IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 07-7671(L)

UNITED STATES OF AMERICA,
Petitioner-Appellant,

v.

GRAYDON COMSTOCK, JR., THOMAS MATHERLY,
MARVIN VIGIL, MARKIS REVLAND, AND SHANE CATRON,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA

SUPPLEMENTAL BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

In 2007, the district court held 18 U.S.C. § 4248 unconstitutional, holding Congress lacked the power to enact the statute and that its standard of proof violated due process. In 2009, this Court affirmed on the federalism issue. On May 17, 2010, the Supreme Court reversed and remanded for this Court's consideration of the remaining issues.

ARGUMENT

Proof beyond a reasonable doubt is required when confinement is premised on past criminal or criminal-like acts. *In re Winship*, 397 U.S. 358 (1970). Before someone may be confined as a "sexually dangerous" person under §4248, however, a court need only find by clear and convincing evidence that he "has engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. § 4247(a)(5). The regulations define this conduct as criminal. *See* 28 C.F.R. §§ 549.92, 549.93 (defining the conduct as "unlawful"). Section 4248's standard is therefore constitutionally insufficient, notwithstanding the government's argument that the higher standard can simply be written into the statute if necessary.[1]

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[1]By focusing on the burden of proof, appellees do not waive any other arguments from their opening briefs. For example, one district court has now adopted appellees' argument that § 4248 violates substantive due process and constitutes criminal, and not civil, proceedings. (J.A. 48-53; 59-60) (Response. Br. 18 n.3). *See* Order Granting Habeas Corpus in No. 5:08-hc-02160-BO , *Timms v. Johns* (Doc. # 47, E.D.N.C., March 31, 2010)(on appeal in this Court as No. 10-6496) (see Appendix A); *see also* Brief of the NACDL and Nat'l Ass'n. Of Fed. Defenders as Amicus Curiae Supporting Respondents, *United States v. Comstock*, 130 S. Ct. 1949 (2010), 2009 WL 3727683 *at* 18-24

I. Beyond a reasonable doubt is the constitutionally-required standard for the prior bad act prong of § 4248.

In *Winship*, the Court observed that the reasonable doubt standard applies in criminal cases "because of the possibility that [the accused] may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 397 U.S. at 363. Extending the reasonable doubt standard to civil juvenile delinquency proceedings, the Court found that: "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards" where the loss of liberty is "comparable in seriousness to a felony prosecution." *Id.* at 365-66 (internal quotation omitted).

Winship's logic dictates that the "beyond a reasonable doubt" standard must apply to the prior criminal act finding in § 4248 hearings. First, as in *Winship*, § 4248 implicates the exact concerns that mandate the use of the reasonable doubt standard in criminal cases—a loss of liberty upon an adjudication of stigmatizing criminal behavior. *Id.* at 363. Second, neither the "civil" label applied to indefinite commitment under § 4248 nor the possibility of treatment reduce the need for the safeguard of the reasonable doubt standard. As in *Winship*, when there is a

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(hereinafter "Defenders' Amicus"). Though, of course, *Kansas v. Hendricks* binds this Court, *see* Response Br. 18 n.3, respondents assert–as they have all along–that the present case is constitutionally distinguishable from *Hendricks*. The district court order in *Timms*, especially in conjunction with the brief cited above, sets out this argument comprehensively and persuasively. Because of the space constraints of this brief, the respondents simply direct the Court's attention to these materials and urge that it adopt the analysis contained therein.

stigmatizing deprivation of liberty, no matter the label nor the intentions, due process mandates the application of our most rigorous procedural safeguards. *Id.* at 366.

Initially, the government argued that due process does not "mandate" § 4248's requirement that an individual have "engaged or attempted to engage in sexually violent conduct or child molestation" (hereinafter the "bad acts" requirement) and thus, this finding "should not be held to a higher standard." (Op. Br. 44). Respondents rebutted this argument, demonstrating that due process does mandate this finding and that the Constitution operates on *every* element contained in a statute. *See* Response Br. 63-68.[2]

Briefing in the Supreme Court further clarified the necessity of the "bad acts" finding by elucidating the uncertainty of the science underlying the other finding required by the statute: the existence of a "mental disorder" and a resultant inability to refrain from sexually violent conduct or child molestation (hereinafter the "mental disorder" finding). As set forth in the Defenders' Amicus, the science underpinning the "mental disorder" requirement has proven unreliable over the last thirty years. 2009 WL 3727683 *at* 4-18. This uncertainty elevates the "bad act" finding because,

[2]The government says that respondents rely on criminal law cases that are "inapposite." (Rply. Br. 21n.8). Criminal cases are not inapposite. Section 4248 requires findings about unlawful, stigmatizing activity that will lead to indefinite confinement. In all relevant ways, criminal cases provide a very useful analogy. Additionally, the lack of analogous civil case law in this area actually proves respondents' point that § 4248 represents an unprecedented expansion of the civil law beyond the limits of due process.

without proof beyond a reasonable doubt that a person has acted on impulses in the past, the reliability of a determination that one will act in the future becomes too speculative to support indefinite commitment. As the amicus brief recognizes, clinicians are, at best, making an informed guess as to whether someone will commit sexually violent act at a future time. *Id.* at 9 ("[L]iterature and data from the past thirty years suggest that, when it comes to predicting which individuals will commit offenses in the future, professionals' predictions are neither accurate nor reliable for purposes of legal determinations affecting a person's liberty interests.") This guess, without proof that an individual has previously committed a sexually violent act, subjects individuals to commitment based on little better than random chance; a standard that violates due process. Thus, analysis of the science behind civil commitment further supports the district court's conclusion that *Winship* mandates the application of the reasonable doubt standard. *See* Response Br. 57-68.

II. Courts cannot re-write statutes.

Confronted with the tension between the plain language of the statute and *In re Winship,* the government suggests that, even if the higher standard applies, this Court can ignore § 4248's "clear and convincing" requirement and simply apply the beyond a reasonable doubt standard instead. (Reply Br. 23). The government relies on the theory of constitutional avoidance set forth in *Ayotte v. Planned Parenthood*, 546 U.S.

320 (2006). However, in the instant case, the government asks this Court to stretch the application of constitutional avoidance beyond its limits to salvage § 4248 by re-drafting it.

Initially, the government cites *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) as authority for this Court to "sever problematic portions" of the statute and leave the remainder intact. This Court must, according to the government, "sever" the "clear and convincing" language from § 4248 and "apply" the "beyond a reasonable doubt" standard. The government, however, fails to explain how a court can "apply" a burden of proof without drafting it into the statute. This unprecedented expansion of the severability doctrine fails.

Unlike the improper language at issue in *Alaska Airlines*, "which by its very nature [was] separate from the operation of the substantive provisions of [the] statute," almost nothing can be as fundamental to the operation of a statue as the congressionally mandated burden of proof to apply to its substantive elements. *Id.* at 684-85. The severability doctrine preserves the bulk of legislative acts when limited, discrete, and naturally severable portions of those acts are unconstitutional. It has never been a tool that allows the courts to excise and re-write burdens of proof or other essential statutory components: "[Congress] did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations

it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (cited in *Alaska Airlines*).[3]

Relatedly, the government relies on the idea that the courts must write the reasonable doubt standard into the statute because Congress would have preferred that to invalidation of the statute.[4] Of course, the government could *always* argue that Congress would prefer the judiciary re-writing a statute to invalidating a statute. Accepting this line of argument would prevent the judiciary from *ever* invalidating a statute. Constitutional separation of powers and the judiciary's role as a co-equal branch of government cabin the application of this theory:

> [W]e are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

Ayotte, 546 U.S. at 330 (internal quotation omitted).

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[3]Along these same lines, the government makes a hyper-textual argument that this court should apply "clear and convincing," not to the individual elements of the statute, but to the "overall conclusion." (Rply. Br. 24). Respondents can find no other instance in which a statutory burden of proof does not naturally and necessarily apply to the individual elements of an offense. Such a reading of the statute strains the very definitions of the terms-of-art "elements" and "burden of proof." For constitutional avoidance to operate, "the statute must be *genuinely susceptible* to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one."*Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (emphasis added).

[4]As noted in the initial round of briefing, respondents dispute that Congress, which specifically changed the burden of proof from the *Hendricks* template, would have preferred the reasonable doubt standard in § 4248.

Comstock provides a textbook example of the executive branch of government misusing the theory of constitutional avoidance to force the judiciary to subordinate its responsibility to interpret statutes. Simply put, the government expects the judiciary to re-write the law to say what the executive branch wants it to say.

III. Neither harmless error analysis nor as-applied challenges resolve § 4248's constitutional infirmity.

The government's other arguments collapse into two theories. First, under harmless error analysis, the government asserts that the unconstitutional burden of proof should not matter because the vast majority of potential respondents would meet the that standard anyway. (Opening Br. 48-49 & n.20)(noting that the beyond a reasonable doubt standard is "incontrovertibly" and "plainly" met for certain respondents). Alternatively, the government argues that this Court should view respondents' challenge as an as-applied challenge because most of the respondents would meet the beyond a reasonable doubt standard as applied to them. (Opening Br. 47)(discussing "facial" invalidation). Both arguments suffer the same flaw: they require this Court to ignore structural error on the face of the statute. Neither harmless error analysis nor as-applied reasoning can sustain this course

A. Structural error can never be harmless.

An improper burden of proof constitutes structural error and can never be harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 279-81 (1993). As this Court has noted

several times,"[T]he Supreme Court has . . . held that an error in an instruction that relieves the State of its burden of proof beyond a reasonable doubt can never be harmless." *Jenkins v. Hutchinson*, 221 F.3d 679, 685-86 (4th Cir. 2000) (citing *Sullivan*); *see also United States v. McKoy*, 277 Fed. Appx. 283, 284-85 (4th Cir. 2008) (unpublished)(same); *Adams v. Aiken*, 41 F.3d 175, 177-78 (4th Cir. 1994) (same).[5]

The burden of proof implicates concerns more fundamental than accuracy: "Without a jury's constitutional finding of guilt, a conviction lacks both accuracy *and* one of the bedrock procedural elements essential to the fairness of the proceeding." *Adams,* 41 F.3d at 178 (internal quotations omitted)(emphasis added). "The standard [of proof] serves to allocate the risk of error between the litigants *and* to indicate the relative importance attached to the ultimate decision." *Addington v. Texas,* 441 U.S. 418, 423 (1979)(emphasis added). Harmless error review does not fix issues related to bedrock problems involving the importance and fairness of the proceeding.

B. The district court properly invalidated § 4248 on its face.

Likewise, the government's "facial v. as-applied" argument also fails. The government argues that, as applied to several respondents, § 4248 is constitutional

[5]The cases speak primarily in terms of juries and the Sixth Amendment because the beyond a reasonable doubt standard occurs most frequently in criminal prosecutions. In *Sullivan*, however, the Supreme Court expressly noted that the beyond a reasonable doubt requirement derives, not from the Sixth Amendment, but from the Fifth Amendment. *Sullivan*, 508 U.S at 277-78 (citing *Winship)*. Because the Fifth Amendment, of course, applies to § 4248 hearings (just as it applied to the non-criminal proceedings in *Winship*), *Sullivan* and its progeny are directly on point.

because those respondents would meet the reasonable doubt standard. However, as established in *Sullivan*, the clear and convincing burden of proof constitutes unconstitutional structural error *as applied to anyone and everyone*–without regard to whether an appellate court thinks they would meet a hypothetical reasonable doubt standard. Allowing the government to mis-use the as-applied doctrine in this manner would eviscerate the structural error doctrine and allow the government to uphold almost any judgment obtained in the face of structural error by simply invoking the term "as-applied" instead of "harmless."

More fundamentally, even by the contours of "facial v. as-applied" doctrine, respondents' challenge to § 4248 necessitates facial invalidation. As-applied challenges are appropriate where "a statute has valid applications and no harm occurs in using case-by-case adjudication," or some "set of circumstances exists under which the Act would be valid." *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172-73 (4th Cir. 2009)(en banc) (internal quotation omitted). In contrast, "[t]he idea supporting facial challenges derives from the principle that no one may be judged by an unconstitutional rule of law. . . . [F]acial challenges are justified where as-applied adjudication is thought to be inadequate to protect constitutional norms." *Id* at 172 (internal quotation omitted).[6]

[6]Additionally, this challenge implicates none of the policy reasons that "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008).

The proper question in a "facial v. as-applied" analysis is not whether the constitutional violation is *harmless* as applied to some, but whether there is *a constitutional violation* as applied to all. In the present case, the clear and convincing burden of proof constitutes structural error. Therefore, "[n]o set of circumstances exists under which [§ 4248] would be valid." The "statute is invalid, not merely as applied to the facts, but . . . in whole" and facial invalidation provides the appropriate remedy. *Id.* (internal quotation omitted).

CONCLUSION

Section 4248 contains structural error on its face. Congress has the power and the duty to correct unconstitutional legislation. This court should affirm the district court's order and allow Congress that opportunity. *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result. This allows both of our branches to adhere to our respected, and respective, constitutional roles." (internal quotation omitted)).

In the present case, the law has been settled since *Winship* and *Sullivan*, and no speculation is required to apply it. In addition, this Court does not need to adjudicate the constitutionality of this law "in advance" because the law's unconstitutionality inheres in its application to these five respondents. Also, because the error in this case–structural error on the face of the statute–occurs so rarely, applying facial invalidation to this error will not make a holding "broader than is required," but actually quite narrow in scope.

REQUEST FOR ORAL ARGUMENT

At the original oral argument in this case, the Court and the parties focused almost exclusively on the federalism issue. Thus, the parties have not had an opportunity to answer this Court's questions related to the issues addressed by this supplemental briefing. Accordingly, respondents-appellees respectfully request oral argument.

Respectfully submitted this 7th day of July, 2010.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:08-HC-2160-BO

GERALD WAYNE TIMMS,

Petitioner,

v.

TRACY JOHNS, Warden, FCI Butner,

Respondent.

ORDER

This matter is before the Court on Petitioner Gerald Wayne Timms' Petition for Writ of Habeas Corpus and the Government's Motion to Dismiss the Petition. Petitioner claims that he is unlawfully detained pursuant to 18 U.S.C. § 4248, the civil commitment component of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (2006). For the reasons set forth herein, the Petition is GRANTED. The Government's Motion to Dismiss is DENIED.

INTRODUCTION

On February 16, 2001, Gerald Wayne Timms (hereinafter "Timms" or "Petitioner") pled guilty to violations of 18 U.S.C. § 2252A(a)(2). The United States District Court for the Southern District of Florida sentenced Timms to 100 months of confinement in the custody of the United States Bureau of Prisons. Allowing for credits against his active sentence, Timms was scheduled for release on November 11, 2008. But on October 23, 2008, the United States Bureau of Prisons certified Timms as a Sexually Dangerous Person pursuant to 18 U.S.C. §

4248. *See United States v. Timms*, 08-hc-2156-BR (E.D.N.C. October 23, 2008) (the "Commitment Action"). The Commitment Action was held in abeyance by Order of Judge Britt on October 28, 2008.

At this time, Petitioner remains in the custody of the United States Bureau of Prisons. He is presently confined at the Federal Correctional Institute located in Butner, North Carolina. As of Petitioner's hearing before this Court in Raleigh, North Carolina, Petitioner had been held for nearly 14 months.

Petitioner, acting *pro se*, filed a Petition for a Writ of Habeas Corpus. A status conference was held on October 21, 2009, and counsel was appointed to represent Petitioner. This Court subsequently granted Petitioner leave to file an Amended Petition. Petitioner, through counsel, filed this Amended Petition on January 8, 2010. The Government filed a response and motion to dismiss on January 25, 2010. Petitioner replied on February 5, 2010. A hearing was held in Raleigh, North Carolina, on March 5, 2010. The Petition is now ripe for ruling.

DISCUSSION

This Petition argues that 18 U.S.C. § 4248 violates the United States Constitution. At the outset, this Court notes that the Constitutional questions raised by Petitioner were addressed in part in *United States v. Comstock*, 507 F.Supp.2d 522 (E.D.N.C. 2007), *aff'd* 551 F.3d 274, 280 (4th Cir. 2009), *cert. granted* 129 S.Ct. 2828, 174 L.E.2d 551 (June 22, 2009). Judge Britt's Order in *Comstock*, 507 F.Supp.2d 522 (E.D.N.C. 2007), found § 4248 unconstitutional on the grounds that (1) the civil commitment of those deemed sexually dangerous does not fall within the Article I Commerce Clause powers of Congress; and (2) the failure to apply the beyond a

reasonable doubt standard in § 4248 proceedings constitutes a denial of due process. The Fourth Circuit Court of Appeals affirmed that Order on the grounds that § 4248 fell outside of the Article I Commerce powers of Congress. 551 F.3d 274, 280 (4th Cir. 2009). The United States Supreme Court granted *certiorari* on June 22, 2009, 129 S.Ct. 2828, 174 L.E.2d 551 (June 22, 2009), and held oral arguments on January 12, 2010.

Comstock has been stayed awaiting the Supreme Court's ruling. But here, Petitioner advances grounds for relief not adjudicated in *Comstock*. Specifically, Petitioner contends (1) that he has been subject to criminal punishment pursuant to § 4248 without the benefit of the Constitutional protections afforded to a criminal defendant and (2) that § 4248 on its face violates the due process clause of the Fifth Amendment. As such, this Court will address the merits of the Petition to the extent that these issues were not adjudicated in *Comstock*.

I.

In order to determine the scope and measure of the Constitutional processes and protections to which Petitioner is entitled, this Court must determine whether Petitioner has been subject to civil or criminal proceedings. *See In re DNA Ex Post Facto Issues,* 561 F.3d 294, 298 (4th Cir. 2009). The United States Supreme Court has set forth a two part test for distinguishing between civil and criminal proceedings. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *In re DNA Ex Post Facto Issues,* 561 F.3d 294, 298 (4th Cir. 2009). "The Court first asks whether the legislature's intent, as discerned from the structure and design of the statute along with any declared legislative intent, was to impose a punishment or merely to enact a civil or regulatory law." *In re DNA Ex Post Facto Issues*, 561 at 298 (internal citations omitted). "Second, even if the legislature did not intend to impose a punishment, a law still may be said to do so if the

sanction or disability that it imposes is 'so punitive in fact' that the law 'may not legitimately be viewed as civil in nature.'" *Id.* "A defendant faces a 'heavy burden' in making a showing of such a punitive effect and can succeed only on the 'clearest proof.'" *Id.* "In those limited circumstances, [Courts] will consider the statute to have established criminal proceedings for constitutional purposes." *Hendricks*, 521 U.S. at 361.

Congress intended § 4248 to establish civil proceedings. Section 4248 is entitled "civil commitment of a sexually dangerous person." Section 4248 was placed in Chapter 313 pertaining to offenders with a mental disease or defect. And nothing on the face of the statute indicates that Congress intended that § 4248 should be construed as a criminal statute.

But although Congress intended to enact § 4248 as a civil or regulatory law, the sanctions imposed on Petitioner pursuant to § 4248 are so punitive in fact that the Act may not legitimately be viewed as civil in nature. In finding that the Kansas Sexually Violent Predator Act imposed civil commitment rather than criminal punishment, the Supreme Court in *Hendricks* held that "[w]here the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safe-guards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent." *Hendricks*, 521 U.S. at 368-69. The Court noted that "an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution." *Id.* at 363.

Moreover, the Court found it significant that individuals subject to civil commitment pursuant to the Kansas statute were "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals" and "receiving in the neighborhood of "31- ½ hours of treatment per week."" *Id.* at 368.

By contrast, in *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004), the Ninth Circuit Court of Appeals held that where a "detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'" *See also Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

In the instant case, Petitioner has been subject to substantially the same conditions of confinement as a federal prisoner serving a criminal sentence. Petitioner is held within the confines of the Federal Correctional Institute in Butner, North Carolina. He is managed by BOP corrections officers and remains subject to BOP rules and regulations promulgated for the management of prisoners that are punitive in effect. Pursuant to these regulations, Petitioner has been placed in solitary confinement and lost telephone, commissary, and visitation privileges. Moreover, Petitioner is double bunked. His telephone calls are monitored and recorded. His recreational activities are limited. He shares mess privileges with prisoners. He wears a prison uniform. He is subject to strip searches and visual body cavity searches following visitation.

And he is required to vacate his cell during periodic searches. These conditions, considered together, compel the conclusion that Petitioner has been subject to criminal punishment.

When viewed as a criminal statute, the Constitutional infirmities of § 4248 are both numerous and apparent. Section 4248 does not provide for a trial by jury. Proof beyond a reasonable doubt is not required. Section 4248 increases Petitioner's incarceration based on his past conviction in the Southern District of Florida in violation of the *ex post facto* clause. *See Lance v. Mathis*, 519 U.S. 433, 441 (1997) ("The bulk of our ex post facto jurisprudence has involved claims that a law has inflicted 'a greater punishment, than the law annexed to the crime, when committed.' We have explained that such laws implicate the central concerns of the Ex Post Facto Clause: 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'") (*quoting Calder v. Bull*, 3 U.S. 386, 390 (1798); *Weaver v. Graham*, 450 U.S. 24, 30 (1981)). And Petitioner's continued criminal detention on the basis of his past conviction violates the double jeopardy clause by "punishing twice, or attempting a second time to punish criminally, for the same offense." *Hendricks*, 521 U.S. at 346. Therefore, this Court concludes that Petitioner has been unconstitutionally deprived of liberty pursuant to 18 U.S.C. § 4248.

II.

Assuming, *arguendo,* that 18 U.S.C. § 4248 is civil in nature, Petitioner is nonetheless entitled to relief. It has long been recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). As the Supreme Court noted in *Hendricks*: "[w]e have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper

procedures and evidentiary standards." *Hendricks*, 521 U.S. at 357 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Addington*, 441 U.S. at 426-427). But 18 U.S.C. § 4248 fails to provide procedural and evidentiary protections sufficient to satisfy the procedural due process requirements of the Fifth Amendment both on its face and as applied to Petitioner.

A.

The standard of proof set forth in § 4248 has already been addressed by Judge Britt in *Comstock*. Specifically, Judge Britt held that "§ 4248's failure to require a court to find beyond a reasonable doubt that a person has engaged or attempted to engage in sexually violent conduct or child molestation prior to permitting the individual's indefinite involuntary civil commitment as a sexually dangerous person constitutes a violation of due process." 507 F.Supp.2d at 559. Judge Britt reasoned that:

> This antecedent finding of fact takes on even greater importance when one considers the commitment scheme as a whole and the criteria for eligibility for commitment. Any person in the custody of the BoP, any person who has been committed pursuant to § 4241(d), and any person against whom charges have been dismissed solely for reasons pertaining to the mental condition of the person, is eligible for commitment under this statute, regardless of the nature of his criminal history or the charges against him. A criminal history of sexual violence or molestation is not required; for example, individuals convicted of and serving time for bank robbery, mail fraud, tax evasion, drug dealing, and sexual abuse of a child in the special maritime or territorial jurisdiction of the United States are all equally subject to certification and commitment under § 4248. Application of the reasonable doubt standard to the antecedent factual finding would more properly guard against the erroneous commitment of a person who had never engaged in sexually violent conduct or child molestation.
> 507 F.Supp.2d at 556-57 (internal citations omitted).

The clear and convincing evidence standard is not the only Constitutional infirmity of § 4248. Section 4248 does not define the antecedent conduct required to support commitment with specificity adequate to pass Constitutional muster. Where an involuntary commitment statute is

premised on a particular class of offender's likelihood of recidivism,[1] past crimes serve an essential evidentiary function. The Supreme Court in *Hendricks* noted that "[t]he [Kansas] statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. As we have recognized, '[p]revious instances of violent behavior are an important indicator of future violent tendencies.'" 521 U.S. at 358. (quoting *Heller v. Doe*, 509 U.S. 312, 323 (1993)).

Sections 4247 and 4248 require that the finder of fact determine by clear and convincing evidence that a person has engaged or attempted to engage in "sexually violent conduct" in order to find that person sexually dangerous. But §§ 4247 and 4248 provide no definition of the acts or attempted acts that qualify as "sexually violent conduct." In contrast, the Kansas Act in *Hendricks* required a prior conviction for a sexually violent crime, a finding of not guilty of a

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[1]Section 4248 applies to those persons in Bureau of Prisons (BOP) custody deemed to be sexually dangerous on the basis of, *inter alia*, some metric of recidivism prediction. The tests and batteries currently used by the mental health profession to predict sex offense recidivism offer, according to one study, "statistically moderate correlations with sexual recidivism." Shoba Sreenivasa et al., *Predicting the Likelihood of Future Sexual Recidivism: Pilot Study Findings From a California Sex Offender Risk Project and Cross-Validation of the Static-99*, 35 AM. ACAD. PSYCHIATRY & L. 454, 454 (2007); *see also* Jan Looman & Jeffrey Abracen, *Comparison of Measures of Risk for Recidivism in Sexual Offenders*, J. INTERPERSONAL VIOLENCE 2009 Jul 8. [Epub ahead of print] (finding two primary tests for recidivism "failed to predict significantly" for rape recidivism and that "none of the risk-assessment instruments were able to significantly predict sexual recidivism" in child molesters.). Whether or not moderate success in predicting sexual offense recidivism is a sufficient basis upon which to confine individuals to BOP custody under the auspices of perceived future dangerousness is outside the scope of this matter, but, at a minimum, the issue raises some level of concern. *See* Kelly K. Bonnar-Kidd, 100(3) *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, AM. J. PUB. HEALTH 412, 416 (2010) (". . . moderate validity (a 30%-36% likelihood of error) should not be acceptable for instruments designed to limit freedoms and impose additional regulatory restrictions . . .").

sexually violent crime by reason of insanity or mental defect, or a finding that an individual charged with a sexually violent crime was incompetent to stand trial. 521 U.S. at 351 (citing Kan. Stat. Ann. § 59-29a03(a), § 22-3221 (1995)).[2]

The over-breadth of the term "sexually violent conduct" renders § 4248 unconstitutional because it infringes on an individual's liberty interest in engaging in certain consensual sexual conduct protected by due process under *Lawrence v. Texas,* 539 U.S. 558 (2003). The term "sexually violent conduct" in § 4247 is so vague and over-broad as to encompass consensual sexual conduct that "does not involve minors ... does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused ... [and] does not involve public conduct or prostitution." *Id.* at 560. Allowing such conduct to form the basis of civil commitment for sexual dangerousness would contravene the Supreme Court's holding in *Lawrence v. Texas* that "individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process." *Id.* at 560. As such, this overly broad language of § 4247 that forms the basis for commitment under § 4248 violates the due process clause guarantee of "the full right to engage in private conduct without government intervention" as set forth in *Lawrence*. *Id.*

In sum, the due process clause of the Fifth Amendment requires more than a determination that a person has engaged in prior "sexually violent *conduct.*" Rather, due process requires a prior conviction for a sexual *crime*. This requirement ensures both that evidence sufficient to justify a finding of a likelihood of recidivism exists and that commitment does not infringe on the liberty interest recognized in *Lawrence v. Texas*. As such, because § 4248 does

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[2] And as Judge Britt notes in *Comstock*, at least 15 of the States that have adopted civil commitment statutes impose similar requirements. 507 F.Supp. 2d at 557.

not require a prior conviction for a sexually violent crime, a finding of not guilty of a sexually violent crime by reason of insanity, or a finding that an individual charged with a sexually violent crime is incompetent to stand trial, this Court concludes that § 4248 violates on its face the due process clause of the Fifth Amendment. Therefore, because Petitioner is detained pursuant to an unconstitutional statute, this Petition is GRANTED.

B.

Moreover, § 4248 contains no provision for a speedy determination of sexual dangerousness. "For more than a century, the central meaning of procedural due process has been clear: [p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). As the Supreme Court explained in *Jones v. United States,* "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." 463 U.S. 354, 367-68 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest..." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Hendricks*, the Supreme Court noted that such procedures were provided in the Kansas statute:

> The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. If such a petition were

> filed, the court was to determine whether "probable cause" existed to support a finding that the person was a "sexually violent predator" and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur.
> 539 U.S. at 352-53 (internal citations omitted).

This Court concludes that due process requires at least an initial judicial determination of probable cause to justify an individual's continued detention followed by a prompt hearing to determine sexual dangerousness. The Government does not contend that § 4248 provides for speedy adjudication. Rather, the Government's position is that "in the ordinary case a hearing could, and likely would, be held as soon as the district court's docket allows." Resp. Br. at 20. But such a result is plainly insufficient when considered in light of *Matthews v. Eldridge*. First, the private interest affected by civil commitment is substantial. The individual committed is deprived of his or her liberty by continued detention. Second, a risk of erroneous deprivation exists under the procedures used because the individual is automatically detained upon the un-reviewed certification by the Government that the individual is sexually dangerous and such detention would continue prior to the Government's carrying its final burden of proof. The additional procedural safeguards of initial review and speedy final adjudication would significantly reduce this risk of erroneous deprivation of liberty imposed by detention awaiting a hearing and limit the extent of such a deprivation in the case of an individual eventually determined to be not sexually dangerous. Finally, the cost to the Government in providing these additional procedures is slight. The Government is already required to provide an initial certification. A review of that certification for probable cause imposes a minimal burden. And a speedy adjudication of sexual dangerousness does not increase the Government's investigative burden. Rather, such a requirement merely alters the time at which the Government must carry

its burden of proof.

In sum, procedural due process requires at least a judicial determination that the Government has demonstrated probable cause to show that an individual is sexually dangerous to justify continued detention and a speedy final determination of sexual dangerousness. The Government contends that this deficiency does not meet the high standard required to facially invalidate the statute. *See United States v. Carta*, 592 F.3d 34, 43 (1st Cir. 2010) ("[Petitioner claims that] the failure of section 4248 to specify that a prompt hearing is required and perhaps-whether this is requisite is more debatable-to impose some prompt preliminary screening by a neutral magistrate before a substantial period of detention occurs after the sentence has expired. We cannot say that violations are so likely as to meet the high standard needed to facially invalidate the statute..."). But even accepting this contention, such procedures are required to justify Petitioner's continued detention awaiting a hearing. Therefore, on these grounds, the Petition is GRANTED.

III.

The Government's argument that this Petition must be dismissed as a result of Petitioner's failure to exhaust administrative remedies is without merit. The Government claims that Petitioner has failed to exhaust the administrative process set forth in 28 C.F.R. §§ 542.10, *et seq.* But these regulations were promulgated pursuant to 18 U.S.C. §§ 3621, *et seq.*, which apply to persons "sentenced to a term of imprisonment..." 18 U.S.C. §§ 3621(a). These regulations do not apply in cases of civil commitment. *See Hicks v. James*, 255 Fed. Appx. 744, 747-48 (4th Cir. 2007) (citing *Michau v. Charleston County*, 434 F.3d 725, 727-728 (4th Cir.2006)) ("Because Hicks' detention under § 4246 is not the result of a violation of criminal law and does

not relate to conditions of parole, probation, pretrial release, or a diversionary program, he does not meet the [Prisoner Litigation Reform Act's] definition of prisoner."). Therefore, the administrative exhaustion requirement referenced by the Government does not apply to this Petitioner. And Petitioner's claims that 18 U.S.C. § 4248 is unconstitutional need not be presented to the BOP for adjudication under any circumstances because this determination falls to the Courts.

Moreover, even assuming that Petitioner was subject to an administrative regime, the Supreme Court has recognized that the prudential doctrine requiring exhaustion of remedies prior to a petition for habeas corpus may yield in the face of prolonged deprivations of liberty. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008). In the instant case, Petitioner has been held for more than one year and this Court concludes that Petitioner need not bear the additional delay of presenting his claims to the BOP.

Therefore, this Court concludes that this Petition was properly presented for adjudication. Consequently, the Government's Motion to Dismiss is DENIED.

CONCLUSION

In sum, this Court finds that 18 U.S.C. § 4248 is unconstitutional both on its face and as applied to Petitioner. Petitioner has been subject to criminal punishment pursuant to the nominally civil 18 U.S.C. § 4248 without due process of law. 18 U.S.C. § 4248 is unconstitutional on its face as a civil statute because the basis for commitment found in § 4247 violates the due process clause of the Fifth Amendment. And 18 U.S.C. § 4248 does not provide adequate procedures to justify Petitioner's continued detention awaiting a hearing. Therefore, this Petition for Writ of Habeas Corpus is GRANTED. The Government's Motion to Dismiss is

DENIED. The Respondent is hereby directed to release Petitioner Gerald Wayne Timms.

SO ORDERED, this 31st day of March, 2010.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE