

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
NO. 5:10-HC-2105-H

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

**ORDER**

The United States of America seeks to civilly commit Respondent, Joseph [REDACTED] (" [REDACTED] as a "sexually dangerous person" under the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act") Pub. L. No. 109-248, Title 111, § 302(4), 120 Stat. 587, 620-20 (2006), codified at 18 U.S.C. §§ 4247-4248. On June 3, 2010, the United States commenced the instant litigation by filing a Certificate of a Sexually Dangerous Person against [REDACTED] pursuant to 18 U.S.C. § 4248(a). 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 110-month criminal sentence.

On June 7, 2012, and May 20, 2015, the Court granted Respondent's unopposed motions to stay the commitment hearing to

allow Respondent to participate in sex offender treatment prior to the commitment hearing. [D.E. #38, #73]. The Court lifted the stay on January 4, 2017. [D.E. #76].

On May 1, 2017, the court conducted an evidentiary hearing pursuant to 18 U.S.C. § 4247(d). The government presented the testimony of respondent, Joseph [REDACTED] and two expert witnesses, Dr. John Matthew Fabian and Dr. Harry Hoberman. Respondent presented the testimony of two expert witnesses, Dr. Manuel Gutierrez 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 parties' expert witnesses. The parties have each filed proposed findings of fact and conclusions of law, and this matter is ripe for adjudication.

#### BACKGROUND

[REDACTED] has been in federal custody continuously since 2002. At the time this action was initiated, [REDACTED] was serving the remainder of a 110-month criminal sentence. He was due to be released June 11, 2010; however, eight days before his scheduled release, the government certified [REDACTED] as a sexually dangerous person pursuant to 18 U.S.C. § 4248, thereby staying his release from federal custody.

A. Personal History

██████████ was born in 1953 and is currently a sixty-three-year-old male and registered member of the Quianault Native American tribe. His parents struggled with alcohol abuse and due to various health issues, Mr. ██████████ and his siblings were temporarily placed in foster care. While in foster care, Mr. ██████████ was sexually abused by the older children of the foster parents. When he told the foster parents of the abuse, they didn't believe him. To cope with the abuse, Mr. ██████████ began abusing alcohol at a very young age, eight or nine years old. His alcohol problems continued into his teens and adulthood. At age 16, he was expelled from a boarding school due to alcohol related problems. He subsequently dropped out of high school and has obtained his General Equivalency Diploma. He confesses he is an alcoholic.

Physically, Mr. ██████████ continues to suffer effects from an accident in 1983 in which he was struck by a truck. He walks with a cane and has hearing difficulties, eye issues, high blood pressure, and chronic obstructive pulmonary disorder.

Mr. ██████████ was briefly married (less than a year) to a woman he met while in treatment and was in a separate relationship with a woman for approximately four years.

B. Sexual Offenses

There is no dispute as to Mr. ██████████ history of sexual offenses, summarized as follows. In 1973, when ██████████ was 19

years old, he was charged with attempted rape. He pled guilty to assault and received a sentence of 6 months. He was drunk at the time of the offense and he attempted to have sex with a 15-year-old female, but she ran away.

In 1982, [REDACTED] was convicted of Assault and Battery, Child Abuse, Molesting and Attempted Rape, and sentenced to 6 months in jail. The victim was five-years-old. In 1985, [REDACTED] was convicted in tribal court of Assault and Battery, and Child Molesting, and sentenced to 6 months in jail. The victim was ten-years-old. [REDACTED] was severely impaired by alcohol during these offenses.

In 1988, at age 34, he pled guilty to aggravated sexual abuse of a seven-year-old girl and received a 9 year sentence. Once again, he was drunk at the time of the offense. He was released in 1996.

In 2002, [REDACTED] stopped his car and picked up a nine-year-old girl who was walking home. He drove her to a certain location and attempted to sexually molest her. The incident was reported and a warrant was issued for his arrest. The next day, before the warrant was served, [REDACTED] entered the home of a twelve-year-old girl, convinced her to ride in the car with him, drove her to a certain location and attempted to rape her after removing her clothing and digitally penetrating her. He was arrested later that same day.

He later pled guilty to sexual abuse of a minor and was sentenced to a 110-month term of imprisonment to be followed by three years of supervised release. [REDACTED] believes he reoffended because he began drinking again, let his guard down, and failed to use his resources and daily tools like he should have. His criminal sentence ended in 2010, and following his certification, he voluntarily stayed at Butner to participate in the Commitment and Treatment Program for Sexual Offenders ("CTP").

C. Conduct in Prison

[REDACTED] has been continuously incarcerated since 2002, and received only two minor, non-sexual offense infractions while incarcerated—one for being absent from an assignment and another for misusing authorized medication when he "tongued" an oxycontin because he did not want to take it. All indications point toward his sobriety since 2002 when he began his prison sentence. Mr. [REDACTED] voluntarily consented to staying past his release date, and voluntarily attends Alcoholics Anonymous (AA) meetings weekly.

[REDACTED] has been in the CTP since 2012 and is still enrolled today. He is currently in Phase Two of the program. [REDACTED] admits that he is an alcoholic. He testified that he understood he still needed to go to treatment once released because keeping in contact with others is what "keeps you on your feet." He noted he has learned how to communicate with people in treatment and learned he needed to stay away from children.

### COURT' S DISCUSSION

The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006), 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 ██████ 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 (4<sup>th</sup> 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 [REDACTED] has engaged in, or attempted to engage in, child molestation as demonstrated by [REDACTED] convictions. Mr. [REDACTED] does not dispute this finding on the first element.

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

To meet its burden of establishing that Mr. [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). All four experts agree that [REDACTED] suffers from alcohol use disorder, cannabis use disorder, and pedophilic disorder. The court notes that Dr. Hoberman also diagnosed [REDACTED] with antisocial personality disorder, but the court finds the evidence supporting an antisocial personality

disorder is not clear and convincing. Therefore, the court finds [REDACTED] suffers from alcohol use disorder, cannabis use disorder, and pedophilic disorder. Despite the diagnosis of cannabis use disorder, the experts agree this disorder would not cause [REDACTED] serious difficulty refraining from sexually violent conduct or child molestation.

There is some dispute among the parties whether [REDACTED] alcohol use disorder and pedophilia currently qualify as "serious." However, the court need not decide in this case whether his pedophilic disorder or alcohol dependence, in combination or isolation, constitutes a serious mental disorder sufficient to civilly commit an individual under § 4248. That determination is unnecessary here because the court concludes, for the reasons stated below, that the government has not met its burden as to the third and final prong of the sexual dangerousness test.

**III. Serious Difficulty Refraining from Sexually Violent Conduct or Child Molestation**

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

The evidence in this case makes clear that the trigger for [REDACTED] child molestation is his drinking. [REDACTED] almost perfect prison record, his voluntary entry into CTP after the conclusion of his criminal sentence, and his fifteen years of

sobriety demonstrate that [REDACTED] is currently exercising control over his behavior. While we can never be certain whether [REDACTED] has the ability to refrain from using alcohol until he is in a non-confined environment, the court notes he has maintained sobriety notwithstanding the unfortunate availability of such substances in the prison system.

The court finds that the experts' opinions, when taken as a whole, do not show clear and convincing evidence of sexual dangerousness.

Dr. Hoberman testified for the government and opined that [REDACTED] satisfies all the criteria for being a sexually dangerous person in each of four evaluations. He believes [REDACTED] severe alcohol use disorder puts him at greater risk of reoffending as to molestation. However, Hoberman greatly discounted [REDACTED] almost 15 years of sobriety due to his being in the structured, institutionalized setting. Hoberman also found [REDACTED] to have a personality disorder, which this court does not so find. He believes his heightened risk factors are his criminal sexual history and his personality issues, including being egocentric, and that he thereby does not learn from experience. On cross examination, Hoberman admitted there was nothing more [REDACTED] could do to show commitment to sobriety while he is incarcerated (noting his voluntary AA attendance for the past several years).

See United States v. Antone, 742 F.3d 151, 167 (4th Cir. 2014) ("On these facts, there is not much more that he could have done to demonstrate that he is in control of his volitional faculties and that such control is likely to persist after his release.").

Dr. Fabian also testified for the government, indicating he believed [REDACTED] would have difficulty refraining. However, Dr. Fabian admitted on the stand that this case is a very close call in his expert opinion. He also believes alcohol use is the significant issue in Mr. [REDACTED] case. He noted that while [REDACTED] testosterone levels appear in the normal range for men his age, he does not have information regarding [REDACTED] arousal levels, masturbation practices, etc. He noted for the court that while [REDACTED] participated in five or more treatment programs, he relapsed each time. He did state his advanced age should factor against recidivism, but here without certain information and a risk management plan, he does not feel comfortable with release.

Dr. Plaud testified for the defendant, noting [REDACTED] is currently exhibiting "good behavioral stability." He noted [REDACTED] age as well as his ongoing consistent sobriety and progress and his maintained participation in CTP (despite bumps in the road). While he agrees that Mr. [REDACTED] must be diagnosed with a pedophilic disorder based on past behavior, he does not, in his "heart of professional hearts" believe Mr. [REDACTED] is

preoccupied with prepubescent children. He rather believes these children were "available" at a time in which his alcohol use disorder was driving his drinking. He finds lack of evidence of current sexual deviance. He believes that Mr. [REDACTED] when sober, is not dangerous. So he believes the risk here is based primarily on whether [REDACTED] will drink again. This court agrees. Based on all the evidence here, Plaud testified he does not believe [REDACTED] is sexually dangerous currently.

Dr. Gutierrez, who is a licensed forensic psychologist employed by the BOP at FCI Butner and who has evaluated close to 100 sex offenders, also testified for the defendant. He made initial findings of dangerousness in this case and in his reports, but at the hearing, testified that in his opinion, [REDACTED] is no longer a sexually dangerous person. He has not authored a report stating this opinion because he was not asked to by his employer, the BOP. Dr. Gutierrez contributed much of his current opinion to [REDACTED] increased age and his low risk for returning to alcohol based on how he is doing with substance abuse issues. He believes [REDACTED] has a better understanding of the dangers of alcohol after participating in CTP treatment, despite having some difficulties in treatment. While [REDACTED] has some personality traits that tend to make him a bit narcissistic and has some cognitive and educational limitations, he believes based on his close contact

with [REDACTED] at Butner that [REDACTED] has a good understanding of what led to his offenses, even if he has trouble articulating that understanding. While he agrees he suffers from both pedophilic and alcohol use disorders, he believes alcohol drives his sex offending. He has not seen any emotional identification with children. He believes because of his low risk of returning to alcohol, he is no longer sexually dangerous.

In sum, while two BOP experts testified for the government and opined [REDACTED] meets the test for sexual dangerousness, one did so acknowledging this case was a close call. In addition to Dr. Plaud's testimony opining [REDACTED] was not currently sexually dangerous and finding current lack of sexual deviance, a psychologist who is a BOP employee testified on behalf of defendant. Dr. Guterrez has the unique perspective of seeing Mr. [REDACTED] at Butner on a regular basis and watching his progress over the last several years in a setting with other sex offenders. The court finds the opinions of Dr. Plaud and especially Dr. Guterrez to be persuasive in this matter. The sum of these four experts' opinions, even taking all as credible and reliable, does not reach the high burden of clear and convincing evidence of sexual dangerousness.

While the court acknowledges that with release comes some risk that [REDACTED] will begin using alcohol again and then possibly

reoffend, that risk is not enough for the government to meet its burden of presenting *clear and convincing evidence* that [REDACTED] currently lacks the volitional control required to justify his indefinite civil commitment. Although his sobriety has been while in custody, this period of sobriety is the longest of his life and demonstrates that alcohol does not currently have a grip on Mr. [REDACTED] life and behavior. See United States v. Antone, 742 F.3d 151 (4<sup>th</sup> Cir. 2014); United States v. Sneezer, 5:08-HC-2107-H, E.D.N.C. (Order of November 30, 2012).

The evidence in this case shows that the trigger for [REDACTED] sexually violent conduct and/or child molestation is his drinking. It appears [REDACTED] has never committed a sexual offense while sober; it is only when he is disinhibited by alcohol consumption that [REDACTED] has difficulty controlling his behavior. 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.

The court notes there is some dispute as to whether [REDACTED] has any remaining term of supervised release to serve. That issue is not before this court and does not affect this court's decision herein. In an ideal world, [REDACTED] would re-enter society with

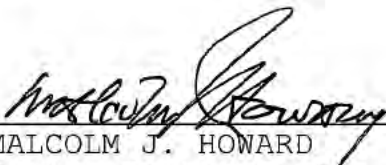
the guidance and supervision of a United States probation officer. However, it is unclear whether [REDACTED] will be under any term of supervised release. It is this court's understanding that Mr. [REDACTED] will be required to register as a sex offender under the Sex Offender Registration and Notification Act of 2006 ("SORNA"). The court directs Mr. [REDACTED] counsel to consult with him and advise him on notification of the appropriate authorities regarding both registration as a sex offender and contact with the Probation Office in the District of his release based on the judgment of the Western District of Washington ordering a term of supervised release. This court makes no finding regarding supervised release or registration under SORNA, but simply notes the issue for the record.

#### CONCLUSION

For the foregoing reasons, judgment shall be entered against the United States and in favor of the respondent, Joseph [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.

This 30<sup>th</sup> day of May 2017.

  
MALCOLM J. HOWARD  
Senior United States District Judge

At Greenville, NC  
#26