NO. _____

IN THE
Supreme Court of the United States

JAMES VANDIVERE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

Jeffrey M. Young
Pro Bono Counsel
1310 Mordecai Drive
Raleigh, NC 27604
919-856-2514
jeff.young7777@gmail.com.com

Sharon L. Smith
Counsel of Record for Petitioner
PO Box 99815
Raleigh, NC 27624
(919) 599-2734
slsmith@ulslaw.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond Virginia 23219 (804) 644-0477

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United States v. Vandivere

United States Court of Appeals for the Fourth Circuit

October 25, 2023, Argued; December 8, 2023, Decided

No. 22-6118

Reporter
88 F.4th 481 *; 2023 U.S. App. LEXIS 32656 **; 2023 WL 8488135

UNITED STATES OF AMERICA, Petitioner — Appellee, v. JAMES DOW VANDIVERE, Respondent — Appellant.

Subsequent History: Rehearing denied by, En banc United States v. Vandivere, 2024 U.S. App. LEXIS 2592 (4th Cir., Feb. 5, 2024)

Prior History: [1]** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. (5:15-hc-02017-D). James C. Dever III, District Judge.

United States v. Vandivere, 2015 U.S. Dist. LEXIS 197841 (E.D.N.C., Feb. 12, 2015)

Disposition: AFFIRMED.

Core Terms

sexually, district court, burden of proof, detainee, custody, civil commitment, preponderance of evidence, disorder, illness, standard of proof, Adam Walsh Act, hebephilia, recidivism, offender, serious difficulty, sex offender, confinement, serious mental, proceedings, antisocial, witnesses, factors, clear and convincing evidence, sexual abuse, challenges, pubescent, features, stressed, asserts, civilly

Case Summary

Overview
HOLDINGS: [1]-In a discharge hearing under 18 U.S.C.S. § 4247(h) for a civilly committed sex offender, the district court correctly applied the preponderance of the evidence standard of proof set forth in 18 U.S.C.S. § 4248(e) because Fourth Circuit decisions had consistently applied that standard in such cases; [2]-Placing the burden of proof on the committed person to show recovery was not error because § 4248(e) required a showing that a committed person was no longer sexually dangerous, parties seeking relief usually had to justify the request, and allocating the burden of proof to the committed person did not violate procedural due process; [3]-The district court did not clearly err in finding that the committed person remained sexually dangerous because advanced age and good behavior while in custody did not outweigh lack of remorse and refusal to attempt sex offender treatment.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Standards of Review, Clearly Erroneous Review**

An appellate court reviews a district court's factual findings for clear error and its legal conclusions de novo.

Constitutional Law > ... > Case or Controversy > Standing > Elements

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

HN2[] **Standing, Elements**

The injury to the government, for purposes of standing to oppose the discharge of a civilly committed sex offender, is the potential release of a sexually dangerous person into society. This injury is traceable to the offender's prior conduct as a sexual predator and the district court's finding that he remains sexually dangerous. And it is likely to be redressed by his continued commitment.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Clear & Convincing Proof

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN3[] **Sex Offenders, Civil Commitments**

Civil commitment under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, applies to individuals who are already in the custody of the Bureau of Prisons (BOP); who are committed to the custody of the Attorney General because they have been deemed incompetent to stand trial pursuant to 18 U.S.C.S. § 4241(d); or who have had their criminal charges dropped solely because of their mental condition. § 4248(a). The Attorney General, his designee, or the Director of the BOP may certify an individual falling into one of these categories as sexually dangerous and petition a federal district court to order that person's civil commitment. Certification automatically stays that person's release from federal custody until a hearing where the district court determines whether the individual is in fact sexually dangerous. At this initial commitment hearing, the government bears the burden of proving that the individual is sexually dangerous by clear and convincing evidence. § 4248(d). If the government prevails, the person is taken into the custody of the Attorney General, who arranges for detention and treatment.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

HN4[] **Sex Offenders, Civil Commitments**

A person who has been civilly committed pursuant to the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, has several avenues to discharge. For example, the committed individual may collaterally attack his detention via habeas corpus. 18 U.S.C.S. § 4247(g). Another avenue comes from within the act itself. Under § 4248(e), when the director of the facility in which the person is being housed determines that 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 treatment, the director shall promptly file a certificate to that effect in the district court. The district court then either orders the discharge outright or holds a hearing to determine whether discharge is appropriate.

Criminal Law & Procedure > Sentencing > Mental Incapacity

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Discharge & Release of Adults

HN5 **Sentencing, Mental Incapacity**

Under 18 U.S.C.S. § 4247(h), a committed person may move for a discharge hearing at any time during such person's commitment and, if denied discharge after the hearing, renew the motion every 180 days. At the hearing contemplated in § 4247(h), 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. § 4247(d). The person shall be represented by counsel and will be appointed counsel if he is financially unable to obtain adequate representation.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN6 **Sex Offenders, Civil Commitments**

The burden of proof at a discharge hearing under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, is that the detainee must show he is no longer sexually dangerous by a preponderance of the evidence.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Preponderance of Evidence

HN7 **Sex Offenders, Civil Commitments**

The proper standard of proof at an Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, discharge hearing initiated via 18 U.S.C.S. § 4247(h) is a preponderance of the evidence. Section 4247(h) itself is silent about the standard of proof that attaches to a detainee-initiated hearing. The Adam Walsh Act is clear, however, as to the standard of proof in director-initiated hearings under § 4248(e): If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that he is not sexually dangerous or can be safely released under a prescribed regimen of treatment, the court shall order discharge. In Adam Walsh Act cases, the Fourth Circuit has consistently read § 4247(h) as a vehicle to access the discharge hearing delineated in § 4248(e). The § 4248(e) standard of proof thus applies to hearings initiated by § 4247(h) motions as well.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Preponderance of Evidence

HN8 **Sex Offenders, Civil Commitments**

Applying the standard of proof in 18 U.S.C.S. § 4248(e) to hearings initiated via 18 U.S.C.S. § 4247(h) is sound. Although the vehicle by which the discharge hearing is initiated may differ, the destination is the same: a hearing, conducted with the safeguards set out in § 4247(d), where the district court determines if the detainee can be released. Thus, the proper standard of proof in a discharge hearing is a preponderance of the evidence.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Clear & Convincing Proof

HN9[] **Sex Offenders, Civil Commitments**

Because the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, speaks in terms of showing recovery, rather than asking the government to prove non-recovery, the detainee is the one who must offer such proof. It would not make sense to place on the government the burden of proving precisely what it disagrees with: that the committed person is no longer sexually dangerous. The language of the statute thus indicates that the burden should fall on the committed individual. A burden-shifting framework makes sense here. By the time we get to a discharge hearing, the government has already met its initial burden of proving that the individual is sexually dangerous by clear and convincing evidence at the time of confinement. The burden then logically shifts to the committed individual to prove he has recovered. The committed individual is the one who seeks to alter the status quo, and the person who seeks court action should justify the request. Absent some reason to believe that Congress intended otherwise, therefore, the burden of persuasion lies where it usually falls, upon the party seeking relief.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Allocation

HN10[] **Procedural Due Process, Scope of Protection**

The proper allocation of burdens of proof in a given statutory scheme is a question of procedural due process. Courts therefore look to the three Mathews factors for guidance: (a) the private interest affected by the official action,; (b) the fairness and reliability of the existing procedures, and the probable value, if any, of additional procedural safeguards, and, finally, (c) the public interest, which includes the administrative burden and other societal costs that would accompany the requested procedure. While Mathews has the drawbacks of indeterminacy, it has the virtues of balance.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Challenges to Sex Offender Laws

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11[] **Constitutional Law, Substantive Due Process**

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection, and freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause. The private interest at stake is a weighty one. But that liberty interest is not absolute, and the governmental interest in protecting the public from mentally disturbed and sexually dangerous detainees should not be minimized.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN12[] **Sex Offenders, Civil Commitments**

Congress, in enacting the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, provided detainees with a number of guardrails. In the initial civil commitment hearing, procedures differ substantially from those that apply to a run-of-the-mill civil case in that they afford individuals rights traditionally associated with criminal proceedings, including the right to appointed counsel, the right to confront witnesses, and a heightened burden of proof. Even if the government is successful in the initial commitment proceeding, the individual is not condemned to indefinite confinement. He has access to various avenues for relief, one of which is renewable by the detainee himself under 18 U.S.C.S. § 4247(h), and one of which permits his caretakers to advocate on his behalf, as provided in 18 U.S.C.S. § 4248(e). In both proceedings, the individual bears a lesser burden to earn his discharge than the government bore to secure his confinement. And both proceedings come with the safeguards set out in § 4247(d). Finally, an individual has the option to collaterally attack his confinement. § 4247(g). In this way, Congress aimed to strike a balance between respecting individual liberty on the one hand and protecting the citizenry at large on the other.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN13[] **Sex Offenders, Civil Commitments**

If the government were forced to hold more frequent or more elaborate hearings under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, even if the detainee had little evidence of his rehabilitation, the government would bear an unnecessary hardship. At the very least, it would require the government to repeatedly recall the same expert witnesses and make the same claims about the detainee's behavior patterns. Placing the burden on the detainee at each discharge hearing helps to prevent such needless and wasteful repetition, as a hearing will only prove beneficial to the detainee if he can persuade the court that circumstances have changed such that he can be safely released. This scheme has the additional side effect of breeding positive incentives: the detainee is encouraged to participate in treatment while in commitment, so that he has proof of recovery at a subsequent discharge hearing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

HN14[] **Procedural Due Process, Scope of Protection**

On balance, the Mathews factors demonstrate that the allocation of the burden of proof on an Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, detainee complies with the Due Process Clause.

Criminal Law & Procedure > Sentencing > Mental Incapacity

Public Health & Welfare Law > ... > Mental Health Services > Commitment > Involuntary Commitment of Adults

HN15[] **Sentencing, Mental Incapacity**

For indefinite civil commitment to be justified, the

state must at all times contend that the detainee is both mentally ill and dangerous.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Civil Commitments

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN16 **Sex Offenders, Civil Commitments**

In a discharge hearing under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C.S. § 4248, the detainee bears the burden of proof to show his recovery by a preponderance of the evidence.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN17 **Clearly Erroneous Review, Findings of Fact**

A district court's factual findings are reviewed for clear error and its legal conclusions de novo. The clear error standard preserves the district court's role as the primary fact finder. Thus, a reviewing court is not entitled to reverse factual findings merely because it might have weighed the evidence differently. Further, evaluating the credibility of experts and the value of their opinions is a function best committed to the district courts, and the reviewing court should be especially reluctant to set aside a finding based on the trial court's evaluation of conflicting expert testimony.

Criminal Law & Procedure > Sentencing > Mental Incapacity

HN18 **Sentencing, Mental Incapacity**

The scope of illness, abnormality, or disorder in 18 U.S.C.S. § 4247(a)(6) is broad enough to include hebephilia. A mental disorder or defect need not necessarily be one so identified in the Diagnostic and Statistical Manual of Mental Disorders in order to meet the statutory requirement.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Classification

HN19 **Sex Offenders, Classification**

The question of whether a particular sex offender will reoffend requires more than a consideration of general statistics about the mine-run of sex offenders. Instead, district courts are tasked with considering the personal proclivities of each offender and what these idiosyncrasies might indicate about his risk of reoffending.

Counsel: ARGUED: Jeffrey M. Young, HITACHI ENERGY USA INC., Raleigh, North Carolina, for Appellant.

Rudy E. Renfer, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

ON BRIEF: Sharon Leigh Smith, UNTI & SMITH, Raleigh, North Carolina, for Appellant.

Michael F. Easley, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Judges: Before WILKINSON, NIEMEYER, and BENJAMIN, Circuit Judges. Judge Wilkinson wrote the opinion, in which Judges Niemeyer and Benjamin joined.

Opinion by: WILKINSON

Opinion

[*483] WILKINSON, Circuit Judge:

James Dow Vandivere appeals the district court order denying his motion for release from civil commitment under the Adam Walsh Act, 18 U.S.C. § 4248. Vandivere was convicted of various crimes involving the sexual exploitation of minors and sentenced to almost twenty years' imprisonment. As he neared the conclusion of his sentence, however, the government moved to civilly commit him, arguing that he remained sexually dangerous and could not be safely released into the community. The district court agreed and ordered that he be committed.

In August 2020, Vandivere filed a motion for discharge. **[**2]** After a hearing, the district court found that he remained sexually dangerous and denied his motion. Vandivere challenges the district court's ruling, arguing that he was wrongly forced to bear the burden of proof at the hearing. He also asserts that the district court erred in determining that he remains sexually dangerous. We reject Vandivere's **[*484]** challenges and affirm the judgment of the district court.

I.

A.

James Dow Vandivere was arrested in 1998 after a decades-long spree of sexually abusing preteen boys. He was roughly fifty years old at the time, aged enough to make his own choices and reckon (or not) with his own misconduct. Yet his victims were often fatherless and wayward, scarcely old enough to shave. Vandivere lured them in with companionship, with money, with promises he would help them fulfill their dreams. He assured them that the sexual acts they performed together were normal and nothing to be ashamed of. So they acquiesced.

Vandivere's abuse was cut short when he was arrested in May 1998. He was convicted in December 1998 of sexual exploitation of children, certain activities related to material involving sexual exploitation, and transportation of a minor with intent to **[**3]** engage in criminal sexual activity. He was sentenced to nearly twenty years in prison and three years of supervised release. Vandivere entered the custody of the Bureau of Prisons (BOP) and began to serve his time.

B.

As Vandivere's sentence neared its end, the government feared he could not be safely released into society. In January 2015, the government certified Vandivere as a sexually dangerous person pursuant to the Adam Walsh Act and petitioned the district court to civilly commit him. *See* 18 U.S.C. § 4248(a), (d). That certification triggered the requisite statutory hearing "to determine whether [Vandivere] is a sexually dangerous person." *Id.* § 4248(a). At that hearing, the government was required to demonstrate by clear and convincing evidence that: (1) Vandivere "engaged or attempted to engage in sexually violent conduct or child molestation," *id.* § 4247(a)(5) (the "prior conduct" element); (2) Vandivere "suffers from a serious mental illness, abnormality, or disorder," *id.* § 4247(a)(6) (the "serious mental illness" element); and (3) Vandivere "would have serious difficulty in refraining from sexually violent conduct or child molestation if released" as a result of his disorder, *id.* (the "serious difficulty" element). In November **[**4]** 2016, the district court found that the government had met its burden, and Vandivere was civilly committed to the custody of the BOP. *See id.* § 4248(d).

C.

In August 2020, after nearly four years of civil commitment, Vandivere filed a motion via 18 U.S.C. § 4247(h) seeking a discharge hearing before the district court in order to argue he was no longer sexually dangerous and could be released. Section 4247(h) is silent as to the burden of proof in this hearing. Vandivere filed a motion in limine contending that the burden of proof at the discharge hearing should be the same as at the initial commitment hearing: the government would bear the burden of proving Vandivere's sexual dangerousness by clear and convincing evidence. The government disagreed, asserting that the

burden had shifted to Vandivere to prove he was no longer sexually dangerous by a preponderance of the evidence.

The discharge hearing was held in May 2021. At the outset, the district court denied Vandivere's motion in limine and agreed with the government that Vandivere had the burden to demonstrate he was no longer sexually dangerous by a preponderance of the evidence. Vandivere conceded the first element of the sexual **[*485]** dangerousness test (the prior conduct element), **[**5]** but disputed elements two (the serious mental illness element) and three (the serious difficulty element). Five witnesses testified at the hearing. Because one of Vandivere's claims challenges the district court's assessment of this testimony, we think it proper to give an overview of that testimony here.

Three psychologists testified as expert witnesses. Dr. Gary Zinik and Dr. Dawn Graney testified on behalf of the government, and Dr. Luis Rosell testified on behalf of Vandivere.

Dr. Zinik, a clinical forensic psychologist, testified on behalf of the government. He opined that Vandivere continued to satisfy the elements of sexual dangerousness. As for the serious mental illness element, he diagnosed Vandivere with (a) other specified paraphilic disorder, hebephilia; and (b) other specified personality disorder, antisocial and narcissistic features. Hebephilia is a term used to describe adults with an enduring sexual interest in children around the age of pubescence. J.A. 216-17. Dr. Zinik testified that a diagnosis of hebephilia was proper for Vandivere because he suffered from a lifelong sexual preference for boys who are immediately post-pubescent or just prior to pubescence, typically **[**6]** preying on boys ages ten through fifteen. He discussed the harms to Vandivere's victims and how Vandivere targeted disadvantaged, homeless, and runaway boys. Regarding Vandivere's antisocial and narcissistic features, Dr. Zinik emphasized Vandivere's lack of remorse for his victims and his persistent failure to take responsibility for the harm he had wrought.

As for the serious difficulty element, Dr. Zinik stressed that Vandivere was not safe to be released. He conceded offenders older than sixty are typically unlikely to reoffend, and that Vandivere's age of seventy-two weighed in his favor. Dr. Zinik emphasized however, that, while rare, recidivism in older sex offenders occurs. Dr. Zinik referred to these individuals as "rare birds." J.A. 230. He testified to his belief that "Mr. Vandivere is one of those rare birds. He is one out of a hundred, maybe one out of a thousand, maybe one out of a million." *Id.* He emphasized that Vandivere showed several dynamic risk factors that exacerbated his likelihood of recidivism, including Vandivere's emotional identification with children, his poor problem-solving skills, his tendency to lie, and his distorted understandings of what constitutes **[**7]** sexual abuse. On this last risk factor, Dr. Zinik reported that Vandivere had recently confessed that he did not believe pubescent boys were children and that sex with a pubescent boy was not abuse. In sum, Dr. Zinik stressed that Vandivere was "one of those rare birds that we need to protect the community from" because of Vandivere's "current definition of sexual abuse, his current lack of understanding of his own offending history and the damage he caused, his current belief that he still wants to help teenage boys, [and] his current belief that he sees no reason why he shouldn't have contact with teenage boys." *Id.* at 230-31.

Dr. Graney, a psychologist for the Federal Bureau of Prisons, also testified on behalf of the government. As for the serious mental illness element, she diagnosed Vandivere with (a) other specified paraphilic disorder, hebephilia; and (b) other specified personality disorder, antisocial features. With respect to hebephilia, Dr. Graney emphasized that Vandivere had an extended history of preying on thirteen-, fourteen-, and fifteen-year-old boys, using drugs, pornography, or employment to groom them before escalating to sexual abuse. She detailed how Vandivere's **[**8]** fifty-plus **[*486]** years of deviant sexual interest in

pubescent boys caused immense harm to his victims. With respect to Vandivere's antisocial features, Dr. Graney stressed Vandivere's repeated criminal conduct, deceitful character, lack of remorse, and history of impulsive behavior. She acknowledged that some individuals age out of antisocial and narcissistic behaviors but stressed that Vandivere had not shed these tendencies even in his late age.

As for the serious difficulty element, Dr. Graney acknowledged that Vandivere was in the "advanced-age category" and that research shows "a very low risk of reoffense for that age category." J.A. 190. Nonetheless, she pointed out that it is important to consider a sex offender as an individual and take his personal characteristics into account when assessing sexual dangerousness. Based on a holistic consideration of Vandivere's case, Dr. Graney agreed that Vandivere was a "rare bird." J.A. 204. While she admitted that rare-bird status was a subjective determination, she emphasized that Vandivere's persistent denial of responsibility and refusal to receive sex offender treatment while in custody differentiated him from other sex offenders of his **[**9]** age. She likewise pointed out that over a fifty-year period, Vandivere's attitudes and beliefs about sexual abuse had not meaningfully changed.

Dr. Rosell, a clinical and forensic psychologist, testified on behalf of Vandivere. As for the serious mental illness element, Dr. Rosell argued that hebephilia could not serve as valid grounds for a civil commitment. He explained that the diagnosis was "controversial because there's no specific criteria for evaluators to make a determination whether it's present or not," and that it was not recognized in the fifth edition of The Diagnostic and Statistical Manual of Mental Disorders (DSM-V). J.A. 134. He emphasized Vandivere's rule-abiding behavior while in custody was an indication that his antisocial conduct may have diminished with age. As for the serious difficulty element, Dr. Rosell opined that Vandivere was not likely to reoffend. He testified that extensive research conducted over the preceding fifteen years had demonstrated that sex offenders older than sixty have a reduced rate of recidivism, and that offenders older than seventy have an even lower rate. Citing various studies, he put Vandivere's risk of recidivism at 5.9 percent. **[**10]** He testified that that "no matter how you look at it in terms of risk, there's never more than a 10 percent recidivism rate. It's always in the single digits." J.A. 133.

Regarding Vandivere's refusal to participate in sex offender treatment while in custody, Dr. Rosell testified that such treatment does reduce recidivism rates, but that the recidivism rates of those who do not undergo such treatment are still not very high. He dismissed reliance on dynamic risk factors, contending that most of these are generally not strong predictors of recidivism. He again pointed to Vandivere's compliant behavior while in custody as evidence that he could control his conduct if released. However, Dr. Rosell did concede that Vandivere had a history of lying to authorities, had molested children while out on supervision in 1971, and had indicated distorted understandings of sexual abuse.

As for lay witness testimony, Vandivere testified on his own behalf, as did his long-time friend, Denton Scott Wilson.

In his testimony, Vandivere admitted to engaging in inappropriate sexual contact with ten minors between 1966 and 1978, and then again with more minors in the 1980s and 1990s. However, he continued to **[**11]** deny any inappropriate sexual contact with the boys he was convicted of molesting in 1971 and asserted the boys concocted the **[*487]** allegations. He stressed that he had not engaged in sexual contact with a minor for at least twenty-three years. However, he admitted that he told Dr. Zinik he believed that as long as children were growing pubic hair and understood right from wrong, they were old enough to consent to sexual relationships. When asked why he had repeatedly declined sex offender treatment while in custody,

he claimed that he did not trust the prison therapists. However, he stressed that he "absolutely" would comply with such treatment if it were ordered as a condition of his release. J.A. 83.

Denton Scott Wilson also testified on behalf of Vandivere. Wilson met Vandivere in 1989, when Wilson was eighteen years old. Wilson was friends with one of Vandivere's victims. Vandivere was never sexually inappropriate with Wilson, and Wilson was unaware at the time that Vandivere was abusing minors. Wilson owned a cabin in a remote area of Washington State and offered it to Vandivere as a place to live if he were discharged. This cabin was six hours away from where Wilson lived. Wilson testified **[**12]** that he would report Vandivere if he ever learned about Vandivere abusing a minor.

D.

The district court orally announced its findings of facts and conclusions of law on the record in December 2021. It stated that it "reviewed the entire record and all exhibits from both Vandivere's original trial and from Vandivere's Section 4247(h) trial," and that it "made credibility determinations concerning the witnesses who testified at the 4247(h) trial." J.A. 260. The court also considered various reports the experts had prepared after evaluations of Vandivere. The court then explained that Vandivere had failed to meet his burden of proving he was no longer sexually dangerous.

As for the serious mental illness element, the district court found persuasive Dr. Zinik's and Dr. Graney's diagnoses of hebephilia and other specified personality disorder, antisocial and narcissistic features. Regarding the serious difficulty element, the district court found that Vandivere failed to demonstrate he would not have serious difficulty in refraining from child molestation if released either unconditionally or conditionally. Its analysis focused on "Vandivere's volitional control in light of such features of the case as **[**13]** the nature of the psychiatric diagnoses and the severity of his mental illnesses, abnormalities, or disorders, in such a way that distinguish Vandivere from the dangerous but typical recidivist convicted in an ordinary criminal case." J.A. 294 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 22 S. Ct. 867, 151 L. Ed. 2d 856 (2002)). The court emphasized that this determination "requires more than relying on recidivism rates of past offenders but requires an analysis of a range of different factors." J.A. 293. The court thus considered the record as a whole,

> including Vandivere's [prior] failure on supervision, his resistance to treatment, his medical conditions, his age, his long-standing and continued deviant thoughts, his cognitive distortions, his impulsivity, his actuarial risk assessment, his dynamic risk factors, his lack of credibility, his conduct while incarcerated, and the historical nature of his offenses, both sexual and non-sexual.

J.A. 295.

Additionally, the court gave "greater weight to the persuasive opinions of Drs. Graney and Zinik" than to the opinion of Dr. Rosell, as "[t]heir analysis of Vandivere's sexual dangerousness [was] more thorough, better reasoned, better supported by the record, and better supported by research, especially in light **[**14]** of the factors" **[*488]** the Fourth Circuit has found relevant to an analysis of sexual dangerousness. J.A. 296.

In sum, the district court concluded that Vandivere had failed to show by a preponderance of the evidence that he was no longer sexually dangerous and denied his motion for discharge.

Vandivere timely appealed the order of the district court. He argues that the district court erred in making him shoulder the burden of proof at his discharge hearing. Vandivere also challenges the district court's conclusion that he remains sexually dangerous.[*] ***HN1***[↑] We review the district court's

[*] Vandivere also asserts that the government lacks standing in the present action. But we can easily reject this claim. ***HN2***[↑] The injury to the government here is the potential release of a sexually

factual findings for clear error and its legal conclusions de novo. *United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012).

II.

This case principally concerns the Adam Walsh Child Protection and Safety Act of 2006, codified at 18 U.S.C. § 4248. Enacted in the wake of the gruesome kidnapping and murder of six-year-old Adam Walsh, the statute aims to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." Pub. L. No. 109-248, 120 Stat. 587. Among other provisions, the Act created novel sex-offender registration and notification requirements; strengthened various laws penalizing sexual and violent crimes against children; **[**15]** and, pertinent here, instituted a procedure for federal civil commitment of sexually violent predators.

HN3[] Civil commitment under the Adam Walsh Act applies to individuals who are already in the custody of the BOP, such as Vandivere; who are committed to the custody of the Attorney General because they have been deemed incompetent to stand trial pursuant to 18 U.S.C. § 4241(d); or who have had their criminal charges dropped solely because of their mental condition. 18 U.S.C. § 4248(a). The Attorney General, his designee, or the Director of the BOP may certify an individual falling into one of these categories as "sexually dangerous" and petition a federal district court to order that person's civil commitment. *Id.* Certification automatically stays that person's release from federal custody until a hearing where the district court determines whether the individual is in fact "sexually dangerous." *Id.* At this initial commitment hearing, the government bears the burden of proving that the individual is sexually dangerous by clear and convincing evidence. *Id.* § 4248(d). If the government prevails, the person is taken into the custody of the Attorney General, who arranges for detention and treatment. *Id.*

HN4[] A person who has been civilly committed **[**16]** pursuant to the Adam Walsh Act has several avenues to discharge. For example, the committed individual may collaterally **[*489]** attack his detention via habeas corpus. *Id.* § 4247(g). Another avenue comes from within the Act itself. Under § 4248(e), when the director of the facility in which the person is being housed determines that 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 treatment, the director "shall promptly file a certificate to that effect" in the district court. The district court then either orders the discharge outright or holds a hearing to determine whether discharge is appropriate. *Id.*

Vandivere himself pursued discharge under a related statute, 18 U.S.C. § 4247(h). This provision provides a channel for a variety of committed people, including Adam Walsh detainees, to challenge their commitments. ***HN5***[] Under § 4247(h), the committed person may move for a discharge hearing "at any time during such person's commitment" and, if denied discharge after the hearing, renew the motion every 180 days. At the hearing contemplated in § 4247(h), "[t]he person shall be afforded an opportunity to testify, to present evidence, **[**17]** to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." *Id.* § 4247(d). The person "shall be represented by counsel" and will be appointed counsel if "he is financially unable to obtain adequate representation." *Id.*

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dangerous person into society. *See United States v. Searcy*, 880 F.3d 116, 124 (4th Cir. 2018) (explaining that in an Adam Walsh Act commitment proceeding, "the government is exercising its constitutional power to civilly commit an individual for the protection of the public at large"); *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010) (holding Congress can enact legislation which "define[s] an injury in fact to the United States" and noting "the government would have standing to enforce its own law"). This injury is traceable to Vandivere's prior conduct as a sexual predator and the district court's finding that he remains sexually dangerous. And it is likely to be redressed by his continued commitment.

As recounted above, Vandivere was given a hearing before the district court after filing a § 4247(h) motion. At the conclusion of this hearing, the district court found that Vandivere failed to establish he was no longer sexually dangerous and ordered he remain in civil commitment. We turn now to Vandivere's challenges to the district court's decision.

III.

Vandivere challenges the district court's ruling on two grounds: (A) that the district court wrongly forced him to bear the burden of proof and (B) that, regardless of the burden of proof, the district court improperly weighed the evidence. We take each in turn.

A.

Vandivere argues that the district court erred when it forced him to bear the burden of proving he was no longer sexually dangerous by a preponderance of the evidence, and in doing so violated his due process rights. He maintains, as he argued in his motion in limine below, that the burden should have been on the government to **[**18]** show that he remained sexually dangerous by clear and convincing evidence.

HN6[⬆] We disagree. The statute and our precedents make clear that the burden of proof at an Adam Walsh discharge hearing is just as the district court said: the detainee must show he is no longer sexually dangerous by a preponderance of the evidence. And despite Vandivere's protests, the Supreme Court's due process decisions do not make that allocation unconstitutional. In the sections below, we start with the statutory framework before moving to Vandivere's due process arguments.

1.

There are really two questions here. First, *what* is the *standard* of proof? Second, *who* bears the *burden* of proof?

HN7[⬆] The statutory scheme confirms that the proper standard of proof at an Adam Walsh discharge hearing initiated via § 4247(h) is a preponderance of the evidence. It is true that § 4247(h) itself is silent about the standard of proof that attaches to a detainee-initiated hearing. **[*490]** The Adam Walsh Act *is* clear, however, as to the standard of proof in director-initiated hearings under § 4248(e): "If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that" he is not sexually dangerous or can be safely "released **[**19]** under a prescribed regimen" of treatment, the court shall order discharge. In Adam Walsh Act cases, this circuit has consistently read § 4247(h) as a vehicle to access the discharge hearing delineated in § 4248(e). *See United States v. Maclaren*, 866 F.3d 212, 218 (4th Cir. 2017) (referring to a § 4247(h) motion as a "motion for a § 4248 discharge hearing"). Section 4248(e)'s standard of proof thus applies to hearings initiated by § 4247(h) motions as well. *See Searcy*, 880 F.3d at 120 (applying the § 4248(e) standard of proof to a hearing initiated by a § 4247(h) motion); *United States v. Comstock*, 627 F.3d 513, 516 (4th Cir. 2010) (same).

HN8[⬆] Applying the standard of proof we find in § 4248(e) to hearings initiated via § 4247(h) is sound. Although the vehicle by which the discharge hearing is initiated may differ, the destination is the same: a hearing, conducted with the safeguards set out in § 4247(d), where the district court determines if the detainee can be released. It is altogether unclear why the standard of proof would change because the director is advocating on behalf of the detainee, rather than the detainee advocating on behalf of himself. We thus agree with the district court that the proper standard of proof in a discharge hearing is a preponderance of the evidence.

That leaves us with the question of *who* bears the *burden* of proof. ***HN9***[⬆] Because "[t]he statute speaks in terms of showing recovery, rather than asking the **[**20]** government to prove non-recovery," *United States v. McAllister*, 963 F. Supp. 829, 833 (D. Minn. 1997), we readily conclude that the detainee is the one who must offer such proof.

It would not make sense to place on the government the burden of proving precisely what it disagrees with: "that the committed person is no longer sexually dangerous." *United States v. Wetmore*, 812 F.3d 245, 248 (1st Cir. 2016). The language of the statute thus indicates that the burden should fall on the committed individual.

A burden-shifting framework makes sense here. By the time we get to a discharge hearing, the government has already met its initial burden of proving that the individual is sexually dangerous by clear and convincing evidence at the time of confinement. *See id.* The burden then logically shifts to the committed individual to prove he has recovered. *See United States v. Barrett*, 691 F. App'x 754, 755 (4th Cir. 2017). The committed individual is the one who seeks to alter the status quo, and in our system "the person who seeks court action should justify the request." C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 104 (3d ed. 2003). "Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

Our interpretation is confirmed by the treatment of a similar **[**21]** statute, 18 U.S.C. § 4246, which concerns the civil commitment of mentally ill individuals whose release into society would create "a substantial risk of bodily injury to another person or serious damage to property of another." *Id.* § 4246(a). Like the Adam Walsh Act, this statute permits the director of the facility in which the individual is being housed to certify that the individual's release would no longer pose a danger to society. Certification triggers a hearing **[*491]** where if the court "finds by a preponderance of the evidence that the person has recovered" from his mental illness to the extent that he is no longer dangerous, the court shall order discharge. *Id.* § 4246(e). And detainees committed pursuant to § 4246 can move for their own discharge via § 4247(h), just as Adam Walsh detainees can. Courts that have considered the issue have thus concluded that § 4247(h) movants seeking to be released from § 4246 custody bear the burden of proving they no longer pose a danger to society by a preponderance of the evidence. *United States v. Evanoff*, 10 F.3d 559, 563 (8th Cir. 1993); *McAllister*, 963 F. Supp. at 833; *United States v. Taylor*, 513 F. App'x 287, 290 (4th Cir. 2013) (per curiam); *United States v. Anderson*, 104 F.3d 359 [published in full-text format at 1996 U.S. App. LEXIS 33365] *5 n.12 (4th Cir. 1996) (unpublished). The same goes for § 4247(h) movants seeking to be released from Adam Walsh Act custody.

2.

Vandivere asserts that, regardless of what the statute mandates, forcing detainees to bear the burden of proof at **[**22]** their own discharge hearings violates their due process rights. ***HN10***[] The proper allocation of burdens of proof in a given statutory scheme is a question of procedural due process. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Santosky v. Kramer*, 455 U.S. 745, 758, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). We therefore look to the three factors elucidated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), for guidance: (a) "the private interest . . . affected by the official action," *id.*; (b) "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards," *id.* at 343; and, finally, (c) "the public interest," which "includes the administrative burden and other societal costs" that would accompany the requested procedure, *id.* at 347. While *Mathews* has the drawbacks of indeterminacy, it has the virtues of balance, which seem especially appropriate to this setting.

HN11[] *a. The private interest at stake*. The Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," *Addington*, 441 U.S. at 425, and that "[f]reedom from bodily restraint has always been at the core of the liberty protected by

the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). It cannot be denied, then, that the private interest at stake is a weighty one. But "that liberty interest is not absolute," *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), and the **[**23]** governmental interest in protecting the public from mentally disturbed and sexually dangerous detainees should not be minimized. *See Mathews*, 424 U.S. at 340-43.

b. Evaluation of existing procedures; value of potential additional safeguards. ***HN12***[⬆] Congress, in enacting the Adam Walsh Act, provided detainees with a number of guardrails. Start with the initial civil commitment hearing, in which procedures "differ substantially from those that apply to a run-of-the-mill civil case in that they afford individuals rights traditionally associated with criminal proceedings, including the right to appointed counsel, the right to confront witnesses, and a heightened burden of proof." *Searcy*, 880 F.3d at 125.

Even if the government is successful in the initial commitment proceeding, the individual is not condemned to indefinite confinement. He has access to various avenues for relief, *see supra* Part II, one of which is renewable by the detainee himself, **[*492]** 18 U.S.C. § 4247(h), and one of which permits his caretakers to advocate on his behalf, *id.* § 4248(e). In both proceedings, the individual bears a lesser burden to earn his discharge than the government bore to secure his confinement. And both proceedings come with the safeguards set out in § 4247(d). Finally, an individual has the option **[**24]** to collaterally attack his confinement. *Id.* § 4247(g). In this way, Congress aimed to strike a balance between respecting individual liberty on the one hand and protecting the citizenry at large on the other. Courts should not lightly overturn what was obviously a thorough and concerted effort on the part of a coordinate branch of government to weigh the personal and public stakes at issue.

c. The public interest. ***HN13***[⬆] If the government were forced to hold more frequent or more elaborate hearings, even if the detainee had little evidence of his rehabilitation, the government would bear an unnecessary hardship. At the very least, it would require the government to repeatedly recall the same expert witnesses and make the same claims about the detainee's behavior patterns. Placing the burden on the detainee at each discharge hearing helps to prevent such needless and wasteful repetition, as a hearing will only prove beneficial to the detainee if he can persuade the court that circumstances have changed such that he can be safely released. The existing scheme has the additional side effect of breeding positive incentives: the detainee is encouraged to participate in treatment while in commitment, so **[**25]** that he has proof of recovery at a subsequent discharge hearing. Shifting the burden to the government would eviscerate these positive incentives and undermine the statute's general thrust towards rehabilitation.

HN14[⬆] On balance, therefore, the *Mathews v. Eldridge* factors demonstrate that the allocation of the burden of proof on an Adam Walsh Act detainee complies with the Due Process Clause.

Vandivere, however, tried to avoid the *Mathews* inquiry entirely by invoking three Supreme Court precedents in support of his claim: *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); and *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). None of these precedents can bear the weight Vandivere attempts to place on them.

Start with *Addington*. There, the Supreme Court considered the constitutionally requisite standard of proof in initial civil commitment proceedings. 441 U.S. at 419-20. The Court held that to civilly commit an individual in the first instance, the government must prove by clear and convincing evidence that the individual is mentally ill and

dangerous. *Id.* at 431. This "middle level of burden of proof" between a preponderance of the evidence standard and a proof beyond a reasonable doubt standard strikes "a fair balance between the rights of the individual and the legitimate concerns of the state." *Id.*

Addington does little to help Vandivere. No one disputes **[**26]** that the government has the burden of proof in the initial commitment proceedings, a burden it met here. And nothing in *Addington* indicates that the government must be forced to bear this burden each time a civilly committed individual moves for discharge, which could be as often as every 180 days. 18 U.S.C. § 4247(h).

Vandivere next argues that *Foucha* established the principle that "in matters involving civil commitment, the burden must at all times be on the Government." **[*493]** Appellant's Br. 29. But *Foucha* said no such thing. In *Foucha*, a criminal defendant was committed to a psychiatric hospital on the grounds that he was mentally ill and dangerous after being found not guilty by reason of insanity. 504 U.S. at 73-74. At a subsequent discharge hearing, the state no longer contended he was mentally ill, and thus sought to confine him indefinitely based on dangerousness alone. *Id.* at 75, 80. ***HN15***[⬆] The Supreme Court held that for indefinite civil commitment to be justified, the state must at all times contend that the detainee is both mentally ill and dangerous. *Id.* at 77, 83. Here, the government continues to assert that Vandivere remains both mentally ill and dangerous; indeed, the government put forth evidence at Vandivere's discharge hearing to attest **[**27]** to exactly that.

Finally, Vandivere points to *Hendricks* as establishing that, for a civil commitment scheme to be constitutional, the state cannot shift the burden of proof at discharge proceedings to the detainee. But this is too broad a reading of the case. *Hendricks* concerned a state law predecessor of the Adam Walsh Act. 521 U.S. at 350. In describing the statute, the Court noted that "[i]n addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards." *Id.* at 353. In subsequent discharge proceedings, "[i]f the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement." *Id.*

From this description of the statute, Vandivere tries to extract a constitutional rule. He posits that the statute's lack of burden shifting was a necessary condition of its constitutionality. But the Court's ultimate conclusion that the statute complied with the Due Process Clause did not rest on burdens of proof. Rather, the Court upheld the statute against a challenge that it ran counter to *Foucha* and *Addington* because it allowed for civil commitment of those with a mere "mental abnormality," a "term **[**28]** coined by the Kansas Legislature," rather than those with a "mental illness." *Id.* at 358-59. The Court rejected this assertion, holding that "the term 'mental illness' is devoid of any talismanic significance." *Id.* at 359. Because the statute "require[d] a finding of future dangerousness, and then link[ed] that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior," the statute complied with the Due Process Clause. *Id.* at 358. The statute's lack of burden shifting simply did not play into the Court's analysis.

None of the precedents Vandivere cites, then, render the Adam Walsh Act constitutionally suspect, and we decline to read into the meticulous efforts of Congress constitutional problems where there are none. Unwinding these interrelated efforts either piecemeal or wholesale would produce a perfect mess. ***HN16***[⬆] We therefore agree with the district court and hold that, in an Adam Walsh Act discharge hearing, the detainee bears the burden of proof to show his recovery by a preponderance of the evidence.

IV.

Vandivere next contends that, regardless of the burden of proof, the district court erred in

concluding that he remained **[**29]** sexually dangerous.

HN17[] We review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Charboneau*, 914 F.3d 906, 912 (4th Cir. 2019). The clear error standard preserves the **[*494]** district court's role as the primary fact finder. Thus, a reviewing court is not entitled to reverse factual findings merely because it might have weighed the evidence differently. *United States v. Wooden*, 693 F.3d 440, 451 (4th Cir. 2012). Further, "[e]valuating the credibility of experts and the value of their opinions is a function best committed to the district courts," and the reviewing court "should be especially reluctant to set aside a finding based on the trial court's evaluation of conflicting expert testimony." *Hendricks v. Cent. Reserve Life Ins. Co.*, 39 F.3d 507, 513 (4th Cir. 1994).

As discussed above, the district court concluded that Vandivere failed to meet his burden of proving he was no longer sexually dangerous after a consideration of the entire record, which included expert testimony, lay witness testimony, and evidentiary reports. The district court carefully evaluated the credibility of the witnesses and cogently explained its conclusions on the record. We have not been left with "the definite and firm conviction" that the district court erred in concluding Vandivere remained sexually dangerous. *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001). Instead, the district court's assessment **[**30]** of the evidence appears reasoned, balanced, and well-informed.

Vandivere nonetheless criticizes the district court for disregarding Dr. Rosell's opinion that hebephilia is not a valid basis for civil commitment, due to its exclusion from the DSM-V. ***HN18***[] However, this Court has already rejected that very same argument, holding that "the scope of 'illness, abnormality, or disorder' in § 4247(a)(6) is certainly broad enough to include hebephilia," and that "a mental disorder or defect need not necessarily be one so identified in the DSM in order to meet the statutory requirement." *United States v. Caporale*, 701 F.3d 128, 136-37 (4th Cir. 2012) (quoting *United States v. Carta*, 592 F.3d 34, 39-40 (1st Cir.2010)) (internal quotation marks omitted); *see also Hendricks*, 521 U.S. at 359 (holding that definitions of mental illness in civil commitment statutes need not track precise medical definitions).

Vandivere also protests that the district court erred in relying on the government's rare-bird theory. He asserts that the theory is entirely subjective and contradicts the weight of objective research that suggests a sex offender of Vandivere's age is highly unlikely to reoffend. But ***HN19***[] the question of whether a particular sex offender will reoffend requires more than a consideration of general statistics about the mine-run of sex offenders. Instead, district **[**31]** courts are tasked with considering the personal proclivities of each offender and what these idiosyncrasies might indicate about his risk of reoffending. *See, e.g., Charboneau*, 914 F.3d at 917 n.10; *United States v. Perez*, 752 F.3d 398, 408 (4th Cir. 2014); *United States v. Heyer*, 740 F.3d 284, 292-94 (4th Cir. 2014); *Hall*, 664 F.3d at 466. The district court was thus well within its discretion to evaluate the statistical evidence in light of Vandivere's own foibles, most notably his utter lack of remorse and persistent refusal to participate in sex offender therapy, and conclude that Vandivere remained sexually dangerous, despite his advanced age.

Finally, Vandivere asserts that the district court committed reversible error due to its "inadequate consideration of certain substantial evidence," namely, Vandivere's positive behavior during confinement. Appellant's Reply Br. 23 (quoting *United States v. Antone*, 742 F.3d 151, 165 (4th Cir. 2014)). He points out that all three experts agreed that Vandivere has not been a management problem while in custody, and that his last sexually based infraction was fifteen years ago. He argues that this demonstrates he can control his **[*495]** behavior.

He therefore asserts that the district court's refusal to properly account for this evidence warrants reversal.

We reject this argument. The district court did consider Vandivere's behavior while in custody, but correctly noted that **[**32]** "there are no 13-to 15-year-old boys in the BOP." J.A. 298. Further, the court emphasized that Vandivere continued to demonstrate cognitive distortions about sexual abuse into the present, such as his belief that pubescent boys could validly consent to sex with an adult, that he refused to "even attempt" sex offender treatment while in custody, and that his suggested release plan to live in Wilson's remote cabin was not "remotely acceptable." J.A. 295, 298-99.

Thus, we are far from a situation where the district court ignored "substantial evidence in the record indicating that [Vandivere] has developed a level of general and social self-regulation" and engaged in a "decade[s]-long process of rehabilitation." *Antone*, 742 F.3d at 167, 169. Nor is it the case that the district court reached its conclusions "by relying on a flawed expert opinion [or] by ignoring or otherwise failing to account for [a] substantial body of contradictory evidence." *Wooden*, 693 F.3d at 461. On the contrary, the record reflects that "the district court carefully considered the evidence before it, and its factual findings represent a permissible and reasonable interpretation of the evidence presented at the hearing." *United States v. Bolander*, 722 F.3d 199, 216 (4th Cir. 2013).

V.

We end with a brief observation on the **[**33]** peculiarity of civil commitment. We would be remiss if we did not comment on the oddity of a system that deprives individuals so fully of their liberty outside the context of criminal confinement. Indeed, the concept may strike one as unseemly in a society founded on higher notions of justice and redemption.

But we would also be remiss if we failed to acknowledge the horrid details of Vandivere's crimes. The callousness and cruelty with which he subjected his young victims to lifetimes of trauma cannot be dismissed here. We do not raise the brutality of his abuse to allude to some moralistic desire to make him pay for what he has done, however. He has already served his time in prison for that purpose. Rather, his past crimes inform what the district court understood it was protecting the public from in the present. In its view, the risk of recurrence upon release had not dissipated, and we have no basis for upsetting the trial court's judgment.

AFFIRMED

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA, Petitioner, vs. JAMES DOW VANDIVERE, Respondent.	5:15-HC-02017-D

DECEMBER 3, 2021
FINDINGS OF FACT/CONCLUSIONS OF LAW
BEFORE THE HONORABLE JAMES C. DEVER III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

On Behalf of the Petitioner:

RUDY E. RENFER, ASSISTANT U.S. ATTORNEY
LAUREN A. GOLDEN, ASSISTANT U.S. ATTORNEY
U.S. Attorney's Office
150 Fayetteville Street, Suite 2100
Raleigh, North Carolina 27601

On Behalf of the Respondent:

WILLIAM MICHAEL DOWLING, Esq.
The Dowling Law Firm, PLLC
P.O. Box 27843
Raleigh, North Carolina 27611

AMY M. CONDON, CRR, RPR, CSR
Official Court Reporter
United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

(Friday, December 3rd, 2021, commencing at 1:30 p.m.)

P R O C E E D I N G S

THE COURT: Good afternoon, and welcome to the United States District Court for the Eastern District of North Carolina.

We're here today, I'm going to announce my findings and conclusions in connection with the motion that James Dow Vandivere filed under the Adam Walsh Act under 18 U.S.C., Section 4247(h).

As in prior cases, I'm going to read my findings and conclusions into the record. Obviously, a transcript will be made, and then I'll enter a short order incorporating by reference those findings and conclusions.

Mr. Renfer and Ms. Golden are here on behalf of the United States. Mr. Dowling is here on behalf of Mr. Vandivere, and Mr. Vandivere is here by video at his request.

If at any time during the hearing, Mr. Vandivere, we lose the connection we will stop and try and get it back; but to the extent that you can't hear me or something, just please raise your hand.

MR. VANDIVERE: Okay. Can you see me okay?

THE COURT: Yes, sir, I can.

MR. VANDIVERE: All right.

THE COURT: Pursuant to 18 U.S.C., Section 4247(h), Respondent, James Vandivere, seeks to be released from his

civil commitment as a sexually dangerous person who is sexually dangerous to others under the Adam Walsh Child Protection and Safety Act of 2006 codified at 18 U.S.C., Section 4247-4248.

Under 18 U.S.C., Section 4247(h), a person, such as Vandivere, who the Court has committed as sexually dangerous to others may file a motion for hearing after 180 days has expired from his commitment. See 18 U.S.C., Section 4247(h).

At the hearing, the Court should consider the detainee's "behavior in prison and his progress in treatment, as well as the rest of the record before the district court at the time of any such request for discharge." United States v. Charboneau, 914 F.3d 906, 917 n.10 (4th Cir. 2019); *United States v. Wooden*, 887 F.3d 591, 594-610 (4th Cir. 2018).

At the hearing, Vandivere must prove by a preponderance of the evidence that he is no longer sexually dangerous to others under the Act. See *United States v. Searcy*, 880 F.3d 116, 120 (4th Cir. 2018); *United States v. Maclaren*, 866 F.3d 212, 216-219 (4th Cir. 2017); *United States v. Barrett*, 691 F.App'x 754, 755 (4th Cir. 2017)(per curiam)(unpublished); *United States v. Wetmore*, 812 F.3d 245, 248 (1st Cir. 2016); accord *United States v. Conroy*, 546 F.App'x 311, 314 (4th Cir. 2013) (per curiam)(unpublished).

On January 29th, 2015, the government filed a certification of a sexually dangerous person against Vandivere pursuant to 18 U.S.C., Section 4248.

Vandivere completed his federal term of incarceration for his most recent criminal convictions on July 12th, 2015.

On September 7th, 2016, the Court held a trial in Vandivere's Adam Walsh case. During the trial, Vandivere testified, as did Dr. Mark Hastings, Dr. Dawn Graney, Dr. Gary Zinik, and Dr. Joseph Plaud. On.

November 16th, 2016, the Court entered detailed findings of fact and conclusions of law and found Vandivere sexually dangerous to others under the Adam Walsh Act.

On July 5th, 2018, the United States Court of Appeals for the Fourth Circuit affirmed this Court's judgment committing Vandivere to the custody of the Bureau of Prisons pursuant to the Adam Walsh Act. See *United States v. Vandivere*, 729 F.App'x 265, 266 (4th Cir. 2018)(per curiam)(unpublished.)

On August 18th, 2020, Vandivere moved to be released from BOP custody pursuant to 18 U.S.C., Section 4247(h). On May 12th, 2021, the Court held a hearing on Vandivere's motion.

The Court now enters these findings of fact and conclusions of law. Before doing so, the Court has reviewed the entire record and all exhibits from both Vandivere's original trial and from Vandivere's Section 4247(h) trial. The Court also has made credibility determinations concerning witnesses who testified at the 4247(h) trial, including Vandivere, Denton Scott Wilson, Dr. Luis Roswell, Dr. Dawn

Graney, and Dr. Gary Zinik.

Vandivere, now age 73, was born on July 31st, 1948, in Tulsa, Oklahoma. Alcidimus and Velma Vandivere adopted him as an infant. Vandivere's parents divorced when he was about eight years old, and he remained with his mother Velma. Vandivere's parents are now deceased.

In 1968, Vandivere married a woman named Judy, but that marriage was annulled after about a year. Vandivere also reported to the probation officer who authored his PSR in 1999 in his federal case that Judy and his unborn child were killed in a car accident. Vandivere later admitted that he lied about the fact.

In 1978, he married Robin Tomkins and they had three children. They divorced in 1991.

In the early '90s, Vandivere dated a woman named Karen Wilson for approximately four years.

Vandivere did not graduate from high school but obtained his GED while incarcerated.

Vandivere has training as an electrician and has worked as an electrician when he has not been incarcerated.

Since May 1998, Vandivere has been incarcerated on his most recent sex offenses or as a detainee under the Adam Walsh Act. Vandivere completed his federal term of incarceration on July 12th, 2015. He has been detained in BOP custody pursuant to 18 U.S.C., Section 4247 and 4248 since

July 12th, 2015.

As for Vandivere's sexual criminal history against children, it is extensive. During the 4247(h) hearing, Vandivere admitted to having, quote, "somewhere in the neighborhood of 10," end quote, child victims between 1966 and 1978. And the number 10 doesn't include Josh Haskins in the 1990s and Darren Meyer in the 1980s.

On August 10th, 1971, Vandivere was arrested in Oklahoma for two counts of lewd molestation.

On October 21st, 1971, Vandivere pleaded guilty to outraging the public decency and received two consecutive one-year sentences.

The offense conduct involved two counts. In the first incident, Vandivere molested a 10 or 11-year-old male by placing his mouth on the child's penis. This offense occurred at a church. The second incident occurred when Vandivere and a friend used their status as Boy Scout leaders to molest two young males under the age of 14 by placing the boys' penises in their mouths. Vandivere falsely denied any inappropriate physical contact with the boys at his original 4248 trial and contends the boys made up the charges against him. At his 4247(h) hearing, Vandivere continued the denial. This false denial is a cognitive distortion.

As for the 1971 conduct, Vandivere claims that he witnessed his adult friend have inappropriate sexual contact

with one boy on multiple occasions but that he did not report that sexual misconduct because he wanted to protect his friend from getting into trouble. After Vandivere's trial in September of 2016, the Court found that Vandivere did molest and orally copulate the boys. The Court remains convinced about these facts even though Vandivere continues to lie about his behavior towards these boys.

on January 10th, 1998, Vandivere, who was then age 49, was arrested in the State of California, charged him with multiple counts of misdemeanor possession of materials depicting sexual conduct of a person under age 18. After Vandivere's conviction, the State Court sentenced Vandivere to 180 days in jail.

on May 14th, 1998, Vandivere was charged in the United States District Court for the Northern District of California with transportation of a minor with the intent to engage in criminal sexual activity and sexual abuse of a minor or ward arising from the same offense conduct as the State charges.

on November 14th, 1998, a federal grand jury in the Northern District of California returned a superseding federal indictment. The grand jury charged Vandivere in Counts 1, 2, and 3 with sexual exploitation of children. In Count 4, the grand jury charged Vandivere with certain activities relating to materials involving the sexual exploitation of children. In

Count 5, the grand jury charged Vandivere with transportation of a minor with intent to engage in criminal sexual activity. In Count 6 the grand jury charged Vandivere with sexual abuse of a minor or ward.

The offense conduct included Vandivere persuading an enticing a minor male to engage in sexually explicit conduct which Vandivere recorded on a videotape with intent to sell the video for profit.

Vandivere's conduct also included distributing sexually explicit images over the internet and transporting a minor male named Josh Haskins from Oklahoma to California for the purposes of engaging in sexually activity with the minor male.

On December 11th, 1998, a jury found Vandivere guilty of Counts 1, 2, 4, and 5. The Court dismissed Count 6 before trial. The jury acquitted Vandivere of Count 3.

The Court sentenced Vandivere to a total of 235 months' imprisonment with 36 months of supervised release

As for Vandivere's offense conduct in California, Vandivere came to the attention of law enforcement in January, 1998 when the police received a tip that Vandivere would routinely travel to Eureka, California where he would entice juvenile males with drugs and pornography and would return with them to Santa Cruz for the purpose of engaging in sexually illicit activity.

On January 10th, 1998, police encountered Vandivere at his home with a young male. Vandivere admitted to police that he had downloaded child pornography and provided the police sexually explicit photos of a minor male. The police arrested Vandivere and obtained a search warrant for a more thorough search. The police then obtained more evidence of child pornography.

As a result of this investigation, the police identified Josh Haskins as a victim of some of Vandivere's crimes. Haskins provided details of his relationship with Vandivere. Haskins stated that he met Vandivere when Haskins was 13 years old and Vandivere was 48 years old. Vandivere offered Haskins marijuana and showed him both adult and child pornography.

Later, Haskins found a video camera in Vandivere's closet and noted that the camera was located in a manner to record people using the bathroom. Haskins confronted Vandivere about the camera and Vandivere offered Haskins money to keep quiet about the camera.

Haskins said that Vandivere allowed him to do things that his father would not allow him to do. As their relationship progressed but while Haskins was still a minor, Vandivere asked Haskins to view pornography and masturbate while Vandivere watched and sometimes masturbated himself while watching Haskins masturbate.

Eventually, Vandivere would have Josh Haskins masturbate in front of him on a nearly daily basis. Vandivere convinced Haskins' father to allow him to move in with Josh and his father. Vandivere then began asking Josh Haskins if he would orally copulate him and offered him money for the sexual acts. Haskins said that Vandivere convinced him that there was nothing wrong with this sexual behavior.

After some time, Vandivere enticed Josh Haskins to leave Oklahoma with him to pursue Josh Haskins' dream of being a model. In March 1997, Vandivere, then age 48, took Josh Haskins to California with him without asking Josh Haskins' father.

MR. RENFER: Your Honor, I apologize for interrupting. I can't tell if we lost the video feed.

THE COURT: Somebody check the video feed please.

(Pause in the proceeding.)

THE COURT: Mr. Vandivere, can you hear me?

MR. VANDIVERE: Yes, sir.

THE COURT: Continuing with the findings and conclusions. Vandivere manufactured a fake birth certificate for Josh Haskins identifying Vandivere as his father --

MR. VANDIVERE: Hold up a minute please.

(Pause in the proceeding.)

THE COURT: -- and changing the birth date to make Haskins appear older. The pair got arrested for breaking into

a house and authorities sent Josh Haskins back to Oklahoma to live with his father.

Approximately two weeks after Josh Haskins returned home, Vandivere began calling and asking Josh Haskins to return to California. Vandivere bought a plane ticket for Josh Haskins and Josh Haskins returned to Eureka, California to again live with Vandivere.

Josh Haskins then lived with Vandivere in Eureka, California. During that time, Vandivere would hit on other teenage boy and offer another teenage boy money if Vandivere could record the teen masturbating. Josh Haskins eventually agreed to have Vandivere videotape Haskins while masturbating and while having sex with a minor female. Josh Haskins indicated that Vandivere intended to sell the video to make money. During this time, Vandivere also continued to sexually abuse Josh Haskins by regularly orally copulating him.

Josh Haskins ultimately JH came to hate Vandivere for what Vandivere did to him. Josh Haskins reported that in the early stages of his relationship with Vandivere, Vandivere wanted to perform oral sex on him as the price of their relationship. But as time progressed, Vandivere would only provide Josh with food and money for performing sexually explicit acts. Ultimately, Haskins returned by bus to Oklahoma to be with his father.

At the trial on September 7, 2016, Vandivere admitted

that he victimized Josh Haskins sexually.

At the 4247(h) hearing, Vandivere attempted to minimize his role in creating child pornography involving Josh Haskins by claiming that he did not create, quote, "the entire video," end quote. Vandivere's minimization constitutes a cognitive distortion. At the 4247(h) hearing, Vandivere also falsely claimed that he and Josh Haskins only engaged in mutual masturbation, but that Vandivere never orally copulated Haskins. This false testimony also constitutes a cognitive distortion.

At the 4247(h) hearing, Vandivere also admitted that in the 1980s he orally copulated Darren Meyer when Meyer was a teenager. According to Dr. Zinik, Darren Meyer told Dr. Zinik that he, Darren Meyer, was a skinny, lanky, teenager age 14 or 15 with little pubic hair and weighed 100 pounds when Vandivere sex molested him in the '80s. Darren Meyer also told Dr. Zinik that Vandivere molested some of his friends.

Vandivere now claims that he realizes that he harmed Darren Meyer and the other boys he molested. At the 4247(h) hearing, however, Vandivere falsely denied molesting any of Darren Meyer's friends.

Vandivere's current medical conditions include mild chronic obstructive pulmonary disease, COPD, for which he has an inhaler; benign enlargement of the prostitute due to prostate cancer; disease of stomach and duodenum, unspecified;

noninfective gastroenteritis and colitis, unspecified; urinary tract infection, site not specified; inflammation of the testicles, pain while passing urine, retention of urine, unspecified; seborrhea, a skin condition; osteoarthritis, generalized; and cataract, unspecified.

In November 2019 doctors diagnosed Vandivere with prostate cancer. His oncologist recommended beginning radiation and chemotherapy, but Vandivere declined even though he was warned that delay would allow the cancer to spread and could worsen his symptoms and lead to an untimely death.

In January 2020 Vandivere developed stomach pains and doctors diagnosed that he had an inflamed gallbladder which required removal of his gallbladder. The BOP transferred him from FCI Butner to the medical facility for surgery. After recovering from that surgery, Vandivere decided to remain at the medical facility to begin treatment for prostate cancer. But due to COVID-19, Vandivere would need to remain on lockdown status and confined to the hospital room. Vandivere requested a room with a TV and other personal items but the BOP could not accommodate those requests. Vandivere then changed his mind and returned to FCI Butner.

In September 2020, Vandivere again changed his mind after completing the required 15 days of quarantine. The BOP transferred Vandivere back to the medical facility to begin treatment for prostate cancer. At that time, Vandivere's

cancer remained localized to the prostate and there was no indication it had spread. According to Vandivere's testimony at the 4247(h) hearing, the cancer treatment, quote, "knocked it down," end quote, but did not knock it out.

During the 4247(h) hearing, Vandivere admitted that he told Dr. Zinik in December 2020 that he was open to using Viagra to overcome any erectile dysfunction if released. Vandivere also opined to Dr. Zinik that he relates better to teenage boys than adults because he is more of a, quote, "teenager in spirit."

As for any sex offender treatment, from approximately March 2010 until May 2011, the BOP sent Vandivere to FCI Petersburg, Virginia, to participate in the Bureau of Prisons' Sex Offender Management Program. However, Vandivere was determined to be inappropriate for group treatment because Vandivere stated that he did not believe that he is a sexual offender; that he did not believe that he had a victim; and that he did not believe that he was sexually deviant.

Vandivere has not participated in a sex offender treatment while in the custody of Bureau of Prisons and has specifically refused treatment in the Commitment and Treatment Program while housed at FCI Butner as a detainee under the Adam Walsh Act.

On November 16, 2016, this Court committed Vandivere as sexually dangerous to others under the Adam Walsh Act.

Since that time, he's repeatedly refused to participate in any sex offender treatment, including the BOP's Commitment and Treatment Program. Vandivere also has declined to be interviewed for his annual evaluations under the Adam Walsh Act. Dr. Graney could not interview Vandivere for her most recent annual review dated December 22nd, 2020, due to the COVID-19 lockdown.

As for Vandivere's behavior since his civil commitment in 2016, Vandivere has kept a fairly low profile and has not been a management problem. He was been compliant with prison routine and has not exhibited aggressive or unruly behavior. Vandivere, however, has received some inappropriate materials in the mail and had one incident in July 2017 that involved a boundary violation concerning his comments about the clothes and appearance of a female therapist.

Vandivere testified at the 4247(h) hearing. He was not a credible witness. For example, Vandivere testified that he is no longer attracted to teenagers. The Court does not credit this testimony and believes the opposite. Vandivere also testified that he was attracted to men and women 18 to 25-ish. Again, the Court does not credit this testimony. The Court finds that Vandivere remains attracted to boys age 11 to 15 around the cusp of puberty or just into puberty.

Vandivere also testified in 2021 when he received Dr. Gary Zinik's report concerning Vandivere, Vandivere first

considered himself a sex offender. According to Vandivere, reading Dr. Zinik's report was akin to an epiphany about his molestation of boys. Vandivere acknowledged, however, telling Dr. Zinik in December of 2020 that so long as a boy had pubic hair and understood right from wrong, then the boy could consent to sex with him. The Court finds Vandivere's alleged recognition of himself as a sex offender to be a, quote, "4247(h) conversion," end quote. In reality, the Court finds that Vandivere continues to believe that a boy with pubic hair who knows right from wrong can consent with to sex with Vandivere.

Vandivere also continues to falsely contend that Santa Cruz city police manufactured the child pornography on Vandivere's hard drive and that the federal probation officer who wrote his PSR included information that the probation officer made up. The Court does not credit this testimony of Vandivere.

Dr. Dawn Graney is a sex offender forensic psychologist who works for the Federal Bureau of Prisons at FCI Butner. Dr. Graney's Pre-certification Forensic Evaluation report of Vandivere is dated November 14th, 2014. Dr. Graney completed a supplement report in 2015. In 2017, 2018, 2019, and 2020, Dr. Graney completed annual forensic updates concerning Vandivere. Vandivere declined to be interviewed for the years 2017, 2018, and 2019 and could not be interviewed for

2020 due to the COVID-19 restriction.

In each year, Dr. Graney opined that Vandivere meets criteria for civil commitment as sexually dangerous to others under the Adam Walsh Act. In forming her opinion, Dr. Graney reviewed the written discovery provided to Vandivere, some of which is in the record.

The written discovery includes information concerning Vandivere's criminal history, social history, institutional reports, investigative records related to his sexual conduct, psychological evaluations by other mental health care providers, and Dr. Graney's own evaluations of Vandivere.

Dr. Graney considered Vandivere's range of risk using actuarial tools and dynamic risk factors.

Dr. Graney also attended the trial in 2016 and the discharge hearing in 2021 and observed Vandivere's testimony. Dr. Graney also testified in 2016 and 2021.

Dr. Graney described Vandivere's sexual criminal history which shows that Vandivere committed child molestation in the 1970s, 1980s, and 1990s. Thus, Dr. Graney opined that Vandivere met Prong 1 under the Adam Walsh Act.

As for Prong 2, Dr. Graney diagnosed Vandivere with the following serious illnesses, abnormalities, or disorders: One, other specified paraphilic disorder, hebephilia; and two, other specified personality disorder, antisocial features. With respect to hebephilia, Dr. Graney opined that Vandivere --

has a long history of targeting 13, 14, and 15 year old boys who were on the cusp of puberty or just into puberty. Vandivere's preferred act was orally copulating the boys. Vandivere used drugs and pornography to groom the boys and then sexually abused them. Dr. Graney noted that Vandivere's sexual interest and misconduct was longstanding, persistent, problematic, and caused harm to the victims.

Dr. Graney then explained why hebephilia was the proper diagnosis in this case, even though hebephilia is not in the DSM-5. Dr. Graney noted that Vandivere's sexual fixation with this age group disrupted his life and marriage, negatively affected his relationship with his children and resulted in years of incarceration.

With respect to the other specified personality disorder, antisocial features, Dr. Graney noted Vandivere's repeated criminal conduct, deceitfulness, lack of remorse, and history of impulsivity. Dr. Graney acknowledged that some people age out of antisocial behaviors over time, but Vandivere has not. Dr. Graney then persuasively expounded on examples of Vandivere's deceitfulness, lack of remorse, and impulsivity. Dr. Graney also explained how Vandivere's personality disorder has caused substantial impairment in his life.

As for Prong 3, Dr. Graney scored the actuarial tool Static-99R to assess Vandivere's risk of re-offense. Vandivere scored a 3 which is the low-moderate risk range of this

instrument. Dr. Graney also identified several dynamic risk factors which she determined exacerbate Vandivere's level of risk, including intimacy deficits, emotional identification with children, a lack of concern for others, aberrant sexual interest evidenced by his long-standing sexual interest in immediately pre- or post-pubescent boys, sexual preoccupation over many decades, poor cooperation with supervision, poor general self-regulation including impulsivity, poor problem-solving skills, and negative emotionality and hostility.

Dr. Graney explained she does not put significant weight on any one risk factor; be it Static or dynamic. Rather, Dr. Graney looks at the case as a whole. According to Dr. Graney, this case involves Vandivere's long-standing sexual interest in boys age 13, 14, and 15, Vandivere's sexual offending in his twenties, thirties, and forties, Vandivere's sexual interest in such boys to the current date, and Vandivere's lack of sex offender treatment. Dr. Graney also noted the absence of a viable relapse prevention plan. Dr. Graney also explained why she did not view the supervised release conditions of Vandivere's criminal judgment to be protective as to Vandivere.

On cross-examination, Dr. Graney conceded that Vandivere had not sexually offended against children in his fifties, sixties, seventies due to his incarceration and lack

of victim pool within the BOP, and that he had been largely rule compliant since his 2016 civil commitment and even back to 2013.

On cross-examination, Dr. Graney also acknowledged the studies at Respondent's Exhibits 10, 11, and 12, but explained why she still believed Vandivere met Prong 3. Dr. Graney also discounted the release plan with Denton Williams due to Vandivere's failure on supervision.

Dr. Graney considered mitigating factors, including Vandivere's age, now 73, and medical conditions but found that none would lessen Vandivere's risk. Specifically with respect to age, Dr. Graney recognized that advance age could be a mitigating factor but it was not significant in this unique case. In support, Dr. Graney noted that Vandivere sexual offense history offered no evidence that his sexual interest or preoccupation had followed the typical trajectory of decreasing with age. Specifically, Vandivere's sexually offended in his twenties, thirties, and even in his late forties and continued to demonstrate a sexual interest in minor males into his sixties and seventies.

In addition to advanced age, Dr. Graney recognized that chronic medical conditions which specifically minimize the risk of sexual reoffending can be a mitigating factor. Dr. Graney opined, however, that Vandivere's medical conditions would not specifically minimize his risk of sexual reoffending,

particularly as to Vandivere orally copulating the penises of prepubescent or immediately post-pubescent boys.

Dr. Graney concluded that Vandivere has engaged in child molestation in the 1970s, '80s, and '90s. Dr. Graney opined that Vandivere has more than one serious mental illness, abnormality or disorder; namely, other specified paraphilic disorder, hebephilia, and other specified personality.

Finally, as to Prong 3, Dr. Graney found that Vandivere was sexually dangerous to others. In support, Dr. Graney considered Vandivere's serious mental illnesses, abnormalities, or disorders, his long history of sexual offending against boys, his enduring sexual interest in minor males, his long history of targeting and grooming vulnerable, young male victims, and the manner in which Vandivere committed his offenses. Dr. Graney also considered that Vandivere's sexual misconduct with minor males did not diminish as a result with either age or negative consequences associated with his behavior.

Dr. Graney also noted Vandivere's denial of responsibility for his offense conduct and his lack of participation in sex offender treatment. In light of all these factors and the whole record, Dr. Graney opined that Vandivere would have serious difficulty refraining from child molestation if released.

Dr. Graney explained why she discounted Vandivere's

claim that if he developed any sexual attraction in the future, then he would limit himself to males age 18 to 25. This was not credible due to Vandivere's long history of deceit and other conduct.

Finally, as to Prong 3, Dr. Graney persuasively discussed both the risk tools and the dynamic risk factors that applied to Vandivere, including his historical problems of sexual self-regulation, sexual preoccupation, problems on supervision, disparagement of victims, cognitive distortions, inconsistent statements, deceit, and his offense patterns that involve him orally copulating young males. That offense pattern does not require Vandivere to get or maintain an erection.

According to Dr.Graney, since his 2016 civil commitment, Vandivere has not participated in sex offender treatment. In the past, he has contended he does not need treatment.

In the 4247(h) hearing, Vandivere suggested that he has not participated in sex offender treatment at Butner due to the lack of confidentiality and because he does not trust the doctors. Vandivere also testified that he would go to sex offender treatment if released in order to do so. The Court does not credit Vandivere's testimony. Numerous detainees have completed the sex offender treatment successfully. Moreover, this Court does not believe that Vandivere would participate

effectively in sex offender treatment if released in order to do so.

Vandivere has yet to address in treatment any of his dynamic risk factors which are risk relevant with respect to him. Also, Vandivere has not engaged in treatment or in relapse prevention; that is, avoidance-based interventions, Good Lives; that is, interventions based on pro-social value and goals, or release planning, which would further assist in reducing his risk. Indeed, during Vandivere's testimony, he incredibly claimed that he had no relapse triggered. Dr. Graney also persuasively testified about why age was not a protective factor in this unique case.

Dr. Graney opined that, given Vandivere's long-standing sexual interest in pubescent-aged boys, his lengthy history of sexual offending, the presence of numerous dynamic risk factors, to include emotional identification with children, poor cooperation with supervision, and problems with general self-regulation, among others; his lack of participation in sex offender treatment; and his present lack of notable mitigating risk factors, Vandivere remains a sexually dangerous person who's sexually dangerous to others.

Dr. Gary Zinik is a clinical forensic psychologist who the Government retained in this case. Dr. Zinik has conducted hundreds of sex offender evaluations and has testified frequently as an expert witness in sex offender civil

commitment hearings.

MR. VANDIVERE: Excuse me. Your Honor, can we take a 10-minute break. I have got to go to the bathroom.

THE COURT: Yes. That's fine. We'll be in recess for 10 minutes.

(The proceedings were recessed at 2:10 p.m. and reconvened at 2:20 p.m.)

THE COURT: Thank you. We reconvened. I'll continue with my findings and conclusions.

Dr. Gary Zinik, Ph.D., is a clinical forensic psychologist who the Government retained in this case. Dr. Zinik has conducted hundreds of sex offender evaluations and has testified frequently as an expert witness in sex offender civil commitment hearings. Sometimes Dr. Zinik has testified for the Government has petitioner, and sometimes he has testified for the respondent. Dr. Zinik's CV and report is in the record.

Dr. Zinik reviewed the discovery in this case and completed a forensic evaluation report on May 4th, 2015. Dr. Zinik also testified at Vandivere's 2016 trial. Since Vandivere's civil commitment on November 16th, 2016, Dr. Zinik conducted another record review of the discovery in this case, interviewed Vandivere in December 2020, and completed a forensic evaluation report on January 4th, 2021. See Government Exhibit 36. He also attended the 4247(h) trial and

observed Vandivere's testimony. As a result of Dr. Zinik's evaluation, Dr. Zinik opined as to Prong 1 that Vandivere engaged in child molestation in the 1970s, 1980s, and 1990s. The victims included the two boys in Oklahoma in 1971, Darren Meyer in the 1980s, and Josh Haskins in the 1990s.

As for Prong 2, Dr. Zinik opined with a reasonable psychological certainly that he meets criteria for the following diagnosis: Other specified paraphilic disorder, hebephilia, and other specified personality disorder, antisocial and narcissistic features.

Dr. Zinik testified that a diagnosis of hebephilic disorder under the DSM-5 category of other specified paraphilic disorder is appropriate for Vandivere in this case because one, the disorder is a persistent sexual preference in boys who are immediately post-pubescent or just prior to pubescence that is equal to or greater than normative sexual interest. The disorder causes harm to others; i.e., the victims just entering puberty and this disorder meets the Section 4248 statutory criteria as a serious mental illness, abnormality, or disorder.

Moreover, Dr. Zinik testified that Vandivere told him in 2020 that he's sexually attracted to boys with little or no body hair. Furthermore, Dr. Zinik opined that this sexual attraction is a life-long condition and a sexual deviance of Vandivere. Dr. Zinik also explained why he believed that hebephilia was a serious mental illness, abnormality, or

disorder under the Adam Walsh Act. Dr. Zinik discussed the harm to the victims from the molestation and how Vandivere targeted disadvantaged homeless and runaway boys. Dr. Zinik also agreed with the statement in Respondent Exhibit 10 that, quote, "paraphilic disorders are prevalent in sexually violent predator populations and may be indicative of entrenched traits that are less amenable to protective aging effects."

Dr. Zinik also opined that Vandivere continues to satisfy the diagnosis of other specified personality disorder with antisocial and narcissistic features. As an example of an antisocial trait, Dr. Zinik noted Vandivere's lack of remorse towards his victims. Dr. Zinik also discounted the sincerity of remorse that Vandivere expressed about Darren Meyer while testifying at the 4247(h) trial.

As for Vandivere's improved behavior in custody since 2012, Dr. Zinik noted that he often sees remittance of antisocial behavior with age, but doesn't alter the diagnosis. Moreover, even with age, Vandivere continues to exhibit narcissistic features, such as blaming others, using others, and failure to take responsibility.

As for Prong 3, Dr. Zinik also opined with a reasonable degree of psychological certainty that Vandivere still meets the criteria for civil commitment as sexually dangerous to others and as not safe to be released to the community conditionally or unconditionally.

Dr. Zinik opined that Vandivere has the following dynamic risk factors for child molestation: Emotional identification with children, poor problem solving, attitudes supporting sexual offending, and lack of emotionally intimate relationships with adults.

As for emotional identification with children, Dr. Zinik noted Vandivere's statement that he had the heart and spirit of a 14-year-old boy. As for poor problem solving, Dr. Zinik cited Vandivere's tendency to lie and to blame others for his problems. As for attitudes that support offending, Dr. Zinik cited Vandivere's statements to him in December 2020 that he did not believe pubescent boys were children and that sexual abuse does not include sex with a pubescent boy. Vandivere also noted he did not believe his molestation at age 14 was sexual abuse and that he recalled enjoying it. Vandivere also told Dr. Zinik in December 2020 that he wanted to rescue young boys.

Dr. Zinik noted that Vandivere told Dr. Zinik in December 2020 that he did not see that any contact with young boys put him at risk to re-offend. Vandivere also does not view pubescent boys as children because they are sexually mature. Vandivere told Dr. Zinik he thinks pubescent boys can consent to sex when they are able to ejaculate. These are cognitive distortions. See *United States v. Wooden*, 693 F.3d 440, 452-443 (4th Cir. 2012).

Dr. Zinik considered Vandivere's risk with special attention to his age. Dr. Zinik opined that although age is a critical issue that must be factored into risk assessment and that advanced age, over 60, usually reduces risk, Vandivere is one of those rare cases in which age is not a mitigating factor based on Vandivere's risk profile and holistic details of the case. Cf. *United States v. Sporich*, 764 F.App'x 376, 377 (4th Cir. 2019)(per curiam)(unpublished). *United States v. Blackledge*, 714 F.App'x 249-50 (4th Cir. 2018)(per curiam) (unpublished.)

With respect to Vandivere's age, now 73, not being protective in this unique case, Dr. Zinik cited the record and an article from the 1990s that had a sample of 13 elderly sex offenders who committed new index offenses of child molestation in their sixties, seventies, or eighties. Dr. Zinik also acknowledged Dr. Rosell's summary of age research and sex offending, but noting that the research never got to a zero risk. Stated differently, even with a much lower rate of recidivism, some offenders in their sixties, seventies, or eighties re-offend against children. Based on the entire record, Dr. Zinik opined that Vandivere is one of those "rare birds that we need to protect the community from."

Dr. Zinik opined that Vandivere's hebephilia and his currently active dynamic risk factors are part of the Achilles heel that keeps him at high risk for sexual re-offense despite

his advanced age.

Dr. Zinik also considered Vandivere's health. Dr. Zinik noted that Vandivere described his own health to Dr. Zinik as, quote, "better than good but not quite excellent." Government Exhibit 36 at page 4491. Vandivere also expressed an interest to Dr. Zinik in December 2020 in Viagra to address any erectile dysfunction. See Government Exhibit 36, page 4491.

Dr. Zinik concluded that despite Vandivere's age and medical issues, there are no protective risk factors that offset Vandivere's high risk to sexually re-offend. Tellingly, according to Dr. Zinik, even if Vandivere is impotent and incapable of sexual functioning, that does not tip the balance to make him safer. After all, Vandivere gets his pleasure from orally copulating boys or watching them masturbate rather than any stimulation directed toward his own genitals. He could still perform oral copulation, his favorite sexual behavior with teenagers.

As for Vandivere's proposal to be released on conditions, Dr. Zinik opposed the idea. Dr. Zinik opined that if released, Vandivere would have too much freedom to go where he wants and do what he wants. He also opined that Vandivere would find a way to interact with homeless and runaway teenage boys. Dr. Zinik also was concerned that Denton Wilson's cabin was a six-hour drive away from Denton Wilson's residence.

On cross-examination, Dr. Zinik acknowledged that Vandivere's last sex offense against a child was when Vandivere was age 49 and that he had been incarcerated since age 49. Dr. Zinik also recognized that Vandivere's last hands-on sexual misconduct in prison was in 2008. Dr. Zinik also explained the relevance of his interview of Darren Meyer in 2020 and his interview of Vandivere in 2020 in forming his opinion. Dr. Zinik also explained why Respondent's Exhibits 10 and 11 and 12 did not change his opinion about Vandivere's sexual dangerousness. Dr. Zinik continues to believe Vandivere's dynamic risk factors are relevant to sexual dangerousness in this case, especially when coupled with the totality of the case, including his offense behavior in the 1970s, 1980s, and 1990s, his current psychological conditions and his interview with Dr. Zinik in December of 2020.

Dr. Luis Rosell, PhD, is a clinical and forensic psychologist. His forensic evaluation of Vandivere is dated March 16th, 2015, and is in the record. Dr. Rosell also reviewed discovery material provided to Vandivere by the Government and Vandivere's counsel. Dr. Rosell also interviewed Vandivere on July 6th, 2020, and observed Vandivere's testimony at the 4247(h) trial.

As for Prong 1, Dr. Rosell does not dispute Prong 1 because Vandivere has engaged in child molestation. As for Prong 2, Dr. Rosell opined that Vandivere met a diagnosis of

historical antisocial personality disorder. Dr. Rosell also opined, however, that hebephilia is not recognized as a paraphilic disorder in the DSM-5 and, thus, not an appropriate diagnosis for purposes of Prong 2 in this case. The Fourth Circuit has rejected Dr. Rosell's view that hebephilia is not a proper diagnosis under Prong 2. See e.g. *United States v. Boyd*, 537 F.App'x 234, 236 (4th Cir. 2013)(per curiam) (unpublished), *United States v. Caporale*, 701 F.3d 128, 136 (4th Cir. 2012).

As for Prong 3, Dr. Rosell opined that Vandivere's age is a prominent protective fact. With respect to age, Dr. Rosell opined that the risk of sex offending decreases at age 60 and gets even lower after age 70. In support, Dr. Rosell cited a 2020 study from Wisconsin and other studies.

Dr. Rosell opined there's not more than a 10 percent recidivism rate. As part of his testimony, Dr. Rosell discussed changes to the Static-99 to account for age.

Dr. Rosell also cited an Ambroziak study, Respondent Exhibit 10, concerning sexually violent persons released in Wisconsin after age 60. He contrasted the study with Respondent Exhibit 12, which is an abstract of a study from 2008 that Dr. Zinik cited in support of his opinion as to Prong 3.

As for Vandivere's lack of sex offender treatment, Dr. Rosell testified that those who complete sex offender

treatment have a lower risk than those who do not, but the recidivism rates of the untreated are not very high.

Dr. Rosell also opined that a sex offender's false denials or minimizations do not predict recidivism; that low treatment motivation does not predict recidivism, and that a lack of empathy does not predict recidivism. Dr. Rosell also opined that dynamic risk factors are generally not strong predictors of recidivism. In support, Dr. Rosell cited Respondent Exhibit 11.

According to Dr. Rosell, only being resistant to rules and supervision is predictive of recidivism among the so-called dynamic risk factors. Dr. Rosell then disagreed with Dr. Zinik's reliance on the following dynamic risk factors as to Vandivere's risk: One, emotional identification with children; two, poor problem solving; three, attitude supporting sexual offending; and four, lack of emotionally intimate relationships. Dr. Rosell then offered the same critique of Dr. Graney's analysis of dynamic risk factors other than her reference to resistance to rules and supervision.

On cross-examination, Dr. Rosell admitted that part of his opinion on Prong 3 was based on Vandivere's statement of his intent of not to re-offend, but conceded that Vandivere repeatedly has been untruthful about his sexual offending and other topics. Dr. Rosell also conceded that Vandivere told Dr. Zinik that he would help a teenage in need.

As for dynamic risk factors, Dr. Rosell conceded that when Vandivere molested the boys in Oklahoma in 1971, he was on supervision. Dr. Rosell also admitted that Vandivere is sexually attracted to teenage boys and that attraction is risk relevant. Likewise, Dr. Rosell conceded that Vandivere opined that when he was 14 years old, he had sex with an adult male, did not consider it abuse, enjoyed it, and went back for more. Dr. Rosell also conceded that an attitude that supports sexual offending is a risk relevant consideration.

Finally, Dr. Rosell conceded that Vandivere's age and medical condition would not prevent him from orally copulating teenage boys.

Dr. Rosell also views Vandivere's compliant behavior in custody as evincing that Vandivere would follow conditions in society if released. Based on Dr. Rosell's review of records and the clinical interview, Dr. Rosell opined that Vandivere demonstrates an ability to currently control his behavior and has expressed an understanding of how to behave in the future. Therefore, Dr. Rosell opined that Vandivere could either be released on supervision or be discharged from his commitment status because he is no longer sexually dangerous to others under Prong 3.

In order to establish grounds for release, Vandivere must prove by a preponderance of the evidence that he is not sexually dangerous to others. See *Barrett*, 691 F.App'x at 755;

Wetmore, 812 F.3d at 248.

Under the Adam Walsh Act, a person is sexually dangerous if he has engaged or attempted to engage in sexually violent conduct or child molestation and is sexually dangerous to others. 18 U.S.C., Section 4247(a)(5). Moreover, to determine that a person remains sexually dangerous to others, the Court must find that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would continue to have serious difficulty in refraining from sexually violent conduct or child molestation if released. See 18 U.S.C., Section 4247(a)(5) and (a)(6). See also *United States v. Hall*, 664, F.3d 456, 461 (4th Cir. 2012).

Child molestation includes any unlawful conduct of a sexual nature with or exploitation of a person under the age of 18. See 28 C.F.R. Section 549.93.

The burden of showing something by a preponderance of the evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its non-existence. See *Concrete Pipe & Prods. of California, Incorporated versus Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993), United States v. Manigan, 592 F.3d 621, 631 (4th Cir. 2010).

In reaching the Court's decision, the Court is to consider many factors, including Vandivere's offense history, diagnoses, conduct while incarcerated, and treatment responses.

See e.g., *Charboneau*, 914 F.3d at 917 n.10; *Wooden*, 887 F.3d 594-60; see also *United States v. Wooden*, 693 F.3d 440, 462 (4th Cir. 2012). Although the Court draws on the examiners' and experts' psychological findings in reaching its conclusions, the science of psychology informs the Court's decision but does not determine the Court's ultimate legal conclusions. See *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

In reaching the Court's as ultimate legal conclusion, the Court is not limited to definitions used by psychological clinicians in the DSM. See e.g., *United States v. Caporale*, 701 F.3d 128, 137 (4th Cir. 2012).

The Court has considered all the admissible evidence including the exhibits, the testimony of the expert witnesses, the testimony of Denton Wilson, and the testimony of Mr. Vandivere. The Court also has considered the record from 2016 trial and the 2021 4247(h) hearing.

As for Prong 1, Vandivere engaged in or attempted to engage in child molestation. Indeed, Vandivere does not contest Prong 1.

As for Prong 2, Vandivere fails to establish by a preponderance of the evidence that he does not suffer from a serious mental illness, abnormal, or disorder. Specifically, Drs. Graney and Zinik persuasively diagnosed Vandivere with other specified paraphilic disorder, hebephilia, and other specified personality disorder, antisocial. Dr. Zinik also

found it to have narcissistic features. Dr. Rosell declined to assign any sexually-based paraphilic disorder to Vandivere and opined that Vandivere does meet criteria for historical antisocial personality disorder.

The Court credits the more persuasive opinion testimony of Drs. Graney and Zinik as to Prong 2. Their testimony and reports and evaluations of the record was more thorough, better reasoned, better supported by the record, and better supported by independent research than Dr. Rosell's analysis. Consequently, Vandivere has failed to prove by a preponderance of the evidence that he does not suffer from a serious mental illness, abnormality, or disorder in the context of civil commitment proceeding under 18 U.S.C., Section 4247 and 4248. See *Barrett*, 691 F.App'x at 655; *Wetmore*, 812 F.3d 248. See also *United States v. Heyer*, 740 F.3d 284, 292-294 (4th Cir. 2014); *United States v. Wood*, 741 F.3d 417, 425-426 (4th Cir. 2013); *United States v. Springer*, 715 F.3d 535, 546-47 (4th Cir. 2013); *United States v. Caporale*, 701 F.3d 128, 136-142 (4th Cir. 2012); *United States v. Wooden*, 693 F.3d 440, 452-62 (4th Cir. 2012).

Specifically, the Court agrees with Dr. Graney that Vandivere suffers from other specified paraphilic disorder, hebephilia, under DSM-5, other specified personality disorder, antisocial features. The Court also agrees with Dr. Zinik that Vandivere suffers from other specified paraphilic disorder,

hebephilia, under DSM-5, and other specified personality disorder, antisocial narcissistic features.

As for Prong 3, Vandivere has failed to prove by a preponderance of the evidence that as a result of his serious mental illnesses, abnormalities, or disorder, Vandivere would not have serious difficulty in refraining from child molestation if released either unconditionally or conditionally.

Under Prong 3, the analysis focuses on Vandivere's volitional control understood in relation to a serious mental illnesses, abnormalities or disorders. This determination requires more than relying on recidivism rates of past offenders but requires an analysis of a range of different factors, including Vandivere's offense history, his conduct in prison, the opinions of experts, and his treatment responses. See, *Charboneau*, 914 F.3d at 917 n.10; *United States v. Perez*, 752 F.3d 398, 407-408 (4th Cir. 2014); *United States v. Heyer*, 740 F.3d 284, 291-294 (4th Cir. 2014); *United States v. Bolander*, 733 F.3d 199, 206-208 (4th Cir. 2013), *United States v. Caporale*, 701, F.3d 128, 137-142 (4th Cir. 2012); *United States v. Wooden*, 693, F.3d 440, 452-462, (4th Cir. 2012); and *United States v. Hall*, 664 F.3d 456, 463, (4th Cir. 2012).

THE WITNESS: The Court also has considered the constitutional constraints on civil commitment when making a decision on the third prong in *Kansas v. Crane*, 534 U.S. 411

(2002), the Supreme Court held in order to simply commit a person for sexual dangerousness, there must be proof for serious difficulty in control and behavior. See *Crane*, 534 U.S. 413.

The Court noted that this standard allowed courts wide discretion in relying on numerous factors relevant to sexual dangerousness. The standard did not have any kind of narrow or technical meaning, nor was it demonstrable with mathematical precision.

In other words, in analyzing the potential future risk, the Court can and has considered more than just whether Vandivere exhibits traits shared by other recidivists. Rather, the Court has considered Vandivere's volitional control in light of such features of the case as the nature of the psychiatric diagnoses and the severity of his mental illnesses, abnormalities, or disorders, in such a way that distinguish Vandivere from the dangerous but typical recidivist convicted in an ordinary criminal case. See *Crane*, 534 U.S. 413.

In considering the third prong in this case, the Court has evaluated Vandivere's present mental conditions and the likely prospective effect of those conditions on Vandivere's volitional control. See e.g., *Charboneau*, 914 F.3d. at 917 n.10; *Wooden*, 887 F.3d at 594-610; *Wooden*, 693 F.3d 460, 462.

To do so, the Court has taken into account the entire

record, including Vandivere's failure on supervision, his resistance to treatment, his medical conditions, his age, his long-standing and continued deviant thoughts, his cognitive distortions, his impulsivity, his actuarial risk assessment, his dynamic risk factors, his lack of credibility, his conduct while incarcerated, and the historical nature of his offenses, both sexual and non-sexual. See *Charboneau*, 914 F.3d 917 n.10; *Wooden*, 887 F.3d 594, 610; *Wooden*, 693 F.3d 452, 462.

Vandivere's serious mental illness, abnormalities, or disorders, have led him to engage in child molestation in the 1970s, 1980s, and 1990s. Moreover, as shown by the evidence and his behavior while under supervision and his failure to even attempt sex offender treatment, Vandivere continues to lack the ability to appropriately manage his serious mental illnesses, abnormalities, or disorders in the community.

The evidence in this case supports the Court's finding that Vandivere would continue to have serious difficulty in refraining from child molestation if released.

In finding that Vandivere has not met his burden of proof on Prongs 2 and 3, the Court specifically rejects Dr. Rosell's opinion that Vandivere does not meet either Prong 2 or Prong 3.

Rather, the Court finds that Vandivere would have serious difficulty refraining from child molestation if released as a result of his serious mental illnesses,

abnormalities, or disorders. The Court makes this finding whether Vandivere were released unconditionally or conditionally.

On Prong 3, the Court gives greater weight to the persuasive opinions of Drs. Graney and Zinik. Their analysis of Vandivere's sexual dangerousness is more thorough, better reasoned, better supported by the record, and better supported by research, especially in light of the factors highlighted by the Fourth Circuit in *Wooden* and its progeny. Those factors include Vandivere's persistent deviant thoughts as reflected in his behavior from 1971 through his incarceration, as well as his conduct while incarcerated that included sexual misconduct in 2008, some collection of pictures in 2011, and the 2012 pen pal letter, his interview with Dr. Zinik in 2020, and his testimony at both the 2016 trial and the 2021 4247(h) trial. Cf. *Charboneau*, 914 F.3d at 915-17; *United States v. Antone*, 742 F.3d 151, 158-165 (4th Cir. 2014).

The Court also has considered his historical offense behavior in the 1970s, '80s, and '90s, his resistance to sex offender treatment, his failure on supervision, his impulsivity, his numerous and significant cognitive distortions, including those observed at the original 4248 trial and those at the 4247(h) trial, the relationship between his serious mental illnesses, abnormalities, or disorders, his volitional control, and his lack of a viable release plan.

The Court has considered the debate between the experts including the dispute between the experts about Vandivere's age as a protective factor and credits the more persuasive opinions as Dr. Zinik and Dr. Graney. Ultimately with respect to Prong 3, the Court agrees with the more thorough and convincing opinions of Dr. Graney and Dr. Zinik and rejects the opinion of Dr. Rosell.

In opposition, Vandivere argues that his age and the psychological research shows that there is no way to know whether he is that, quote, "rare bird," end quote, who will have serious difficulty in not reoffending. Vandivere also notes he has not molested a child in the last 23 years while incarcerated and that he has not been a management problem in custody for approximately 10 years. Vandivere also contends that he has a viable release plan and that the dynamic risk factors that Dr. Graney and Zinik cited are not associated with or correlated with risk of reoffending. Vandivere also cites his testimony that he is willing to go to sex offender treatment if released in order to do so.

The Court rejects Vandivere's arguments. The Court finds Dr. Zinik's and Dr. Graney's holistic assessment of the entire record more persuasive than the opinion of Dr. Rosell. Dr. Zinik and Dr. Graney persuasively explained their holistic analysis, and Dr. Zinik persuasively and specifically explained and rebutted Dr. Rosell's view on Vandivere's age.

As for Vandivere's lack of a child victim in 23 years, there are no 13- to 15-year-old boys in the BOP. Moreover, Dr. Zinik persuasively discussed his December 2020 interview with Vandivere which was filled with cognitive distortions. Furthermore, both Dr. Zinik and Dr. Graney persuasively discussed the deficiencies in Vandivere's release plan.

As for the dynamic risk factors, even Dr. Rosell admits that those who have completed sex offender treatment have a lower risk of re-offense than those who have not. Dr. Rosell also admits that even though dynamic risk factors, other than non-compliance on supervision, are generally not strong predictors of recidivism according to the study he cited, the dynamic risk factors that Dr. Zinik and Dr. Graney discussed are still risk relevant considerations.

Finally, as for Vandivere's release plan, the Court has considered it, particularly Vandivere's plan to live with Denton Scott Wilson. Wilson testified at the 4247(h) hearing. Wilson lives in Centralia, Washington, and said he was willing to have Vandivere live with him. Wilson first met Vandivere when Vandivere was age 43 and Wilson was age 18. Wilson met Vandivere via Vandivere's victim, Darren Meyer. Wilson claims, however, he did not know Vandivere was sexually victimizing Darren Meyer. According to Wilson, Vandivere could live with him or in a cabin that he owns that is a six-hour drive from

Wilson's residence.

The Court does not find this release plan remotely acceptable. Wilson only recently learned that Vandivere was a sex offender and one adjudicated as sexually dangerous under the Adam Walsh Act. The Court does not have confidence in Wilson's ability to detect Vandivere's non-compliance with release conditions. The Court also does not have confidence in Vandivere's ability to be truthful with his probation officer or Wilson or his ability to control himself sexually.

In sum, the Court finds that Vandivere has failed to show by a preponderance of the evidence that he has not engaged in child molestation, he does not currently suffer from serious mental illnesses, abnormalities, or disorders, or as a result of those serious mental illnesses, abnormalities, or disorders, he would not have serious difficulty in refraining from child molestation if released.

Vandivere hereby remains committed to the custody of the Attorney General under the Adam Walsh Act until his condition is such that he would no longer be sexually dangerous to others.

I will and have signed a short order incorporating by reference all of my findings and conclusions that will be made part of the record in the case.

I do thank counsel for their work in connection with the case.

Anything else from the United States?

MR. RENFER: No, Your Honor.

THE COURT: Anything else from for Mr. Vandivere?

MR. DOWLING: No, Your Honor.

THE COURT: We'll be in recess until 9:00 a.m. Monday.

* * *

(The proceedings concluded at 2:47 p.m.)

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Amy M. Condon, CRR, RPR, CSR, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 1st day of June, 2022.

_____
/s/ Amy M. Condon
Amy M. Condon, CRR, CSR, RPR
U.S. Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-HC-2017-D

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
JAMES DOW VANDIVERE,	)	
	)	
Respondent.	)	

On November 16, 2016, the court entered detailed findings of fact and conclusions of law and committed James Dow Vandivere ("Vandivere" or "respondent") as a sexually dangerous person who is sexually dangerous to others under the Adam Walsh Child Protection and Safety Act of 2006 ("Act"), codified at 18 U.S.C. §§ 4247–4248. See [D.E. 97, 103, 104, 112, 113], aff'd, United States v. Vandivere, 729 F. App'x 265, 266 (4th Cir. 2018) (per curiam) (unpublished), cert. denied, 139 S. Ct. 603 (2018). On August 18, 2020, Vandivere moved for release under 18 U.S.C. § 4247(h). See [D.E. 153]. On May 12, 2021, the court held a hearing on Vandivere's motion for release. See [D.E. 180].

A person committed under the Act "may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed." 18 U.S.C. § 4247(h). At the hearing under 18 U.S.C. § 4247(h), the movant must prove "by a preponderance of the evidence that he is no longer sexually dangerous" to others under the Act. United States v.

Barrett, 691 F. App'x 754, 755 (4th Cir. 2017) (per curiam) (unpublished) (quotation omitted); see United States v. Wetmore, 812 F.3d 245, 248 (1st Cir. 2016); see also United States v. Charboneau, 914 F.3d 906, 917 n.10 (4th Cir. 2019); United States v. Wooden, 887 F.3d 591, 594–610 (4th Cir. 2018); United States v. Searcy, 880 F.3d 116, 120 (4th Cir. 2018); United States v. Maclaren, 866 F.3d 212, 216–19 (4th Cir. 2017).

On December 3, 2021, in open court, the court entered detailed findings of fact and conclusions of law concerning Vandivere's motion under 18 U.S.C. § 4247(h). As explained in open court and incorporated herein by reference, Vandivere remains sexually dangerous to others under 18 U.S.C. § 4247(a)(5)–(6). Thus, the court denies Vandivere's motion for release under 18 U.S.C. § 4247(h).

In sum, as discussed in open court and incorporated herein by reference, the court DENIES respondent's motion for release under 18 U.S.C. § 4247(h). Respondent remains sexually dangerous to others under the Act and shall remain in the custody of the Attorney General for housing in a suitable facility for treatment.

SO ORDERED. This 3 day of December, 2021.

JAMES C. DEVER III
United States District Judge

United States v. Vandivere

United States Court of Appeals for the Fourth Circuit

February 5, 2024, Filed

No. 22-6118

Reporter
2024 U.S. App. LEXIS 2592 *

UNITED STATES OF AMERICA, Petitioner - Appellee v. JAMES DOW VANDIVERE, Respondent - Appellant

Prior History: **[*1]** (5:15-hc-02017-D).

Core Terms

petition for rehearing, en banc

Counsel: For UNITED STATES OF AMERICA, Petitioner - Appellee: Michael F. Easley Jr., Rudy E. Renfer, Assistant U. S. Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, NC.

For JAMES DOW VANDIVERE, Respondent - Appellant: Sharon Leigh Smith, UNTI & SMITH, Raleigh, NC; Jeffrey M. Young, HITACHI ENERGY USA INC., Raleigh, NC.

Opinion

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

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