

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

the government, testified that Mr. Vandivere continued to meet the requirements of sexual dangerousness. Dr. Zink diagnosed Mr. Vandivere with other specified paraphilic disorder, hebephilia, other specified personality disorder, and antisocial and narcissistic features. Dr. Zink testified that, although offenders older than age 60 are unlikely to reoffend, recidivism in older offenders, referred to as “rare birds,” can still occur. He testified that Mr. Vandivere was a rare bird, given his dynamic risk factors that increased his likelihood of reoffending. Dr. Dawn Graney, a psychologist retained by the government, diagnosed Mr. Vandivere with other specified paraphilic disorder, hebephilia, other specified personality disorder, and antisocial features. Dr. Graney testified that, although Mr. Vandivere’s age placed him at low risk for reoffending, it was important to consider a sex offender’s personal characteristics when assessing sexual dangerousness. On behalf of Mr. Vandivere, Dr. Luis Rosell, a clinical and forensic psychologist, testified that hebephilia is not recognized in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and could not satisfy the serious mental illness element. Dr. Rosell testified that Mr. Vandivere was not likely to reoffend given the research indicating sex offenders older than 60 have a reduced rate of reoffending and dismissed data related to Mr. Vandivere’s dynamic risk factors.

The district court reviewed the record and found the government’s experts’ diagnoses persuasive. The district court found he would have serious difficulty in refraining from child molestation if released and cited the determination “requires more than relying on recidivism rates of past offenders but requires an analysis of a range of different factors” (*Vandivere*, p 487). The court stated they gave greater weight to the government’s experts 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 of the factors” (*Vandivere*, p 487). The district court ruled that Mr. Vandivere failed to meet his burden of a preponderance of the evidence that he was no longer sexually dangerous and denied his motion for discharge. Mr. Vandivere appealed to the U.S. Court of Appeals for the Fourth Circuit, primarily arguing the district court wrongly forced him to bear the burden of proof and that the district court wrongly weighed the evidence indicating he remained sexually dangerous.

Ruling and Reasoning

The Fourth Circuit concluded that the AWA clearly indicates that detainees bear the burden of showing, by a preponderance of evidence, that they are no longer sexually dangerous. Mr. Vandivere asserted that this violates detainees’ due process rights. The court looked at three factors outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976) for guidance: the private interest at stake, fairness and reliability of existing procedures, and the public interest. The court found that the factors discussed in *Mathews* indicate the burden of proof on an AWA detainee does comply with the Due Process Clause. Mr. Vandivere attempted to avoid the *Mathews* comparison by citing three Supreme Court precedents (*Addington v. Texas*, 441 U.S. 418 (1979), *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Kansas v. Hendricks*, 521 U.S. 346 (1997)), none of which apply to the constitutionality of the AWA.

In response to Mr. Vandivere’s statement that the district court wrongly accepted a diagnosis of hebephilia as grounds for civil commitment, the court relied on prior rulings from *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010) and *Kansas v. Hendricks*, which determined a mental disorder does not need to meet exact medical definitions or the diagnosis does not need to be identified in the DSM to meet civil commitment criteria. Mr. Vandivere argued that the district court relied on the “rare bird” theory, which he stated was highly subjective. The court determined that assessing a sex offender’s recidivism rate goes beyond general statistics, requiring district courts to analyze the “personal proclivities of each offender and what these idiosyncrasies might indicate about his risk of reoffending” (*Vandivere*, p 494). Finally, Mr. Vandivere argued that the district court did not consider his positive behavior while imprisoned. The court rejected his argument because he continued to endorse cognitive distortions about his sexual encounters with pubescent boys and noted the absence of 13- to 15-year-old boys in the Bureau of Prisons. Thus, the findings were affirmed.

Discussion

In *Vandivere*, the court confirmed that hebephilia can be a valid basis for civil commitment, despite its exclusion from the DSM-5. Further, the court explicitly recognized that district courts are well within their discretion to consider empirically supported risk factors for sexual violence in light of a detainee’s personal

characteristics and behavior. There are primarily two accepted approaches to assessing risk for sexual violence: the nondiscretionary approach and structured professional judgment (SPJ). The nondiscretionary approach relies on prior rules and statistical methods of weighing risk factors and prevents consideration of personal, situational, or idiosyncratic factors on risk. In contrast, a SPJ approach allows professionals to weigh each risk factor based on the frequency and severity of behavior, an evaluatee's personal idiosyncrasies, and the overall context of the situation.

In this case, the district court heard testimony and reviewed evaluations from experts that presented conflicting opinions regarding Mr. Vandivere's sexual violence risk. All agreed that existing research indicated individuals older than age 60, like Mr. Vandivere, have a reduced rate of reoffending. But, the government's experts also considered Mr. Vandivere's personal factors, such as lack of remorse, ongoing deviant sexual beliefs, and refusal to participate in sex offender treatment, in concluding he remained an SDP, despite advanced age. The case is instructive for forensic mental health evaluators who are involved in SDP cases. Following *Vandivere*, it is prudent for clinicians, especially in the Fourth Circuit, to consider additional factors beyond diagnosis and consider any personal proclivities of the offender that bear on likelihood of reoffending.

Competence to Stand Trial and Due Process Rights

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The Kansas Supreme Court Clarifies Procedural and Substantive Requirements in Competence to Stand Trial Proceedings

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In the case of *State v. Mitchell*, 539 P.3d 218 (Kan. 2023), the Kansas Supreme Court reviewed the appeal of a defendant who asserted that he had been tried while incompetent to stand trial. Devawn T. Mitchell was convicted of felony murder and other charges following his involvement in a fatal collision with another vehicle during a police pursuit. Despite initial concerns about his psychiatric history, Mr. Mitchell was found competent to stand trial in a post-conviction hearing. The Supreme Court of Kansas upheld his conviction and sentence, ruling that the lower court complied with the state's statute for competency hearings.

Facts of the Case

Mr. Mitchell was allegedly involved in various traffic infractions that resulted in numerous pursuits by law enforcement. He was ultimately involved in a fatal collision with another vehicle. Mr. Mitchell was convicted on charges of felony murder, aggravated assault on a law enforcement officer, and fleeing and eluding after a bench trial in the District Court of Lyon County, Kansas.

Mr. Mitchell's defense initially raised concerns about his psychiatric history and competency to stand trial and filed a pretrial notice of lack of intent due to mental disease or defect. He was evaluated by a psychologist contracted by his defense attorney. After hearing back from this psychologist, Mr. Mitchell's defense withdrew this filing. The court held a two-day bench trial, during which Mr. Mitchell presented no evidence. He was found guilty on all charges.

After the trial, Mr. Mitchell's defense attorney filed a motion to determine competency. Crosswinds Counseling performed a competency evaluation. The forensic evaluator opined that Mr. Mitchell had symptoms consistent with a diagnosis of schizophrenia but was able to participate in his defense with "coaching and support." The evaluator explained that Mr. Mitchell was coached to identify methods to remain calm to work toward treatment goals with good effect, indicating behavioral control when he is offered relevant incentives. At this competency hearing, Mr. Mitchell again presented no additional evidence and was found competent to stand trial. The district court ordered a life sentence with a minimum of 554 months before parole eligibility, followed by a consecutive controlling 39-month sentence. Mr. Mitchell appealed directly to the Kansas Supreme Court, arguing that the district