No. 23-7418

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DOW VANDIVERE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that a civilly committed person bears the burden of proving that he should be discharged at a hearing pursuant to 18 U.S.C. 4247(h).

2. Whether the court of appeals correctly determined that the federal civil-commitment statute's placement of the burden of proof on a civilly committed person at a Section 4247(h) hearing does not violate due process.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Vandivere, No. 15-hc-2017 (Dec. 3, 2021)

United States Court of Appeals (4th Cir.):

United States v. Vandivere, No. 16-7605 (July 5, 2018)

United States v. Vandivere, No. 22-6118 (Feb. 5, 2024)

Supreme Court of the United States:

Vandivere v. United States, No. 18-6194 (Dec. 3, 2018)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 88 F.4th 481.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2023. A petition for rehearing was denied on February 5, 2024 (Pet. App. A65). The petition for a writ of certiorari was filed on May 6, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act to "protect children from sexual exploitation and violent crime." Pub. L. No. 109-248, 120 Stat. 587. As relevant here, the Act added 18 U.S.C. 4248, which authorizes a district court to order the civil commitment of "a sexually dangerous person" who is already "in the custody of the Bureau of Prisons." 18 U.S.C. 4248(a). Under the Act, a "sexually dangerous person" is a person who (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation" (the prior-conduct element), 18 U.S.C. 4247(a)(5); (2) currently "suffers from a serious mental illness, abnormality, or disorder" (the serious-mental-illness element), 18 U.S.C. 4247(a)(6); and (3) "as a result of" that mental illness, abnormality, or disorder "would have serious difficulty in refraining from sexually violent conduct or child molestation if released" (the serious-difficulty element), ibid.

A civil-commitment proceeding under Section 4248 is initiated when the government certifies to the federal district court for the district in which a person is confined that "the person is a sexually dangerous person." 18 U.S.C. 4248(a). Such certification "stay[s] the release" of that person from federal custody "pending completion of procedures contained in [Section 4248]." Ibid. Those procedures include a hearing before the court "to determine whether the person is a sexually dangerous

person." 18 U.S.C. 4248(a); see 18 U.S.C. 4248(c). At that hearing, the government bears the burden of proving "by clear and convincing evidence that the person is a sexually dangerous person." 18 U.S.C. 4248(d). If the court finds that the government has carried that burden, "the court shall commit the person to the custody of the Attorney General." Ibid.

A civil-commitment order under Section 4248 is subject to ongoing review. The "director of the facility in which a person is committed" must provide the district court that ordered the commitment with "annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). If the director "determines that the person's condition is such that he is no longer sexually dangerous to others," the director "shall promptly file a certificate to that effect" with the court. 18 U.S.C. 4248(e). "The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing * * * to determine whether he should be released." Ibid. The court shall order that the person be discharged if, after the hearing, it "finds by a preponderance of the evidence that the person's condition is such that * * * he will not be sexually dangerous to others." Ibid.

"Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to" Section 4248(e), "counsel for the person or his legal guardian

may * * * file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility." 18 U.S.C. 4247(h). Such a motion may be filed "at any time during such person's commitment, * * * but no such motion may be filed within one hundred eighty days of a court determination that the person should continue to be committed." Ibid.

2. Petitioner has a long history of sexually abusing minor boys. Pet. App. A7. Petitioner "engage[d] in inappropriate sexual contact with ten minors between 1966 and 1978, and then again with more minors in the 1980s and 1990s." Id. at A9. Petitioner's "victims were often fatherless and wayward," and petitioner "lured them in with companionship, with money, [and] with promises he would help them fulfill their dreams." Id. at A7.

In 1998, petitioner was convicted of multiple federal offenses, including "sexual exploitation of children, certain activities related to material involving sexual exploitation, and transportation of a minor with intent to engage in criminal sexual activity." Pet. App. A7; see id. at A25. Petitioner was sentenced to 235 months of imprisonment, id. at A25, and was scheduled to be released from the custody of the Bureau of Prisons in 2015, id. at A22.

Before petitioner's release date, the government certified to the district court pursuant to Section 4248 that petitioner

is a "sexually dangerous person." Pet. App. A7. In 2016, after a hearing, the court found that the government had established by clear and convincing evidence that petitioner is a "sexually dangerous person." Ibid. (citation omitted). The court therefore ordered petitioner civilly committed to the custody of the Bureau of Prisons. Ibid. The court of appeals affirmed, 729 Fed. Appx. 265 (per curiam), and this Court denied a petition for a writ of certiorari, 139 S. Ct. 603.

3. In 2020, petitioner filed a motion under Section 4247(h) for a hearing to determine whether he should be discharged. Pet. App. A7. Petitioner conceded that he satisfied the prior-conduct element of the Act's definition of a "sexually dangerous person," but asserted that he did not satisfy the serious-mental-illness element or the serious-difficulty element. See id. at A8.

In 2021, the district court held a discharge hearing. Pet. App. A8. Two psychologists, Dr. Gary Zinik and Dr. Dawn Graney, testified as expert witnesses on behalf of the government. Ibid. Both Dr. Zinik and Dr. Graney testified that petitioner continued to satisfy the serious-mental-illness and serious-difficulty elements of sexual dangerousness. Id. at A8-A9. With respect to the serious-mental-illness element, both Dr. Zinik and Dr. Graney diagnosed petitioner with hebephilia, "a term used to describe adults with an enduring sexual interest in children around the age of pubescence." Id. at A8. Dr. Graney "emphasized

that [petitioner] 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." Ibid. With respect to the serious-difficulty element, both Dr. Zinik and Dr. Graney testified that, although petitioner was 72 years old, he would have serious difficulty in refraining from reoffending if he were discharged. Id. at A8-A9. Dr. Zinik, for instance, "reported that [petitioner] had recently confessed that he did not believe pubescent boys were children and that sex with a pubescent boy was not abuse." Id. A8. And Dr. Graney "emphasized that [petitioner's] persistent denial of responsibility and refusal to receive sex offender treatment while in custody differentiated him from other sex offenders of his age." Id. at A9. Dr. Graney "likewise pointed out that over a fifty-year period, [petitioner's] attitudes and beliefs about sexual abuse had not meaningfully changed." Ibid.

One psychologist, Dr. Luis Rosell, testified on petitioner's behalf. Pet. App. A8. Dr. Rosell "argued that hebephilia could not serve as valid grounds for a civil commitment," and "opined that [petitioner] was not likely to reoffend" because sex offenders older than 70 have a reduced rate of recidivism. Id. at A9. Petitioner also testified on his own behalf. Ibid. In his testimony, petitioner "admitted that he told Dr. Zinik that 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." Ibid. Petitioner also testified that he had "repeatedly declined sex offender treatment while in custody" because "he did not trust the prison therapists." Id. at A9-A10.

After the hearing, the district court determined that petitioner should not be discharged. Pet. App. A18-A64. The court explained that petitioner bore the burden of "prov[ing] by a preponderance of the evidence that he is no longer sexually dangerous to others under the Act." Id. at A20. The court found that petitioner had not met that burden. Id. at A60. The court credited the expert testimony of Dr. Zinik and Dr. Graney on the serious-mental-illness element, finding their opinions "more thorough, better reasoned, better supported by the record, and better supported by independent research than Dr. Rosell's analysis." Id. at A53. The court likewise gave "greater weight to the persuasive opinions of Drs. Graney and Zinik" on the serious-difficulty prong, id. at A57, and found that petitioner "would continue to have serious difficulty in refraining from child molestation if released," id. at A56. The court rejected petitioner's contrary testimony as "not * * * credible," id. at A32, finding that petitioner "continue[d] to lie about his behavior towards * * * boys," id. at A24.

4. The court of appeals affirmed. Pet. App. A1-A17.

The court of appeals rejected petitioner's contention 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." Pet. App. A12. The court of appeals explained that "[t]he language of the statute * * * indicates that the burden should fall on the committed individual" because "'the statute speaks in terms of showing'" that the individual should be discharged, rather than in terms of showing that the individual should not be discharged. Id. at A12-A13 (brackets and citation omitted). The court emphasized that placing the burden on the "committed individual" "makes sense" because he "is the one who seeks to alter the status quo, and in our system 'the person who seeks court action should justify the request.'" Id. at A13 (citation omitted).

The court of appeals also rejected petitioner's contention that, "regardless of what the statute mandates, forcing detainees to bear the burden of proof at discharge hearings violates their due process rights." Pet. App. A13. The court viewed "[t]he proper allocation of burdens of proof in a given statutory scheme" as "a question of procedural due process." Ibid. Applying the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), the court acknowledged that "the private interest" in liberty "is a weighty one," but determined that placing the burden of proof on the civilly committed person at a discharge hearing was consistent with due process in light of "the governmental interest in protecting the public from mentally disturbed and sexually dangerous detainees," the existence of

statutory "guardrails" that protect individual liberty, and the "needless and wasteful repetition" that would result if the government had to "repeatedly" establish the person's sexual dangerousness after having already done so in "the initial commitment proceeding." Pet. App. A14. The court also rejected petitioner's reliance on Foucha v. Louisiana, 504 U.S. 71 (1992), and Kansas v. Hendricks, 521 U.S. 346 (1997). Pet. App. A14-A15. The court explained that Foucha held only that indefinite civil commitment could not be justified where the individual was no longer "mentally ill," and that Hendricks's due process holding "did not rest on burdens of proof." Id. at A15.*

5. The court of appeals denied rehearing en banc without noted dissent. Pet. App. A65.

ARGUMENT

Petitioner contends (Pet. 9-12) that, when a person who has been civilly committed as a "sexually dangerous person" moves for a hearing to determine whether he should be discharged under 18 U.S.C. 4247(h), the statute places the burden of proof on the government to show that the person should not be discharged.

* The court of appeals also rejected petitioner's assertion that "the government lacks standing in the present action." Pet. App. A10 n.*. The court explained that "[t]he injury to the government here is the potential release of a sexually dangerous person into society"; that the "injury is traceable to [petitioner's] prior conduct as a sexual predator and the district court's finding that he remains sexually dangerous"; and that the injury "is likely to be redressed by his continued commitment." Ibid.

Petitioner further contends (Pet. 12-19) that, if the statute does not place the burden of proof on the government in that circumstance, the statute violates the Due Process Clause. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for further review because the outcome would be the same regardless of this Court's resolution of the questions presented. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that, under the federal civil-commitment statute, the civilly committed person bears the burden of proving that he should be discharged at a hearing pursuant to Section 4247(h). Pet. App. A12-A13. That determination does not warrant further review.

a. Section 4247(h) provides that, "[r]egardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to" Section 4248(e), "counsel for the person or his legal guardian may * * * file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility." 18 U.S.C. 4247(h). The text of Section 4247(h) thus identifies the relevant question as "whether the person should be discharged." Ibid. And it is a "general precept that a party who seeks the affirmative of an issue bears the burden of proving his petition." United States v. Wetmore, 812 F.3d 245, 248 (1st Cir. 2016). Because the civilly

committed person is the one who seeks an affirmative answer to the question identified in Section 4247(h), the text of that provision is most naturally read as placing the burden on that person (through his counsel or legal guardian) to show that "the person should be discharged." 18 U.S.C. 4247(h).

b. The structure of the federal civil-commitment statute reinforces that reading. Section 4248(e), for example, provides for a hearing "to determine whether [a civilly committed person] should be released" in certain circumstances in which the director of the facility in which the person is placed certifies that the person "is no longer sexually dangerous to others." 18 U.S.C. 4248(e). The text of Section 4248(e) thus identifies the relevant question as "whether [the person] should be released." Ibid. And the statute places the burden on the party seeking an affirmative answer to prove "by a preponderance of the evidence" that the person "will not be sexually dangerous to others." Ibid.

Similarly, Section 4248(a) requires a "hearing to determine whether the person is a sexually dangerous person" before the person may be civilly committed in the first place. 18 U.S.C. 4248(a). The text of Section 4248(a) thus identifies the relevant question as "whether the person is a sexually dangerous person." Ibid. And the statute places the burden on the party seeking an affirmative answer -- namely, the government -- to prove "by clear and convincing evidence that the person is a sexually dangerous person." 18 U.S.C. 4248(d).

Section 4247(h) should be understood to operate in a similar way. Because Section 4247(h) identifies the relevant question as "whether the person should be discharged," 18 U.S.C. 4247(h), the text of the provision is most naturally read as placing the burden on the party seeking an affirmative answer to prove that "the person's condition is such that he is no longer sexually dangerous to others," 18 U.S.C. 4748(d)(2).

c. That reading also accords with Section 4247(h)'s place in the overall statutory scheme. In cases like this one, the court has already found "by clear and convincing evidence that the person is a sexually dangerous person" in ordering the person civilly committed in the first place. 18 U.S.C. 4248(d). When that person (through his counsel or legal guardian) subsequently moves under Section 4247(h) "for a hearing to determine whether [he] should be discharged," 18 U.S.C. 4247(h), he is the one seeking relief from the status quo, Pet. App. A13. And "[a]bsent some reason to believe that Congress intended otherwise," the "ordinary default rule" is that "the burden of persuasion lies * * * upon the party seeking relief." Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005).

d. Petitioner contends (Pet. 9-10) that because "the Government bears the burden in the initial commitment hearing to prove by clear and convincing evidence that the person" is "a sexually dangerous person," the burden should be understood to remain with the government at a discharge hearing absent an

"express statutory indication of an intent to shift the burden to" the civilly committed person. But contrary to petitioner's contention (Pet. 10), there is an "express statutory indication of an intent to shift the burden" here. In Section 4747(h), Congress identified the relevant question at a discharge hearing as "whether the person should be discharged," not whether the person should remain in custody. 18 U.S.C. 4747(h). "The language of the statute thus indicates that the burden should fall on the" party seeking to establish that the person should be discharged. Pet. App. A13; see pp. 10-12, supra.

2. The court of appeals also correctly determined that placing the burden of proof on the civilly committed person at a discharge hearing under Section 4247(h) does not violate due process. Pet. App. A13-A15. That determination likewise does not warrant further review.

a. Petitioner does not challenge the court of appeals' weighing of the factors set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). Pet. App. A13-A14. Instead, petitioner argues (Pet. 16) that the court of appeals erred in "treating the burden of proof issue as purely procedural and not one of substantive due process." But petitioner himself characterized the issue below as one of procedural due process. See Pet. C.A. Br. 27 (describing the issue as "whether the government failed to afford the appellant minimally adequate process to protect [a] liberty interest"). That characterization makes sense because petitioner does not contend

that the government may not restrain his liberty "at all, no matter what process is provided," Reno v. Flores, 507 U.S. 292, 302 (1993); instead, petitioner contends that the restraints on his liberty may not continue unless certain process is provided, see, e.g., Santosky v. Kramer, 455 U.S. 745, 758 (1982) (applying procedural due process principles to a standard-of-proof issue); Addington v. Texas, 441 U.S. 418, 425 (1979) (same).

The decisions that petitioner cites (Pet. 16) do not suggest otherwise. Each of those decisions addressed the placement of the burden of proof in a particular action. See Medtronic, Inc. v. Mirowski Family Ventures, LLC, 571 U.S. 191, 193 (2014) (considering where the burden of proof lies "in a declaratory judgment action"); Director, Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 269 (1994) (considering where the burden of proof lies in "adjudicating benefits claims" under two federal statutes); Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942) (addressing where the burden of proof lies in a federal action brought in state court). None addressed whether that placement violated the Constitution.

b. Petitioner contends (Pet. 12-16) that the court of appeals' decision conflicts with Foucha v. Louisiana, 504 U.S. 71 (1992), and Kansas v. Hendricks, 521 U.S. 346 (1997). But the court correctly found petitioner's reliance on Foucha and Hendricks misplaced. Pet. App. A14-A15.

"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." Pet. App. A15 (citing Foucha, 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." Ibid. (citing Foucha, 504 U.S. at 75, 80). This Court held that indefinite civil commitment based on dangerousness alone was unconstitutional. Foucha, 504 U.S. at 78-79. That holding is inapposite here because petitioner's civil commitment is not based on dangerousness alone. Rather, in ordering petitioner civilly committed, the district court found by clear and convincing evidence that petitioner is both mentally ill and dangerous, Pet. App. A7, and "the government continues to assert that [he] remains both," id. at A15.

Hendricks likewise is inapposite here. The only due process issue in that case was whether a state civil-commitment statute's definition of "mental abnormality" satisfied "substantive" due process requirements. Hendricks, 521 U.S. at 356. In describing the state statute, the Court noted that the State retained the burden of proof in post-commitment discharge hearings. See id. at 353. But that aspect of the statutory scheme played no role in the Court's due process analysis. See id. at 356-360. In addressing whether the state statute violated "the Constitution's double jeopardy prohibition or its ban on ex post facto lawmaking,"

id. at 360-361, the Court also noted the statute's requirement that a court each year "determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement," id. at 364. But this Court cited that aspect of the statutory scheme merely as support for its holding that confinement under the statute was civil, rather than "punitive," in nature and therefore did not implicate either the Double Jeopardy Clause or the Ex Post Facto Clause. Id. at 363; see id. at 369. That holding has no relevance to the due process issue that petitioner raises here.

c. Petitioner also contends (Pet. 17) that "basic rules of Article III standing confirm that the burden to show the reasons for confinement exist must remain on the government." But that contention conflates Article III standing with the merits of "whether the person should be discharged." 18 U.S.C. 4747(h). In any event, it is petitioner who must have Article III standing because it is petitioner who is seeking relief from an Article III court. See Town of Chester v. Laroe Estates, Inc., 581 U.S. 433, 438-439 (2017). And even if the government's standing were relevant, the court of appeals correctly rejected petitioner's challenge to it. See Pet. App. A10 n.*.

3. In any event, this case would be a poor vehicle for further review because the outcome would be the same even if the government had to prove by clear and convincing evidence that petitioner should not be discharged. At the discharge hearing,

the government presented the opinions of two experts who testified that petitioner continued to satisfy the serious-mental-illness and serious-difficulty elements. Pet. App. A8-A9. The district court credited their testimony over that of petitioner's own witnesses, including petitioner himself, whom the court found "not * * * credible." Id. at A32; see p. 7, supra. The court therefore "agree[d]" with the government's experts that petitioner currently suffers from a serious mental illness, abnormality, or disorder, Pet. App. A53, and found that petitioner "would continue to have serious difficulty in refraining from child molestation if released," id. at A56. Thus, even if the burden had been placed on the government to prove by clear and convincing evidence that petitioner should not be discharged, the government would have met that burden in this case. Because this Court's resolution of the questions presented would not be outcome-determinative, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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