No. _____

In The

Supreme Court of the United States

THOMAS BLACKLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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The Adam Walsh Act, 18 U.S.C. § 4248 was enacted in 2006 to provide for the indefinite civil commitment of individuals who, at the end of their current Federal prison sentence, are found to be sexually dangerous. The Act was challenged under the Necessary and Proper Clause and ultimately upheld in *United States v. Comstock*, 560 U.S. 126, 130 (2010). In determining whether an individual qualifies for commitment under the act, Federal District and Circuit courts look to *Kansas v. Crane*, 534 U.S. 407 (2002) and *Kansas v. Hendricks*, 521 U.S. 346 (1997). *See e.g.*, *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012). Because of the complex nature of these cases, the State and Federal courts have decided the issue of sexual dangerousness in many different ways, leading to dramatically different conclusions. Therefore, the questions presented are:

1. Whether the Adam Walsh Act unconstitutionally deprives a respondent of their liberty interest by indefinitely civilly committing an individual for an emotional impairment rather than a volitional one, a question explicitly left open both by *United States v. Comstock*, 560 U.S. 126 (2010) and *Kansas v. Crane*, 534 U.S. 407 (2002).
2. Whether the Adam Walsh Act violates due process by indefinitely civilly committing an individual for their private thoughts.

Petition for a Writ of Certiorari

Thomas Blackledge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion of the court of appeals (Pet. App. A) is unpublished but is reported at 714 Fed. Appx. 247 (4th Cir. 2018). The district court order and findings are unpublished.

Jurisdiction

The judgment of the court of appeals was entered on January 8, 2018. A petition for rehearing was denied on May 8, 2018 (Pet. App. B). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const. amend V.

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law … ."

18 U.S.C. § 4248 provides, in pertinent part:

> (a) Institution of proceedings. In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person …. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.
>
> (b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition. If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. … [T]he Attorney General shall place the person for treatment in a suitable facility, until --

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment; whichever is earlier.

…

18 U.S.C. § 4247 provides, in pertinent part:

…

(b) Psychiatric or psychological examination. A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. …

(c) Psychiatric or psychological reports. A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include --

(a) the person's history and present symptoms;

(b) a description of the psychiatric, psychological, and medical tests that were employed and their result;

(c) the examiner's findings; and

(d) the examiner's opinions as to diagnosis, prognosis, and --

…

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(d) Hearing. At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

Statement of the Case

I. Proceedings Below

On March 28, 1960, Petitioner Thomas Blackledge was convicted of First-Degree murder and was sentenced to life in prison which was later commuted to eight years. (J.A. 231). Mr. Blackledge was released on supervision on May 3, 1968 and was discharged from parole on May 28, 1975. (J.A. 233).

On June 10, 1986, petitioner Thomas Blackledge was convicted of one count of knowingly mailing visual depictions, the producing of which involved the use of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1); and 16 counts of employing and using a minor child for the purpose of producing a visual depiction of such conduct which visual depiction was or would be mailed in violation of 18 U.S.C. § 2251(a). (J.A. 230). Mr. Blackledge was released on February 23, 2003. (J.A. 230).

Mr. Blackledge pled guilty on February 23, 2005 to one count of Sexual Exploitation of Children-Second Offense (Class 4 Felony) and was sentenced to two to six years in prison concurrent with his federal probation revocation. (J.A. 466-68).

Mr. Blackledge was found guilty on April 27, 2005 of one count of Violation of Special Condition Prohibiting Defendant from Viewing and/or Possessing Child Pornography and one count of Violation of the Law and was sentenced to six years in prison and five years of probation. (J.A. 484-87).

Mr. Blackledge was certified as a sexually dangerous person on September 19, 2009. (J.A. 18-25). Mr. Blackledge was appointed counsel from the Federal Public Defender on June of 2010 after the ruling in *United States v. Comstock*, 560 U.S. 126 (2010) upholding the Adam Walsh Act. On July 10, 2012, Mr. Blackledge's counsel filed a motion to withdraw due to conflict with Mr. Blackledge, and on July 18, 2012 after a hearing, the motion was denied. *United States v. Blackledge*, 751 F.3d 188, 190 (4th Cir. 2014). Counsel appealed the district court's ruling. *Id*. Following a hearing on August 10, 2012, while Mr. Blackledge's counsel's appeal was pending, Mr. Blackledge was committed under the Adam Walsh Act. (J.A. 9, D.E. 74-76). On Mr. Blackledge's counsel's appeal, the Fourth Circuit reversed and remanded, ruling that Mr. Blackledge should be granted a new commitment hearing with new counsel. *Blackledge*, 751 F.3d at 198-99.

On November 16, 2016, following a civil commitment hearing on May 16, 2016, Mr. Blackledge was again committed under the Adam Walsh Act. (J.A. 712-714). The

court of appeals affirmed and denied Mr. Blackledge's request for an *en banc* hearing. (Pet. App. B).

II. Factual Background

1. On January 20, 1960, when Mr. Blacklege was 15-years old, Mr. Blackledge was "making out" with a 15-year-old female in his home. When Mr. Blackledge began taking off his underwear, the female "protested…and became hysterical." (J.A. 231). They argued and Mr. Blackledge struck her. *Id*. They got dressed and agreed that Mr. Blackledge would drive her home. *Id*. Mr. Blackledge drove her to a vacant house and repeatedly struck her with a hammer and then drove away. Mr. Blackledge told authorities that he intended to kill her. (J.A. 232).

Mr. Blackledge was tried as an adult and pled guilty by reason of insanity. (J.A. 232). The court's psychiatric evaluation found that Mr. Blackledge was not insane but that he was "severely incapacitated by a disabling mental illness… passive-aggressive personality, aggressive type." Mr. Blackledge was convicted of First-Degree murder and sentenced to life in prison. (J.A. 232).

While incarcerated, Mr. Blackledge was mentored by an older inmate, Robert James Robinson, described as a "one-time tough con who had apparently natural counseling abilities" (J.A. 233). Mr. Robinson was "very influential" in Mr. Blackledge's good behavior and pursuit of education and helped Mr. Blackledge "develop his emotional maturity." (J.A. 234). Mr. Blackledge took classes while imprisoned and received his high school diploma. (J.A. 237). He was valedictorian of

his class. While imprisoned, he also took college courses through the University of Wyoming. (J.A. 237).

On August 24, 1964, Mr. Blackledge was evaluated by a psychiatrist who found that Mr. Blackledge's "emotional controls had improved and that he would probably not resort to violence again under similar circumstances." (J.A. 240).

From 1966 to 1968, Mr. Blackledge received "intense psychological counseling" from Michael Gamble, a psychologist at Wyoming State Penitentiary. (J.A. 240). The psychologist found that Mr. Blackledge had committed the 1960 homicide one month after finding out he had been adopted and had done it out of fear that his adopted parents might reject him as his natural parents had if they found out about the female "[becoming hysterical] after his sexual advances." (J.A. 240).

2. After Mr. Blackledge was released, he enrolled in college on scholarship, married, and had a son. (J.A. 235-37). In 1972, Mr. Blackledge received a B.A. in Psychology, Special Education, and Rehabilitation and Related Services, and in 1974 became employed as a social services case worker. (J.A. 237-38). Mr. Blackledge and his wife divorced in 1976 after which Mr. Blackledge began to struggle with severe anxiety which forced him to resign from his job. (J.A. 235-37). He voluntarily sought therapy for several years and was able to work for periods of years on and off as his anxiety fluctuated. (J.A. 238-39). He sought alcohol abuse treatment in 1985 and has remained sober except for a period of relapse from 2003-2004. (J.A. 238-213). His primary therapist was Ms. Bear who found that Mr. Blackledge coped by using fantasy to handle his stress effectively. (J.A. 241).

In January or February of 1986, Mr. Blackledge, along with Mr. and Mrs. Esch, created child pornography using the Esch's three-year-old girl and two-year-old boy. (J.A. 223-27). Mr. Blackledge took two photographs of each of his co-defendants simulating sex with each of the children. (J.A. 223-27). Mr. Blackledge sent these photographs to an undercover law enforcement agent. (J.A. 223).

In 1986, following the aforementioned offense, Mr. Blackledge's defense counsel asked Dr. Selkin, who had seen Mr. Blackledge in 1977, to evaluate Mr. Blackledge. (J.A. 242). Mr. Blackledge disclosed to Dr. Selkin his "strong temptation" to have sex with children but said he had never followed through on his desires. (J.A. 252). Dr. Selkin diagnosed him as "an addictive personality, with intense anxiety, and periodic severe depression." (J.A. 242). He also found that "immaturity and poor judgment are additional significant diagnostic features." (J.A. 242). He found that Mr. Blackledge was not "criminally motivated because he responded well to therapy [and] other forms of supervision, and because he has lived within the law for 15 successive years." (J.A. 242). Mr. Selkin believed that Mr. Blackledge would be "safe in the community should the Court see fit to grant him that opportunity." (J.A. 242).

In 1986, Mr. Gamble was also consulted. (J.A. 241). Mr. Gamble had stayed in touch with Mr. Blackledge after his release and saw a deterioration in Mr. Blackledge in the 5-10 years before his 1983 offense. (J.A. 241). Mr. Gamble described that "[w]hile imprisoned, defendant always had a good imagination, but was able to keep his imagination and reality in proper perspective." (J.A. 241). Mr. Gamble thought from their recent discussions that Mr. Blackledge was no longer able to maintain that

perspective. (J.A. 241). He also noted that Mr. Blackledge "suppressed much emotional pain, which only became observable…through a hindsight process after [Mr. Blackledge] had left the institution." (J.A. 241). Mr. Gamble expressed a belief that Mr. Blackledge "is treatable, especially since [he] has always responded well to counseling." (J.A. 241).

3. In 1993, Mr. Blackledge entered sex offender treatment with the Colorado Department of Corrections. He completed Phase I and began Phase II on March 17, 2000. (J.A. 476). In February of 2003, the month of his release, he was evaluated by one of his treatment providers, Dr. Vehar, who found that "due to his sexual violence in the past at a young age and his history of antisocial behavior, Mr. Blackledge's risk to re-offend is moderate to high." (J.A. 399-400).

4. On February 23, 2003, Mr. Blackledge was released on supervision to his son's home in Greeley, Colorado. (J.A. 399). On or about September 3, 2003, Mr. Blackledge purchased a computer with Internet access. On October 16, 20, or November 20, 2003, he told his therapist, Kim Ruybal, that he had looked at child pornography on this computer. (J.A. 403-32). Law enforcement subsequently searched his computer and found 12,000 photos, 17 of which depicted what appeared to be "nude minor children." (J.A. 399). In February of 2004, Ms. Ruybal found that Mr. Blackledge "is not amenable to treatment" and that he "appears at an extremely high risk to re-offend both sexually and non-sexually." (J.A. 403-32).

On May 26, 2004, Mr. Blackledge took a polygraph examination in which he disclosed that he had been going to chat rooms and engaging in sexual discussions

with minors. (J.A. 480). He said that he exchanged nude photos with five females aged 13 to 18. (J.A. 480). He also admitted to viewing child pornography. (J.A. 480). The polygraph "revealed" that he "admitted fantasies about minors 100% of the time during masturbation." (J.A. 480). He denied meeting, photographing, or videotaping any minors. (J.A. 480).

In June of 2004, Mr. Blackledge was evaluated by Dr. Stephen Brake. (J.A. 455). Dr. Brake found that Mr. Blackledge's account of the number of minors he had had sexual contact with as an adult had varied but was at least 12 and at most 20. (J.A. 480). Dr. Brake found that Mr. Blackledge is a "psychopath and a sexual predator who remains at high risk as a sexual offender" and that he "requires treatment in a closed and contained facility." (J.A. 481-82).

5. On November 16, 2016, following a May 16, 2016 renewed civil commitment hearing, Mr. Blackledge was again committed under the Adam Walsh Act. (J.A. 712-714).

a. Of the three prongs that must be met to be justify civil commitment under the Adam Walsh Act, prongs one and two were stipulated and therefore not in dispute. (J.A. 26-190). Therefore, much of the hearing focused on whether Mr. Blackledge met the "serious difficulty" prong of the Adam Walsh Act. (J.A. 26-190).

b. At the time of the trial, Mr. Blackledge was seventy-one. (J.A. 678-711). All of the experts agreed that individuals above age seventy sexually recidivate at a rate of three percent. (J.A. 26-190). The United States' expert, Dr. Gary Zinik, described individuals who recidivate after age seventy as "rare birds" (J.A. 111),

further noting that "if we wanted to be right most of the time, we should release 70 year-old sex offenders because…we would be correct probably 96, 97 percent of the time." (J.A. 110). In regards to this issue, the court's appointed independent evaluator Dr. Frank Wood testified that "[t]here is an inevitable corollary to that rarity…rare events occur so infrequently that you can't get evidence that distinguishes people who are going to have that rare event from people who are not going to have it" (J.A. 132), indicating his belief that recidivists over age 70 are so few and far between that it is scientifically incoherent to predict who they might be. (J.A. 141).

In addition to age, another dominant focus at the hearing was Mr. Blackledge's frank testimony about his sexual fantasies. (J.A. 26-190). He testified that he fantasizes about having sex with young girls, and that in his fantasies, the young girls are not hurt. (J.A. 13-15). However, he described the idea that the young girls are not hurt by having sex with an adult as a delusion; he testified as to his awareness that, outside of fantasy, children *are* harmed by having sex with adults. (J.A. 41-43). When questioned about his supposed belief that children are harmed by sexual contact with adults solely because of social stigmatization of such contact, Mr. Blackledge replied that, upon growing older, the child "[learns] new information" and then "*realizes* the damage," (J.A. 42) (emphasis added) further explaining that the damage is caused at the time of sexual contact but may not be realized until the child is old enough to understand what has happened to them. (J.A. 42-43). Mr. Blackledge testified that he had not always understood that children were harmed by sexual contact with adults but that in sex offender therapy in Colorado he started to develop

this understanding. (J.A. 63). He also testified that he developed this understanding by talking online in a chat room to a victim of sexual violence and empathizing with her experience of harm. (J.A. 63). Finally, when asked if he was aware that he had done harm to children, he acknowledged the ripple effects of harm, answering "not only to the children, but also to their parents and family and friends." (J.A. 66).

The government also argued that Mr. Blackledge had trouble with authority figures such that he would be likely to disregard or violate conditions of release. (J.A. 46-48). Other evidence contradicted this view: his lack of disciplinary violations, disruptive, or rebellious behavior during his many years in jail and prison; his lack of probation violations or trouble with his probation officer during his seven years on parole from 1968 to 1975; his long history of seeking out and successfully participating in mental health and substance abuse treatment both in community and prison settings (J.A. 240-243); and the fact that he held two steady jobs for three and four years respectively during his only substantial period in the community as an adult (J.A. 238).

The Government also argued that Mr. Blackledge's past offenses, particularly his 2004 probation violation, meant that he would be likely to offend again upon release, particularly because he viewed child pornography even after developing a safety plan in sex offender therapy. (J.A. 111). When asked if he had followed this safety plan, Mr. Blackledge replied that he ignored his safety plan in regard to looking at child pornography on the internet but that he practiced it "in regards to everyday life." (J.A. 49). And although Mr. Blackledge did look at child pornography in 2004,

he was aware that doing so "[created] a self-perpetuating downward spiral" (J.A. 29). Because of this, he decided to self-report his conduct to his counselor within two months of purchasing the computer, knowing full well that this would mean he would be sent back to prison. (J.A. 59-60).

The district court ordered Mr. Blackledge committed under the Adam Walsh Act. (J.A. 712-713). The court in its Findings and Conclusions spent numerous pages recounting Mr. Blackledge's criminal history but accorded none of its words to the positive changes Mr. Blackledge has demonstrated throughout his history. (J.A. 679-91). In discussing Mr. Blackledge's incarceration from 1960 to 1968, the court includes no mention of Mr. Blackledge's participating in counseling during his time in prison, or the fact that a medical evaluator found in 1964 that his volitional control had increased, nor his positive relationships with staff and other inmates, nor his lack of any conduct violations. (J.A. 681). The court also includes no mention of Mr. Blackledge's life from 1968 to 1985, a period of time during which he was in the community, five years of which he was on probation (during which time he did not violate his probation); a time in which he received a Bachelor's Degree, held two steady jobs for several years, and voluntarily sought and participated in years of counseling and substance abuse treatment. (J.A. 681-82). The court merely briefly notes, when discussing Mr. Blackledge's imprisonment from 1986 to 2003, that Mr. Blackledge participated in sex offender treatment in Colorado; it does not mention that Mr. Blackledge successfully participated in thirteen years of sex offender treatment in Colorado from 1990 to 2003 which he credits for having increased his

compassion and empathy such that he understands that children are harmed by sexual contact with adults. (J.A. 682-685). The court does not mention the remarkable fact that in 2004, when Mr. Blackledge looked at child pornography, he turned himself in to his counselor within two months of doing so, feeling that returning to prison was worth avoiding the harm caused to himself and others by his behavior. (J.A. 685). The court does not mention the fact that Mr. Blackledge testified that he was indeed applying the safety plan he learned in sex offender treatment in Colorado to his everyday real life (juxtaposed with internet pornography fantasizing). (J.A. 685).

6. Mr. Blackledge appealed the order citing in particular the fact that only 3% of sex offenders over age 70 recidivate, the court's overreliance on past offenses, and a study which was not admitted into evidence. (J.A. 715). The court of appeals affirmed, finding the district court's reasoning plausible, and denied Mr. Blackledge's request for an *en banc* hearing. (Pet. App. B).

Reasons for Granting the Writ

Crane and Hendricks left a great deal of room for variation in how courts might apply the "serious difficulty" standard. As such, it has been applied in a wide variety of idiosyncratic ways. Only in such a landscape, where the court is offered wide leeway to rule based on its personal feelings about what constitutes clear and convincing evidence of this "serious difficulty" could it be considered reasonable that Mr. Blackledge be found sexually dangerous such that he must be committed under the Adam Walsh Act.

Mr. Blackledge case evidences the progress that can be made through sex offender treatment and the deterrent aspect of incarceration and civil commitment. Throughout Mr. Blackledge's series of confinements, he has participated in various forms of therapies and learned coping mechanisms. Mr. Blackledge has de-escalated his conduct from murder at age 15 to his most recent offense of viewing child pornography. As a coping mechanism to prevent recidivism, Mr. Blackledge fantasizes privately about children.

With a complete and total lack of validated scientific literature as to what can predict sexual dangerousness, the district court nonetheless found by clear and convincing evidence that Mr. Blackledge should be committed despite their being only one relevant scientifically-agreed-upon statistic – that Mr. Blackledge represents a group that only recidivates at the rate of 3%. While Crane cautions against bright-line rules, a 3% chance of recidivating cannot be reasonably equated with clear and convincing evidence of sexual dangerousness under the Adam Walsh Act.

Because of the lack of clear standards regarding dangerousness following the ruling of *Kansas v. Crane*, Mr. Blackledge has been ordered civilly committed indefinitely. Therefore, this court should clarify what must be demonstrated in order for an individual to constitutionally have their liberty interest potentially permanently deprived.

I. Adam Walsh Act Generally

The Adam Walsh Act permits civil commitment of certain Federal inmates at the completion of their sentence who meet three specific criteria: "(1) has previously

'engaged or attempted to engage in sexually violent conduct or child molestation,' (2) currently 'suffers from a serious mental illness, abnormality, or disorder,' and (3) 'as a result of' that mental illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *United States v. Comstock*, 560 U.S. 126, 130 (2010). The government bears the burden of proof, the standard of which is clear and convincing. *Id*.

The Supreme Court has addressed the Adam Walsh Act only insofar as upholding its constitutionality under the Necessary and Proper Clause. *Id.* at 149. However, the Court pointedly stated that "[w]e do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution." *Id.* at 149-50. At oral argument, Justice Sotomayor inquired of then Solicitor General Kagan if the government had an "unlimited constitutional power to then civilly commit this dangerous person" indefinitely purely by nature of "their time in control of the individual." Transcript of Oral Argument at 10-11, *United States v. Comstock*, 560 U.S. 126 (2010) (No. 08-1224). In defending the Adam Walsh Act, Solicitor General Kagan responded with "I think what would prevent that, Justice Sotomayor, is the Due Process Clause. It is obviously the case that there are other constraints on governmental action than Article I." *Id.* To date, no such Due Process case has been decided by the Supreme Court.

II. Conflicts among the federal courts of appeals and/or state supreme courts.

Courts have developed a wide variety of interpretations as to the question of determining what it means to prove "serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

A. Jurisdictions interpret the finding of Crane in different ways, specifically as to whether a volitional control finding is a requirement; therefore, this Court has a vested interest in establishing a uniform standard.

Justice Scalia has remarked that Crane "[established] the requirement of a separate finding of inability to control behavior." *Kansas v. Crane*, 534 U.S. 407, 419 (2002) (Scalia, A., dissenting).

> Today's opinion says that the Constitution requires the addition of a third finding: (3) that the subject suffers from an inability to control behavior—not utter inability and not even inability in a particular constant degree, but rather inability in a degree that will vary in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself. … Unfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas's SVPA, not a clue as to how they are supposed to charge the jury!

Id. at 423 (internal quotation marks omitted).

In interpreting Crane, courts have disagreed on whether Crane adds an additional due process requirement by necessitating a finding of volitional impairment when establishing a serious inability to control behavior.

A majority of jurisdictions appear not to require a finding of volitional control. *Richard v. Carpinello* summarized the complexity and distinguished courts' approaches:

[T]he majority of state high courts and circuit courts of appeal that have examined the Crane decision have concluded that the Supreme Court did not add a factor to the due process test for involuntary commitment. *See Varner, 460 F.3d at 864* ("Once a jury has found mental illness and a likelihood of future offenses, it has drawn the line [between civil commitment and the criminal law] the Court thought essential."); *Laxton v. Bartow*, 421 F.3d 565, 572 (7th Cir.2005) (holding that Crane did not "clearly establish [ ] that the jury must be instructed and specifically find that petitioner has serious difficulty in controlling his behavior"); *In re Leon G.*, 204 Ariz. 15, 59 P.3d 779, 786 (2002) (holding that Crane did not alter the Hendricks analysis "that focused on the link between proof of dangerousness and proof of mental abnormality"); *People v. Williams*, 31 Cal.4th 757, 3 Cal.Rptr.3d 684, 74 P.3d 779, 790 (2003) ("[Crane] does not compel us to hold that further lack-of-control instructions or findings are necessary to support a commitment under [California's Sexually Violent Predators Act]."); *State v. White*, 891 So.2d 502, 509-510 (Fla. 2004) ("While Crane requires proof of serious difficulty in controlling behavior, the proof Crane requires is not proof in addition to that already required under [Florida's sexually violent predator] statute.") (internal quotation marks omitted); *In re Detention of Varner*, 207 Ill.2d 425, 279 Ill.Dec. 506, 800 N.E.2d 794, 798 (2003) (holding that Crane does not require a specific determination by the fact finder that a person lacks volitional control); *In re Dutil*, 437 Mass. 9, 768 N.E.2d 1055, 1064 (2002) ("As long as the [Massachusetts] statute requires a showing that the prohibited behavior is the result of a mental condition that causes a serious difficulty in controlling behavior, the statute meets due process requirements."); *In re Vantreece*, 771 N.W.2d 585, 587-88 (N.D.2009) (holding that the due process requirement of serious difficulty in controlling behavior is part of the definition of sexually dangerous individual, which requires a nexus between the mental disorder and the dangerousness); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338, 348 (2002) ("Crane does not mandate a court must separately and specially make a lack of control determination, only that a court must determine the individual lacks control while looking at the totality of the evidence."); *In re Detention of Thorell*, 149 Wash.2d 724, 72 P.3d 708, 715-16 (2003) (en banc) ("Crane requires a determination that a potential SVP has serious difficulty controlling dangerous, sexually predatory behavior, but does not require a separate finding to that effect."); *In re Commitment of Laxton*, 254 Wis.2d 185, 647 N.W.2d 784, 787 (2002) ("[A] civil commitment does not require a separate finding that the individual's mental disorder involves serious difficulty for such person to control his or her behavior."). *But see In re Detention of Barnes*, 658 N.W.2d 98, 101 (Iowa 2003) (holding that to justify civil commitment, the jury must be instructed that the

> person's mental condition must cause serious difficulty in controlling behavior); *In re Thomas,* 74 S.W.3d 789, 792 (Mo.2002) (en banc) (requiring a jury instruction defining mental abnormality to include serious difficulty in controlling behavior); *In re Commitment of W.Z.*, 173 N.J. 109, 801 A.2d 205, 219 (2002) (holding that for involuntary commitment under the state's sexually violent predators act, the state must prove an additional requirement "that the individual has serious difficulty controlling his or her harmful sexual behavior such that it is highly likely that the person will not control his or her sexually violent behavior and will reoffend").

Richard S. v. Carpinello, 589 F.3d 75, 84-85 (2d Cir. 2009).

The statute in question in this case does not explicitly require the fact-finder to establish a *separate* finding of volitional impairment by requiring the government to prove by clear and convincing evidence that the person, but rather implies that a volitional finding is necessary by requiring a finding of "serious difficulty in refraining" from prohibited conduct. 18 U.S.C. §§ 4247(a)(5)-(6).

B. Jurisdictions disagree as to what likelihood of recidivism must be demonstrated to prove serious difficulty in controlling behavior; therefore this Court has a vested interest in establishing a uniform standard.

Courts disagree on the weight of evidence required to demonstrate serious difficulty in controlling behavior. *Compare Westerheide v. State*, 767 So. 2d 637, 660 (Fla. Dist. Ct. App. 2000) *with People v. Superior Court*, 44 P.3d 949 (Cal. 2002). In a First Circuit case, the court noted "there is no crystal ball that an examining expert or court might consult to predict conclusively whether a past offender will recidivate. At best, offenders can be located, by means of an actuarial tool, within a population of individuals that share certain characteristics and that studies have shown to recidivate at a particular rate. These tools are … moderate predictors of risk." *United States v. Shields,* 649 F.3d 78, 84 (1st Cir. 2011) (internal quotation marks omitted).

Several courts have ruled that the risk of re-offense must be established at higher than fifty percent. *See Westerheide v. State*, 767 So. 2d 637, 660 (Fla. Dist. Ct. App. 2000) (Sharp, concurring) ("Since this statute has very grave consequences … I would read the language of the statute as placing the highest barrier to being found to be a sexual predator. The ending part of the statutory definition of 'likely to engage' says this likeliness must be 'of such a degree as to pose a menace.' Thus, I would construe 'likely' as meaning a high probability, greater than 50%."); *In re Commitment of W.Z.* 773 A.2d 97, 115-116 (N.J. Super. A.D. 2001); *Laxton v. Bartow*, 421 F.3d 565, 569 (7th Cir. 2005) (holding that substantial probability means much more likely than not, noting that "[t]he state was obligated to prove that Laxton is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence…") (internal quotation marks omitted); *State v. Nelson*, 727. N.W.2d 364, 366-68 (Wis. Ct. App. 2006) (holding that "likely" is statutorily defined as "more likely than not.")

Others have ruled that showing a greater than 50% probability is not necessary. *See e.g., People v. Superior Court*, 44 P.3d 949 (Cal. 2002); *Van Grivensen v. G.R.H*, 711 N.W.2d 587, 593 (N.D. 2006).

In *Wooden I*, the Fourth Circuit found that a showing of greater than fifty percent is unnecessary because it "finds no support in the language of the Act. The Act requires the government to prove that the inmate will have serious difficulty refraining from re-offense … but it does not ask the finder of fact to determine exactly

how likely [the inmate] is to reoffend." *United States v. Wooden (Wooden I),* 693 F.3d 440, 460-61 (4th Cir. 2012).

In *State v. White* one of the dissenting opinions notes the many ways that "likely to recidivate" can be interpreted, concluding that the various definitions represent a "range of possibilities, and one too great to pass constitutional muster." *State v. White*, No. SC02-2277, 2004 Fla. LEXIS 2402 (Fla. Dec. 23, 2004) (Pariente, C.J., dissenting).

C. The Adam Walsh Act rulings inconsistently apply similar evidence to support or find against volitional control in commitment hearings; therefore this Court has a vested interest in establishing a uniform standard.

What must be shown to demonstrate lack of volitional control has been applied unevenly even within the Fourth Circuit. *Compare United States v. Caporale*, 701 F.3d. 128 (4th Cir. 2012) *with United States v. Hall*, 664 F.3d 456, 466 (4th Cir. 2012). Some courts have required a demonstrated lack of volitional control in order to commit, *see United States v. Caporale*, 701 F.3d 128, 142 (4th Cir. 2012) (finding that a release was proper because Caporale had refrained from viewing pornography while committed), while others note patterns of escalating conduct as grounds for establishing dangerousness*, see United States v. Bell*, 884 F.3d 500, 507 (4th Cir. 2018) (affirming order committing respondent despite respondent never having committed a contact offense due to "a pattern of escalating conduct, and what the Court finds to be several attempts at hands-on conduct…"). Still others point to changes while committed. *See United States v. Wooden (Wooden II)*, 887 F.3d 591, 608 n.7 (4th Cir. 2018) ("[W]hen Wooden was transferred to Butner in 2005, he sent a

Christmas card to the seven-year-old boy at the center of the 2005 laundry-room incident…There is no indication that Wooden has ever again attempted to correspond with children.").

In *United States v. Caporale*, the Fourth Circuit upheld the district court's judgment that Caporale could not be civilly committed, despite an approximate risk of recidivism at 25%. *United States v. Caporale*, 701 F.3d 128, 134-35 (4th Cir. 2012). Importantly, the court recognized that Caporale's behavior while confined would speak to control. *Id.* at 141 (noting "that no such [illicit] materials had been found in Caporale's possession during the ten months prior to hearing plausibly supports … an inference of control").

By contrast, in the *United States v. Hall,* the Fourth Circuit upheld the district court's finding that while Hall met prongs one and two (prior sexually violent offenses and a serious mental illness, abnormality, or disorder), he did not meet prong three, dangerousness, *despite* his "troubling history of failing to comply with institutional rules and supervised release conditions, as well as his continued sexual interest in pictures and drawings of prepubescent children." *United States v. Hall*, 664 F.3d 456, 466 (4th Cir. 2012).

In *United States v. Bolander*, the Fourth Circuit affirmed commitment despite the fact that the defendant had not committed a contact offense in over 20 years since strict supervision could explain Bolander's restraint rather than a "true change of heart." *United States v. Bolander*, 722 F.3d 199, 216 (4th Cir. 2013).

In *United States v. Volungus*, the First Circuit affirmed the commitment of Volungus despite the fact that he had only one contact offense many years before. *United States v. Volungus,* 730 F.3d 40, 49 (1st Cir. 2013). ("A court could reasonably conclude that an individual who has committed multiple offenses but successfully completed a rehabilitation program may be less dangerous than someone who has committed one offense but exhibits a perpetual desire or propensity to commit more offenses, even while in treatment.").

In *United States v. Antone*, the Fourth Circuit explained the importance of an individual's factual record. *See generally United States v. Antone,* 742 F.3d 151 (2014). In reversing a commitment order, the Fourth Circuit noted that in order to meet the serious difficulty prong, "the Government must demonstrate that the serious illness, as it has manifested in the particular respondent, has so significantly diminished his volitional capacity such that he is distinguishable from the ordinary dangerous but typical recidivist." *Id.* at 159 (internal quotations omitted). The court ruled that "Antone's behavior … reveals no acts that conceivably come close to the sort of malfeasance present in our aforementioned precedent. … The district court should have been aware of the uniqueness of Antone's factual record." *Id.* at 167.

III. *Kansas v. Crane* and *United States v. Comstock* explicitly left open Due Process challenges to the act and whether commitment for an emotional disorder is permissible; therefore this issue is ripe for adjudication.

A. To hold that a respondent is sexually dangerous, the court must find by clear and convincing evidence that there is a volitional control issue, and cases in various jurisdictions have handled this issue differently.

Two important state-law cases have addressed some similar issues of determining dangerousness for sex offender civil commitment, each decided prior to the enactment of the Adam Walsh Act. *Kansas v. Crane*, 534 U.S. 407 (2002) spoke only to volitional behavior, and explicitly stated that the Court was not issuing a ruling on purely emotional abnormalities. *Crane* discussed that pedophilia might be described "by a lay person … as a lack of control." *Id.* at 414 (2002). However, at this point, *Crane* was primarily referring to the context of *Kansas v. Hendricks*, 521 U.S. 346 (1997), where Mr. Hendricks himself stated that he could not control the urge to molest children. *Crane*, 534 U.S. at 414. As such, the Court in *Crane* agreed that its discussion of "controlling behavior" was limited to volitional challenges and held that "[t]he Court in *Hendricks* had no occasion to consider whether confinement based solely on "emotional" abnormality would be constitutional, and we likewise have no occasion to do so in the present case." *Crane*, 534 U.S. at 415.

Despite the guidance of *Crane*, district and appeals courts have considerable difficulty in defining and determining sexual dangerousness, even stating that "the 'serious difficulty refraining' assessment presented the most vexing issue." *United States v. Carta*, 690 F.3d 1 (1st Cir. 2012).

As a consequence, there is extremely limited case law concerning individuals who clearly suffer emotional abnormalities with no evidence of demonstrating a volitional inability or serious difficulty to refrain from sexually reoffending. Courts addressing the issue have all found some example of a volitional matter to address, such as possessing or creating child pornography while incarcerated. *See, United States v. Hall*, 664 F.3d 456, 466-67 (4th Cir. 2012) ("As the experts noted, Hall's pedophilia and antisocial personality disorder have led him to continue to break the rules and to seek out inappropriate sexual materials."). However, the logic in such cases often conflates volitional and emotional abnormalities, making claims such as "[a] person with an emotional impairment might be subject to fits of anger or meanness so extreme that he cannot control his actions." *In re Commitment of W.Z.*, 773 A.2d 97, 569 (N.J. 2001).

B. Although past offending is relevant to the inquiry of dangerousness, the respondent's present condition must be acknowledged.

The court in *Volungus* was tasked with determining the relationship between past offending and future likelihood of recidivism, ultimately holding that "while actual or attempted child molestation offenses may be telling evidence of just how sexually dangerous an individual is, this is not the only type of evidence that speaks to this trait." *United States v. Volungus*, 730 F.3d 40, 49 (1st Cir. 2013). In this case, the respondent was found to be sexually dangerous even though he only had a single prior sexual offense.

A recent Fourth Circuit opinion addressed the necessity of looking beyond past criminal offending to the "personal growth" of a respondent. *Wooden II*, 887 F.3d 591,

604-05 (4th Cir. 2018) (finding that the evaluator "focused too heavily on historical criminal behavior rather than [the respondent's] present condition").

By definition, a diagnosis of pedophilic disorder requires a past act with a child. The diagnosis does not, however, require current acts. It does permit a diagnosis based on current urges, but it also permits a diagnosis based only on fantasies. Through conflating these two options in the diagnosis, and assuming that past acts can ensure certainty of future acts, the court allowed a commitment of an individual who does not presently have any volitional control issues.

Furthermore, the law requires that, *as a result of a mental illness*, the individual is sexually dangerous. Although pedophilic disorder certainly can render someone volitionally impaired, fantasies alone do not speak to volition. However, to suggest that an individual diagnosed with pedophilic disorder is inherently dangerous and inherently lacks volitional control exclusively due to past actions overwhelmingly ignores the ability for individuals to recover or otherwise change. In the case of Mr. Blackledge, his most recent action that could speak to volitional impairment was a non-contact offense thirteen years ago.

IV. By allowing civil commitments based primarily on an individual's private fantasies, the court acted as thought police.

Since *Proctor*, a foundational principle of American jurisprudence is that "an unexecuted criminal intent is not punishable as a crime." *Proctor v. State*, 15 Okla. Crim. 338, 342 (1918). In 1969, this Court addressed freedom of thought in *Stanley v. Georgia*, finding that "[w]e are loath to give the government the power to punish us for our thoughts and not our actions. *Stanley v. Georgia,* 394 U.S. 557, 565 (1969). In

1992, the Court reaffirmed this principle, that "a person's inclinations and fantasies are his own and beyond the reach of the government." *Jacobson v. United States*, 503 U.S. 540, 551-52 (1992).

In a Second Circuit case, the court carefully weighed the line between fantasy and action, noting that the government has only the power to punish actions, not thoughts, stating that the government does not have "the power to criminalize an individual's expression of sexual fantasies, no matter how perverse or disturbing. Fantasizing about committing a crime, even a crime of violence against a real person whom you know, is not a crime." *United States v. Valle*, 807 F.3d 508, 511 (2d Cir 2015).

A Seventh Circuit case from just two years before the creation of the Adam Walsh Act discusses the fine line between sexual fantasy and a likelihood of child molestation. *See Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir 2004). In this case, Mr. Doe, who had a lengthy history of sexual crimes against children, was banned from public parks in his city after going to a park "looking for children." 377 F.3d at 759. In upholding the ban, the court distinguished between punishment for "pure thought" as opposed to "thought accompanied by action.":

> The City has not banned him from having sexual fantasies about children. It did not ban him from the public parks because he admitted to having sexual fantasies about children in his home or even in a coffee shop. The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of committing child molestation. He had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation.
>
> To characterize the ban as directed at "pure thought" would require us to close our eyes to Mr. Doe's actions. It also would require

> that we give short shrift to Mr. Doe's condition as an admitted pedophile who continues to have difficulty controlling his urges.

337 F.3d at 767.

Commitments based either primarily or exclusively on a current condition presenting as "pure thought" certainly violate fundamental American jurisprudential principles of legality such as the principle that no one should be punished for a status, behaving as the thought police, and criminalizing mental illnesses. It is imperative to recall that civil commitment can deprive an individual of their liberty interest for life, and the weight of this liberty interest must be balanced with the requirements for a showing of dangerousness.

V. Committing someone who has openly expressed his fantasies but does not have a volitional control issue will undermine and invalidate the effectiveness of the Adam Walsh Act in protecting the public.

Committing an individual, potentially indefinitely, for fantasies sets a dangerous stage for the future effectiveness of the Commitment and Treatment Program (CTP), and the ability for individuals who require mental health treatment but have not yet sought it.

1. Because the Adam Walsh Act requires that a respondent currently be in Federal custody but does *not* require that the respondent is in custody for a sexual offense, current inmates who may fantasize about sexual deviant activities will be resistant to seek help. They may fear that, by expressing their sexual fantasies, they are putting themselves at risk of civil commitment. Therefore, those who may suffer from disorders such as pedophilic disorder will not seek the treatment they need.

2. In commitment hearings, respondents will be reluctant to testify honestly about their fantasies, since such testimony may be the basis for their indefinite civil commitment. This will lead to individuals who may be sexually dangerous not being committed because they were simply dishonest.
3. Individuals who are civilly committed, similarly, will be resistant to be honest in treatment about their fantasies if they know they will be viewed as dangerous because of these fantasies alone. Already, in the CTP, inmates are hesitant to be open and honest with the treatment providers because they must waive confidentiality. Allowing courts to commit based on fantasy alone will send a clear signal to those in treatment that their pathway to release may lie in concealing their fantasies, thereby hindering treatment progress.
4. Commitment for fantasy is analogous to commitment for addiction. However, when an addict will no longer use a drug, they are released from commitment, not when they no longer fantasize about using a drug. A ruling that allows commitment for fantasy, not for action will instill a sense of hopelessness in respondents, and hopelessness is considered "counter-therapeutic" in sexual offender civil commitment settings. *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 859 (E.D. Mo. 2015) ("Nearly every witness who testified at trial … agreed that … there is a perception among committed individuals that the only way out … is to die. This hopelessness is counter-therapeutic and impedes the treatment progress of … residents.").

5. It is self-evident that individuals who are committed indefinitely are highly motivated to be released. Therefore, what is designed to be a therapeutic process becomes a contrivance. To the extent that disclosing fantasies helps define the therapeutic parameters of who can be released, it encourages respondents to lie to their therapists because those lies are more likely to result in their release from commitment than disclosure of their most intimate thoughts. As a result, individuals who very well may be sexually dangerous will be able to skillfully progress through treatment in dishonest pathways, ultimately securing their premature release, undermining the intended protective effect of the Adam Walsh Act.

Conclusion

For the foregoing reasons, the United States Supreme Court should grant the petition for certiorari.

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