

IN THE
Supreme Court of the United States

WILLIAM CARL WELSH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE DECISION BELOW IS WRONG	2
II. THE ISSUE PRESENTED IS IMPORTANT	7
III. THIS CASE IS A CLEAN VEHICLE.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006)	5
<i>Bousley v. United States</i> , 523 U.S. 614 (1998)	3
<i>Kontrick v. Ryan</i> , 540 U.S. 443 (2004)	5
<i>Reed Elsevier, Inc. v. Muchnick</i> , 559 U.S. 154 (2010)	5
<i>United States v. Comstock</i> , 560 U.S. 126 (2010)	5
<i>United States v. Hernandez-Arenado</i> , 571 F.3d 662 (7th Cir. 2009)	6
<i>United States v. Joshua</i> , 607 F.3d 379 (4th Cir. 2010)	6, 7
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	3-4
 STATUTES	
18 U.S.C. § 4248(a)	4, 5
18 U.S.C. § 924(e)	3
 RULES	
Fed. R. Civ. P. 60(b)(4)	4, 9
Fed. R. Civ. P. 60(b)(5)	2, 9
 OTHER AUTHORITIES	
Bureau of Prisons, U.S. Dep’t of Justice, Program Statement No. 5394.01, Certification and Civil Commitment of Sexually Dangerous Persons (2016)	7

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INTRODUCTION

William Welsh remains in federal prison, where he has been for more than eight years, even though the conduct for which he was imprisoned was not a crime. The Government does not dispute that fact, yet it asserts that this unlawful detention allowed it to certify, and the District Court to commit, Mr. Welsh indefinitely under the Adam Walsh Act.

The Government acknowledges that only three categories of people may be civilly committed under the Act, two of which do not apply to Mr. Welsh. And it acknowledges that Mr. Welsh was only in the custody of the Bureau of Prisons—the third category—because he was convicted of an offense that did not exist. If that wrongful conviction had never happened, Mr. Welsh would never have been in the physical custody of the Bureau of Prisons.

And yet, because Mr. Welsh was wrongly imprisoned, the Government boldly asserts that it was given authority it otherwise would not have possessed: The power to detain Mr. Welsh indefinitely.

At bottom, the Government's objective here, as it was below, is to convince the Court that constitutional and statutory limits on the civil-commitment authority should not apply because Mr. Welsh's continued confinement would be in the public's interest. That is not how this works. We do not let the Government lock people up based on its notion of the public interest. And it is in cases like this one, where the Government seeks to avoid constitutional and statutory boundaries protecting the least among us, that the Judiciary's intervention is most desperately needed.

This Court should grant certiorari and reject the Government's sweeping view of Federal authority.

ARGUMENT

I. THE DECISION BELOW IS WRONG

The Government notes that it was required to prove three substantive elements for Mr. Welsh to be civilly committed as a "sexually dangerous person."¹ Br. in Opp. 20-21. Echoing the District Court, the Government argues that relief under Federal Rule of Civil Procedure 60(b)(5) was not warranted because the conclusion that Mr. Welsh met these criteria, and thus was dangerous, was based on prior conduct and did not "rest[] on" his later-invalidated SORNA conviction.

See Br. in Opp. 21 (quoting Pet. App. 35a).

That is beside the point. The point is that, absent Mr. Welsh's conviction and custody, the Government would have had no power to certify Mr. Welsh in the first place. Neither the Government nor the courts below have ever contended that Mr. Welsh could have been committed if he had not been in custody for the conviction that was later vacated because no crime happened.

But the Government boldly argues that Mr. Welsh's wrongful conviction played only a "minor role" in his civil commitment and the vacatur of that conviction "may in fact have further strengthened the district court's original determination" that he was sexually dangerous. Br. in Opp. 23 n.3. That is absurd. In the absence of that wrongful conviction, the Government would not have had any authority to certify Mr. Welsh, and the District Court would not have had any authority to civilly commit him.

Let's be clear about this. In the ordinary course of criminal prosecution, the Government routinely obtains a criminal conviction and then asks judges to impose additional incarceration based on the defendant's prior conduct. Indeed, under statutes like the Armed Career Criminal Act, additional incarceration is based *exclusively* on prior offenses. *See* 18 U.S.C. § 924(e). But when it is later discovered that the criminal defendant's underlying criminal conviction was no crime at all, the Court has not countenanced his continued confinement simply because his extended confinement did not "rest on" his underlying criminal conviction. It has done just the opposite and intervened to set aside the individual's illegal confinement. *See, e.g., Bousley v. United States*, 523 U.S. 614, 620 (1998);

Welch v. United States, 136 S. Ct. 1257, 1268 (2016). The Government’s contention that it can do through a civil process what it could not in the criminal process defies the basic protections for liberty in our constitutional framework.

The Government’s suggestion that Mr. Welsh “has not identified any ‘significant change either in factual conditions or in law’ ” overlooked by the lower courts is thus remarkable. It is hard to imagine what change in “factual conditions or in law” could be more significant than actual innocence. Mr. Welsh’s wrongful conviction for a SORNA violation was the but-for cause, the statutory prerequisite, and, as explained below and in the petition for certiorari, the jurisdictional basis for the courts to consider whether or not Mr. Welsh met criteria for civil commitment.

Turning to Federal Rule of Civil Procedure 60(b)(4), the Government argues that the Fourth Circuit panel got it right when it held that Section 4248(a)’s custody requirement is not jurisdictional. Br. in Opp. 13-17. It claims that a person’s legal custody is merely an element of the Government’s claim for relief. Br. in Opp. 15. But the District Court itself had to admit that Mr. Welsh’s SORNA conviction “was not evidence of any prong of the court’s Adam Walsh Act analysis.” Pet. App. 39a; *see* Br. in Opp. 22. That is because it was a jurisdictional precondition to the Government’s civil-commitment action.

The Government’s assertion to the contrary ignores the plain language and structure of Section 4248(a). That subsection defines the class of persons the Government may certify, and a federal court may commit, under the Adam Walsh Act, if three elements of the claim for relief can be met. It defines “the classes of

cases *** and the persons *** falling within a court’s adjudicatory authority.”

Kontrick v. Ryan, 540 U.S. 443, 455 (2004). That is precisely what jurisdictional requirements do.

What is more, Section 4248(a) is set aside from the substantive elements of whether a person is, on the merits, a “sexually dangerous person.” This Court has explained that the separation of jurisdictional elements and substantive elements is telling. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164 (2010) (Copyright Act’s registration requirement is a claim-processing rule, in part because it was “located in a provision ‘separate’ from those” concerning subject-matter jurisdiction); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006) (Title VII’s 15-employee provision is an element of a claim rather than a jurisdictional requirement in part because it “appears in a separate provision” from jurisdictional requirements).

Perhaps most important, if the legal custody requirement were not jurisdictional, it would mean that it could be forfeited or waived. But *United States v. Comstock* explains that civil commitment in the absence of federal custody would exceed the Federal Government’s authority. 560 U.S. 126, 148 (2010) (“[Federal authority for § 4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system ***.”) (citation omitted).

Because Mr. Welsh’s conduct could not serve as the basis for a lawful charge or conviction, that legal custody was lacking. The power to civilly commit is inextricably linked to the power to criminalize conduct: “Congress’ power to act as a responsible federal custodian” and potentially seek civil commitment “rests ***

upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority.” *Id.* at 143. As the Government acknowledged in oral argument in *Comstock*, “the Federal Government would not have *** the power to commit a person” who has been released from prison and is not on supervised release. *Id.* at 148 (quoting Tr. of Oral Arg. at 9). But the Government purported to do exactly that here, on the basis of a conviction for conduct that was not a crime. That cannot be right.

The Government then turns to argue that, even assuming the custody requirement is jurisdictional, Mr. Welsh was subject to the Act because his wrongful conviction committed him to the custody of the Bureau of Prisons and because “the Bureau of Prisons was solely responsible for [Mr. Welsh’s] ‘custody, care, subsistence, education, treatment and training.’” Br. in Opp. 18 (quoting Pet. App. 9a).

That is nonsensical. Following the Government’s logic, a wrongful conviction enhances rather than limits its authority. By its reasoning, the conviction we now know was always unlawful gave the Federal Government a power it otherwise would not have had: the power to civilly commit Mr. Welsh.

What is more, it conflates legal custody with physical custody. The Fourth and Seventh Circuits have each confirmed that legal custody, not mere physical custody, is required under the Act. *See United States v. Joshua*, 607 F.3d 379, 387 (4th Cir. 2010) (“‘custody’ under § 4248 cannot reasonably refer to physical custody”); *United States v. Hernandez-Arenado*, 571 F.3d 662, 667 (7th Cir. 2009) (“We reject an

interpretation that would allow physical custody alone to suffice under the Adam Walsh Act.”). The Fourth Circuit explained that, “[a]lthough the BOP exercises authority over [an individual’s] everyday activities and circumstances,” although he may be “housed at BOP facilities * * * and although the BOP [may] attend to his daily needs,” these hallmarks of physical custody say nothing at all about whether that custody is legal. *See Joshua*, 607 F.3d at 390 (quoting *Hernandez-Arenado*, 571 F.3d at 667).

The Government turns next to the context of escape convictions, arguing that physical custody is sufficient because someone may be charged and convicted for escaping from prison even if his incarceration was later determined to be erroneous. Br. in Opp. 19. But those cases are inapposite here; Mr. Welsh is not seeking immunity from the rules of the Bureau of Prisons or the laws of the United States; he is, rather, seeking their enforcement on their own terms and asking for relief from a judgment against him that was entered without jurisdiction.

This Court should grant certiorari to reassert the constitutional and statutory limits on Federal authority in the civil-commitment context and to ensure that the Fourth Circuit, which hears all Adam Walsh Act civil-commitment appeals, is enforcing those critical limitations.

II. THE ISSUE PRESENTED IS IMPORTANT

The Government’s argument that the Court should not grant certiorari because the issues raised by this case “have limited application and are not likely to recur frequently” is a red herring. As powerfully explained in the amicus brief filed by

Cato Institute—which the Government does not mention once—allowing the Fourth Circuit’s decision to stand would imbue the Federal Government with a power it does not possess: the power to civilly detain indefinitely someone whom it could not lawfully charge or convict of any federal crime. That threat is particularly concerning because the Fourth Circuit is the only federal court of appeals to review civil commitment orders pursuant to the Adam Walsh Act. *See* Bureau of Prisons, U.S. Dep’t of Justice, Program Statement No. 5394.01, Certification and Civil Commitment of Sexually Dangerous Persons 15 (2016). So this issue will not percolate through other federal courts of appeals; the time to address it is now.

This is not a mere “factbound disagreement.” It is a fundamental question about the courts’ authority to civilly commit someone who could not lawfully have been charged or convicted of any crime. As Judge Thacker explained in her statement respecting the petition for rehearing en banc, “[u]pholding [Mr. Welsh’s] continued civil commitment in this case, despite the fact that his underlying conduct was not criminal, divorces civil commitment from the constitutional principles upon which it is justified.” Pet. App. 88a.

The absence of a lower-court conflict should not dissuade this Court from granting certiorari. As explained in the petition, and in the Cato Institute brief, the concentration of Adam Walsh Act civil commitment cases in one federal circuit increases, rather than decreases, the need for this Court’s review. Because no circuit split can develop, allowing the Fourth Circuit’s divided decision to stand would entrench a ruling that aggrandizes Federal power and comes precariously

close to granting the Federal Government a generalized police power. Although the specific circumstances may be unique, the principles at stake are fundamental. As explained by Cato Institute, the Fourth Circuit’s “extraordinary holding defies not only *** Federalism principles ***, it also defies basic notions of liberty and due process as well as fundamental tenets about federal-court jurisdiction.” Cato Br. 17.

III. THIS CASE IS A CLEAN VEHICLE

The Government argues that this case is an “unsuitable vehicle” to address the question presented under Rule 60(b)(5), asserting that Mr. Welsh could not demonstrate that he has a “meritorious defense.” Br. in Opp. 26-27. But the Court of Appeals never suggested that Mr. Welsh could not satisfy this requirement, and proceeded to discuss each of his arguments on its merits. Pet. App. 5a (setting forth threshold requirements). And the District Court “assume[d] without deciding that the existence of a reversed or vacated underlying criminal judgment upon which the challenged civil judgment was, at least in part, based satisfies the ‘meritorious claim or defense’ requirement.” Pet. App. 37a (citing *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990) (per curiam)).

To the contrary, the issues presented in this petition have been squarely presented to and addressed by the lower courts and a favorable ruling by this Court under Rule 60(b)(4) or Rule 60(b)(5) would be outcome-determinative. The Court should grant certiorari now, to ensure that the Fourth Circuit—the lone circuit to entertain appeals in these complex and consequential cases—is enforcing the constitutional and statutory limits on which this Court premised its decision in

Comstock. After more than eight years in a federal prison for conduct that was not a crime, Mr. Welsh's case requires this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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