direct result of the criminal conduct. This court also relied upon *Vattimo*, asserting Mr. Vattimo was found not guilty by reason of insanity and still played an active role, whereas Mr. DiNardo confessed to, and was convicted of, four counts of first-degree murder. The court supported the trial court's finding that the appellant was not entitled to recovery of compensatory and indemnification damages; however, it relied upon the no felony conviction recovery rule, as opposed to *Vattimo*, for this finding.

Ruling and Reasoning

The Pennsylvania Supreme Court rejected the appellant's claim that Dr. Kohler was the active participant in the murders, finding Mr. DiNardo's guilty plea precluded attempts to evade personal responsibility. The court reviewed the reasoning from the superior court and found it persuasive. The court ruled that the "no felony conviction recovery" barred the appellant's claims against the psychiatric providers.

The court said that the losses for which Mr. DiNardo sought recovery flowed from his "own volitional homicidal conduct," relying on the common law principle referred to as the "outlaw" doctrine. The first principle of this doctrine from the Latin maxim "*ex turpi causa nonoritur acio*" ("from a wicked cause there arises no action") holds that an individual cannot sue another for damages arising from the individual's criminal misconduct. The second principle, "*in pari delicto potior est conditio defendentis*" ("of equal guilt or fault"), holds that, in cases where the plaintiff (in this case Mr. DiNardo) has been an active, voluntary participant in the wrongful conduct, the individual cannot recover damages "if their cause of action is based at least partially on their own illegal conduct" (*DiNardo*, p 1203). The modern version of this principle, the "no felony conviction recovery" rule, holds that an individual may not be compensated for harm resulting from the individual's own wrongdoing.

Discussion

The court's ruling in this case highlights three principles, *ex turpi causa*, *in pari delicto*, and the no felony conviction recovery rule, each substantiating that an individual may not seek recovery for harm resulting from the individual's own criminal conduct. These principles carry weight in Mr. DiNardo's case, given he pled guilty to four counts of first-degree murder. Despite the claim that Dr. Kohler provided negligent psychiatric care, Mr. DiNardo did not plead guilty by reason of insanity nor guilty but mentally ill for the violent acts. His guilty plea serves as an admission of his volitional participation in the acts.

The ruling in this case carries significant implications for treating psychiatrists. Had Dr. Kohler been held liable for losses experienced because of Mr. DiNardo's criminal conduct, this may have had a chilling effect upon other psychiatrists who may become hesitant to treat patients who express homicidal ideation or exhibit physical aggression for fear of being held liable for their patients' future acts. Similarly, such a liability may cause treating psychiatrists to practice defensive medicine or overhospitalize or excessively medicate individuals with homicidal ideation or a history of physical aggression for fear of legal or financial consequences if an individual acted violently while under their care. This liability would also certainly undermine the difficulty treating psychiatrists face in predicting future dangerousness to others. Moreover, on a societal level, such liability would have financial implications by increasing health care costs if medical providers incurred the financial burden of criminal conduct committed by their patients.

Burden of Proof in Federal Civil Commitment Release Hearings for Detainees Deemed Sexually Dangerous Persons

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The Detainee Is Responsible for Proving by a Preponderance of Evidence That He Is No Longer a Sexually Dangerous Person in Federal Civil Commitment Release Hearings

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Key words: sexually dangerous person; civil commitment; burden of proof; risk assessment; hebephilia

In *United States v. Vandivere*, 88 F. 4th 481 (4th Cir. 2023), the Fourth Circuit Court of Appeals unanimously ruled that, in a hearing to determine whether a civilly committed "sexually dangerous person" can be released, the burden of proof is on the detainee to prove by a preponderance of evidence that he is no longer dangerous.

Facts of the Case

James Dow Vandivere was convicted in 1998 of various crimes involving the sexual exploitation of minors. The federal government alleged that Mr. Vandivere, who was approximately 50 years old at the time of his arrest, had been sexually abusing preteen boys for decades. He was sentenced to nearly 20 years in federal prison.

As Mr. Vandivere's prison sentence neared its end, the government certified Mr. Vandivere as a sexually dangerous person pursuant to the Adam Walsh Child Protection and Safety Act of 2006 and petitioned the district court to civilly commit him pursuant to 18 U.S.C. § 4248 (2006). That certification triggered a requisite statutory hearing to determine whether Mr. Vandivere was a sexually dangerous person. At that hearing, the government was required to demonstrate by clear and convincing evidence that Mr. Vandivere's prior conduct was of a sexually dangerous nature (the prior conduct element); that he experienced a serious mental illness, abnormality, or disorder (the serious mental illness element); and that he would have serious difficulty in refraining from sexually violent conduct or child molestation if released because of his disorder (the serious difficulty element). In November 2016, the district court found that the government had met its burden and Mr. Vandivere was civilly committed for an indefinite term.

In August 2020, after nearly four years of civil confinement, Mr. Vandivere filed a motion under 18 U.S.C. § 4247(h) (2006) seeking a discharge hearing before the district court to argue he was no longer sexually dangerous and could be released. Section 4247(h) does not specify which party has the burden of proof in this hearing. Mr. Vandivere filed a motion contending that the burden of proof at the discharge hearing should be the same as at the initial commitment hearing: the government should bear the burden of proving that Mr. Vandivere remained dangerous by clear and convincing evidence. The government disagreed, asserting that the burden had shifted to Mr. Vandivere to prove he was no longer sexually dangerous by a preponderance of the evidence. The district court denied Mr. Vandivere's motion and agreed with the government.

The discharge hearing was held in May 2021. Two psychologists, Drs. Gary Zinik and Dawn Graney, testified on behalf of the government and opined that Mr. Vandivere continued to satisfy the elements of sexual dangerousness. In terms of the serious mental illness element, they diagnosed Mr. Vandivere with other specified paraphilic disorder, hebephilia (a term used to describe adults with an enduring sexual interest in children around the age of pubescence), and other specified personality disorder, with antisocial and narcissistic features (emphasizing Mr. Vandivere's lack of remorse for his victims and his persistent failure to take responsibility for the harm he had caused). The psychologists testified that they believed Mr. Vandivere met the criteria for the serious difficulty element despite his advanced age and described several dynamic risk factors that exacerbated Mr. Vandivere's risk, including his emotional identification with children, his poor problem-solving skills, his tendency to lie, and his distorted understanding of what constitutes sexual abuse. Dr. Zinik posited that, although infrequent, recidivism in older sexual offenders does occur. He referred to these individuals as "rare birds" and stated, "Mr. Vandivere is one of those rare birds. He is one out of a hundred, maybe one out of a thousand, maybe one out of a million" (*Vandivere*, p 485).

Dr. Luis Rosell, a clinical and forensic psychologist, testified on behalf of Mr. Vandivere. As for the serious mental illness element, Dr. Rosell argued that hebephilia could not serve as valid grounds for a civil commitment. He explained that the diagnosis was controversial and that it was not recognized in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). Dr. Rosell opined that research demonstrated that offenders older than 70 had a very low recidivism rate, and he placed

Mr. Vandivere's risk of recidivism at 5.9 percent based on a synthesis of recent published studies of the subject.

The district court concluded that Mr. Vandivere failed to show by a preponderance of evidence that he was no longer sexually dangerous and denied his motion for discharge. In terms of the serious mental illness element, the district court accepted the diagnoses of hebephilia and personality disorder. The district court found that Mr. Vandivere failed to demonstrate he would not have serious difficulty in refraining from child molestation if released. The court cited a process of comprehensive assessment, "including Vandivere's [prior] failure on supervision, his resistance to treatment, his medical conditions, his age, his long-standing and continued deviant thoughts, his cognitive distortions, his impulsivity, his actuarial risk assessment, his dynamic risk factors, his lack of credibility, his conduct while incarcerated, and the historical nature of his offenses, both sexual and nonsexual" (*Vandivere,* p 487). Mr. Vandivere appealed the order of the district court and argued that the court wrongly forced him to bear the burden of proof and that, regardless of the burden of proof, the court improperly weighed the evidence of sexual dangerousness.

Ruling and Reasoning

The Fourth Circuit affirmed the district court's decision. It reasoned that, although the statutory scheme underlying the Adam Walsh Act does not state what the standard of proof is for detainee-initiated release hearings, it does indicate that the standard at a hearing initiated at the direction of the hospital is a preponderance of the evidence and that there is no reason why it should be different for a detainee-initiated hearing. Regarding which party bears the burden, the court concluded that "the burden of persuasion lies where it usually falls, upon the party seeking relief" (*Vandivere*, p 490).

Regarding the claim that the district court erred in concluding that Mr. Vandivere remained sexually dangerous, the appeals court noted that a reviewing court is not entitled to reverse factual findings merely because it would have weighed the evidence differently and that the trial court is in a better position to evaluate the credibility of experts and the value of their opinions. That said, the appeals court noted that the district court's assessment of the evidence was "reasoned, balanced, and well-informed." With regard to Mr. Vandivere's criticism of the use of the hebephilia diagnosis as the basis for the "serious mental illness" element, the court cited a prior holding that "the scope of 'illness, abnormality, or disorder' in § 4247(a)(6) is certainly broad enough to include hebephilia" and that "a mental disorder or defect need not necessarily be one so identified in the DSM to meet the statutory requirement" (*Vandivere*, p 494).

Discussion

In this ruling, the Fourth Circuit defined for the first time the burden of proof standard for a sexually dangerous person commitment release hearing initiated by the detainee. It placed that burden upon the individual seeking release to prove by a preponderance of evidence that the individual is no longer dangerous. The court was also asked to review the trial court's conclusion that Mr. Vandivere remained a sexually dangerous person, which was based largely upon the testimony of the forensic psychologists regarding their assessments of future risk posed by Mr. Vandivere.

Risk assessment falls within the expertise of many forensic psychiatrists and psychologists. By practice, experts are not expected to predict the future but assess various static and dynamic factors leading to an opinion about dangerousness. As there is no standard of practice regarding risk assessment, those who practice in this area need to decide how to conduct such an evaluation and whether to employ a strictly actuarial versus a more holistic approach based upon an analysis of both static and dynamic factors. In this case, one of the main questions at hand was how to balance the substantially reduced risk of recidivism because of the detainee's advanced age against factors such as lack of participation in treatment, previous failure on supervision, and ongoing deviant thoughts and cognitive distortions. Because the burden was found to fall upon the detainee, the case raises the question of what modifiable dynamic factors would convince a court that a detainee was no longer dangerous, given the need to overcome the potential bias related to the prior offense history, particularly one that was described by the court in this case as "horrid" and "brutal."

This case also considered the use of psychiatric diagnoses that are not found in the DSM, such as hebephilia in this case, as a basis for the serious mental illness, abnormality, or disorder element that forms a basis upon which an individual may be

classified a sexually dangerous person. In their ruling, the court made it clear that they are not restricted to consider only diagnoses listed within the DSM, opening the door for discussion of non-DSM disorders, such as complex post-traumatic stress disorder (PTSD) or hypersexuality (sexual addiction) that might be relevant in cases such as this.

In their ruling, the Fourth Circuit acknowledged the immense weight of judgment asked of both experts and the courts in civil commitment release hearings. It recognized that balancing an individual's liberty interests with the duty of protecting the public from potential future dangerous behavior is indeed a daunting task.

Requirements for Involuntary Medication Recommendations under *Sell*

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Using *Sell* Factors for Competency Restoration Treatment with Involuntary Medications Requires Analysis of the Meaning of "Important Governmental Interests"

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Key words: involuntary medication; *Sell*; competency restoration

In *United States v. Fieste*, 84 F.4th 713 (7th Cir. 2023), the Seventh Circuit Court of Appeals reviewed an appeal from federal district court involving involuntary medication of a defendant under *Sell* criteria. In this case on appeal, the court focused its analysis on the first *Sell* factor requiring important governmental interests and the second factor involving the question of whether the recommended treatment would significantly further those interests. The court concluded that these two elements of the *Sell* criteria were met appropriately; however, the court concluded that more specificity of the medication recommendations was required and returned the case to the lower court to refine the order.

Facts of the Case

Darlene Fieste was charged with threatening to assault and murder two federal judges, the current president, and three former United States presidents. She exhibited delusional beliefs of having been sexually assaulted by several high-ranking federal officials. Ms. Fieste was found incompetent to proceed because her delusions interfered with a rational understanding of her charges and her ability to work with her attorney to assist in her defense.

After she was committed to the custody of the Attorney General for the purpose of determining whether there was a substantial probability that she could be restored to competency within the foreseeable future, her competency was again evaluated by Dr. Matthew Opesso, a Bureau of Prisons psychologist. Dr. Opesso diagnosed her with "bipolar disorder, current episode manic, with mood congruent psychotic features" (*Fieste*, p 717). He also determined that "her delusions heavily impaired her abilities to participate in her defense and communicate with her attorneys" (*Fieste*, p 717) and therefore opined she was incompetent to proceed. He added that, during the evaluation period, Ms. Fieste demonstrated improvement in her symptoms while taking fluphenazine. He concluded that medication compliance "would give her a substantial probability of attaining competency" (*Fieste*, p 718).

Soon after the submission of Dr. Opesso's report, Ms. Fieste began refusing medication. The government then moved for the court to authorize involuntary medication to restore her to competency under *Sell v. U.S.*, 539 U.S. 166 (2003). On March 20, 2023, a *Sell* hearing was held, during which three expert witnesses testified. These experts were Dr. Opessa, Dr. Ramya Seeni, Ms. Fieste's psychiatrist within the Bureau of Prisons, and Dr. Michael Byrne, a psychiatrist retained by the defense. The experts disagreed on the diagnosis, with Dr. Seeni agreeing with Dr. Opesso's diagnosis of bipolar I