No. 24-

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD TIMMS,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Comstock*, 560 U.S. 126 (2010), this Court held that Congress had the constitutional authority under the Necessary and Proper Clause to enact 18 U.S.C. § 4248, the Adam Walsh Act's provision permitting the involuntary and indefinite civil commitment of "sexually dangerous" federal prisoners who would otherwise be released from Bureau of Prisons custody at the end of their sentences. *Comstock* expressly reserved—and this Court has yet to address—whether the Act's civil commitment procedures comply with the Fifth Amendment's Due Process clause. 560 U.S. at 149-150 (2010) ("We do not reach or decide any claim that the statute or its application denies . . . procedural or substantive due process, or any other rights guaranteed by the Constitution."). This case presents the fundamental issues reserved in *Comstock*. The question presented is:

Whether 18 U.S.C. § 4248, consistent with both substantive and procedural due process, can be read to permit a civil commitment order to remain in effect if the Attorney General unilaterally removes the committed person to serve a punitive sentence such that upon completion of that criminal sentence, the earlier civil commitment order remains in force without any further judicial oversight as is otherwise expressly required by § 4248.

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INTRODUCTION

State governments can civilly commit sexually dangerous people if they comply with due process requirements by demonstrating by clear and convincing evidence that the person is dangerous, coupled with proof of a "mental illness" or "mental abnormality." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). Such commitment provisions are frequently invoked for dangerous state prisoners who would otherwise be released at the end of their terms of imprisonment. The Court upheld the federal counterpart, 18 USC § 4248, in *United States v. Comstock*, 560 U.S. 126 (2010). That case left for another day whether the statute satisfies "procedural or substantive due process" requirements. *Id.* at 149-150. This case raises Due Process questions related to the Fourth Circuit's construction of the statute that allows a commitment order to remain in full force after a civilly committed person is transferred to Bureau of Prisons' custody for criminal prosecution and punishment. On the Fourth Circuit's view, once the prison sentence is completed, the person may be transferred back to civil commitment without any judicial oversight. That decision both misreads the statute and fails to comply with Due Process.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (App. 1a – 10a) is reported at *Timms v. Attorney General*, 93 F.4th 187 (4th Cir. 2024). The order of the district court (App. 11a-16a) is unreported.

JURISDICTION

The Fourth Circuit, exercising jurisdiction under 28 U.S.C. § 1331, entered judgment on February 14, 2024. This Court granted petitioner's motion for a 60-day

extension of time, making the petition due on July 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of Section 4247 of Title 18 of the U.S. Code state:

(a) DEFINITIONS.
As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

* * *

(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.

(1) The director of the facility in which a person is committed pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in

these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

* * *

(g) HABEAS CORPUS UNIMPAIRED.

Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) DISCHARGE.

Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

Section 4248 of Title 18 of the U.S. Code states, in relevant part:

(a) INSTITUTION OF PROCEEDINGS.

In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to

the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.

Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.

The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.

If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

(e) DISCHARGE.

When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that—

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

* * *

Section 2241 of Title 28 of the U.S. Code states, in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

* * *

STATEMENT OF THE CASE

Petitioner Gerald Timms was sentenced in federal court on a child pornography conviction, and he served that sentence in the custody of the Bureau of Prisons (BOP). In October 2008, less than three weeks before his scheduled release from criminal confinement, the Attorney General certified Mr. Timms for civil commitment pursuant to 18 U.S.C. § 4248(a) and transferred him to FCI Butner I, a unit that the Bureau of Prisons has designated a "suitable facility" for people under civil commitment orders. *See* Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 1–2, 15, https://www.bop.gov/policy/progstat/5394.01.pdf. The government's certification stayed Mr. Timms' release pending resolution of the civil commitment action against him. *See* 18 U.S.C. § 4248(a).

Before the government filed Mr. Timms' certification, the Eastern District of North Carolina district court judge to whom the commitment action was assigned had previously found 18 U.S.C. § 4248 to be an unconstitutional exercise of authority by Congress. *United State v. Comstock*, 507 F. Supp. 2d 522 (E.D.N.C. 2007). The district court therefore held Mr. Timms' civil commitment case in abeyance pending the government's appeal in *Comstock*. *Timms v. Johns*, 627 F.3d 525, 527 (4th Cir. 2010). Mr. Timms then filed a pro se 28 U.S.C. § 2241 habeas corpus action, alleging that he was entitled to release or an immediate commitment hearing and that 18 U.S.C. § 4248 violated his due process rights. *Id.* at 527-28. The proceedings in the two cases—the government's civil commitment case against Mr. Timms and Mr. Timms' habeas case against the government—are presented chronologically below.

The Fourth Circuit, after briefing and oral argument, held that Congress exceeded its authority in enacting 18 U.S.C. § 4248. *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009). The government sought certiorari and this Court granted review. In the meantime, the district court hearing Mr. Timms' habeas action appointed counsel and granted habeas relief, holding in relevant part that 18 U.S.C. § 4248 violated the due process standard set out by this Court in *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997), both because it was overbroad and because it failed to guarantee Mr. Timms a timely hearing. *Timms v. Johns*, 700 F.Supp.2d 764, 771-773 (E.D.N.C. 2010). It ordered Mr. Timms' immediate release. *Id.* at 774. The Fourth Circuit stayed the district court's ruling and ultimately reversed, holding that Mr. Timms had failed to exhaust his remedies with the commitment court before seeking habeas relief. *Timms v. Johns*, 627 F.3d at 532. Mr. Timms remained confined at Butner I during this entire time.

This Court in *Comstock*, 560 U.S. 126 (2010), reversed the Fourth Circuit's determination that Congress lacked authority to enact § 4248, holding that Congress had such authority under the Necessary and Proper Clause. The district court—four years after Mr. Timms' original certification—then held a hearing and found by clear and convincing evidence under 18 U.S.C. § 4248(a) that Mr. Timms was a sexually dangerous person. (App. 11a). It therefore committed him to the custody of the Attorney General. (App. 11a). Because the state of Florida did not assume responsibility for Mr. Timms, the statute required the Attorney General to place Mr. Timms "for treatment in a suitable facility." 18 U.S.C. § 4248(d). That civil

commitment is indefinite, serving to keep Mr. Timms in custody until either he can prove that he is entitled to release, 18 U.S.C. § 4247(h), or until the director of the Bureau of Prisons facility moves for his release, 18 U.S.C. § 4248(e).

The Attorney General confined Mr. Timms at FCI Butner I, the unit in which the Bureau of Prisons now houses all civilly committed prisoners nationwide, until sometime in 2016, when Mr. Timms was criminally prosecuted for, and ultimately convicted of, possessing contraband as "an inmate of a prison" in violation of 18 U.S.C. § 1791 (a)(2). In August 2016, he was sentenced to thirty months imprisonment, and he remanded to the custody of the Bureau of Prisons and incarcerated at FCI Butner Medium II, a penal prison for individuals serving criminal sentences. On appeal, the Fourth Circuit held that as a civilly committed person, Mr. Timms was an "inmate of a prison" within the meaning of 18 U.S.C. § 1791(a)(2) who could be prosecuted under that provision. *United States v. Timms*, 685 Fed. App'x. 285 (4th Cir. 2017) (per curiam).

While serving his criminal sentence at FCI Butner Medium II, Mr. Timms filed a pro se emergency motion with the civil commitment court asking for clarification about whether his civil commitment continued during his criminal confinement. (App. 12a). The commitment court denied that motion, refusing to clarify whether he remained in civil commitment while incarcerated in a penal facility. (App. 12a).

After Mr. Timms completed his criminal sentence on the possession of contraband charge on July 31, 2017, (App. 12a), he was released from Bureau of Prisons custody, and the Attorney General, without any judicial process, transferred

him back to the civil commitment unit at FCI Butner I. The Attorney General did not file an 18 U.S.C. § 4248(a) certification before placing Mr. Timms in civil commitment, and no 18 U.S.C. § 4248(d) hearing was held.

In May 2019, Mr. Timms was again charged with possession of prohibited items. This time, the Attorney General transferred him from FCI Butner I for pre-trial detention, first to a regional jail in Farmville, Virginia, and then to FCI Butner Medium II, the federal prison. After Mr. Timms was convicted and sentenced to 30 months imprisonment, he was again committed to the custody of the Bureau of Prisons in June 2020. The BOP held him first at FCI Butner Medium II and then transferred him to USP Marion in Illinois, another prison for people serving federal sentences. After Mr. Timms completed his criminal sentence at USP Marion in July 2021, the Attorney General again transferred him from criminal custody to FCI Butner I's civil commitment unit without filing a § 4248(a) certification.

Mr. Timms then filed a pro se 28 U.S.C. § 2241 habeas corpus petition alleging in relevant part that the Attorney General violated his Due Process rights by twice transferring him from penal to civil commitment without following § 4248(a)'s clear command that the Attorney General file a certification prior to the person's release from federal criminal custody and § 4248(d)'s requirement that the government prove by clear and convincing evidence at a hearing that Mr. Timms is a sexually dangerous person. (App. 19a-20a).

The district court dismissed that petition on the grounds that Mr. Timms had not exhausted his claim with the civil commitment court.[1] (App. 11a-16a). Mr. Timms appealed, and the Fourth Circuit appointed undersigned counsel as amicus in support of Mr. Timms. (App. 1a).

The Fourth Circuit, after briefing and oral argument, held that Mr. Timms failed to state a claim for relief because "[u]nder the Act, a person ordered to be civilly detained after a finding of sexual dangerousness remains committed until a court finds that he is no longer sexually dangerous." (App. 3a-4a). In the Fourth Circuit's view, Mr. Timms' civil commitment order could be terminated "only if a court—after his facility director files a certificate under § 4248 or he files a petition under § 4247—finds that he is no longer sexually dangerous." (App. 6a-7a). Because Mr. Timms "has not been able to satisfy his burden to show, by a preponderance of the evidence, that he is no longer sexually dangerous," the Fourth Circuit held that his commitment order remained in effect during his penal confinements in the custody of the Bureau of Prisons. (App. 7a). Finally, the Fourth Circuit held that incarceration in a penal facility with people serving criminal sentences can constitute a "suitable facility" for civil detainees. (App. 8a-9a).

REASONS FOR GRANTING THE WRIT

The decision below reads 18 U.S.C. § 4248 to mandate that once there has been a determination that a federal prisoner can be civilly confined because he is sexually

[1] The district court that dismissed Mr. Timms' habeas petition was the same district court that had adjudicated his civil commitment proceedings and that refused to consider his motion to clarify whether his civil commitment continued while he was criminally incarcerated. (App. 12a).

dangerous, that order remains in effect indefinitely unless the Bureau of Prisons chooses to move for his release, 18 U.S.C. § 4248(e), or if the civil detainee can prove that he is no longer dangerous, 18 U.S.C. § 4247(h). (App. 6a-9a). The decision below merits review by this Court because 18 U.S.C. § 4248 and the due process protections this Court recognized in *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997), require that, notwithstanding the existence of an earlier civil commitment order, the Attorney General must seek judicial review and prove sexual dangerousness by clear and convincing evidence whenever transferring a person from serving a criminal sentence to civil commitment. *See Foucha v. Louisiana*, 504 U.S. 71, 78-80 (1992). There can be no circuit split on this highly important issue that the Court left open in *Comstock*, 560 U.S. 149-50, because the Attorney General has confined every person civilly committed under 18 U.S.C. § 4248 in a prison facility in Butner, North Carolina. The Fourth Circuit's published decision thus applies nationwide to every detainee under 18 U.S.C. § 4248. No other circuit has had any opportunity to consider this issue.

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE REGARDING THE REACH OF A CIVIL COMMITMENT ORDER AFTER THE ATTORNEY GENERAL TRANSFERS THE COMMITTED PERSON OUT OF CIVIL CONFINEMENT.

The Court considered the constitutionality of 18 U.S.C. § 4248, the statute governing the federal civil commitment of sexually dangerous persons who are completing federal criminal sentences in the Bureau of Prisons. *See Comstock*, 560 U.S. 560 U.S. 126 (2010). The Court held only that Congress had proper authority under the Necessary and Proper Clause to enact the statute. *Id.* at 149. But it expressly reserved ruling on whether the statute complies with due process

requirements for civil commitment statutes. *Id.* at 149-150 ("We do not reach or decide any claim that the statute or its application denies . . . procedural or substantive due process, or any other rights guaranteed by the Constitution.").

This case presents precisely the questions this Court reserved fourteen years ago. In the years since Mr. Timms has been federally confined, he has three times been "in the custody of the Bureau of Prisons," 18 U.S.C. § 4248(a), and then moved into civil commitment confinement. But only once has the Attorney General followed the requirements of 18 U.S.C. § 4248. That first time in 2008, the Attorney General filed a § 4248(a) certification prior to the end of Mr. Timms' criminal sentence. *Timms v. Johns*, 627 F.3d at 527. The district court then conducted a hearing at which it determined Mr. Timms' status as a sexually dangerous person by clear and convincing evidence and ordered him committed to the "custody of the Attorney General." 18 U.S.C. § 4248(d). Mr. Timms was detained at Butner I, the facility that the Bureau of Prisons (BOP) has deemed suitable for civil commitment as mandated by § 4248(d).[2]

While under the civil commitment order, Mr. Timms was twice charged with criminal offenses related to possession of prohibited items by an inmate in a prison. In both 2017 and 2021, when Mr. Timms completed service of those criminal sentences, the Attorney General did not file a certification that Mr. Timms was a "sexually dangerous person" as required by 18 U.S.C. § 4248(a) before moving him

[2] *See* Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 1–2, 15, https://www.bop.gov/policy/progstat/5394.01.pdf.

from "the custody of the Bureau of Prisons" to civil commitment status. He also did not attempt to prove by clear and convincing evidence to a district court that Mr. Timms was a sexually dangerous person who should be civilly committed. 18 U.S.C. § 4248(d). These unilateral actions in 2017 and 2021 by the Attorney General call into question whether he complied with: (1) the requirements of § 4248(d); (2) the due process necessary for civil commitment; and (3) separation of powers principles.

A. When the Attorney General Transferred Mr. Timms From Civil Commitment to Criminal Custody, Section 4248 Required Him to Prove By Clear and Convincing Evidence That Mr. Timms Was a Sexually Dangerous Person Before Civilly Committing Him at the End of His Criminal Sentence.

The Attorney General twice moved Mr. Timms from a criminal sentence to civil commitment without any judicial process protection otherwise provided by § 4248. The statute does not permit the Attorney General such unilateral authority to move a person serving a criminal sentence under BOP custody into civil commitment. The statute sets out the requirements before a person can be civilly committed to the custody of the Attorney General, and it provides as follows:

> In relation to a person who is in the custody of the Bureau of Prisons . . . the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined.

18 U.S.C. § 4248(a). Once a certification has been transmitted, it automatically stays the person's release until a civil commitment hearing can be held before a district court. *Id*. At a hearing, the district court must determine whether the government has established by clear and convincing evidence that the person is a sexually dangerous person. 18 U.S.C. § 4248(d). If the district court makes such a finding,

the person is committed "to the custody of the Attorney General" for "treatment in a suitable facility." *Id.*[3]

This is the only mechanism the statute provides for moving a person serving a criminal sentence "in the custody of the Bureau of Prisons" into civil commitment under the custody of the Attorney General. When Mr. Timms was committed to the custody of the Attorney General at the conclusion of his commitment hearing in 2012, the statute required the Attorney General to hold him for "treatment in a suitable facility." But in 2016, a district court committed Mr. Timms to the custody of the Bureau of Prisons to serve a penal sentence in a prison. At that point, Mr. Timms was no longer committed to "the custody of the Attorney General" for "treatment in a suitable facility" as required by 18 U.S.C. § 4248(d). The civil commitment order effectively terminated when the Attorney General moved him out of Butner I's "suitable facility" into BOP custody for service of a criminal sentence.

The Attorney General's actions in connection with Mr. Timms' 2019 criminal case demonstrate the termination of the 18 U.S.C. § 4248(d) commitment even more starkly. The Attorney General moved Mr. Timms out of FCI Butner I's civil commitment facility during pretrial proceedings, housing him first in a regional jail in Farmville, N.C., a facility that could not possibly have provided for his § 4247 "care or treatment," and then in FCI Butner II during pretrial proceedings. These are not "suitable facilities" anticipated by 18 U.S.C. § 4247(a)(2). Nor were FCI Butner II or

[3] The statute first requires the Attorney General to "make all reasonable efforts to cause" a state to assume responsibility for the treatment of the person, but those efforts failed in this case.

USP Marion suitable facilities for care and treatment of Mr. Timms after his conviction.

To read the statute as the Fourth Circuit did here not only defies a plain reading of the statute but also undermines its purpose. The statute requires that the Attorney General initiate civil commitment proceedings against "a person who is in the custody of the Bureau of Prisons." 18 U.S.C. § 4248(a). Permitting transfer to punitive criminal custody to run alongside non-punitive civil commitment would frustrate § 4248's purpose. *See* 18 U.S.C. § 4248 (requiring a facility to provide for a committed person's "care or treatment"); *see also* 18 U.S.C. § 4247(a)(2). Criminal imprisonment is contrary to the purpose of civil commitment under the Act: § 4248 confinement seeks to isolate persons to maintain the safety of others and to provide treatment for the committed person's mental disorder.[4] This measure, like civil commitment determinations generally, is required to be non-punitive. *E.g.*, *Addington v. Texas*, 441 U.S. 418, 428 (1979) ("In a civil commitment state power is not exercised in a punitive sense."). By contrast, criminal incarceration is *necessarily* punitive. There, sentencing reflects the desire to provide just punishment for an offense and deter future misconduct, neither of which justifies civil commitment. 18 U.S.C. § 3553(a)(2). Once the Attorney General transferred Mr. Timms out for a criminal sentence, the civil commitment order can only be read as extinguished to avoid these problems. *See United States v. Johnson*, 529 U.S. 53, 59–60 (2000)

[4] *See* Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 1–2, https://www.bop.gov/policy/progstat/5394.01.pdf.

(holding that the rehabilitative goals of supervised release are distinct from those of incarceration so they cannot be served simultaneously).

Nor does § 4248 contain any indication that its mandatory terms are read out of the statute to allow for administrative decisions to transfer a person out of the commitment for criminal prosecutions. *Cf.*, *e.g.*, WASH. REV. CODE § 71.09.112 (2023) (providing that the department of social and health services retains jurisdiction over a person who is convicted of a crime and the person should be returned to the department after completing the criminal sentence). There is no dispute that Mr. Timms served his criminal sentence in a penal facility under the custody of the Bureau of Prisons. In accordance with the statute, the Attorney General or his designee therefore had to file a § 4248(a) certification before Mr. Timms was released from BOP custody on his penal sentences. Because the Attorney General failed to do so, his continued § 4248(d) confinement of Mr. Timms violates the statute. The Fourth Circuit's holding to the contrary—that the Attorney General is free to transfer Mr. Timms in and out of criminal custody and maintain his civil commitment status—is at odds with the plain terms of the statute. (App. 3a-4a).

B. The Fifth Amendment's Due Process Clause Requires a Hearing Before an Individual Can Be Civilly Committed

Interpreting § 4248 to permit the Attorney General to unilaterally move Mr. Timms from civil commitment to serving a criminal sentence and then back to civil commitment raises serious Due Process concerns. The Court has approved the use of indefinite civil commitment to protect society from those whose mental illness—including mental illnesses related to an inability to control sexual violence—present

a risk of danger to themselves or others. *See*, *e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 352-53 (1997). But the Court has also made clear that such indefinite civil commitment implicates serious concerns about due process. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 78-80 (1992). As a result, the government may not subject people to such commitment unless it proves to a civil court "'by clear and convincing evidence that the person is mentally ill and dangerous.'" *Id.* at 80 (quoting *Jones v. United States,* 463 U.S. 354, 362 (1983)). In particular, the Court has repeatedly held that when a person's criminal commitment ends, the person either must be released or civil commitment procedures need to be initiated. *See, e.g., Foucha*, 504 U.S. at 78-80 (citing cases).

But Mr. Timms received *no* process—let alone Due Process—when the Attorney General unilaterally moved him from criminal confinement to civil commitment custody status in both 2017 and 2021. And it is only those who have been civilly committed under 18 U.S.C. § 4248 who can be treated in this way. No state civil commitment statute civilly commits people to the custody of an attorney general for placement in a prison facility. *See*, *e.g.*, FLA. STAT. § 394.917(2) (2023) (providing that "sexually violent predators" be "committed to the custody of the Department of Children and Families for control, care, and treatment"). The only state statute that civilly commits those deemed sexually dangerous to a department of corrections is Illinois, and it provides the protections of criminal conviction—the requirements of proof beyond a reasonable doubt and a right to a jury trial—in civil commitment proceedings. *See* 725 ILL. COMP. STAT, 205/3.01; 5; 8 (2023). But every

person committed under 18 U.S.C. § 4248(d) upon proof to a judge by clear and convincing evidence is committed to the custody of the Attorney General and held at a prison.[5] The Attorney General's actions strike at the core of the Due Process clause—depriving Mr. Timms of liberty without *any* proof that he was sexually dangerous.

The Due Process violation is even more concerning because the Attorney General moved Mr. Timms into civil commitment upon his release from his 2016 criminal sentence, and then after his sentence in the 2019 criminal case. Section 4248(d) is clear that federal courts—not the Attorney General—have the exclusive authority to decide whether a person completing a federal criminal sentence can be civilly committed as a sexually dangerous person. And this Court has been clear that separation of powers doctrine requires that judges, not the Department of Justice, determine when a person may be subjected to confinement. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

II. THERE CANNOT BE CONTRARY AUTHORITY ON THIS ISSUE

There are no contrary decisions about whether 18 U.S.C. § 4248 or the Due Process Clause render unlawful the Attorney General's actions in moving a person from serving a criminal sentence to civil commitment without judicial involvement. But that fact should not be relevant to this Court's decision because there *cannot* be a contrary decision. That is because the Attorney General has chosen to confine *every*

[5] State civil commitment statutes are also generally within a section of the code addressing health and welfare. The federal civil commitment statute, by contrast, is in Title 18, the federal *criminal* code.

person civilly committed under 18 U.S.C. § 4248 nationwide at the same prison in Butner, North Carolina. The Fourth Circuit is thus the only court in the country that has jurisdiction to hear appeals from 18 U.S.C. § 2241 habeas claims brought by people civilly committed under 18 U.S.C. § 4248(d). Indeed, because all of the federal civil commitment proceedings take place in the United States District Court for the Eastern District of North Carolina, the Fourth Circuit is the only circuit in the country that hears appeals either from § 4248(d) commitments or from petitions for release under 18 U.S.C. § 4247(h) discharge hearings.

Because the Attorney General has prevented even the possibility of a circuit split on the exceptionally important question of whether he has complied with the statute and due process in continuing to hold Mr. Timms in federal civil commitment custody, this Court should grant certiorari. *See* Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH.L.R. 1345, 1347 (2018) (noting that in 2016, nearly 10% of this Court's docket was patent cases as to which there were no contrary decisions because Congress requires that most patent appeals be heard in the Federal Circuit).

III. THE FOURTH CIRCUIT'S DECISION IS WRONG

The Fourth Circuit got it backwards in holding that it was Mr. Timms' burden to establish that he was *not* a sexually dangerous person. To be sure, the Fourth Circuit has held that the statutory mechanism for *discharge* from civil commitment—18 U.S.C. § 4247(h)—requires the person to prove that they are no longer sexually

dangerous. *See United States v. Vandivere*, 88 F.4th 481 (4th Cir. 2023).[6] But Mr. Timms did not argue that he was entitled to discharge from civil commitment. Instead, he argued that the statute and Due Process Clause required certification before he could be moved from BOP's criminal custody *into* civil commitment. Because the Attorney General failed to file a certification before his release from criminal confinement in 2016 and in 2019, Mr. Timms has not been civilly committed in compliance with 18 U.S.C. § 4248.

The Fourth Circuit's holding that penal prison facilities were "suitable" facilities for Mr. Timms because he had been convicted of a crime is also wrong. (App. 8a-9a). The statute defines a "suitable facility" as "a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant." 18 U.S.C. § 4247(a)(2). And it provides that the Attorney General "shall, before placing a person in a facility pursuant to the provisions of section . . . 4248, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person." 18 U.S.C. § 4247(i)(C). There is no indication in the record that either Butner II in 2017, the jail in Farmville in 2019, or USP Marion in 2019-2020 had any rehabilitation programs to meet Mr. Timms' needs. BOP's own records indicate that "FCI Butner is the designated institution for inmates who are referred for precertification evaluations and certified and committed as sexually dangerous

[6] The § 4247 requirement that a civilly committed person bear the burden of proving that entitlement to release runs counter to many state statutes, which require the state to bear the burden of proof. *See*, *e.g.*, VA. CODE ANN. § 37.2-910(C) (2023) (requiring that the state prove by clear and convincing evidence at regular hearings the need to continue confinement).

persons." Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 15, https://www.bop.gov/policy/progstat/5394.01.pdf.

Contrary to the Fourth Circuit's ruling, an 18 U.S.C. § 4247(h) hearing was not an adequate substitute for § 4248(a)'s requirement that the Attorney General file a certification prior to the expiration of Mr. Timms's criminal sentence. (App. 7a). Any transfer from BOP custody to civil commitment requires an 18 U.S.C. § 4248(a) certification. And an 18 U.S.C. § 4247(h) hearing, which places the burden of proof on the civilly committed person to establish their right to release, is a wholly inadequate substitute for an 18 U.S.C. § 4248(d) proceeding requiring the government to prove Mr. Timms a sexually dangerous person.

The Fourth Circuit also got it wrong in holding that a plain reading of the statute would burden the government and provide an incentive for civilly committed people to commit crimes. (App. 8a). The Attorney General need only have filed a certification under 18 U.S.C. § 4248(a) before Mr. Timms completed his criminal sentence. His release would have been stayed until a trial could be held at which the government would have had to prove by clear and convincing evidence that he was a sexually dangerous person. Although that perhaps is a slight burden on the government, it is the necessary cost of depriving Mr. Timms of his liberty. And the threat of criminal prosecution and incarceration in a punitive prison should more than deter any civilly committed people from committing crimes.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THIS ISSUE

This case presents an ideal vehicle for the Court to squarely address the question of what the statute requires and whether the Attorney General has been constitutionally complying with it within the bounds of Due Process and separation of powers principles. Although the district court dismissed this case for failure to first exhaust remedies in the civil commitment court, (App. 14a), the Fourth Circuit declined to address that issue, (App. 10a fn.9). With good reason. There were no remedies to exhaust. *See Stack v. Boyle*, 342 U.S. 1, 6–7 (1951 (requiring exhaustion only of *available* remedies before habeas corpus relief can be granted). Once a person has been civilly committed, the only relief contemplated by 18 U.S.C. § 4247 and § 4248 is either a court order finding that the committed person is no longer sexually dangerous or a writ of habeas corpus. Mr. Timms could not raise his due process claim—that he was entitled to a new § 4248 determination—in discharge proceedings that are focused solely on his sexual dangerousness. 18 U.S.C. §§ 4247(h), 4248(e). Thus, his only option was to bring a habeas corpus petition challenging the illegality of his confinement. 18 U.S.C. § 4247(g).

CONCLUSION

This Court should grant certiorari to resolve the important question of whether 18 U.S.C. § 4248 and the Due Process Clause require the Attorney General to file § 4248 proceedings against a person in criminal BOP custody before civilly committing that person.

Respectfully submitted,

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