

to participate in judicial proceedings is fluid, with the court weighing the available information in light of psychological literature. This approach allowed the court to respond to Mr. Justus's efforts in a flexible manner consistent with established law, permitting Mr. Justus to pursue due process given the complicated nature of his post-conviction efforts and experiences of pitfalls outside of his control.

Additionally, this case illustrates the level of mental health impairment courts might consider relevant to one's ability to file *habeas* petitions. This example may assist practitioners and researchers to further operationalize such capacities in a manner that can be informative for legal decision-makers. Overall, this also serves to highlight psychological science as an effective source of data for courts to incorporate when considering a *pro se* defendant's ability to pursue postjudgment relief.

## Suicide Risk Under the Bail Reform Act

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### Under the Bail Reform Act, Risk of Suicidality Alone Is an Insufficient Basis to Order a Defendant's Pretrial Detention

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**Key words:** Bail Reform Act; suicide risk; pretrial release

In *United States v. Storme*, 83 F.4th 1078 (7th Cir. 2023), the U.S. Court of Appeals for the Seventh Circuit affirmed the revocation of the defendant's pretrial release, finding that his suicidality coupled with his elevated risk of harm toward others in the community justified his pretrial detention. The court further held that risk of suicidality alone is an insufficient basis for pretrial detention.

#### Facts of the Case

In September 2020, Vincent Storme was arrested on multiple counts of cyberstalking and unauthorized

intrusion into a cellphone against three different women. His underlying conduct allegedly included extreme online harassment with obsessive accusations against the victims and occasional physical stalking. At his arraignment, the magistrate judge released him on bond to the custody of his mother with conditions, including a curfew, psychiatric treatment, and restricted use of technology. The next day, he attempted suicide by overdose. Over the next several months, his behavior became increasingly erratic as he repeatedly violated curfew (usually by mere minutes), and in February 2021, he was arrested for allegedly stalking a fourth woman. Further, he began abusing alcohol and continued to express suicidal ideation. The district court ordered drug testing and prohibited him from contacting the victims but did not revoke his release. Then, his mother moved out of state and the district court did not appoint him a new custodian.

In July 2023, Mr. Storme's therapist expressed concern regarding his elevated risk of suicide, specifically stating he thought Mr. Storme would kill himself if he thought the district court might deny his motion to dismiss the indictment. Further, Mr. Storme exhibited concerning behaviors, such as transferring his assets to his mother and refusing to form a safety plan with his therapist. Notably, he began to watch unrelated court proceedings before his assigned judge in the district court, stating this was his attempt to predict the judge's ruling patterns.

On August 3, 2023, the district court heard argument on Mr. Storme's motion to dismiss but reserved ruling. Then, without notice, explanation, or findings, the court revoked Mr. Storme's pretrial release and ordered him detained, indicating findings would be forthcoming in a written order. In response, after leaving the courtroom and returning to his holding cell, he exhibited increased suicidality such that he urged the U.S. Marshalls to kill him, banged his head on the floor, and attempted to hang himself.

Mr. Storme's counsel sought immediate review from the court, which ordered his release within 24 hours unless the government filed the appropriate motion to revoke release, and the government promptly complied. On August 9, 2023, after a formal hearing, the district court allowed the motion to revoke Mr. Storme's release, finding probable cause that he both committed crimes and violated his conditions of release. The district court held that suicide was a form of flight under the Bail Reform Act and Mr. Storme's erratic behavior made him a risk to others

such that no pretrial conditions would adequately mitigate the risk. Mr. Storme appealed these findings to the Seventh Circuit and requested release.

#### Ruling and Reasoning

The Bail Reform Act, 18 U.S.C. § 3142 (2008) provides guidelines for determining whether defendants in criminal cases are subject to pretrial release or detention while awaiting trial. The purpose of bail is to “assure that the person will not flee or pose a danger to the safety of any other person or the community” (18 U.S.C. § 3148(b)(2)(A)(2006)). The Bail Reform Act authorizes judges to revoke a defendant’s pretrial release if a two-part standard is satisfied (18 U.S.C. § 3148(b)). First, the judge must find probable cause that the defendant either committed a subsequent crime or find by clear and convincing evidence that the defendant violated the conditions of release (18 U.S.C. § 3148(b)(1)). Second, a judge must find that there are no conditions of release that would prevent a defendant from fleeing or that would mitigate danger to the safety of others or the community or that the defendant is unlikely to follow any conditions of release and thus detention is justified (18 U.S.C. § 3148(b)(2)), 3142).

Satisfying the first prong as outlined above, the court ruled there was sufficient probable cause to find that Mr. Storme committed subsequent crimes while on release (specifically his arrest for stalking a fourth woman) as well as clear and convincing evidence that he violated the conditions of release. Although Mr. Storme argued that the violations were remote in time and effectively “stale,” the court found that the Bail Reform Act placed no time restraints on revocation. Moreover, these violations merely served to establish Mr. Storme’s eligibility and exposure to the risk of pretrial detention.

Next, the court considered the second prong. The court found Mr. Storme’s likelihood of violating his pretrial conditions of release, although proven, did not warrant detention, given the nature of the violations. The court could not conclude that he was unable to abide by any conditions of release. The court also considered whether suicide was a form of flight or nonappearance under the Bail Reform Act. Flight infers that a defendant avoids prosecution by means of leaving the jurisdiction. Nonappearance refers to an intentional act or attempt to avoid criminal prosecution. Further, as matter of law and court operation, death does not constitute an act to avoid

prosecution. Following any death, criminal proceedings are terminated; bail and court appearances are rendered meaningless. Citing legislative intent, the court found that Congress would have explicitly identified risk of harm to self as a consideration if they had intended it to apply to bail determinations. Thus, the court held that suicidality is distinct and separate from risk of flight or nonappearance. Finally, the court ruled that risk of suicide alone is insufficient, as the Bail Reform Act explicitly notes revocation of bail must be based on a risk of harm toward others or the community as well as the other factors noted above.

Ultimately, the court affirmed there was sufficient evidence to warrant Mr. Storme’s detention, as his conduct posed a danger to the community according to 18 U.S.C. § 3148(b)(2)(A). Focusing on Mr. Storme’s increasingly obsessive and erratic behavior in concert with his ongoing and escalating mental health problems, the court found he posed a danger of unpredictable violence to others that sufficiently justified his bail revocation. Mr. Storme continued to engage in problematic behavior despite strict supervision, and there was evidence this behavior could escalate further through either self-harm or a desperate act of violence against others, which could not be effectively mitigated through conditions of release.

#### Discussion

Although *Storme* held that suicidality alone is insufficient to warrant pretrial detention, the presence of aggravating factors, specifically a defendant’s dangerousness toward others or the community, may provide sufficient grounds for pretrial detention. Defendants evidencing community-based risk factors that cannot be effectively mitigated with conditions of release may be subject to pretrial detention.

In considering these findings, forensic practitioners are reminded of the distinction between risk of harm to self and risk of harm toward others. This case, however, highlights that there may be considerable overlap between a person’s risk of suicide and dangerousness toward others. In the context of pretrial detention, the court may consider aggravating factors, such as mental illness, impulsivity, uncontrolled or erratic behavior, statements of violence, and other heightening conduct that may elevate a person’s overall risk. Practitioners should consider how an individual’s escalating behavior, unpredictability, suicidal statements, and obsessions may create a substantial risk of harm to others or the community

at large. For example, the court considered the case of a suicidal individual who threatens to kill anyone who attempts to prevent his death. In circumstances such as this, the risk of serious violence is extended onto others and, in the context of bail considerations, may be grounds for detention.

As evaluators may be asked to assess defendants' mental health status for purposes of pretrial detention, it is crucial to consider not only the defendant's specific risk but the conduct in the context of the effect on others and the community. Simply stated, where suicidality alone is insufficient for pretrial detention, evaluators should additionally assess for the presence of aggravating or community-based risk factors for suicidal defendants. Although the case itself does not expressly state whether Mr. Storme was formally evaluated by a forensic practitioner, it is likely he was assessed at some point, given the concerns about his mental health, suicidality, and risk of harm toward the community. Thus, in understanding the factors that a court will consider relevant and applicable in weighing a pretrial detention determination, forensic practitioners can ensure that they are providing the factfinder the most relevant information in the given circumstances.

## Adam Walsh Act Discharge Hearings

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**In Adam Walsh Act Discharge Hearings, Detainee Bears the Burden of Proof by a Preponderance of Evidence of No Longer Being Sexually Dangerous**

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**Key words:** Adam Walsh Act; sexually dangerous person; standard of proof; due process rights; structured professional judgment; hebephilia

In *United States v. Vandivere*, 88 F. 4th 481 (4th Cir. 2023), a detainee, who was civilly committed as

a sexually dangerous person (SDP), claimed the district court erred in its determination making an SDP detainee bear the burden of proving by a preponderance of the evidence he was no longer sexually dangerous in an Adam Walsh Act (AWA) discharge hearing. He argued the district court erred in determining that he remained sexually dangerous. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court findings, ruling that the preponderance of evidence was the proper standard of proof and the detainee bore the burden of proof. The court also found no error in considering the evidence in concluding that he remained sexually dangerous.

### Facts of the Case

James Dow Vandivere had an extensive history of sexually abusing preteen boys, leading to his arrest in May 1998 at approximately 50 years old. He was convicted in December 1998 for crimes involving the sexual exploitation of children and was sentenced to almost 20 years imprisonment. In January 2015, toward the end of his criminal sentence, the government certified Mr. Vandivere as an SDP pursuant to AWA and petitioned the district court to commit him civilly. At the AWA hearing, the government had to demonstrate by clear and convincing evidence that Mr. Vandivere “engaged or attempted to engage in sexually violent conduct or child molestation,” that he “suffers from a serious mental illness, abnormality, or disorder,” and that he “would have serious difficulty in refraining from sexually violent conduct or child molestation if released” (*Vandivere*, p 484; citing 18 U.S.C. § 4247 et seq (2006)). In 2016, the government met its burden, and Mr. Vandivere was civilly committed to the Bureau of Prisons as an SDP.

In August 2020, Mr. Vandivere filed a motion for a discharge hearing to argue that he was no longer sexually dangerous and could be released. Mr. Vandivere also argued that the burden of proof should have remained on the government to show that he remained sexually dangerous. The government disagreed, stating that the burden had shifted to him to prove he was no longer sexually dangerous by a preponderance of the evidence.

At the outset of the discharge hearing, Mr. Vandivere conceded the first element of the sexual dangerousness test (i.e., his prior conduct) but disputed the serious mental illness and serious difficulty element. Three expert witnesses testified at the hearing. Dr. Gary Zink, a clinical forensic psychologist, on behalf of