

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:14-HC-2055

UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
v.)	ORDER
)	
LEVI JOHN [REDACTED])	
)	
Respondent.)	

On 19 March 2014, petitioner United States of America (“the government”) initiated this proceeding seeking to have respondent, Levi John [REDACTED] ([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. Pursuant to 18 U.S.C. § 4247(d), the court conducted an evidentiary hearing on this matter on 10 November 2014.

I. BACKGROUND

[REDACTED] was 34 years old at the time of the evidentiary hearing. He was physically abused by his father until the age of five, when his parents separated. (Gov’t Exs. 5 at 2; 13 at 3; 15 at 16; Resp’t Ex. 2 at 12.) Throughout his childhood, [REDACTED] was molested numerous times by his stepfather, his father’s girlfriend, and two family acquaintances. (Gov’t Exs. 5 at 3; 13 at 3; 15 at 19; Resp’t Ex. 2 at 12.) These abuse episodes consisted of fondling, oral sexual contact, and masturbation. (Id.)

[REDACTED] suffers from Buerger’s Disease, a condition that involves recurring circulation and clotting problems in the hands and feet. (Gov’t Exs. 5 at 3; 13 at 5-6; 15 at 17; Resp’t Ex. 2 at 14.) He lost portions of his right index finger and right thumb due to frostbite, which was complicated by the Buerger’s Disease. (Gov’t Exs. 5 at 3; 13 at 6; 15 at 17.) In addition, [REDACTED]

suffered a work-related injury to his left leg that resulted in a series of amputations to the limb. (Gov't Exs. 5 at 3; 13 at 4; 15 at 17; Resp't Ex. 2 at 15.) He is currently confined to a wheel chair. (Gov't Ex. 15 at 17; Resp't Ex. 2 at 4.)

██████ has a long history of substance abuse, including the use of alcohol, marijuana, methamphetamine, cocaine, and heroin. (Gov't Exs. 5 at 3; 13 at 6; 15 at 18; Resp't Ex. 2 at 15.) He also has an extensive mental health history, which includes self-injurious behavior and several suicide attempts. (Gov't Exs. 13 at 7-9; 15 at 17-18; Resp't Ex. 2 at 15-22.) ██████ has multiple diagnoses of malingering due to his unfounded reports of mental health symptoms. (Gov't Ex. 13 at 8-9; Resp't Ex. 2 at 18-21.) ██████ has acknowledged that in the past he has feigned psychiatric symptoms in order to receive attention, medication to satisfy his addictive urges, or special housing during terms of his incarceration. (Gov't Exs. 13 at 27; 15 at 18, 24-25.)

With regard to ██████ criminal history, sexual offenses account for the majority of his juvenile and adult criminal record. ██████ first conviction for a sexual offense involved conduct that occurred on 24 February 1993, when he was 12 years old. (Gov't Exs. 5 at 4; 13 at 15; Resp't Ex. 2 at 22.) He was arrested after he exposed himself to a woman in her mid-thirties as he was walking home. (Id.) He was convicted of Indecent Exposure and sentenced to one year of probation. (Id.) Several months later, on 18 June 1993, ██████ was charged with Obscene Conduct following an incident where he grabbed the breast of an adult woman. (Gov't Exs. 5 at 4; 13 at 15; Resp't Ex. 2 at 23.) He was sentenced to an unknown term of probation and ordered to pay \$238.90 in restitution. (Id.)

██████ was next arrested on 19 August 1994, at the age of 13, following an incident

where he entered a woman's home and exposed himself to her. (Gov't Exs. 5 at 5; 13 at 15; Resp't Ex. 2 at 23.) ██████ reported that he entered the woman's bedroom and took off his pants, but she awoke and called the police, causing him to flee the residence. (Gov't Ex. 5 at 5; 13 at 16.) He was convicted of Unlawful Entry and sentenced to one year of probation. (Gov't Exs. 5 at 5; 13 at 15; Resp't Ex. 2 at 23.)

On 28 November 1995, ██████ then age 15, underwent a polygraph examination while detained at a juvenile detention facility for a burglary charge. (Gov't Exs. 5 at 5; 13 at 16; 15 at 23; Resp't Ex. 17-18.) The purpose of the examination was to determine the accuracy of ██████ reported sexual history. (Gov't Ex. 5 at 5.) ██████ made the following admissions regarding multiple other victims for which conduct he was not adjudicated:

Prior to the pretest interview the defendant presented his written sexual history and stated that he had a total of 52 sexual victims. He stated that 33 were hands-on victims and 19 were hands-off victims. He reported among his sexual molestations an incident in June or July of 1994, where he was sexually aroused by a three or four year old girl and he touched her buttocks and vagina. He reported this incident occurred while he was in sex offender treatment. He reported molesting another girl his mother was babysitting and he had digitally penetrated the girl with up to three fingers. The defendant estimated he had molested 20 to 25 people since he had started his sex offender treatment. Also, that he had molested 10 to 12 girls who were at least three years younger than himself since he started treatment. He reported that he masturbated in the restroom of his school about 75 times since school had started. The defendant was asked if he had more sexual victims that he deliberately did not report, and he responded, no. The defendant then admitted to incidents when he was 13 where at a public swimming pool he swam under water and touched the vaginas of 3 or 4 girls aged 3 to 5 years old.

(Gov't Exs. 5 at 5; 13 at 16; 15 at 23; Resp't Ex. 17-18.)

While awaiting a hearing in the instant matter, ██████ disclosed to Dr. Manuel Gutierrez

that he had been truthful in his statements during the polygraph. (Gov't Ex. 5 at 6.) [REDACTED] also told Dr. Gutierrez that the number of victims he provided during the polygraph may have been an underestimate of the true number of victims. (Id.) At the evidentiary hearing, however, [REDACTED] denied committing any acts of uncharged sexual misconduct. He further testified that he lied to Dr. Gutierrez about the veracity of his statements during the polygraph because "at that point [he] felt [he] needed to be committed."

Following the 1995 polygraph examination, [REDACTED] was placed at the Northwest Idaho Children's Home for sex offender treatment. (Gov't Exs. 5 at 6; 13 at 19.) He was later transferred to the San Marcos Treatment Center, in Texas, on 11 July 1997. (Gov't Exs. 5 at 6; 13 at 20). On or about 6 March 1998, [REDACTED] then age 17, escaped from the San Marcos facility. (Gov't Ex. 5 at 6.) A few days later, on 10 March 1998, [REDACTED] was arrested after he approached a woman and her teenage daughter in a shopping center parking lot. (Gov't Exs. 5 at 7; 13 at 17; 15 at 21; Resp't Ex. 2 at 24.) The woman reported that [REDACTED] exposed his genitals to her while standing next to her vehicle. (Id.) The woman's daughter did not see the exposure. (Gov't Exs. 5 at 7; 13 at 17.) [REDACTED] was charged as an adult and pled guilty to Indecent Exposure. (Gov't Exs. 5 at 7; 13 at 17; 15 at 21; Resp't Ex. 2 at 24.) He was sentenced to 30 days in jail, fined \$250, and ordered to pay court costs. (Id.)

[REDACTED] was discharged from the San Marcos facility on 30 March 1998. (Gov't Exs. 5 at 6; 13 at 20.) The psychiatric summary from his time there reflects the following:

[H]e continued to maintain that if given the opportunity he would offend again as evidenced by a recent run prior to discharge where he exposed his genitals to a woman and child in a mall parking lot. The young child did not see him, however, the mother of the child stated that the resident had an erect penis. He made statements throughout treatment that he was learning how to be a better

offender. He wrote explicit and graphic details of how he would stalk and rape a female prior to discharge. He maintained that given the opportunity he would re-offend again. Little to no improvement, generalized antisocial behaviors. The resident continued with sneaky behaviors throughout the course of treatment.

(Id.)

On 3 April 2001, at the age of 20, ██████ was charged with Indecent Exposure after he exposed his genitals and masturbated in front of several people in a mall parking lot. (Gov't Exs. 5 at 7; 13 at 17; 15 at 21; Resp't Ex. 2 at 25..) ██████ pled guilty to the lesser charge of Obscene Conduct. (Gov't Exs. 5 at 8; 15 at 21.) He was sentenced to 20 days in jail, two years of probation, and ordered to pay an undisclosed fine and court costs. (Gov't Exs. 5 at 8, 13 at 17; 15 at 21; Resp't Ex. 2 at 25.) In addition, ██████ was ordered to complete a psychosexual evaluation and to follow the recommendations of the treatment provider. (Gov't Ex. 5 at 8.)

While ██████ was on probation for the 2001 offense, a criminal complaint was filed alleging that on 5 June 2002, he committed a sexual offense against a fifteen-year-old girl. (Gov't Exs. 5 at 8; 13 at 18; 15 at 21-22; Resp't Ex. 2 at 27.) ██████ attended a party with several individuals, including the girl, where he consumed alcohol and used marijuana. (Gov't Exs. 5 at 9; 13 at 18; 15 at 22; Resp't Ex. 2 at 28.) The girl later fell asleep in ██████ car as he was driving her home. (Id.) The girl reported that when she woke up, ██████ was outside of the vehicle with only his boxers on. (Id.) When the girl attempted to move away from the vehicle, ██████ grabbed her and pulled her to the ground, where he placed one hand on her throat and used his other to forcibly remove her pants and underwear. (Id.) ██████ then pushed the girl's legs up to her chest and rubbed his penis against her. (Id.) The girl screamed at ██████ to stop, and he told her that would only make it worse if she didn't stop yelling. ██████

then inserted his fingers into the girl's vagina. (Id.)

█████ pled guilty to Sexual Abuse of Minor Under 16 Years of Age. (Gov't Exs. 5 at 10; 13 at 18; 15 at 22; Resp't Ex. 2 at 28.) He was sentenced to a ten-year determinate and five-year indeterminate term, suspended, and 15 years' probation. (Id.) He was also ordered to complete sex offender treatment. (Gov't Exs. 5 at 10; 13 at 21.)

On 21 October 2003, a report of violation was filed with the State of Idaho Probation and Parole Office. (Gov't Exs. 5 at 10; 15 at 22.) The report alleged that █████ had failed to complete sex offender treatment, had smoked marijuana, had unauthorized contact with persons under the age of 18, and had failed to obtain and complete a substance abuse evaluation. (Id.) █████ probation was revoked on 10 February 2004, and he was sentenced to the original ten-year determinate and five-year indeterminate term of incarceration. (Gov't Exs. 5 at 10; 15 at 23; Resp't Ex. 2 at 27.) On 17 March 2004, █████ sentence was modified to a seven-year determinate and eight-year indeterminate term of incarceration. (Id.)

█████ most recent conviction stems from conduct that occurred while he was incarcerated at the Idaho Department of Corrections. Between June and December 2004, █████ sent threatening letters to Idaho Governor Dirk Kempthorne, Fourth District Judge Kathryn Stricklen, U.S. Senator Larry Craig, and U.S. Circuit Judge Stephen Trott. (Gov't Exs. 5 at 10; 13 at 11-13; 15 at 24; Resp't Ex. 2 at 29-30.) The letter set to Governor Kempthorne contained an amount of insecticide and a threat to kill the President of the United States. (Gov't Exs. 5 at 10; 13 at 11; 15 at 24; Resp't Ex. 2 at 30.) █████ reported that he wrote the letters, at least in part, because he was told by other inmates that if he obtained a federal conviction, he would serve his state time concurrently in a federal institution. (Gov't Ex. 13 at 13.) On 25 May 2005,

█████ pled guilty to Mailing of an Injurious Article and Mailing Threatening Communications. (Gov't Exs. 5 at 10; 13 at 11; 15 at 24; Resp't Ex. 2 at 30.) He was sentenced to a total of 52 months' imprisonment and three years of supervised release. (Id.)

While incarcerated at the Idaho Department of Corrections, █████ was also cited for exposing himself to a female staff member on one occasion. (Gov't Exs. 5 at 15; 13 at 18.)

█████ has reported additional instances of exposure for which he was not written up. (Gov't Ex. 13 at 14, 18.) Due to his federal detainer, █████ did not participate sex offender treatment during his term of state incarceration. (Gov't Ex. 5 at 11.)

█████ concluded his state sentence in August 2010 and was then transferred to federal custody. (Gov't Exs. 5 at 12; 13 at 13; 15 at 24.) While in federal custody, █████ has had numerous contacts with the mental health staff. (Gov't Exs. 5 at 12-15; 13 at 14; 15 at 24-26; Resp't Ex. 2 at 20-22.) █████ has engaged in behaviors such as threatening harm to others, attempted medication overdose, swallowing batteries, and attempts to cut himself. (Gov't Exs. 5 at 13-14; 13 at 14; 15 at 24-26; Resp't Ex. 2 at 21.) █████ has admitted to purposefully misrepresenting mental health symptoms in order to fulfill ulterior motives such as attention for his medical issues or a room change. (Gov't Exs. 5 at 13; 13 at 14; 15 at 26.) A psychology data system note from 21 May 2011 states, "It has been established that inmate █████ clearly exaggerates mental health symptoms and in relation to psychotic symptoms it appears he has been feigning or malingering, such symptoms. His report of hearing 'voices' is not considered valid at this time." (Gov't Ex. 5 at 13.)

From 15 May to 31 July 2012, █████ voluntarily participated in the Sex Offender Treatment Program- Non-Residential ("SOTP-NR") at the United States Penitentiary in Tucson,

Arizona. (Gov't Exs. 5 at 13-14; 13 at 21; 15 at 24.) During a group therapy session, ██████ reportedly shared that he was "worried" about "not trusting myself to not doing [sic] something when I get out." (Gov't Ex. 5 at 15; 13 at 21.) ██████ also stated that he was interested in being civilly committed due to his inability to control his sexually deviant behavior. (*Id.*) Although ██████ expressed interest in receiving treatment, he had significant difficulty participating in Phase I of SOTP-NR. On 28 May 2012, a Teen Vogue magazine addressed to ██████ was rejected because it was determined that it was a risk relevant item. (*Id.*) In addition, ██████ repeatedly requested to be placed in the Special Housing Unit ("SHU"), thereby missing several group sessions. (Gov't Exs. 5 at 14; 13 at 21.) When asked about staying the SHU, ██████ reportedly stated, "I don't have to do anything back there (SHU), my food is brought to me, and I don't have to deal with people, I can stay in my room." (Gov't Ex. 5 at 14-15.) ██████ was discharged from SOTP-NR for missing more than three group sessions. (Gov't Exs. 5 at 13; 13 at 21.)

██████ was later transferred to the Federal Medical Center in Butner, North Carolina ("FMC-Butner"), for a precertification evaluation for commitment as a sexually dangerous person under 18 U.S.C. § 4248. (Gov't Ex. 5 at 14.) While housed at FMC-Butner, ██████ has made numerous statements regarding his sexual proclivities, his ability to control his sexual urges, and whether he would benefit from civil commitment. Because of the importance of this evidence to the issues before the court, the court provides a detailed description of ██████ statements throughout the evaluation process.

As a part of the precertification evaluation process, ██████ was interviewed by Dr. Manuel Gutierrez on 6 November 2013. (*Id.* at 1.) ██████ revealed to Dr. Gutierrez that he was

attracted to post-pubescent females. (Id. at 18.) He also acknowledged some continued attraction to girls as young as eight or nine years old. (Id.) ██████ reported that he experienced daily fantasies of raping thirteen-year-old girls, sometimes as often as three to four times a day. (Id. at 16-17, 23.) He described these fantasies as containing thoughts of cutting the girl's breasts and killing the victims. (Id. at 17.) ██████ further disclosed, "I want to be honest . . . I know I need to be committed. I know I'm sick and need to get better." (Id. at 23.)

On 19 March 2014, ██████ was certified as a sexually dangerous person pursuant to 18 U.S.C. § 4248. (DE # 1.) ██████ was then evaluated by Dr. Fabian Saleh on 28 April 2014. (Resp't Ex. 3 at 3.) ██████ told Dr. Saleh that, in the past, he had sexual thoughts involving both prepubescent and pubescent girls. (Id. at 15.) ██████ also reported a number of other paraphilic symptoms including sexual arousal when experiencing pain, necrophilic and cannibalism-related thoughts, attempted sexual activity with animals, and past voyeuristic behaviors. (Id.) When asked if he would act on his paraphilic urges if released, ██████ responded:

Honestly, it's a possibility that it could happen . . . that I could act on the thoughts of killing, eating, raping . . . thoughts come into my head . . . I can be very impulsive . . . that's my main struggle . . . it has calmed down a bit . . . one minute I could be sitting here . . . and the other minute I could act on the impulse . . . within a split second. Honestly, I think I need help.

(Id. at 15-16.)

The next expert to interview ██████ was Dr. Joseph Plaud on 3 June 2014. (Resp't Ex. 4 at 1.) ██████ admitted to Dr. Plaud past sexual thoughts concerning sexual contact with a dead body, as well as thoughts when he was younger concerning cannibalism. (Id. at 19.) He denied any such fantasies at present or in the recent past. (Id.) However, he did report that his present sexual fantasies primarily involved female adults. (Id.) He further revealed occasional thoughts

about female teenagers. (Id.)

In the midst of the post certification evaluation process, ██████ incurred three disciplinary infractions for sexual offenses. On 30 June 2014, ██████ sexually assaulted a BOP nurse during a medical examination by grabbing her rear and vaginal area. (Gov't Exs. 13 at 14, 19; 15 at 26; Resp't Ex. 2 at 33.) ██████ was left alone with the nurse following an incident where he slit his wrist in an attempt to be transferred to the SHU. (Resp't Ex. 2 at 33.) A Suicide Risk Assessment completed following the assault notes that ██████ admitted his responsibility for the incident and "remarked casually" that "[he] had an urge and acted on impulse." (Id.) In addition to the incident with the nurse, ██████ was cited for Engaging in Sex Acts in July and August of 2014 for masturbating in front of female psychology staff members. (Gov't Exs. 13 at 14, 19; 15 at 26; Resp't Ex. 2 at 33.)

██████ was deposed by the government on 29 July 2014. (Resp't. Ex. 2 at 34.) During the deposition, ██████ admitted to his recent sexual disciplinary infractions. (Id.) ██████ testified that he deliberately engaged in these behaviors as a way of compromising himself because he was scared to be released from prison. (Id.) He also denied any sexual attraction to the nurse he assaulted or the female psychology staff members he exposed himself to. (Id.)

██████ later admitted to perjuring himself during that deposition in a letter to Assistant United States Attorney Denise Walker dated 23 August 2014. (Gov't Ex. 16 at 003403.) In the letter, ██████ stated that he lied at the deposition when he testified that he had malingered paraphilic symptoms in an attempt to remain incarcerated. (Id.) He revealed that "Once I read both Dr. Joseph Plaud and Dr. Fabian Saleh's evaluations, I knew I could go with the lies that I was making things up to stay in prison yes in someways I'm institutionalized." (Id.) ██████

further disclosed several uncharged acts of sexually deviant behavior, including the digital penetration of a four-year-old female his mother babysat, previous sexual activity with two seventeen-year-old girls, and one instance of sexual aggression with his former fiancé, which reportedly led to the dissolution of the relationship. (Id.)

On 5 September 2014, ██████ was evaluated by Dr. Mark Hastings. (Gov't Ex. 13 at 2.) ██████ told Dr. Hastings that he had told Dr. Gutierrez the truth about his sexual fantasies and history. (Id. at 22.) He stated that he experienced increasingly frequent and intense sexual fantasies of raping thirteen-year-old girls. (Id. at 34.) ██████ further disclosed that his primary arousal was to girls age 13 and older, but he admitted attraction to girls as young as eight and nine. (Id. at 35.) When questioned by Dr. Hastings as to why he told Dr. Plaud something different, ██████ shared that he was initially upset at being called a malingerer in earlier evaluation reports. (Id. at 22.) He revealed that he lied because he believed it to be his best strategy for avoiding commitment. (Id.) He further stated, "I want to change and the only way I can get help is to be open and honest." (Id.) When asked why he had not raped anyone during his current incarceration, ██████ pointed out that he did recently sexually assault a nurse. (Id.) ██████ also noted that he had not completed sex offender treatment. (Id.) He further added, "The only reason I haven't done it in here is because I couldn't get away with it in here. If I could do it in here and get away with it, I would." (Id.)

During his evaluation with Dr. Hastings, ██████ also stated his belief that if given the opportunity, he would reoffend in a sexual manner due to difficulty in controlling his sexual impulses. (Id.) When asked by Dr. Hastings to rate his risk of sexual reoffending, ██████ scored himself a 9 on a scale of 0 to 10. (Id.) He explained that he selected this rating because

of the "thoughts" he has and the "inclination that I want to try the things." (Id.) When asked by Dr. Hastings why he could not get help in the community during outpatient sex offender treatment, ██████ replied:

I know I'm a dangerous person. I know I've been thinking about things I want to do when I get out there. I know nothing has changed. I know I will reoffend at some point when I get out there. I need to get the tools here so I can be less risk out there.

(Id.)

During a second interview with Dr. Plaud on 29 September 2014, ██████ recanted the risk-relevant statements he made to both Dr. Hastings and Assistant United States Attorney Walker. (Gov't Ex. 15 at 28.) According to ██████ what he told Dr. Hastings as reported in the 9 September 2014 report was false and purposefully stated in order to "look dangerous" so he could remain at FMC-Butner. (Id. at 4, 28) ██████ noted that following his interview with Dr. Hastings he had decided that he did, in fact, want to leave FMC-Butner. (Id. at 4.) He asserted that he was not a sexually dangerous person and that he was in control of his sexual impulses and behavior. (Id. at 4, 28.) Using the same 10 point scale employed by Dr. Hastings, ██████ rated his risk of sexual reoffending a 3 or 4 "at the most." (Id. at 28.)

██████ final evaluation was with Dr. Saleh on 28 October 2014. (Resp't Ex. 2 at 4.) In the interview, ██████ denied having any paraphilia or paraphilic-disorder related symptoms. (Id. at 6.) ██████ reported that he had falsely reported paraphilic symptoms in an attempt to make himself look bad because he was scared of being released from prison. (Id.) When questioned about his assault of the BOP nurse, ██████ replied:

I did it deliberately . . . because I had thought about it before doing it. So, I grabbed her [sic] . . . I was in there with her for 30 or 40 minutes . . . I figured I'd get in trouble and that would commit me .

. . . there would be more the possibility to get committed . . . I was not grabbing her for a sexual reason . . . I was not grabbing for sexual things . . . just to get committed. I had plenty of opportunities in here and I never acted on them.

(Id.) ██████ acknowledged that he had a "credibility issue," however, he stated that he was in control of his sexual thoughts and indicated that he would not reoffend if released. (Id.)

At the evidentiary hearing, ██████ admitted that he had previously told others during SOTP-NR and the evaluation processes that he had a high risk of sexually reoffending if released prior to treatment. However, he recanted those statements and asserted that he was not sexually dangerous. ██████ claimed that he had fabricated his statements to Assistant United States Attorney Walker, Dr. Hastings, and Dr. Gutierrez to “hinder himself” because he initially wanted to be civilly committed. He further testified that he had feigned sexual fantasies and fabricated past reports of sexual misconduct in support of that goal. In addition, he indicated that he had intentionally committed his recent sexual disciplinary infractions in order to “add fuel to the flames” so that he could remain incarcerated. ██████ expressed remorse for his actions and indicated he no longer desired to be committed. When asked why he changed his mind about wanting to be civilly committed, ██████ stated that he realized during the last month or so that he could still get treatment and face his fears regarding community backlash due to his being a registered sex offender. ██████ acknowledged his lack of credibility as well as his history of faking things to get what he wanted. He admitted that he had previously lied about cutting himself, exaggerated psychiatric symptoms in order to get access to medication, and falsely accused a former cell mate of sexually assaulting him.

II. DISCUSSION

The Adam Walsh Act provides for the civil commitment of “sexually dangerous

person[s].” 18 U.S.C. § 4248. Under 18 U.S.C. § 4247(a)(5), a “sexually dangerous person” is one “who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.” A person is “sexually dangerous to others” if he “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); see also United States v. Francis, 686 F.3d 265, 274 (4th Cir. 2012).

Under the Adam Walsh Act, the government has the burden of proving that ██████ is a sexually dangerous person by clear and convincing evidence. 18 U.S.C. § 4248(d). “[T]he ‘clear and convincing’ standard of proof is an ‘intermediate standard’ that falls between a ‘mere preponderance of the evidence’ and ‘beyond a reasonable doubt.’” United States v. Hall, 664 F.3d 456, 462 (4th Cir. 2012) (quoting Addington v. Texas, 441 U.S. 418, 423-24 (1979)). “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, and, as well, as evidence that proves the facts at issue to be highly probable.’” United States v. Springer, 715 F.3d 535, 538 (4th Cir. 2013) (quoting Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001)); see also United States v. Hunt, 643 F. Supp. 2d 161, 179 (D. Mass. 2009) (recognizing that the government must produce “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” (alteration in original) (quoting Black’s Law Dictionary 596 (8th ed. 2004))).

Thus, in order to prove that ██████ is a “sexually dangerous person,” the government must prove three elements by clear and convincing evidence: (1) that ██████ engaged in or

attempted to engage in sexually violent conduct or child molestation; (2) that ██████ 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 he were to be released. See 18 U.S.C. §§ 4247(a)(5)-(6), 4248; Francis, 686 F.3d at 274; Hall, 664 F.3d at 461.

Three experts testified at the evidentiary hearing. Dr. Hastings testified on behalf of the government. Dr. Saleh testified as the court-selected examiner. (See DE ## 4, 5.) Dr. Plaud testified on behalf of the government as an additional examiner selected pursuant to 18 U.S.C. § 4247(b). (See DE # 9.) The only other witness who testified was ██████ who was also called as a witness during the government’s case-in-chief. The court notes that the forensic evaluation of government expert Dr. Gutierrez was admitted into evidence.

A. Previously Engaging or Attempting to Engage in Sexually Violent Conduct

The court finds that the first criterion for commitment under the Adam Walsh Act, that ██████ “has engaged or attempted to engage in sexually violent conduct or child molestation” in the past, is satisfied. All of the experts in this case agree that ██████ has committed sexually violent conduct, and ██████ stipulated at the evidentiary hearing that the government has proven the first element. (See also Resp’t Proposed Findings of Fact and Conclusions of Law, DE # 42, at 2.)

B. Serious Mental Illness, Abnormality, or Disorder

To meet its burden of establishing ██████ is “sexually dangerous to others,” the government must also prove that ██████ “suffers from a serious mental illness, abnormality, or

disorder.” 18 U.S.C. § 4247(a)(6). In this case, there is disagreement among the experts regarding [REDACTED] exact diagnoses and whether his conditions, either individually or collectively, rise to the level of serious mental illness.

1. Exhibitionistic Disorder

All four experts in this matter diagnosed [REDACTED] as suffering from Exhibitionistic Disorder.¹ The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”), lists the criteria of this disorder as follows:

- A. Over a period of at least 6 months, recurrent and intense sexual arousal from the exposure of one’s genitals to an unsuspecting person, as manifested by fantasies, urges, or behaviors.
- B. The individual has acted on these sexual urges with a non-consenting person, or the sexual urges or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

DSM-V § 302.4 at 689. [REDACTED] meets both of these diagnostic criteria. The evidence establishes that [REDACTED] has recurrently exposed himself to adult females since the age of 12. He has a history of exposures both in the community and in correctional settings. Most recently, [REDACTED] was cited for two instances of exposure while awaiting a hearing on this matter.

Although there may be cases where Exhibitionistic Disorder could be considered serious for the purposes of the Adam Walsh Act, the court finds that in this particular case, [REDACTED] condition is not sufficiently severe to constitute a “serious” mental illness, abnormality, or disorder under 18 U.S.C. § 4247(a)(6). The court notes that Exhibitionistic Disorder is typically

¹Dr. Plaud initially diagnosed [REDACTED] with Exhibitionistic Disorder, In Full Remission. (Resp’t Ex. 4 at 6.) After Dr. Plaud formed his initial opinion, [REDACTED] exposed himself to two females members of the psychology staff at FMC-Butner. Following these incidents of exposure, Dr. Plaud met with [REDACTED] for a second interview. He subsequently issued a supplemental report in which he opined that [REDACTED] met the diagnostic criteria for Exhibitionistic Disorder, In a Controlled Environment. (Gov’t Ex. 14 at 6.)

a non-contact based disorder. Dr. Hastings testified that Exhibitionistic Disorder could rise to the level of serious disorder if the act of exposure was accompanied by a sexual behavior such as rape. ██████ has reported that he typically exposed himself to women because he hoped the victims would be interested in him sexually after seeing his penis. (Gov't. Exs. 5 at 17; 15 at 21.) Despite this cognitive distortion, there is no evidence that any of ██████ acts of exposure were followed by hands-on sexual behavior. Moreover, all three of the experts who testified at the hearing— Drs. Plaud, Hastings, and Saleh— opined that ██████ condition did not rise to the level of a serious mental disorder.

2. Other Specified Paraphilic Disorder (Non-consent)

The government's two experts, Dr. Gutierrez and Dr. Hastings, opined that ██████ suffers from Other Specified Paraphilic Disorder (Non-consent).² In contrast, both Dr. Saleh and Dr. Plaud concluded that ██████ did not suffer from any sexual disorder other than Exhibitionistic Disorder.

The DSM-V identifies paraphilia as “any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.” DSM-V at 685. A paraphilic disorder is defined as “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.” *Id.* at 685-86. In addition to enumerating eight common paraphilic disorders, the DSM-V recognizes a

² Other Specified Paraphilic Disorder is a diagnosis described in the DSM-V, which was released in May 2013. In his expert report, Dr. Hastings diagnosed ██████ with this condition. (Gov't Ex.13 at 25.) Dr. Gutierrez provided a diagnosis of Paraphilia, Not Otherwise Specified, which was consistent with the terminology used in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (“DSM-IV-TR”). The court notes that there is no difference between the DSM-IV-TR and the DSM-V with regard to the diagnostic criteria for this disorder, and the court will refer to this disorder as Other Specified Paraphilic Disorder.

category of such disorders that “do not meet the full criteria for any of the disorders in the paraphilic disorders diagnostic class.” Id. § 302.89 at 705.

Drs. Hastings and Gutierrez diagnosed ██████ with Other Specified Paraphilic Disorder, noting ██████ self-report of recurrent fantasies involving raping, torturing, and killing a thirteen-year-old girl. Dr. Hastings concluded that ██████ “suffers from a paraphilic disorder involving non-consensual sex or rape.” (Gov’t Ex. 13 at 25.) In support of his position, Dr. Hastings pointed to ██████ 2002 conviction for sexually assaulting a fifteen-year-old girl and his recent sexual assault of a BOP nurse. Id. Dr. Hastings also noted that as a juvenile ██████ reported a fantasy of stalking and raping a woman. Id. At the evidentiary hearing, Dr. Hastings testified that even though ██████ mentioned symptoms of numerous other paraphilias, his clinical presentation was not consistent with these symptoms. He noted that ██████ was very specific about fantasizing about thirteen-year-old girls and, by contrast, ██████ did not overreport other paraphilic symptoms. He further opined that ██████ Teen Vogue subscription was indicative of having fantasies. Dr. Hastings testified that he considers this disorder to be “serious.”

Apart from Exhibitionistic Disorder, Dr. Plaud did not offer any sexual disorder diagnoses. He opined that ██████ sexually deviant behavior results from personality disorders, rather than paraphilic disorders, and that there is insufficient data to find that ██████ is aroused by non-consent. Similarly, Dr. Saleh opined that there was limited reliable data to support a diagnosis of Other Specified Paraphilic Disorder (Non-consent). He attributed ██████ reported sexual fantasies and assault of the BOP nurse to ██████ proclivity to malingering, motivated by a desire to remain institutionalized.

The court finds that the government has proven by clear and convincing evidence that ██████ presently suffers from Other Specified Paraphilic Disorder (Non-consent), which is a serious illness, abnormality, or disorder for the purposes of the Adam Walsh Act. The court credits Dr. Hasting's testimony regarding this diagnosis, as it is supported by persuasive evidence. The court finds significant ██████ history of sexual urges, fantasies, and conduct related to non-consensual sex. Unlike Dr. Saleh, the court discredits ██████ assertion that he sexually assaulted the BOP nurse and fabricated reports of non-consensual sexual fantasies in order to have this court civilly commit him. In the past, ██████ has manipulated the criminal justice system in order to remain institutionalized without resorting to sexual misconduct and reports of violent sexual fantasies. An example of such conduct is his mailing of threatening letters to several state and federal officials for the purpose of being transferred to federal custody. Moreover, ██████ history of reporting violent sexual fantasies dates back to his adolescent years — a time before a desire to be civilly committed would have motivated his reports. The long history of such reports, coupled with ██████ sexual assaults, strongly support Dr. Hasting's diagnosis of Other Specified Paraphilic Disorder (Non-consent). Additionally, it is evident that ██████ disorder is "serious," for purposes of the Adam Walsh Act, as the disorder has resulted in ██████ causing significant harm to other individuals.

3. Substance Abuse

Drs. Gutierrez, Hastings, and Plaud each diagnosed ██████ with several substance abuse disorders: Alcohol Use Disorder (In a Controlled Environment), Cannabis Use Disorder (In a Controlled Environment), and Stimulant Use Disorder, Amphetamine (In a Controlled Environment). (Gov't Exs. 5 at 16-17; 13 at 27; 15 at 8.) Dr. Hastings additionally diagnosed

██████████ with Opioid Use Disorder. (Gov't Ex. 13 at 27.) While Dr. Saleh did not offer a formal substance abuse diagnosis, he noted in his report that ██████████ has a history of substance abuse.

(Resp't Ex. 2 at 7.)

Regarding ██████████ substance abuse history, Dr. Hasting's report notes the following:

Mr. ██████████ stated he began smoking marijuana and drinking alcohol at age 12 and using methamphetamines at age 13/14. In the year prior to his current incarceration, he reported drinking 18-24 beers and smoking upwards of 12 joints every day. He stated he was using three grams of methamphetamine 2-3 times a week as well. He stated he also became addicted to prescription opiates after being prescribed them following his amputation surgeries. He stated that within 2-3 months of the medication being prescribed, he was abusing them by "doctor shopping." He stated that prior to his arrest, he was taking upwards of six Dilaudid and 15 OxyContin pills every day. He also reported trying heroin, cocaine, LSD, and hallucinogenic mushrooms "a few times" each in the past.

(Gov't Ex. 13 at 6.)

The DSM-V states that "[t]he essential feature of a substance use disorder is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." DSM-V at 483. The court agrees with Drs. Gutierrez, Hastings, and Plaud and finds by clear and convincing evidence that ██████████ meets the diagnostic criteria as set out in the DSM-V for several substance use disorders, namely Alcohol Use Disorder (In a Controlled Environment), Cannabis Use Disorder (In a Controlled Environment), and Stimulant Use Disorder, Amphetamine (In a Controlled Environment). In support of this position, the court relies on the expert reports of the doctors and ██████████ testimony and reports regarding his long history of battling addiction to alcohol, marijuana, and methamphetamine.

While it is evident that [REDACTED] presently suffers from several substance abuse disorders, the court finds that these disorders alone are not serious for purposes of the Adam Walsh Act. Dr. Hastings was the only expert who testified that [REDACTED] substance abuse disorders could be considered serious. In coming to its conclusion, the court has considered the nature and severity of [REDACTED] substance abuse disorders. The court notes that there is limited evidence showing a nexus between [REDACTED] substance abuse disorders and his sexual dangerousness. While [REDACTED] admitted to consuming alcohol and using marijuana prior to sexually assaulting a fifteen-year-old girl, there is no evidence that the substance abuse resulted in his poor sexual control. [REDACTED] exhibited a similar lack of self-control when, under the influence of no substance, he assaulted the BOP nurse. Additionally, the court notes [REDACTED] testimony that, despite the ease of attaining drugs and alcohol in prison, he has abstained from alcohol, methamphetamine, and marijuana use for several years.

4. Antisocial Personality Disorder

Drs. Gutierrez, Hastings, and Saleh opined that [REDACTED] suffers from Antisocial Personality Disorder (“APD”). (Gov’t Exs. 5 at 16-17; 13 at 26; Resp’t Ex. 2 at 7.) Dr. Plaud initially diagnosed [REDACTED] with this disorder, but at the evidentiary hearing, he testified that he had since changed his diagnosis to a “mixed type of personality disorder with a number of features.”³

The DSM-V lays out the diagnostic criteria for APD as follows:

A. A pervasive pattern of disregard for and violation of the rights of

³Dr. Plaud did not outline the diagnostic criteria for such a disorder in his testimony. Accordingly, the court does not find by clear and convincing evidence that [REDACTED] suffers from a mixed personality disorder. Even if the court assumes that [REDACTED] suffers from this disorder, there was no testimony from Dr. Plaud bearing on whether it is serious.

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 safety of self or others.
 6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
 7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.
- B. The individual is at least age 18 years.
- C. There is evidence of conduct disorder with onset before age 15 years.
- D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

DSM-V § 301.7 at 659.

██████ meets this diagnostic criteria. In support of his diagnosis, Dr. Hastings opined in his report that ██████ “has evidenced problems in all seven of the [criteria set out in DSM-V § 301.7(A)].” (Gov’t Ex. 13 at 26.) The court agrees. ██████ long history of violating the law began at age 12 and has continued into adulthood. He has exhibited a pattern of deceitful and manipulative behavior, as evidenced by his testimony that he lied about cutting himself, lied to doctors in order to get access to medication, and filed a false report alleging that his cellmate raped him. Dr. Saleh testified that ██████ is a “master of manipulation.” ██████ sexual assault of a fifteen-year-old girl and a BOP nurse indicate his aggressiveness and his disregard for the safety of others. His consistent irresponsibility is evident in light of his failure to

cooperate with treatment, evaluations, and probation. Further, Drs. Hastings' and Gutierrez's reports note [REDACTED] history of impulsivity. (Gov't Exs. 13 at 26; 5 at 17.)

The court concludes that [REDACTED] APD, when combined with his paraphilic disorder, amounts to a serious disorder under the Adam Walsh Act. As the court noted in United States v. Begay, § 4248 was designed to "isolate *sexually* dangerous offenders," and while APD alone likely does not rise to the level of a serious disorder, that conclusion may change when APD is accompanied by a "diagnosis of a sexual disorder or paraphilia . . ." 880 F. Supp. 2d 707, 711 (E.D.N.C. 2012) (emphasis in original). As noted above, [REDACTED] APD has resulted in a lack of impulse control, an inability to complete treatment programs, a tendency to violate the law, and aggressiveness — all of which have contributed to his prior violent sexual assaults. Accordingly, in light of [REDACTED] paraphilic disorder, the court finds his APD to be serious for purposes of the Adam Walsh Act.

5. Borderline Personality Disorder

Drs. Gutierrez and Hastings diagnosed [REDACTED] with Borderline Personality Disorder ("BPD"). (Gov't Exs. 5 at 17-18; 13 at 26-27.) Dr. Saleh noted in his report that he could not rule out a diagnosis of BPD, (Resp't Ex. 2 at 7), although he testified at the evidentiary hearing that there was not sufficient evidence to support such a diagnosis.

The diagnostic criteria for BPD is as follows:

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity, beginning by early adulthood and present in a variety of contexts, as indicated by five or more of the following:

1. Frantic efforts to avoid real or imagined abandonment.
2. A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.

3. Identity disturbance: markedly and persistently unstable self-image or sense of self.
4. Impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating).
5. Recurrent suicidal behavior, gestures, or threats, or self-mutilation behavior.
6. Affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).
7. Chronic feelings of emptiness.
8. Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights).
9. Transient, stress-related paranoid ideation or severe dissociative symptoms.

DSM-V § 301.83 at 663.

The court credits Drs. Gutierrez's and Hasting's reports and concludes that the government has proven by clear and convincing evidence that ██████ suffers from BPD. Dr. Hastings found that ██████ "acknowledged and/or has a history of problems in most of the above areas [set out in the diagnostic criteria]." Gov't Ex. 13 at 27. In support of this diagnosis, Dr. Hastings noted the following:

██████ stated he has made threats to kill himself in response to females trying to end relationships with him. He admitted a history of moodiness and quick changes in his feelings (from love to hate) towards a partner. He has evidenced problems of identity, impulsivity, affective instability, recurrent suicidal gestures or self-mutilation, and poor anger control. A history of chronic feelings of emptiness and transient stress-related paranoia is also present.

Id. Based on this evidence, it is apparent that ██████ meets the criteria for BPD.

Similar to APD, it is unlikely that BPD alone would amount to a serious disorder for purposes of the Adam Walsh Act. See United States v. Springer, No. 5:12-HC-2009-BO, 2012 WL 3957857, at *3 (E.D.N.C. Sept. 12, 2012) ("[BPD] alone [] would not generally constitute a

serious mental disorder as contemplated by the Act.”). However, when BPD is coupled with a sexual disorder, this conclusion can change. See id. (suggesting that BPD, where combined with an underlying paraphilia, may be sufficient to constitute a serious disorder). There is evidence that ██████ BPD, along with his APD, exacerbates his inability to control his paraphilic urges. His impulsivity, his quick changes in his feelings toward partners, and his poor anger control all support the court’s conclusion that his BPD, in combination with his APD and paraphilia, is a serious disorder under § 4248.

The government has proven by clear and convincing evidence that ██████ suffers from Other Specified Paraphilic Disorder (Non-consent), which is a serious mental disorder for purposes of the Adam Walsh Act. Moreover, ██████ suffers from personality disorders which, when considered in tandem with his paraphilic disorder, constitute serious mental disorders under the Act.

C. Serious Difficulty Refraining

To meet its burden of establishing that ██████ is “sexually dangerous to others,” the government must also prove that ██████ if released, “would have serious difficulty in refraining from sexually violent conduct or child molestation” as a result of his serious mental illness, abnormality, or disorder. 18 U.S.C. § 4247(a)(6). Regarding this third criterion for civil commitment under the Adam Walsh Act, the Fourth Circuit Court of Appeals has provided the following general guidance:

The final element of the sexual dangerousness analysis turns on the degree of the person’s “volitional impairment,” which impacts the person’s ability to refrain from acting upon his deviant sexual interests. Kansas v.

Hendricks, 521 U.S. 346, 358 (1997); Hall, 664 F.3d at 463. A person's lack of control or inability to control his behavior

will not be demonstrable with mathematical precision. It is enough to say that 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). "Whether [an] individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." Addington v. Texas, 441 U.S. 418, 429 (1979).

United States v. Bolander, 722 F.3d 199, 207-08 (4th Cir.) (alteration in original), cert. denied, 134 S. Ct. 549 (2013).

In this case, there was a lack of consensus among the experts as to whether [REDACTED] would have serious difficulty in refraining from child molestation or sexually violent conduct if released. Drs. Gutierrez, Hastings, and Plaud answered the third prong in the affirmative,⁴ while Dr. Saleh opined that [REDACTED] would not have serious difficulty in refraining from sexually violent conduct if released.

The court acknowledges that [REDACTED] has a history of manipulative behavior and malingering symptoms in order to achieve various ulterior motives. The court also recognizes there is no independent evidence verifying that any of the uncharged acts of sexual misconduct

⁴ At the hearing, Dr. Plaud clarified his opinion, noting that he did not believe [REDACTED] was unable to refrain from child molestation, but believed only that [REDACTED] would only have serious difficulty in refraining from sexually violent conduct.

that [REDACTED] initially admitted to actually occurred. Despite [REDACTED] lack of credibility, the court finds that he will have serious difficulty in refraining from child molestation and sexually violent conduct if released.

Even if the court assumes [REDACTED] feigned paraphilic symptoms and lied about uncharged incidents of sexual misconduct during the evaluation process, [REDACTED] history of reporting violent rape fantasies and voicing concerns about reoffending predates these commitment proceedings. As noted in Dr. Hasting's report, [REDACTED] has demonstrated that he will follow through with these concerns:

It should be noted this is not the first time that Mr. [REDACTED] has warned others of this dangerousness. The psychiatric summary from his stay at the San Marco Treatment Center in 1997/1998 states, "He made statements throughout treatment that he was here learning how to be a better offender. He wrote explicit and graphic details of how he would stalk and rape a female prior to discharge. He maintained that given the opportunity he would reoffend again." After his escape from that facility, Mr. [REDACTED] did engage in future acts of exhibitionism and a sexual assault against a fifteen-year-old girl.

(Gov't Ex. 13 at 38.)

[REDACTED] has continued this pattern of behavior while in federal custody. During his time in SOTP-NR, [REDACTED] stated that he was interested in civil commitment due to his inability to control his sexually deviant behavior. (Gov't Ex. 5 at 15.) In an interview with Dr. Gutierrez on 6 November 2013, [REDACTED] revealed "I want to be honest . . . I know I need to be committed. I know I'm sick and need to get better." (Gov't Ex. 5 at 23.) A BOP clinical intervention note dated 19 November 2013 states that [REDACTED] indicated "he 'needs' to go to [the Commitment and Treatment Program] because he has a problem and is sure he would re-offend if released." (Id.) Additionally, during an interview with Dr. Saleh on 28 April 2014, [REDACTED] indicated that due to his impulsivity it was a possibility that he could act on his sexual deviant thoughts and stated,

"Honestly, I think I need help." (Resp't. Ex. 3 at 15-16.) After communicating these concerns, [REDACTED] sexually assaulted a BOP nurse in June 2014 and engaged in two acts of indecent exposure in July and August of 2014.

The court discredits [REDACTED] testimony at the deposition and evidentiary hearing that he intentionally committed his recent acts of sexual misconduct in order to "hinder himself" so that he could remain institutionalized. As noted previously, in the past, [REDACTED] has demonstrated the knowledge and ability to manipulate the system without resorting to sexual misconduct. For instance, a Psychology Data System note dated 2 October 2012 indicates that when [REDACTED] was first informed that he was being reviewed for civil commitment, "He stated he had made a decision to stab a staff member to avoid civil commitment. He indicated he would rather serve a life sentence in prison versus civil commitment." (Gov't Ex. 5 at 13.) Moreover, [REDACTED] offense history suggests he has limited control over his deviant sexual urges as he has committed sex offenses while in sex offender treatment, while subject to supervised visitation, and while in correctional settings. Because [REDACTED] has been unable to control his behavior in even the most supervised setting, it is likely that he will have serious difficulty in controlling his behavior if released.

It is also noteworthy that in September 2014, two months before the evidentiary hearing, [REDACTED] was clear in his desire to be committed and receive treatment for his condition. In his interview with Dr. Hastings on 5 September 2014, [REDACTED] reported fear and anxiety that he would act on his sexual urges if he was released from prison prior to getting sex offender treatment. [REDACTED] told Dr. Hastings, "The state I'm in right now, I know for a fact I would reoffend." He further stated "What is the point of setting myself up for failure . . . I want help

for me and my daughter . . . what if I did something to her, that would mess me up very bad.”

██████████ retracted these admissions during the hearing and in his evaluations with Drs. Plaud and Saleh. He testified that he had lied to Dr. Hastings about his need for commitment out of fear of being released from prison, conveying concern over his disability and how the community reaction to him being a registered sex offender. However, he acknowledged that he has previously functioned in the community with his disability as well as a registered as a sex offender. The court simply does not believe ██████████ explanation for changing his story, especially given that he has recently demonstrated his intent to act on his sexual impulses.

In addition, the court notes that ██████████ actuarial assessment results were consistent with a high risk of recidivism. Applying the Static-99R, all of the the experts gave ██████████ a score of 8, which places him the “high” risk category for sexual reoffense. (Gov’t Exs. 5 at 19-20; 13 at 30; 15 at 11; Resp’t Ex. 2 at 10.) Offenders from a sample with the same score have been found to sexually reoffend at a rate of 37% over five years and 46% over ten years. (*Id.*) Using another actuarial instrument, the Static-2002R, Dr. Hastings found that ██████████ has a “high” risk of recidivism. (Gov’t Ex. 13 at 31.) Dr. Plaud utilized the Multisample Age-Stratified Table of Sexual Recidivism Rates, and ██████████ score on this instrument also indicates a “high” risk of sexual reoffense for his age group. (Gov’t Ex. 15 at 10-11.) Thus, when viewing the actuarial scores as a whole, the court concludes that ██████████ is considered to be a high risk for sexual reoffense. Accordingly, the circumstantial value of the actuarials supports the conclusion that ██████████ would have serious difficulty refraining from child molestation.

There was a consensus among the experts that this case was “unique” in that ██████████ had made multiple statements expressing a desire and willingness to be civilly committed. Although

█████ recent sexual misconduct supports these statements, there was disagreement among the experts regarding whether there was a nexus between █████ sexual deviant behavior and his mental condition. Drs. Hastings and Gutierrez concluded that █████ would have serious difficulty in refraining from sexually violent conduct or child molestation if released. Dr. Plaud opined that █████ would have serious difficulty in refraining from sexually violent conduct but would not have serious difficulty in refraining from child molestation.⁵ Dr. Saleh was the only expert to conclude that █████ would not have serious difficulty in refraining from sexually violent conduct or child molestation.

Here, the court specifically credits the opinion of Dr. Plaud, who testified that █████ recent self-reports and sexual disciplinary infractions demonstrate “volitional impairment along sexual lines.” Dr. Plaud opined that █████ assaulted the BOP nurse as a result of his two personality disorders which cause him to experience serious impulse behavior problems related to sexual control. According to Dr. Plaud, █████ “ongoing psychiatric conditions still mean that if he feels threatened or overwhelmed, he may resort to engaging in further acts of sexual abuse in order to feel a sense of security and stability in his life.” (Gov’t Ex. 15 at 4.) The court agrees with Dr. Plaud that █████ recent institutional sexual misconduct and reports of sexually violent fantasies support the conclusion that there is a nexus between █████ mental disorders and his sexually deviant behavior.

Conversely, the court discounts the testimony of Dr. Saleh, who based his opinion solely on █████ sexual behaviors and ignored █████ statements about his sexual proclivities due

⁵ Dr. Plaud initially concluded that █████ would not have serious difficulty in refraining from sexual misconduct due to the lack of reliable data. (Resp’t Ex. 4 at 2.) At the hearing, Dr. Plaud testified that he had changed his opinion after █████ provided the “missing data” with his own recent self-reports and sexual disciplinary infractions. (See also Gov’t Ex. 15 at 2.)

to his history of malingering psychiatric symptoms. Dr. Saleh opined that [REDACTED] assault of the BOP did not demonstrate his difficulty in refraining from sexual deviant behavior because it was malingered behavior, motivated by [REDACTED] desire to remain institutionalized. When asked whether he would change his opinion with regard to whether [REDACTED] is sexually dangerous if [REDACTED] had raped the BOP nurse, Dr. Saleh stated that such facts would not change his opinion because [REDACTED] behavior was not motivated by a mental disorder but, was instead, deliberate and designed to achieve the goal of commitment.

Through the course of these civil commitment proceedings, [REDACTED] has shown by his own behavior that he will have serious difficulty in refraining from sexually violent conduct if he is released. The fact that [REDACTED] has offered various perspectives on his sexual proclivities and risk of reoffending while awaiting a hearing on this matter indicates his ambivalence about his problems. Although [REDACTED] testified that he was in need of treatment due to his charge for assaulting a fifteen-year-old girl in 2002, he has never completed outpatient sex offender treatment and was expelled from SOTP-NR due to his failure to attend group therapy sessions. Given [REDACTED] claims of institutionalization, his failure to address his sexual deviance supports the conclusion that he will have serious difficulty in controlling his sexual impulses when faced with the stressors of living in the community.

III. CONCLUSION

For the foregoing reasons, the court finds, by clear and convincing evidence, that [REDACTED] is a sexually dangerous person under the Adam Walsh Act. It is hereby ORDERED that [REDACTED] be committed to the custody of the Attorney General for care and treatment pursuant to 18 U.S.C. § 4248.

In the past the court has orally delivered its decisions in these 18 U.S.C. § 4248 cases in open court. However, the court's schedule is such that a date upon which this decision could be delivered orally will not occur until February 2015. In order for all the parties to have knowledge of the decision and for [REDACTED] to have the opportunity to begin sex offender treatment, the court is entering only this written order.

This 22 December 2014.



W. Earl Britt
Senior U.S. District Judge