risk category for reoffending. Pet's Ex. 4, p. 17. Dr. Ross further considered additional risk factors not included in the Static-99R, including sexual preoccupation, deviant sexual interest, lack of emotionally intimate relationships with adults, and lifestyle impulsivity as well as protective factors such as residing in the community offense-free for a significant period as well as illness or physical conditions which would reduce his re-offense risk. *Id.*, pp. 18-19. Based on her assessment, Dr. Ross opined that Mr. [redacted] would have serious difficulty refraining from sexually violent conduct or child molestation if released. *Id.*, p. 20.

Dr. Hastings also employed the Static-99R actuarial measure which resulted in a score of seven for Mr. [redacted] placing him in the high risk category. Pet.'s Ex. 2, p. 25. Dr. Hastings further employed the Static-2002R actuarial measure, which resulted in a score of nine for Mr.

Nunz, placing him again in the high risk category. *Id.*, p. 26. Dr. Hastings also considered dynamic risk factors and protective factors, and, based on his overall assessment concluded that Mr. Nunz would have serious difficulty refraining from sexually violent conduct or child molestation if released. *Id.*, p. 27-32.

Dr. Plaud also employed the Static-99R and scored Mr. [redacted] with a seven, but noted that the classification of low, moderate, or high risk based upon the calculated score "tells us nothing of value or substance." Resp.'s Ex. 5, p. 19. Dr. Plaud opined that "Mr. [redacted] does not presently suffer from a sexually-based mental condition, which would cause him, in the present tense, to have serious difficulty (or lack of volitional capacity) in controlling himself sexually." *Id.*, p. 3. Finally, Dr. Saleh examined items from the Static-99R, resulting in a score of seven for Mr. [redacted] but he did not correlate Mr. [redacted] score to risk categories given the limitations of the instrument in responding to the particular inquiries required under the Act. Resp.'s Ex. 1, pp. 8-9. Dr. Saleh concluded that Mr. Nunz "presents with static risk factors for sexual recidivism; however, based on the totality of information available to me, I cannot conclude to a reasonable degree of medical certainty that Mr. [redacted] is a Sexually Dangerous Person . . ..". *Id.*, p. 9.

The Court declines to fully credit the actuarial analyses and expert witness testimony that relies solely on respondent's past behavior to determine his current volitional impairment, as consideration of historical facts to the exclusion of present behavior does "not allow for a respondent's subsequent growth." *United States v. Antone*, 742 F.3d 151, 169 (4th Cir. 2014) (holding that an expert's opinion based solely on past behavior does not satisfy the government's heightened clear and convincing evidence burden). In this regard, the Court credits the opinions of Dr. Plaud and Dr. Saleh that the actuarial measure scores do not provide the Court with meaningful probative evidence regarding a particular respondent's risk for recidivism.

Review of Mr. [redacted] criminal record reveals that he plainly has difficulty abiding by the terms of court-supervision. However, Mr. [redacted] was also in the community for lengthy periods without any evidence of sexual misconduct. This supports Dr. Saleh's conclusion that Mr. [redacted] sexual offenses are better explained by cognitive distortions and antisocial behavior than by a serious mental disorder which would prevent him from controlling his impulse to engage in sexually violent conduct or child molestation. *See* Resp.'s Ex. 1, p. 7. The Court has further considered the testimony of Mr. [redacted] but, as was discussed by each of the experts, Mr. [redacted] is an inaccurate historian and embellisher, and thus the Court places little weight in Mr. [redacted] own statements that he will not reoffend if released. The Court further places little weight in Mr. [redacted] contention that he has participated in court-ordered sex offender treatment in the past, and credits Dr. Hastings' comments on this issue.

Regarding Mr. [redacted] continued deviant thoughts, the evidence before the Court simply does not support a finding that Mr. [redacted] continues while in custody to be preoccupied sexually or in a sexually deviant manner. While the government relied on evidence of phone calls and emails to adult women about a relationship once Mr. [redacted] is released, the Court credits the testimony of Drs. Saleh and Plaud that while the content of the emails and calls may reveal that Mr. [redacted] is manipulative, deceitful, or just lonely, they do not provide evidence that Mr. [redacted] is unable to control himself sexually.

Mr. [redacted] has made illegal and immoral choices in his past, but the government has not clearly demonstrated that he fits the profile of one who is compulsively driven to commit sexually violent acts or child molestation. Failure to prove such a serious difficulty in controlling his behavior beyond that of the ordinary criminal recidivist is fatal to the government's position that respondent should be indefinitely committed. *See Crane*, 534 U.S. at

413 (holding that civil commitment schemes must require "proof of serious difficulty in controlling behavior . . . [which] 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."); *see also United States v. Wilkinson*, 646 F. Supp. 2d 194, 209 (D. Mass. 2009) ("in the absence of clear and convincing proof that a serious mental impairment causes an individual to have serious difficulty in controlling his behavior, the constitution requires reliance on the criminal law, rather than a civil commitment, to deal with that risk.").

In summary, the government has failed to instill in the Court a "firm belief or conviction, without hesitancy" that Mr. [redacted] currently suffers from a serious mental disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released. *Jimenez*, 269 F.3d at 450. The government has therefore failed to satisfy its high burden and commitment of Mr. [redacted] under 18 U.S.C. § 4248 is not warranted.

CONCLUSION

For the foregoing reasons, judgment shall be entered in favor of the respondent, Maurice [redacted] and against the petitioner, the United States of America. Petitioner is ORDERED to release the respondent to the custody of the appropriate United States Probation Office and this action is hereby DISMISSED.

SO ORDERED, this the 23 day of February, 2017.

Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE