

reaching an opinion, so long as the inadmissible evidence was determined to be sufficiently reliable as indicated above, but that the experts could not relay the underlying hearsay information to the trier of fact. Therefore, experts might be allowed to form opinions and testify based on information that they would be prohibited from introducing during testimony. The court reversed and remanded on this basis, as well.

Discussion

This case has two unusual holdings. First, Nebraska courts must authenticate the reliability of hearsay evidence that experts use in forming their opinions. Second, even if a court finds the underlying facts legally reliable, experts cannot introduce those facts through their testimony. Both holdings have immediate implications for experts who practice in Nebraska and similar jurisdictions.

Federal and most state jurisdictions usually make exceptions to the hearsay rule for experts for information on which people in their field typically rely. Experts in Nebraska and similar jurisdictions, however, are now on notice that, despite the hearsay exception, courts may prohibit them from basing their opinions on unreliable out-of-court statements. If a court issues such a prohibition during or shortly before testimony, experts may have little time to reconsider their opinions after excluding some of the information on which they initially relied. This difficult task could be made easier if the expert prepared in advance.

For preparation, experts testifying in sex offender commitment hearings in Nebraska and similar jurisdictions might systematically think through how their opinion would be affected in turn if each of their out-of-court sources of information were ruled inadmissible. However, we do not recommend that experts begin eliminating such information from their evaluations in anticipation of legal admissibility rulings. Experts in these jurisdictions should continue their usual practices, but prepare for legal rulings on a case-by-case basis.

The court's ruling that the confrontation clause prohibits experts from introducing underlying hearsay facts through their testimony, even when a court has determined that the expert can rely on those facts in forming an opinion, creates additional challenges. In effect, the expert will say, "In forming my opinion I relied on information from the following

sources. . .," without divulging the actual information. This is a difficult position for the expert as well as for the trier of fact. It remains to be seen how this new rule will unfold in practice in Nebraska.

Disclosures of financial or other potential conflicts of interest: None.

The Adam Walsh Child Protection and Safety Act of 2006: Civil Commitment and Supervised Release for Sexually Dangerous Persons

Samantha E. DiMisa, PhD
Forensic Psychology Resident

Ira K. Packer, PhD, ABPP (Forensic)
Clinical Professor of Psychiatry

Law and Psychiatry Program
Department of Psychiatry
University of Massachusetts Medical School
Worcester, MA

Proceeding Under 18 U.S.C. § 4248 Proper for Civil Commitment of Allegedly Sexually Dangerous Persons: Civil Commitment of Allegedly Sexually Dangerous Persons in the Custody of the Bureau of Prisons Is Appropriate, With a Period of Supervised Release Included in the Prison Sentence

The case of *United States of America v. Broncheau* 645 F.3d 676 (4th Cir. 2011) involved nine respondent prisoners in the custody of the Bureau of Prisons (BOP) who were certified as sexually dangerous persons under 18 U.S.C.S. § 4247(a)(5) (2013). The United States, as petitioner, initiated proceedings against the respondent prisoners for civil commitment as sexually dangerous persons. The proceeding was initiated in the United States District Court for the Eastern District of North Carolina in Raleigh, under 18 U.S.C.S. § 4248 (2006) of the Adam Walsh Child Protection and Safety Act of 2006. After the District Court dismissed the petition, the government appealed the dismissal to the Court of Appeals for the Fourth Circuit.

Facts of the Case

As outlined in the United States Code Service (U.S.C.S) § 4248, the federal government may pursue the civil commitment of a sexually dangerous

person who is in federal custody if there are dangers associated with that individual's release from custody. As outlined in 18 U.S.C.S. § 4247(a)(6), a person is defined as "sexually dangerous to others" if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." This statute faced constitutional challenges but ultimately the U.S. Supreme Court (*United States v. Comstock*, 130 S. Ct. 1949 (2010)) ruled that Article I of the Constitution granted sufficient authority for Congress to enact § 4248. Subsequently, the Fourth Circuit Court of Appeals held that requiring the state to bear the burden of proof under § 4248 by the standard of "clear and convincing evidence" rather than the more stringent "beyond a reasonable doubt" did not transgress the due process rights of the Fifth Amendment (*United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010)).

Procedurally, the statute provides that, before civil commitment proceedings are sanctioned pursuant to 18 U.S.C.S. § 4248, an authorized official must first certify the respondent as a sexually dangerous person. Once a § 4248 certification is filed, the respondent's release from custody is stayed pending completion of the certification procedures. Procedures include a psychiatric or psychological examination of the respondent pursuant to § 4248(b), if such an examination is ordered by the district court, in addition to a hearing pursuant to § 4247(d). Once the procedures are carried forth, if the court finds by clear and convincing evidence that the respondent is a sexually dangerous person, the respondent is committed to the custody of the attorney general. The individual is committed until he is "no longer sexually dangerous to others" (§ 4248(d)).

The nine respondent prisoners, all of whom were incarcerated at the Federal Correctional Institute at Butner, North Carolina (FCI-Butner), for sexual offenses, had been given sentences that included supervised release following incarceration. The government instituted § 4248 civil commitment proceedings just before their scheduled supervised release. Pursuant to § 4248(a), by these certifications being filed, the respondents' releases from custody were stayed. Although the respondents were entitled to both hearings as well as rulings on the merits of their § 4248 certifications, because of the pending resolution of the constitutional issues brought forth in the

Comstock litigation, none of the respondents was initially granted hearings. After the Appeals Court decision in *Comstock*, the district court submitted a standing order indicating that the respondents could in fact request merits hearings on their certifications. At that point, each of the respondents filed a motion to dismiss his § 4248 commitment proceeding. The respondents alleged that their terms of supervised release provided adequate safeguards to the public, and as such, the § 4248 certifications were unnecessary. The respondents also asserted that their due process was violated, as their detentions were prolonged and they had not been granted merits hearings. The respondents also noted that the stigma of being labeled as a sexually dangerous person is a "lifelong burden."

The district court agreed with the respondents that the conditions of supervised release meant that § 4248 did not apply to them. Rather, the court held that the government should have proceeded under a different statute, U.S.C.S. § 4241 (2013). This statute provides for commitment of defendants who are impaired in their ability "to understand the nature and consequences of the proceedings against [them] or to assist properly in [their] defense" (§ 4241(a)). The district court held that "when a respondent has not completed his sentence because he has a remaining term of supervised release, the use of § 4241 is the proper way to initiate [civil commitment] proceedings under the Adam Walsh Act" (*Broncheau*, 645 F.3d at 682). Essentially, the district court was proposing that the government should first release the prisoner from custody, then obtain a commitment order under § 4241, and subsequently seek a separate civil commitment order for persons committed to the custody of the attorney general who meet the criteria for certification under § 4248(a). The district court also held that continuing to hold the prisoners in custody would raise concerns about potential violations to their due process rights.

The district court ordered that the respondents be released from custody within 30 days (by November 28, 2010). The government hastily appealed and, pending appeal, sought a stay of the respondents' releases from custody. However, the district court denied the government's stay request on November 22, 2010. In response, the government requested an emergency stay. On November 26, 2010, the government's stay request was granted, and the respondents remained in the custody of the BOP.

Ruling and Reasoning

Judge King wrote the opinion, with Judges Gregory and Wynn joining. The court of appeals held that proceeding under 18 U.S.C. § 4248 is the proper way for the government to pursue the civil commitment of an allegedly sexually dangerous person who is in the custody of the BOP. The court elaborated that, even when the defendant is serving a prison sentence that includes a period of supervised release, § 4248 remains as the appropriate statute to be applied. It held that § 4248 distinctly indicates that persons in the custody of the BOP can be certified as sexually dangerous persons, without exceptions made for prisoners whose sentences include conditions of supervised release. It noted that “a prisoner in BOP custody whose unexpired sentence includes a term of supervised release is no less in the custody of the BOP than another prisoner who does not face a term of supervised release” (*Broncheau*, 645 F.3d at 684). The appeals court went on to highlight that 95 percent of individuals serve sentences that include terms of supervised release.

The appeals court further held that a civil commitment under § 4241 was not the proper first step to be pursued in a § 4248 commitment proceeding. They reasoned that there are fundamentally different purposes between these two sections. In fact, the contrast between § 4241 and § 4248 constitutes the “proverbial horse of a different color” (*Broncheau*, 645 F.3d at 686). Specifically, § 4241, which was first enacted in 1948, addresses the mental competency of a pre-trial criminal defendant. There were no claims or evidence that any of the nine respondents were “unable to understand the nature and consequences of the proceedings against [them] or to assist properly in [their] defense” (§ 4241(a)). Accordingly, civil commitment under § 4241 was deemed not to be a proper first step in § 4248 commitment proceedings that focus on certification of sexual dangerousness, not competence to stand trial. The district court’s order was vacated, and the case remanded for a hearing on sexual dangerousness.

The respondents also asserted that their due process was violated, given that they had been held for many years, without a hearing. However, because the district court failed to raise the question of a potential violation of due process, the majority did not address the question on appeal. However, in a separate concurring opinion, Judge Wynn raised concerns related to the due process rights of the respondents, noting

that several courts have held that the due process rights guaranteed by the Constitution afford an individual a “final determination as to the validity of his confinement within a reasonable period of time” (*Broncheau*, 645 F.3d at 687). Judge Wynn commented on the disconcerting reality that respondents have been detained, for years in some cases, without justification of their detention subsequent to their § 4248 certifications. As referenced in *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971), in terms of emergency involuntary commitment, “where a person, said to be mentally ill and dangerous, is involuntarily detained, he must be given a hearing within a reasonable time to test whether the confinement is based upon probable cause.” (*Broncheau*, 645 F.3d at 687–688) Similarly, Judge Wynn referenced *Coll v. Hyland*, 411 F. Supp. 905, 910 (D. N.J. 1976), noting that in the context of civil commitment, “a hearing held within a reasonable time after confinement begins is an acceptable means of supplying requisite due process” (*Broncheau*, 645 F.3d at 688).

Discussion

This case illustrates some of the questions that arise during a court’s consideration of the sometimes complex and vexing nuances of statutory definitions. As noted in the concurring opinion, the district court attempted to use § 4241 to address the concerns (i.e., deprivation of liberty) raised by the defendants, who had been held for a prolonged time without resolution. However, the application of § 4241 to the amelioration of this situation was inappropriate. Specifically, civil commitment of individuals for the purposes of mitigating the risk of harm to others is distinct from that of commitment of individuals who are incompetent to stand trial. The standards associated with the former address the likelihood that, without hospitalization, an individual poses a substantial risk of harm to self or others, whereas the standards associated with the latter address a criminal defendant’s ability to understand, both factually and rationally, the nature and consequences of the proceedings against him and his ability to assist adequately in his defense. Accordingly, due to the ostensible differences between the nature and purpose of the § 4241 and § 4248 statutes, the application of each section should have been equally distinct and appropriate to the population of individuals who were being addressed.

Disclosures of financial or other potential conflicts of interest: None.