

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:17-HC-2024-H

UNITED STATES OF AMERICA,)
)
 Petitioner,)
)
 v.)
)
)
)
 TERRENCE [REDACTED])
)
 Respondent.)

ORDER

The United States of America seeks to civilly commit Respondent, Terrence [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 February 7, 2017, the United States commenced the instant litigation by filing a Certificate of a Sexually Dangerous Person against Johnson pursuant to 18 U.S.C. § 4248(a). At the time of such filing, Smith was in the custody of the Federal Bureau of Prisons ("BOP") in Butner, North Carolina serving the remainder of a 24-month criminal sentence for failing to register as a sex offender. [REDACTED] projected release date was April 12, 2017.

On September 21, 2017, the court conducted an evidentiary hearing pursuant to 18 U.S.C. § 4247(d). The court heard the

testimony of respondent, Terrence [REDACTED] and four expert witnesses, Dr. Robin Watkins, Dr. Mark Hastings, Dr. Jeffrey Davis, and Dr. Joseph Plaud. 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. Also before the court is a motion for summary judgment filed by respondent following the hearing. The government has responded to respondent's motion for summary judgment.

BACKGROUND

A. Confinement Status and Personal History

Mr. [REDACTED] was 35 years old at the time of the evidentiary hearing. He has been in federal custody since his conviction for failure to register as a sex offender on July 16, 2015 and being certified as a sexually dangerous person on March 8, 2017. Mr. [REDACTED] is subject to lifetime terms of supervised release at both the federal and state levels.

Mr. [REDACTED] was born on October 20, 1981 in Silver Spring, Maryland. He was raised primarily by his paternal grandmother, who was employed as a nurse. Mr. [REDACTED] has eight children by seven different mothers. He dropped out of school in the eighth grade at the age of 14 due to becoming a father as well as going to a

juvenile residential facility from ages 14 to 18 for a car theft charge. Mr. [REDACTED] noted some sexual abuse in his history.

B. Sexual Offenses

Mr. [REDACTED] has three convictions for sexual offenses and was charged with two other offenses in the state of Maryland for which he was never convicted. On January 5, 2001, Smith was convicted of second-degree sex offense in Maryland and received a sentence of seven years (partially suspended) with a five year term of supervised probation. The conviction stems from conduct involving a victim with mild retardation and cerebral palsy. After speaking with the victim on the phone, [REDACTED] then age 18, went to her house and ordered the victim to remove her clothes. After she complied, [REDACTED] forced vaginal intercourse as the victim attempted to force him off and screamed at him to stop. He also forced anal intercourse on the victim and forced her to perform fellatio before ending the attack. Upon this conviction, [REDACTED] was required to register as a sex offender.

On March 24, 2012, [REDACTED] pled guilty to a fourth degree sex offense in the state of Maryland. Records indicate on November 2, 2011, [REDACTED] approached a girl on her way to school, offered her money, hugged her, and squeezed her buttocks. He received a sentence of one year of confinement. At the hearing, defendant denied having ever had any contact with the victim, but he pled

guilty because he was offered a plea deal and was already a convicted sex offender.

On June 26, 2013, [REDACTED] was convicted in Kansas for indecent solicitation of a child. On September 5, 2011, [REDACTED] age 29, maintained a page on myyearbook.com where he held himself out to be a 15 year old male. Based upon that representation, three minor teenage girls agreed to meet [REDACTED] at a mall in Kansas. The three girls got into his vehicle and went to a convenience store where [REDACTED] purchased sodas and poured vodka into the drinks for the girls. [REDACTED] offered to pay the girls money to drink the vodka and soda. The first female sat in [REDACTED] car while the other two friends went inside the mall. While in the car, [REDACTED] made sexual comments to the female about wanting to have a sexual encounter with her. The second female returned to the car and drank another alcoholic drink. While they were parked, [REDACTED] exposed himself to the second female. She stated she was not "going to do anything with that," and then passed out. At the hearing, [REDACTED] denied exposing himself but admitted to having an inappropriate conversation. At the time of the offense, [REDACTED] had absconded from supervision in Maryland, the last place he had registered as a sex offender. He fled the state to avoid apprehension on this charge. Upon this conviction, he was classified by the Kansas court as a persistent sex offender, sentenced to 42 months'

incarceration, and placed on lifetime supervised release and lifetime registration as a sex offender.

██████ was also charged with, but not convicted of, a 2010 sexual offense involving the alleged rape of a 15 year old victim. At the hearing, ██████ asserted his Fifth Amendment right against self-incrimination in response to questions about this incident. The government did present, via exhibits, evidence of the Maryland State DNA laboratory matching ██████ known DNA profile to the unknown DNA profile retrieved from the victim's vaginal swabs obtained the night of the alleged incident.

C. Other Criminal Convictions

Mr. ██████ has a number of non-sexual criminal convictions including:

(1) February 2007 conviction for theft for which he received two years' probation;

(2) March 2010 conviction for possession of marijuana for which he received 6 months' probation;

(3) November 2009 conviction for fourth degree burglary for which he received 3 years' probation;

(4) January 2012 conviction for theft for which he was sentenced to 30 days' custody; and, a

(5) November 2012 conviction for disorderly conduct stemming from a domestic violence incident for which he received a 30 day sentence.

D. Conduct in Prison and Sex Offender Treatment

██████ has never participated in sex offender treatment. While incarcerated at Butner, Mr. ██████ was found in possession of sexually explicit photos of his wife and other women. He stated he possessed the photos of the other women in order to make money. There is no evidence he was sanctioned for this behavior.

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 ██████ pursuant to § 4248, the government must prove by clear and convincing evidence: (1) that ██████ "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, ██████ "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 court finds the government has established by clear and convincing evidence that ██████ has engaged in, or attempted to engage in, sexually violent conduct. Mr. ██████ does not dispute this finding on the first element.

II. Serious Mental Illness, Abnormality, or Disorder

To meet its burden of establishing that Mr. ██████ 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). All four experts agree that Mr. ██████

meets the criteria for antisocial personality disorder as that disorder is defined by the Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition (“DSM-5”). Antisocial personality disorder is defined as a pervasive pattern of disregard for a violation of the rights of others, occurring since age 15 years, as indicated by three or more of the following: (1) failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for the safety of others; (6) consistent irresponsibility; as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. Evidence of Conduct Disorder with onset before age 15 is also required.

While the experts all agree Mr. [REDACTED] has antisocial personality disorder, they do not all agree it is “serious” within the meaning of the Act. According to testimony at trial, 50% to 80% of the persons currently incarcerated could be diagnosed with

antisocial personality disorder. Mr. [REDACTED] has moved for summary judgment, asking this court to find that a finding of antisocial personality disorder, standing alone, can never be sufficient to commit someone under the Adam Walsh Act because there is no way to directly link it to sex offending.

Dr. Robin Watkins, who testified for the government, diagnosed Mr. Smith with antisocial personality disorder with narcissistic personality features. She did not find he met the criteria for any paraphilic disorders. Dr. Watkins opined that Mr. [REDACTED] antisocial personality disorder qualifies as a serious mental disorder. On cross-examination, she admitted that personality disorders, such as antisocial personality disorder, do not necessarily involve sexual behavior. As to difficulty refraining, Dr. Watkin's report provides, "Throughout the evaluation, Mr. [REDACTED] personality disorders were evident in his expressed sense of entitlement, hostility toward women, and his disregard for rules and regulations. Although he does not meet criteria for a sexual diagnosis per se, it appears that his personality disorder contributes to his repeated offending, even while under the scrutiny of supervision and registry." (Watkins Report at 30 [DE #8-1].)

Dr. Mark Hastings, who also testified for the government, also found [REDACTED] met the criteria for antisocial personality

disorder. He noted that while 50% to 75% of the prison population may be diagnosed with antisocial personality disorder, only about 10% of incarcerated persons with antisocial personality disorder also have a sexual offense on their record. He stated that [REDACTED] was not your typical antisocial inmate in prison, noting that approximately 30% of his criminal history involved sexual offenses. His report provides that [REDACTED] antisocial personality disorder is "considered serious based on the functional impairment it has caused Mr. [REDACTED] and the emotional and/or physical harm it has caused others." (Hastings Report at 22 [DE #12-1].) Dr. Hastings opines that Mr. [REDACTED] sexual offending is driven by his antisocial personality disorder and noted that he views women as inferior and as objects for sexual conquest. (Id.). In his testimony, Dr. Hastings stated [REDACTED] did not have a paraphilic disorder nor does his promiscuity rise to the level of sexual preoccupation. However, he is behaviorally impulsive and prioritizes his own needs over the needs of others.

Dr. Jeffrey Davis opined that [REDACTED] does not meet the criteria for commitment as a sexually dangerous person. He assigned antisocial personality disorder diagnosis to [REDACTED] as well as a diagnosis of Cannabis Use Disorder. He also noted that while there were narcissistic features present, he does not meet enough of the criteria for Narcissistic Personality Disorder to warrant the

application of the diagnosis. He noted [REDACTED] does not meet criteria for a diagnosis of a Paraphilic Disorder. He opined that "Mr. [REDACTED] is broadly predisposed to a wide variety of criminal behavior." (Davis Report at 32, [DE #13-1]). He found that "Mr. [REDACTED] is not sufficiently different from the ordinary, serious repeat offender, to say that his antisocial personality disorder specifically predisposes him to the commission of sexual crimes." (Id.) Dr. Davis opined that due to the prevalence of antisocial personality disorder in the general prison population, the features need to be quite strong to rise to the level required for civil commitment. At the hearing, he contrasted [REDACTED] history with another case he reviewed involving multiple rapes committed soon after release, even while in a halfway house and in that case, unlike the instant matter, criminal behavior diminished with age but sexual offenses did not.

Here, Dr. Davis opined that while [REDACTED] has more sexual crimes than the general population, they do not rise to the level necessary for commitment under § 4248. From a psychological standpoint, he noted no signs of sexual deviance regarding the persons and types of behavior in which he wished to participate. Dr. Davis therefore found [REDACTED] did not meet Criteria Two, meaning the disorder was not serious as required by Criteria Two. He noted that as a court appointed examiner, he also evaluated

Criteria Three, despite his negative finding on Criteria Two. Davis opined that while ██████ would have difficulty refraining from committing crimes in general, which would include some sexual crimes, he was not predisposed to commit sexual crimes in a way significantly different as is contemplated by the civil commitment statute.

Dr. Joseph Plaud also testified that ██████ does not meet the criteria for civil commitment under § 4248. He also found ██████ has antisocial personality disorder, and noting that such disorder can be serious, he did not find it to be serious in this case. While he has previously found someone to be sexually dangerous based on antisocial personality disorder, he does not so find here. To meet the criteria, he believes there would need to be a link between the disorder and the focus on sexually abusive acts and an expert would need to consider the number of victims, varied circumstances, physical suffering/injury and how soon after release such acts were committed. He did not find ██████ suffered from any paraphilic, or sexually-based, mental disorders. He opined that while he believes ██████ general (non-sexual) recidivism risk is high, his risk of recidivism in sexual offenses is not high. "Mr. ██████ appears to present more of a risk for general offense recidivism rather than sexual offense recidivism, the former of which is not pertinent to 18 U.S.C. § 4248 regarding

the determination of whether a person is today sexually dangerous.” (Plaud Report at 2 [DE #14]).

The goal of § 4248 is to commit sexually dangerous offenders. This court, and others in this district, have questioned whether antisocial personality disorder, absent a companion diagnosis of a sexual disorder or paraphilia, “rises to the level of a serious mental disorder that is a sufficient basis upon which to predicate civil commitment under the Adam Walsh Act.” United States v. Begay, No. 5:11-HC-2197-BO, 2012 WL 3043200, at *4 (E.D.N.C. 2012); see also United States v. Sneezer, 5:08-HC-2107-H, DE #65 at 10 (E.D.N.C. 2012) (“it is unclear whether alcohol dependence or antisocial personality disorder, alone or in combination, constitute a serious mental disorder sufficient to civilly commit an individual under the Adam Walsh Act.”) However, the court cannot say, as a matter of law, that antisocial personality disorder can never rise to the level of seriousness required for § 4248 commitment. For example, at the hearing, Dr. Plaud, respondent’s expert testified that he has previously opined someone to be sexually dangerous based on a sole diagnosis of antisocial personality disorder. Additionally, Dr. Davis contrasted Mr. [REDACTED] case with a case where he believed the person’s antisocial personality disorder was serious for purposes of § 4248. Finding the need to consider the facts and circumstances and the

respondent's total background in each case, the court declines to make such a bright line rule as sought by respondent in his motion for summary judgment. Therefore, the respondent's motion for summary judgment is denied.

However, the court finds, in the facts and circumstances of this particular respondent's case, taking into account the reports and testimony of all the experts, that the government has failed to show, based on the current evidence presented, that Mr. [REDACTED] diagnosis of antisocial personality disorder rises to the level of serious as contemplated by § 4248. While two experts found it to be serious, the court finds there was not clear and convincing evidence presented that respondent's mental disorder rises to the level of serious as contemplated by § 4248 at this time. Furthermore, even if it were considered serious, the government has failed to carry its burden as to criteria three of the § 4248 framework.

III. Serious Difficulty Refraining from Sexually Violent Conduct or Child Molestation¹

To meet its burden of proof in this case, the government must demonstrate, by clear and convincing evidence, that Mr. [REDACTED] if released, will have serious difficulty refraining from sexually violent conduct or child molestation as a result of his serious

mental disorder. This prong "'serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.'" Hall, 664 F.3d at 463 (quoting Kansas v. Hendricks, 521 U.S. 346, 357 (1997)). It 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).

The court finds that the experts' opinions, when taken as a whole, do not show clear and convincing evidence of sexual dangerousness. Rather, Mr. [REDACTED] is more akin to the "typical recidivist convicted in an ordinary criminal case." Id. The court agrees Mr. [REDACTED] has a high risk of general recidivism, but finds the government presented little evidence that Mr. [REDACTED]

diagnosis and behavior are the type of offender the § 4248 statute was designed to civilly commit.

CONCLUSION

For the foregoing reasons, Respondent's motion for summary judgment [DE #34] is DENIED. Additionally, finding the government has failed to show by clear and convincing evidence that respondent's mental disorder rises to the level of serious as contemplated by § 4248 and further finding the government has failed to meet criteria three of the § 4248 framework, judgment shall be entered against the United States and in favor of the respondent, Terrence [REDACTED]. The stay of release imposed by 18 U.S.C. § 4248(a) is hereby LIFTED, and the United States shall forthwith release [REDACTED].

The clerk is directed to close this case.

This 23RD day of January 2018.



MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
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