

dangerous individual by the presence of past sexual predatory conduct and diagnoses of bipolar I disorder and specified paraphilic, exhibitionistic, and specified personality disorders with antisocial and schizotypal features. The lower court accepted actuarial test scores and dynamic risk factors as evidence of meeting the third prong of the state's sexually dangerous individual definition.

The court examined the substantive due process requirements articulated in *Interest of Tanner*, 897 W.2d 901 (N.D. 2017) to prove serious difficulty in controlling one's behavior. The court cited *Interest of Carter*, 924 N.W.2d 112 (N.D. 2019), as consistent with *Kansas v. Crane* and indicated that a nexus must exist between the requisite disorder and dangerousness to include proof that the disorder involves serious difficulty controlling behavior, thus distinguishing a dangerous sexual offender whose disorder subjects him to civil commitment from other dangerous but typical recidivists in ordinary criminal cases. Additionally, the court cited *Matter of Wolff*, 796 N.W.2d 644 (N.D. 2011), as consistent with *Kansas v. Crane* and noted that the evidence of serious difficulty in controlling behavior does not necessarily need to be sexual in nature. Further, the court stated that, per *Matter of J.M.*, 927 N.W.2d 422 (N.D. 2019), an individual having a mental disorder or condition alone does not satisfy the requirement of clear and convincing evidence that the individual is likely to engage in future sexually predatory conduct.

The court stated that the district court erred in using R.A.S.'s declination of two medication dosages in 2018 as the sole evidence for demonstrating an active inability to control his actions. The court, citing *Interest of J.M.*, 713 N.W.2d 518 (N.D. 2006), noted that although the district court may rely on non-sexual conduct, substantive due process requires that the evidence must show clearly a serious difficulty in controlling sexual predatory behaviors; without more evidence than twice refusing medication, the state did not establish that R.A.S. had serious difficulty controlling his behavior. The court ordered R.A.S.'s release from civil commitment.

### Discussion

In this case, the Supreme Court of North Dakota reiterated the need for substantive due process in the classification and civil commitment of sexually dangerous individuals. The decision highlights that substantive due process requires sufficient evidence of

serious difficulty controlling behavior and that a nexus exists between the requisite disorder and dangerousness. These requirements are necessary to distinguish sexually dangerous individuals as defined by the law from individuals who are convicted of sexual offenses but do not have a requisite disorder and are not subject to civil commitment. Although the two instances of medication refusal did not represent a serious difficulty controlling behavior in this case, the court gave no clear standard for meeting that standard. This position is consistent with *Kansas v. Crane*, when the U.S. Supreme Court stated, ". . . in cases where lack of control is in question, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior" (*Crane*, p 413).

## Diagnostic Standards for Sex Offender Civil Commitment

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**The Fourth Circuit Court of Appeals Considers Whether a Paraphilic Disorder Diagnosis Is Necessary for Civil Commitment Under the Adam Walsh Child Protection and Safety Act**

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**Key words:** paraphilic disorder; civil commitment; sexually dangerous person

In *United States v. Charboneau*, 914 F.3d 906 (4th Cir. 2019), the Fourth Circuit Court of Appeals considered an appellant's claim that a federal district court had erred in finding him a sexually dangerous person under the Adam Walsh Child Safety and Protection Act of 2006 (18 U.S.C. 4247(a)(5) (2006)) even though he had not been diagnosed with a paraphilic disorder. The appellant also challenged

the district court's finding that his diagnoses of mixed personality disorder and alcohol use disorder satisfied the serious mental illness element under the Walsh Act. The Fourth Circuit ruled that the Walsh Act does not require a paraphilic disorder diagnosis.

#### Facts of the Case

Aside from his time in mental health treatment, school, and prison, Blake Charboneau spent his entire life on the Devils Lake Sioux Reservation in Fort Totten, North Dakota. His substance abuse began at age 12, at which time he was using alcohol and inhalants. He stopped attending school in the ninth grade. Mr. Charboneau went on to have extensive interaction with the criminal justice system, as he was arrested or taken into custody more than 30 times. His criminal offenses were usually committed while intoxicated on alcohol. He was arrested for sexually violent conduct four times, and he was intoxicated during each of these crimes.

Mr. Charboneau was arrested for sexually assaulting his 23-year-old cousin in 1983. He committed a second sexual offense in August 1987, when he entered a woman's home and attempted to have intercourse with her after forcibly removing her clothes. He committed a third sexual offense in July 1988 when he sexually assaulted his 10-year-old daughter at a family picnic. He was found guilty of aggravated sexual abuse by force, and he was sentenced to 168 months in prison. He began a five-year, supervised release in October 2000. Mr. Charboneau committed a fourth sexual offense in 2003, which was against his niece while on supervised release. He pled guilty to sexual contact with a person incapable of consenting, and he was sentenced to 10 years' imprisonment, with the federal court imposing an additional 36 months of confinement and 24 months of supervised release for violating the terms of his supervised release.

In 2006, Congress passed the Walsh Act, which granted the federal government authority to civilly commit persons deemed sexually dangerous, and currently in the custody of the Bureau of Prisons, to a federal facility (18 U.S.C. § 4247 (2006)). Under the Walsh Act, classification of a person as sexually dangerous requires proof of a prior act or an attempted act of child molestation or sexually violent behavior (18 U.S.C. § 4247(a) (5) (2006)). The Walsh Act defines a sexually dangerous offender as a person who "suffers from a serious mental illness, abnormality, or disorder as a result of which he would

have serious difficulty in refraining from sexually violent conduct or child molestation if released" (18 U.S.C. § 4247(a) (6) (2006)).

In December 2015, as Mr. Charboneau was nearing the end of his prison term, the government initiated civil commitment proceedings under the Walsh Act. At hearings in federal district court, the government called three psychologists as expert witnesses, all three of whom opined that Mr. Charboneau was a sexually dangerous person as defined by the Walsh Act and that he had previously exhibited sexually violent conduct. The three government experts also opined that Mr. Charboneau suffered from alcohol use disorder, which they asserted would satisfy the mental illness element of the Walsh Act, in lieu of being diagnosed with a paraphilic disorder. One of the three government experts, Dr. Gary Zinik, asserted that, in addition to alcohol use disorder, Mr. Charboneau also had a mixed personality disorder. The government experts also opined that Mr. Charboneau's alcohol use disorder would pose significant challenges for him in refraining from sexually violent conduct in the future.

Mr. Charboneau countered the government experts with testimony from Dr. Joseph Plaud, a forensic psychologist, who opined that Mr. Charboneau did not have a personality or paraphilic disorder. Dr. Plaud also posited that alcohol use disorder did not qualify as a "serious mental illness" under the Walsh Act. Dr. Plaud asserted that if Mr. Charboneau's alcohol use was the cause of his sexual offenses, then he would have expected more than four instances of sexually violent conduct based on Mr. Charboneau's history of alcohol consumption. Mr. Charboneau also argued that he had demonstrated that he would not have difficulty refraining from sexually violent conduct, as he had remained sober in prison (despite the availability of alcohol), was attending weekly Alcoholics Anonymous meetings, and had not committed any sexually violent acts while in jail.

In September 2017, the district court ruled that the government had met its burden of establishing clear and convincing evidence that Mr. Charboneau was a sexually dangerous person under the Walsh Act. In support of its ruling, the court noted that Mr. Charboneau had previously engaged in sexually violent conduct and had a serious mental illness, and that, due to his illness, he would have serious difficulty refraining from sexually violent conduct.

The court ordered that Mr. Charboneau be committed until he was no longer a sexually dangerous person.

In Mr. Charboneau's appeal to the Fourth Circuit Court of Appeals, he posed two questions. First, he asked whether one must be diagnosed with a paraphilic disorder to qualify for civil commitment under the Walsh Act. Second, he asked whether, after review of the record, the factual findings by the district court met the clear error standard of review.

#### Ruling and Reasoning

The Fourth Circuit Court reviewed the district court's factual findings for clear error only, preserving the lower court's role as trier of fact. Mr. Charboneau asserted that the district court erred when holding that the "serious mental illness" requirement could be met without a paraphilia diagnosis. He also argued that by so doing, the district court had expanded the reach of the Walsh Act. The circuit court rejected these arguments and noted that the plain language of the Walsh Act did not require a diagnosis of a paraphilic disorder or of any other specific mental illness for the "serious mental illness" element to be satisfied. The court also noted that it had previously held that Congress had left to the courts the task of defining the meaning of "serious mental illness, abnormality, or disorder" as "a legal term of art" (*United States v. Caporale*, 701 F.3d 128 (4th Cir. 2012), p 136).

Furthermore, the circuit court was not swayed by Mr. Charboneau's argument that Dr. Zinik's finding of a mixed personality disorder was any less credible because he was the only expert to arrive at that conclusion. The court noted that Dr. Zinik's diagnostic opinion was similar to those arrived at by Mr. Charboneau's past treatment providers. The court emphasized that the decision as to the credibility of expert witness testimony was best left to the district courts, and that the primary measure of testimonial worth was quality, not quantity.

Finally, Mr. Charboneau argued that the district court did not give sufficient weight to his behavior while incarcerated during the 15 years preceding his civil commitment. The circuit court agreed with the district court's concern that, when previously released to the community, Mr. Charboneau had multiple instances of alcohol abuse and sexually

violent offenses. The circuit court again found that Dr. Zinik's report and testimony were particularly convincing in explaining "why Mr. Charboneau comports himself well in a controlled institutional environment but reverts to drinking alcohol, law-breaking, and sexual violence in the community" (*Charboneau*, p 916).

#### Discussion

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court clarified that the term "mental illness" is devoid of any "talismanic significance" and that "psychiatrists disagree widely and frequently on what constitutes mental illness" (*Hendricks*, p 359). The *Hendricks* majority also noted that the Court had traditionally left choices, such as whether to use terms like "mental abnormality" instead of "mental illness," to state legislatures, and that "legal definitions which must take into account such issues as individual responsibility and competency need not mirror those advanced by the medical profession" (*Hendricks*, p 359).

The circuit court's opinion in *Charboneau* is consistent with the opinion in *Hendricks*. The circuit court argued that Congress could have drafted the Walsh Act's language so as to follow specific "clinical norms or definitions," but that one would "search in vain" for language within the Walsh Act purporting to restrict the "universe of qualifying mental impairments within clinical or pedagogical parameters" (*Charboneau*, p 913). In *Caporale*, the circuit court had noted that "a serious mental illness, abnormality, or disorder is not limited to those disorders specifically delineated in the Diagnostic and Statistical Manual of Mental Disorders" (*Caporale*, p 136). In *Charboneau*, the Fourth Circuit Court of Appeals reiterated the opinions in their previous cases, holding that it was up to the courts to decide the meaning of "serious mental illness, abnormality, or disorder" for the purposes of civil commitment for sexual offenders.

## Proper Standards for a Faretta Inquiry

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