IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:14-HC-2021-BO

UNITED STATES OF AMERICA, Petitioner, v. DUANE [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 Duane [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 February 6, 2014. Mr. [redacted] projected release date was May 23, 2014.

On September 24, 2014, the Court conducted an evidentiary hearing in this matter pursuant to 18 U.S.C. § 4247(d). Prior to the hearing, the parties filed proposed findings of fact and conclusions of law. [DE 41 and 42]. 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 the following portions of respondent's findings of fact and conclusions of law, as filed on September 22, 2014 [DE 42], and incorporates those portions as if they were fully set forth herein: § I and § II.

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 a respondent 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 that (1) 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 42 at 6.].

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

To meet its burden on this point, 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). Civil commitment is limited to individuals whose mental illness 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 illness rises to the level of a sexually dangerous person is fact specific as viewed by expert psychiatrists and psychologists. *Id.*

Three different psychologists examined Mr. [redacted] and/or his records in preparation for the hearing. Dr. Davis examined Mr. [redacted] in a clinical setting, Dr. Phenix merely reviewed Mr. [redacted] records, and Dr. Plaud evaluated Mr. [redacted] in a forensic setting. All three diagnosed Mr. [redacted] with pedophilic disorder, attracted to males, non-exclusive type.[1]

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-V) requires that the following criteria be met to support a diagnosis of pedophilic disorder:

[1] Dr. Plaud's report was somewhat unclear as to whether he believed Mr. [redacted] presently suffered from a serious mental disease, abnormality or disorder, but clarified this during his trial testimony. While Dr. Plaud questioned the strength of the diagnosis today given that Mr. [redacted] had not engaged in any pedophilic behavior since approximately 2011, he had no doubt about the diagnosis of pedophilic disorder, attracted to males, non-exclusive type and that it constituted a serious mental disease, abnormality, or 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-V at 697. Given the unanimous expert opinions, the Court finds that Mr. [redacted] satisfies the diagnostic criteria for pedophilic disorder, attracted to males, non-exclusive type.

All three psychologists made additional diagnoses. Drs. Davis and Plaud diagnosed other specified personality disorder, and Dr. Phenix diagnosed depressive disorder, and anxiety disorder. The Court finds that Mr. [redacted] meets the diagnostic criteria for other specified personality disorder. Both Dr. Davis and Dr. Plaud diagnosed Mr. [redacted] with this disorder. While Dr. Phenix did not make this diagnosis, Dr. Phenix was the only psychologist not to meet with Mr. [redacted] in making a diagnosis. Accordingly, the Court affords greater weight to Dr. Davis and Dr. Plaud, who both testified that Mr. [redacted] does have this disorder, but does not rely on this diagnosis for purposes of the serious difficulty analysis.

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.

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.").

554. F.3d 456, 463 (4th Cir. 2012). The Fourth Circuit has found that in weighing the serious difficulty prong, 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). It should be noted, however, that this inquiry "will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413.

Here, a number of pieces of evidence demonstrate that Mr. [redacted] is able to control himself and would not have serious difficulty in refraining from sexually violent conduct or child molestation if released. At the outset, the Court notes that credibility is not an all-or-nothing determination. As such, the Court credits some portions of Mr. [redacted] testimony and discredits others and assesses his credibility on an issue-specific basis.

First and foremost in the Court's analysis is the lack of evidence in the past two to four years that Mr. [redacted] has an ongoing volitional impairment. Though the Court notes that Mr. [redacted] criminal record "is by no means a stale or irrelevant [historical factor]," *Wooden*, 693 F.3d at 458, his past criminal behavior is outweighed by the absence of evidence supporting an "ongoing volitional impairment." *United States v. Antone*, 742 F.3d 151, 168 (4th Cir. 2014) (emphasis in original). Mr. [redacted] only has two contact offenses in his history, both of which were in the 1990s. The Court specifically does not credit Mr. [redacted] testimony as to the number of times he molested J.S. and D.S., but notes that a simultaneous investigation failed to establish evidence of additional hands-on offenses, despite Mr. [redacted] job as an elementary school janitor. This is strong evidence that these were, in fact, Mr. [redacted] only two hands-on

offenses. Dr. Phenix opined that Mr. [redacted] may not have had additional victims because the victims he had satisfied his desire. Taking Dr. Phenix's opinion as true, the Court finds that Mr. [redacted] had some modicum of volitional control even in the height of his offense period, given that he lacked a long string of victims despite their availability.

Notably, reliance on past behavior does "not allow for a respondent's subsequent growth." *Antone*, 742 F.3d at 169 (holding an experts opinion based solely on past behavior does not satisfy the government's heightened clear and convincing evidence burden). Dr. Plaud specifically testified that Mr. [redacted] experienced personal growth and evidences understanding and remorse. The Court agrees, and believes this growth is demonstrated by the lack of recent evidence of any type of volitional impairment. The most recent indication of any sexually deviant behavior was Mr. [redacted] 2010 possession of inappropriate photos of children. [Gov't Ex. 18]. This incident occurred over four years ago. The Court also credits Dr. Plaud's testimony that it is common to see an increase in "deviant behaviors" at the beginning of treatment, which corresponds with the photo possession. Records from 2012 indicate that Mr. [redacted] had deviant thoughts about children, but there is no evidence that Mr. [redacted] engaged in any deviant sexual behaviors since the photograph incident in 2010, or deviant thoughts since 2012.

Drs. Davis and Phenix opined that the lack of evidence does not indicate control. Dr. Phenix, in particular, pointed to the fact that Mr. [redacted] did not have occasion to talk about his sexual thoughts because he was not in treatment. Dr. Plaud, on the other hand, opined that the lack of evidence does indicate control. He pointed out that many people who are not in treatment share their deviant sexual thoughts or engage in inappropriate sexual behaviors. The Court credits Dr. Plaud's testimony on this point. The Court has seen numerous cases in which a respondent engaged in sexually deviant behavior and/or thoughts while not in treatment and even

up until the evidentiary hearing. Accordingly, the Court credits the time since 2010 in which there is no evidence of sexually deviant behavior and the time since 2012 in which there is no evidence of sexually deviant thoughts as evidence of Mr. [redacted] volitional control.

While Drs. Davis and Phenix believed Mr. [redacted] relationship with another adult inmate indicated a lack of volitional control and an inability to make his recovery paramount, the Court does not agree. Instead, the Court finds that this relationship indicates an age-appropriate focus on and attraction to adult men. This relationship, while in violation of BOP rules, was a consensual adult relationship, the nature of which demonstrates Mr. [redacted] understanding of appropriate sexual behaviors. Although Mr. [redacted] previously had other sexual relationships with inmates, there is no evidence these relationships were longstanding relationships; rather, they appear from the record to be sexual trysts. Part of Mr. [redacted] recovery must necessarily be developing appropriate sexual and romantic interests, as Dr. Plaud noted. The Court recognizes that Mr. [redacted] violated BOP rules, but finds that overall, the relationship demonstrates Mr. [redacted] social and emotional growth, rather than serious difficult refraining from deviant sexual behavior. This is particularly true light of Mr. [redacted] testimony regarding his longstanding internal struggle with his sexual orientation.

It is important to address the letters written between the two men, which were a focus of testimony. The letters were voluminous—page after page of emotional love letters between the two men. The Court finds that the letters are more evident of youthful emotion than of a sexual preoccupation. As Dr. Plaud noted, the pet names cannot be taken out of context of the letters as a whole. After reading the letters, the Court agrees. The parts that could be considered evidence of a preoccupation are merely small sections of the letters—a few phrases here and there within dozens of pages of letters. Moreover, the overall content of the letters does not indicate a

preoccupation with children; instead the content indicates two men in a romantic relationship. In sum, the Court does not find that Mr. [redacted] recent history demonstrates an ongoing volitional impairment.

Second, Mr. [redacted] is now properly medicated. At the time of his 1997 contact offenses, Mr. [redacted] testified that he was entirely unmedicated. Though he was taking psychiatric medications at the time of his federal child pornography possession offense in 2003, his psychiatric medication regimen was unstable and he engaged in several suicide attempts before going to BOP. Only after he was awarded supplemental security income (SSI) benefits in 2004 did Mr. [redacted] medication regimen stabilize. The SSI benefits award demonstrates that Mr. [redacted] suffers from a severe, pervasive mental disorder. The Court credits Mr. [redacted] testimony that his current medications stabilize his mood, particularly in light of his mother's testimony that she noticed a positive change in her son's mood and maturity level as a result of the BOP's medication regimen. The Court further credits Dr. Plaud's testimony that Mr. [redacted] current medication regimen minimizes conditions that cause him difficulty and helps him undergo and internalize treatment. In light of Dr. Plaud's testimony, the Court finds that Mr. [redacted] stable medication regimen, which was absent prior to his incarceration, weighs in favor of volitional control.

Last, unlike many of the respondents this Court has seen, Mr. [redacted] has undergone sex offender treatment. In fact, Mr. [redacted] voluntarily entered treatment, which the Court considers relevant to Mr. [redacted] volitional control in light of the *Wooden* factors. The Court believes Mr. [redacted] testimony regarding his desire to engage in further treatment and commitment to refraining from child molestation in the future was sincere. Mr. [redacted] additionally put effort into creating a relapse prevention plan, which Dr. Plaud testified is typically the capstone of a

treatment program. This indicates he did progress through treatment. All of the experts testified that Mr. [redacted] benefitted from treatment; the difference of opinion was on how much of the treatment he had internalized. Despite Mr. [redacted] termination from the sex offender treatment program, the Court credits the two years Mr. [redacted] spent in sex offender treatment as further evidence of lack of volitional impairment.

Notably, all the experts opined that further treatment is necessary. Given the portions of Mr. [redacted] testimony in which he minimized his role in his past offenses, the Court agrees. Mr. [redacted] however, has lifetime supervised release. In addition to the standard conditions of supervised release, his sentencing judge imposed a number of sex-offender-specific conditions of supervised release, including mandatory sex offender assessment and treatment, GPS monitoring, restrictions on contact with minors and computer use, and a prohibition on being present at places where minors are present. Mr. [redacted] will receive additional sex offender treatment, and testified that he wants to receive such treatment, while on supervised release. The Court gives weight to Mr. [redacted] desire to continue treatment, which demonstrates an understanding of the nature of his disease and a desire to overcome it.

The lifetime term of supervised release is particularly relevant in this case given Mr. [redacted] behavioral pattern. The evidence demonstrates that Mr. [redacted] offense pattern is characterized by a particularly long grooming period.[2] Given the conditions placed upon Mr. [redacted] during his lifetime term of supervised release, including GPS monitoring, it will be difficult for Mr. [redacted] to engage in the type of grooming behaviors that led to his offending in the past. Mr. [redacted] offense pattern is particularly relevant to volitional control. Because he

[2] Dr. Plaud's report indicated that his first sexual contact with R.S. occurred three weeks after meeting him; however during testimony, Dr. Plaud clarified that records indicated it was in fact three months after meeting him.

engages in a longer grooming period, Mr. [redacted] is by definition not an impulsive offender. The Court credits Dr. Plaud's opinion that impulsivity correlates with volitional control, and finds that Mr. [redacted] offending pattern, past treatment, and future lifetime supervised release weigh against a serious volitional impairment.

The Court considers the recidivism rates associated with Mr. [redacted] actuarial scores, but affords them less weight than Mr. [redacted] own conduct and Dr. Plaud's testimony. In sum, all the experts agree that, as with any sex offender, there are ongoing issues with risk. Viewed in light of Mr. [redacted] present conduct, stable medication regimen, and individual circumstances relating to past treatment and future supervision, the risk assessment and dynamic factors do not support a conclusion that respondent would have serious difficulty in refraining from reoffending. Therefore 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.

CONCLUSION

For the foregoing reasons, judgment shall be entered in favor of the respondent, Duane [redacted] and against the petitioner, the United States of America. The government 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 3th day of October, 2014.

Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE