APPENDIX A
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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6355

UNITED STATES OF AMERICA,

Petitioner − Appellee,

v.

WILLIAM CARL WELSH,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:11-hc-02209-D)

Argued: September 20, 2017 Decided: January 12, 2018

Before DUNCAN, DIAZ, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge Duncan joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Jaclyn Lee DiLauro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Michael Lockridge, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Thomas P. McNamara, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. John Stuart Bruce, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

DIAZ, Circuit Judge:

In January 2011, William Carl Welsh pleaded guilty in an Oregon federal district court to failing to comply with the Sex Offender Registration and Notification Act ("SORNA") and was sentenced to 673 days in the custody of the Bureau of Prisons. Welsh admitted that he had not updated his sex offender registration in Oregon when he left the state to move to Belize. While in the custody of the Bureau of Prisons for that offense, Welsh was certified as a sexually dangerous person and civilly committed under § 4248 of Title 18, enacted by the Adam Walsh Child Protection and Safety Act of 2006.

The Supreme Court later held in a different case that the version of SORNA then applicable to Welsh's offense did not require a sex offender to update his registration in his former homestate after moving to a foreign country. As a result, Welsh successfully moved to have his SORNA conviction vacated. He then sought relief from his civil commitment. Welsh claimed that the judgment was void under Federal Rule of Civil Procedure 60(b)(4) because he was never in the legal custody of the Bureau of Prisons. He also sought relief under Rules 60(b)(5) and 60(b)(6) because his civil commitment was based on a now-vacated conviction.

Because Welsh's civil commitment judgment is not void under Rule 60(b)(4) and the district court had discretion to deny relief under Rules 60(b)(5) and 60(b)(6), we affirm.

I.

Before explaining our decision, we provide additional details of the unusual events giving rise to this appeal.

A.

As we noted earlier, Welsh pleaded guilty to failing to update his registration as a sex offender as required by SORNA, 18 U.S.C. § 2250(a). While Welsh was confined for that offense, the government certified him as a "sexually dangerous person" and transferred him to the Butner Federal Correctional Institution in North Carolina.

Such a certification stayed Welsh's release pending a hearing to determine whether he was a sexually dangerous person. 18 U.S.C. § 4248(a). Under federal law, a person is a "sexually dangerous person" if he has "engaged or attempted to engage in sexually violent conduct or child molestation and . . . is sexually dangerous to others." 18 U.S.C. § 4247(a)(5). A person is sexually dangerous to others if he "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." 18 U.S.C. § 4247(a)(6). If, after a 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." 18 U.S.C. § 4248(d).

The U.S. District Court for the Eastern District of North Carolina found Welsh to be a sexually dangerous person and ordered him committed. The court's determination rested largely on Welsh's criminal history, which includes repeated convictions for child molestation, sodomy, and sexual abuse dating back to 1979. The court also "considered Welsh's poor performance on supervision, including his absconding to Belize." J.A. 59. And the court relied on testimony from two experts who, after evaluating Welsh, concluded that he met the criteria for civil commitment.

Welsh remains committed at the Butner Federal Correctional Institution. Pursuant to 18 U.S.C. § 4247(e)(B), the director of the facility provides the district court with an annual report on Welsh's mental condition and whether his commitment should continue. Most recently, in Welsh's 2017 annual report, a forensic psychologist concluded that Welsh "continues to suffer from a severe mental illness, abnormality, or disorder that would cause him to experience serious difficulty in refraining from sexually violent conduct or child molestation if he was released to the community" and that "[t]herefore, discharge or conditional release is not recommended at this time." J.A. 149.

B.

In 2016, the Supreme Court decided in *Nichols v. United States* that SORNA—before it was amended in February 2016—did not require a person to update his registration in a state that he was leaving in order to travel to a foreign country. 136 S. Ct. 1113, 1118 (2016). As a result, a federal district court in Oregon granted Welsh's motion to vacate his conviction for violating SORNA, concluding that "the factual basis for the guilty plea . . . did not constitute a federal crime." J.A. 73–74.

With vacatur in hand, Welsh moved for relief from his civil commitment judgment in the Eastern District of North Carolina, pursuant to Federal Rules of Civil Procedure 60(b)(4), (b)(5), and (b)(6). The district court denied the motion. We review denial of a Rule 60(b)(4) motion de novo. *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005). Denial of a Rule 60(b)(5) or 60(b)(6) motion is reviewed for abuse of discretion. *MLC Auto, LLC v. Town of S. Pines*, 532 F.3d 269, 277 (4th Cir. 2008).

II.

To obtain relief from a judgment under Rule 60(b), a moving party must first show (1) that the motion is timely, (2) that he has a meritorious claim or defense, and (3) that the opposing party will not suffer unfair prejudice if the judgment is set aside. *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264 (4th Cir. 1993). The party must also satisfy one of six enumerated grounds for relief under Rule 60(b). *Id*. at 266.

A.

In this case, Welsh sought relief under Rules 60(b)(4), (b)(5), and (b)(6). We start with Welsh's claim under Rule 60(b)(4), which allows relief from a judgment that is void. The rule applies "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *U.S. Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010).

Federal courts reserve relief under Rule 60(b)(4) "for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id*. When deciding whether an order is "void" under Rule 60(b)(4), "courts must look for the rare instance of a clear usurpation of power," which is "only when there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction." *Wendt*, 431 F.3d at 413 (internal quotation marks omitted).

Under the Adam Walsh Act, the government may certify a person as a sexually dangerous person if they: (1) are in the custody of the Bureau of Prisons; (2) have been committed to the custody of the Attorney General pursuant to section 4241(d); or (3) have

had all criminal charges dismissed against them solely for reasons relating to their mental condition. 18 U.S.C. § 4248(a). Welsh was certified as a sexually dangerous person under the first category.

Welsh, however, argues that he was never in the legal custody of the Bureau of Prisons because (as the Supreme Court announced in *Nichols*) he never actually committed a crime by failing to register. As a result, he says, the district court lacked subject matter jurisdiction to commit him and its judgment is therefore void. The district court rejected Welsh's argument, holding that § 4248(a)'s custody provision is not jurisdictional, and even if it were, Welsh was in the legal custody of the Bureau of Prisons when he was certified as a sexually dangerous person. We agree.

Specifically, the district court was correct in concluding that § 4248(a)'s custody requirement is not jurisdictional but rather is an element of a civil commitment claim. We begin with first principles. Jurisdiction refers to "a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). "[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted).

In *Arbaugh v. Y & H Corp.*, the Supreme Court explained how to distinguish "jurisdictional" conditions from mere elements of a claim:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

546 U.S. 500, 515–16 (2006) (internal citation omitted); *see also Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163 (2010). Because nothing in the text of § 4248(a)'s custody requirement suggests that it's a limit on the court's jurisdiction, we think it appropriate to treat it as a mere element of a civil commitment claim.

Welsh contends otherwise, arguing that the government's authority to civilly commit is constitutional only because of the custody requirement. We accept that premise, but the fact that an element of a claim is constitutionally required does not mean that it is jurisdictional. *See United States v. Williams*, 341 U.S. 58, 66 (1951) ("Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction.").

Welsh insists that we've previously recognized the custody requirement as jurisdictional, citing *United States v. Joshua*, 607 F.3d 379, 388 (4th Cir. 2010), and *United States v. Savage*, 737 F.3d 304, 307 (4th Cir. 2013). *See* Appellant's Br. at 30; Reply Br. at 7. But *Joshua* doesn't say that § 4248(a)'s custody requirement is a limit on jurisdiction and *Savage* uses the term "jurisdictional authority" in passing. In short, neither case lends Welsh the support he ascribes to them.

Welsh also claims that § 4248(g) of the Adam Walsh Act confirms the importance of the custody requirement to the federal government's authority to civilly commit a person. The provision states that if a facility director "certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the

mental condition of the person, is a sexually dangerous person, the Attorney General shall release the person . . . ."[1] 18 U.S.C. § 4248(g).

We are not persuaded that this provision has anything to say about whether the custody requirement is a limit on the district court's jurisdiction. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (stating that "[o]ther rules" that don't govern a court's adjudicatory capacity, "even if important and mandatory . . . should not be given the jurisdictional brand."). In any event, whether or not the custody requirement is jurisdictional, Welsh was in the custody of the Bureau of Prisons when he was certified as a sexually dangerous person. This is so because at the time of his certification Welsh was still serving a prison sentence pursuant to a court order committing him "to the custody of the United States Bureau of Prisons." J.A. 22.

Welsh, relying on *Joshua* and *United States v. Comstock*, 560 U.S. 126 (2010), argues that a person can never be in the Bureau's "legal custody" if his underlying conviction is subsequently vacated. These cases do not support Welsh's premise. *Joshua*, for example, involved a military court-martial of an Army officer. 607 F.3d at 381. That officer was eventually transferred from an Army garrison to the Butner Federal Correctional Institution. *Id.* There, the Bureau of Prisons housed the officer pursuant to a Memorandum of Agreement with the Army stating that military prisoners transferred to federal prison remain in the "permanent custody" of the U.S. Army. *Id.* at 382. When the

[1] Because Welsh does not seek relief pursuant to § 4248(g), we do not decide whether this provision could apply to someone like Welsh who was certified as a sexually dangerous person before his underlying criminal conviction was dismissed.

government petitioned to civilly commit the officer as a sexually dangerous person, the district court dismissed the petition and we affirmed because the officer was not in the "legal custody" of the Bureau of Prisons as required by the Adam Walsh Act. *Id.* at 391.

By contrast, Welsh *was* in the "legal custody" of the Bureau of Prisons as the term is interpreted in *Joshua*. Unlike the petitioner in *Joshua*, Welsh was "placed in the BOP's custody by statutory authority, not as a matter of convenience." *See Savage*, 737 F.3d at 307. And because the Bureau of Prisons was solely responsible for Welsh's "custody, care, subsistence, education, treatment and training" it had "*legal* custody"—not mere physical custody—over Welsh. *See id.* at 308–09.

This interpretation of "legal custody" is also consistent with the Supreme Court's decision in *Comstock*. There, the question was whether Congress had the constitutional authority to authorize federal civil commitment under § 4248. *Comstock*, 560 U.S. at 129–30. The Court held that § 4248 does not give the federal government an unconstitutional general policing power, but rather, is "a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* at 148.

Comstock, while certainly important, does not help Welsh because the constitutional justification for federal civil commitment is rooted in the federal government's role as custodian, not in an underlying criminal conviction. As the Court explained, the Adam Walsh Act is a constitutional means of ensuring the safe and responsible administration of federal prisons because "at common law, one 'who takes charge of a third person' is 'under a duty to exercise reasonable care to control' that person to prevent him from causing

reasonably foreseeable 'bodily harm to others.'" *Id.* at 142 (quoting Restatement (Second) of Torts § 319 (Am. Law Inst. 1965)). The Court likened civil commitment of a sexually dangerous person to a situation where a prisoner is infected by a communicable disease. In such a scenario, it would be necessary and proper for the government not to release that individual pursuant to its role as federal custodian. *Id.* at 142-43.

The government's interest in ensuring it doesn't release dangerous individuals into society exists whenever it asserts legal custody over a person, even if the underlying conviction is ultimately vacated. Nor does the government's constitutional authority to civilly commit depend solely on a criminal conviction because the Adam Walsh Act also authorizes the government to civilly commit individuals deemed incompetent to stand trial or for whom all criminal charges have been dismissed for reasons relating to their mental condition. *See* 18 U.S.C. § 4248(a).

Thus, regardless of whether § 4248(a)'s custody provision is jurisdictional, Welsh was in the legal custody of the Bureau of Prisons at the time the government certified him as a sexually dangerous person. The civil commitment judgment is therefore not void.

B.

We turn now to Welsh's argument that the district court abused its discretion by denying him relief under Rules 60(b)(5) and 60(b)(6). Welsh's burden here is a heavy one, as a district court abuses its discretion only where it "has acted arbitrarily or irrationally[,] . . . has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises." *L.J. v. Wilbon*,

633 F.3d 297, 304 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted). The district court did nothing of the sort here.

Rule 60(b) states that a court "may" exercise its power to vacate a judgment under certain circumstances. The remedy though "is extraordinary and is only to be invoked upon a showing of exceptional circumstances." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979). In determining whether to grant relief from judgment under 60(b), a district court must delicately balance "the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of [a]ll the facts." *Id.* at 102 (internal quotation marks omitted).

A district court may grant relief under Rule 60(b)(5) if "[1] the judgment has been satisfied, released or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; or [3] applying it prospectively is no longer equitable."[2] In this case, the district court first rejected Welsh's claim for relief under the rule's "no longer equitable clause" which allows for relief from a judgment if "a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks omitted). The court held that although there was a change in circumstances, the public nonetheless had a

[2] The court may also grant relief under Rule 60(b)(6) for "any other reason" when there are "extraordinary circumstances" and "the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)–(5)." *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011). Like the district court, we conclude that Rule 60(b)(6) does not apply because Welsh's claim falls under the more specific Rule 60(b)(5).

substantial countervailing interest in Welsh's continued commitment.[3] In doing so, the district court properly characterized Welsh's argument, applied the appropriate legal standard, and considered the fact that Welsh no longer stands convicted of violating SORNA.

The district court then turned to Welsh's claim under Rule 60(b)(5)'s second clause, which allows for relief from judgment when it is "based on an earlier judgment that has been reversed or vacated." The district court acknowledged that it had discretion to grant Welsh relief, but noted that Welsh's now-vacated conviction played a very minor role in the substantive decision to commit Welsh and that there was "clear and convincing evidence well beyond the mere fact of Welsh's 2011 judgment in the District of Oregon" to support his civil commitment. J.A. 113. The court also discussed a range of factors, including Welsh's interest in release, the courts' interest in finality of judgments, and the public interest in Welsh's continued confinement. It weighed the factors and (in our view) made a reasonable decision not to grant relief under Rule 60(b)(5).

[3] The dissent takes issue with the district court's weighing of the public interest, citing to our decision in *Valero Terrestrial Corp. v. Paige*, where we stated that "considerations of relative fault and public interest are irrelevant to the inquiry for modification or vacatur of an injunction under Rule 60(b)(5) on the grounds of a significant change in fact or law." 211 F.3d 112, 122 (4th Cir. 2000). The Supreme Court, however, has expressly considered the public interest in this context. *See Horne*, 557 U.S. at 447; *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384, 392 (1992). Moreover, Rule 60(b)(5) by its terms expressly directs a district court to make an equitable determination, which by definition requires consideration of the various interests at stake. That is precisely what the district court did here.

Welsh argues that the district court failed to appreciate that he would never have been committed but for the now-vacated conviction. That claim, however, does no more than state the predicate for granting relief under the "reversed or vacated" provision of Rule 60(b)(5). Welsh also characterizes civil commitment as punishment for a crime. Civil commitment though is not a form of retribution, but instead aims to incapacitate. *See Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (finding that a state civil commitment statute is "not retributive because it does not affix culpability for prior criminal conduct," but rather "such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness"). Welsh's allegation of unfairness—that he shouldn't be committed because he didn't commit a crime—can be levied against any form of civil commitment. But of course the Adam Walsh Act expressly authorizes the civil commitment of individuals who were never convicted of a crime. *See* 18 U.S.C. § 4248(a).

Welsh also says that the district court erred in not granting relief because he has avoided any infractions over the past year; he refused to participate in a treatment program for sex offenders only on advice of counsel; and he would be subject to significant reporting requirements if released. But the district court considered these facts and nonetheless found a strong public interest in Welsh's continued confinement given the Bureau of Prisons's forensic psychologists' reports that (1) cast doubt on the progress Welsh had made and (2) concluded that he would "have serious difficulty refraining from acts of sexual violence or child molestation if released." J.A. 114.

In sum, the district court weighed carefully the competing interests, in light of all the facts, and reasonably determined that Welsh should remain civilly committed. We decline to upset the court's considered judgment.

III.

For the reasons given, we affirm in all respects the district court's judgment.

AFFIRMED

THACKER, Circuit Judge, dissenting:

The majority affirms a district court order denying relief to an individual who has spent the last seven years in federal custody without a valid conviction. I respectfully dissent.

I.

A.

The Adam Walsh Act permits the government to subject "sexually dangerous" persons in the custody of the Bureau of Prisons to indefinite civil commitment. 18 U.S.C. § 4248(a). The Supreme Court upheld the Adam Walsh Act as a "'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others." *United States v. Comstock*, 560 U.S. 126, 149 (2010). In short, the Adam Walsh Act is intrinsically tied to Congress's authority to criminalize conduct. This nexus has constitutional implications. In affirming the civil commitment of an individual who has not engaged in criminal conduct, the majority disregards that constitutional nexus.

B.

After the district court vacated the criminal conviction upon which his civil commitment was based, Appellant William Carl Welsh moved for relief from the civil commitment order pursuant to Rule 60 of the Federal Rules of Civil Procedure. Before the district court, Welsh argued he was entitled to relief pursuant to Rules 60(b)(4), 60(b)(5),

and 60(b)(6). For the reasons aptly set forth in the majority opinion, I agree that Welsh is not entitled to relief under 60(b)(4)'s "void" judgment clause or 60(b)(6)'s "any other reason" provision. However, in my view, Welsh's civil commitment order fits squarely within the purview of Rule 60(b)(5), which provides relief where "the judgment . . . is based on an earlier judgment that has been reversed or vacated[,] or applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

II.

A.

The "Reversed or Vacated" Clause

Pursuant to the second clause of Rule 60(b)(5), district courts have discretion to grant a party relief from a civil judgment if "the judgment . . . is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). This provision applies where an earlier reversed or vacated "judgment itself [was] necessarily considered in [the] later action." *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984). Here, the district court acknowledged that Welsh's civil commitment "necessarily considered" his conviction because, absent the conviction, "the BOP would not have had legal custody" over Welsh at the time of the civil commitment hearing. J.A. 106–07.

In my view, the district court abused its discretion by not affording relief in this instance. Appellant's civil commitment judgment, resting on his now vacated conviction, fits so squarely within Rule 60(b)(5)'s "reversed or vacated" clause that I believe it is plainly an abuse of discretion to deny his motion. Reversal is justified on this basis alone.

The district court further abused its discretion by improperly weighing the relevant considerations. Having assumed that Rule 60(b)(5)'s "reversed or vacated" clause applied to Welsh, the district court was tasked with determining whether it would exercise its discretion to grant relief. In doing so, the district court weighed "the sanctity of final judgments" against "the incessant command of the court's conscience that justice be done in light of [a]ll the facts." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979) (internal quotation marks omitted). The district court, noting the thoroughness of the civil commitment proceeding in this case, chose to place emphasis on the sanctity of final judgments over justice. Per the district court, vacating the judgment would offend the efforts and resources committed to those proceedings.

But the sanctity of the final civil commitment order cannot bear the weight the district court gives it for at least three reasons. First, civil commitment is indefinite by nature. *See* 18 U.S.C. § 4248(e). The operative finding in a civil commitment hearing -- that the individual is sexually dangerous -- is subject to reaffirmation by government officials on an annual basis. *See id*. § 4247(e)(1)(B). Therefore, finality is not as pressing a concern. Second, vacatur in this case poses little threat to future final judgments. Civil commitment "has been applied to only a small fraction of federal prisoners." *Comstock*, 560 U.S. at 148. Indeed, the district court was "unaware" of any other individual in Welsh's "unusual predicament." J.A. 114. Third, Welsh's "final judgment" is predicated on a vacated conviction. My conscience dictates that such a judgment cannot be treated as sacrosanct.

Against the sanctity of final judgments, the district court weighs the "command . . . that justice be done in light of [a]ll the facts." *Compton*, 608 F.2d at 102. The district court placed emphasis on Welsh's status as a sexually dangerous person. While I certainly credit the government's interest in protecting the public from such danger, vacating Welsh's civil commitment judgment would not leave this interest unaddressed. Welsh would still be subject to SORNA reporting requirements.[1] Indeed, this is precisely how Congress chose to strike the balance between protecting the public and preserving fundamental freedoms of those in Welsh's position. *See* 34 U.S.C. § 20901 (establishing "a comprehensive national system for the registration of . . . offenders" so as "to protect the public from sex offenders and offenders against children.").

B.

The Prospective Application Clause

The district court also abused its discretion in denying Appellant's motion on equitable grounds. Pursuant to the third clause of Rule 60(b)(5), district courts may grant relief from a judgment if applying it prospectively is no longer equitable in light of "a significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992); *see also* Fed. R. Civ. P. 60(b)(5). "The party seeking relief

[1] Counsel for the government acknowledged "[Welsh] would be subject to SORNA [upon release], is my understanding." Oral Argument at 22:00, *United States v. Welsh*, No. 17-6355 (4th Cir. Sept. 20, 2017), http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. Indeed, it appears from the record that Welsh's past convictions qualify him as a tier III sex offender. *See* 34 U.S.C. § 20911(4); J.A. 31. Tier III offenders are subject to SORNA registration requirements for life. 34 U.S.C. § 20915.

bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion when it refuses to modify [the judgment] in light of such changes." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (citation and internal quotation marks omitted).

Here, the district court concluded that Welsh failed to meet this burden. While the district court acknowledged that Welsh "no longer stands convicted" of the underlying offense upon which his civil commitment was based, the court nonetheless dismissed that concern by relying entirely upon the *public's* interest in Welsh's "continued commitment . . . on the basis of [his] sexual dangerousness." J.A. 104. This analysis is inappropriate and illogical.

As a preliminary matter, we have declined to engage in a "broad, open-ended equitable balancing test" in the context of Rule 60(b)(5). *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 122 (4th Cir. 2000) (internal quotation marks omitted). "[I]n contrast to the inquiry for vacatur . . . under Rule 60(b)(6), considerations of relative fault and *public interest* are irrelevant to the inquiry for . . . vacatur of an injunction under Rule 60(b)(5) on the grounds of a significant change in fact or law." *Id.* (emphasis supplied).

Here, the district court justified its consideration of the public interest by citing two Supreme Court cases. *See Horne*, 557 U.S. at 447; *Rufo*, 502 U.S. at 384. But both *Horne* and *Rufo* are self styled "institutional reform" cases where the *movant's* claimed basis for

relief was that continued enforcement would be detrimental to the public interest.[2] *Horne*, 557 U.S. at 447; *Rufo* 502 U.S. at 384. In essence, the language cited by the district court does not authorize a broad judicial inquiry into the public interest, but instead maps a possible avenue for relief available to the *movant*. *See Horne*, 447 U.S. at 447 ("[Rule 60(b)(5)] provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in the law renders continued enforcement detrimental to the public interest." (citation and internal quotation marks omitted)); *Rufo*, 502 U.S. at 384 ("Modification of a [judgment] may be warranted when changed factual conditions make compliance . . . substantially more onerous . . . . [*or*] when a [judgment] proves to be unworkable because of unforeseen obstacles . . . *or* when enforcement . . . would be detrimental to the public interest." (emphasis supplied)).

At core, the operative question is whether "[t]he party seeking relief [met its] burden of establishing that changed circumstances warrant relief." *Horne*, 557 U.S. at 447. The

[2] In *Horne*, the Superintendent of Public Instruction for the state of Arizona sought Rule 60(b)(5) relief from a district court's declaratory judgment order. 557 U.S. at 441–42. The declaratory judgment order imposed a series of obligations on the state of Arizona to comply with the Equal Education Opportunities Act. *Id*. The Superintendent's Rule 60(b) motion alleged "sensitive federalism concerns" because the original order had "the effect of dictating state or local budget priorities." *Id*. at 448.

In *Rufo*, a county sheriff moved to modify a district court consent decree providing for the construction of a new jail. 502 U.S. at 371–72. The Court acknowledged the importance of the public interest in institutional reform litigation specifically because "such [cases] reach beyond the parties involved directly in the suit and impact the public's right to the sound and efficient operation of its institutions." *Id*. at 381 (internal quotation marks omitted).

To be sure, the public interest is a vital concern in cases like *Horne* and *Rufo* where public funds and federalism concerns are at play. But *Horne* and *Rufo* do not signify that the public interest is vital in all cases.

changed circumstance here is, of course, the fact that Welsh did not commit the crime with which he was convicted. In turn, the Government has used this erroneous conviction to justify his now seven year (and counting) span of detention in a federal correctional facility. Surely, this is more than sufficient to satisfy Welsh's burden of "establishing that changed circumstances warrant relief." *Horne*, 557 U.S. at 447.

III.

The district court characterized Welsh's plea for relief from his lengthy, unjustified detention as a "substantial personal interest in release from civil commitment." J.A. 112. This greatly understates the implications of Welsh's continued commitment. In the United States, we detain for *criminal conduct*, not mere propensity. *See Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("[P]unishment for a mere propensity . . . is a situation universally sought to be avoided in our criminal law; [there is a] fundamental requirement that some action be proved . . . ."). This principle is so deeply embedded in our understanding of due process that it is indispensable in a free society. The Adam Walsh Act walks a tightrope by detaining for propensity a narrow group of individuals: those in legal custody of the Bureau of Prisons who are deemed "sexually dangerous." 18 U.S.C. § 4248(a).

But detaining for propensity a citizen who never should have been in federal custody in the first place[3] is not only inequitable, it is offensive to the most basic tenets of justice.

[3] The majority asserts that "the government's constitutional authority to civilly commit [does not] depend solely on a criminal conviction." *Ante* at 10. It bases this claim on a never challenged provision permitting civil commitment of individuals "against whom

Yet the district court failed to mention, address, or weigh the public's interest in checking the government's power to detain citizens merely by virtue of their alleged propensities. To ignore that interest is to ignore a vital cornerstone of a free society, in favor of emphasizing a general public risk.

Accordingly, I respectfully dissent.

all criminal charges have been dismissed solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a). In light of *Comstock*, this position is on thin ice. *See Comstock*, 560 U.S. at 149. For me, extending *Comstock* to permit the commitment of the factually and legally innocent is a bridge too far.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-HC-2209-D

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
WILLIAM CARL WELSH,	)	
	)	
Respondent.	)	

On May 25, 2010, William Carl Welsh ("Welsh") was indicted in the United States District Court for the District of Oregon for failing to register as a sex offender in violation of 18 U.S.C. § 2250(a). Indictment, United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. May 25, 2010) [D.E. 1]. The indictment alleged that, on or about September 30, 2009, Welsh failed to update his sex-offender registration in the District of Oregon after he left Oregon and moved to Belize. Id. On September 24, 2010, Welsh pleaded guilty to the charge. United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. Sept. 24, 2010) [D.E. 29–31]. On January 10, 2011, the court sentenced Welsh to 673 days' imprisonment and "committed [Welsh] to the custody of the United States Bureau of Prisons." Judgment and Commitment, United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. Jan. 10, 2011) [D.E. 36] 1–2.

Welsh's projected release date from his 2010 conviction for failing to update his sex-offender registration in the District of Oregon was November 6, 2011. [D.E. 1-1] 1. On October 27, 2011, the United States filed a Certification of a Sexually Dangerous Person for Welsh pursuant to 18

U.S.C. § 4248(a). [D.E. 1].[1] On September 6, 2012, this court held a trial under 18 U.S.C. § 4247(c) to determine whether to commit Welsh as a sexually dangerous person under 18 U.S.C. § 4248(d). See [D.E. 38].[2] On February 5, 2013, the court announced from the bench its detailed findings and conclusions, including that the government had proven by clear and convincing evidence that Welsh was a sexually dangerous person under 18 U.S.C. § 4248(d) [D.E. 43]. Thus, on February 5, 2013, the court entered judgment in favor of the United States and committed Welsh to the custody of the Bureau of Prisons ("BOP") [D.E. 44–45], where he has remained and where the BOP has offered Welsh treatment. On April 3, 2014, the United States Court of Appeals for the Fourth Circuit affirmed this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous

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[1] 18 U.S.C. § 4248(a) provides:

> 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.

[2] 18 U.S.C. § 4248(d) provides: "If, after [a hearing conducted pursuant to the provisions of 18 U.S.C. § 4247(d)], 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." A sexually dangerous person is "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. § 4247(a)(5). A person is sexually dangerous to others if "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." Id. § 4247(a)(6).

person under the Adam Walsh Act. See United States v. Welsh, 564 F. App'x 727 (4th Cir. 2014) (per curiam) (unpublished).

On February 6, 2013, while his appeal was pending, Welsh consented to participate in the BOP's Commitment and Treatment Program ("CTP") at Butner. See [D.E. 52-1] 5; cf. 18 U.S.C. § 4248(d) (describing the Attorney General's obligation to make treatment available to individuals committed as sexually dangerous under the Adam Walsh Act). On April 12, 2013, Welsh "engag[ed] in inappropriate sexual conduct" with another person receiving treatment in the CTP. [D.E. 52-1] 5. On June 14, 2014, Welsh again engaged in "inappropriate sexual conduct" with another CTP participant. [D.E. 57-1] 6. Although Welsh initially denied engaging in inappropriate sexual conduct, he later admitted it. Id. at 7. On February 5, 2015, Welsh admitted to engaging in inappropriate sexual acts, specifically that he had "shown his treatment peer his penis and had also propositioned the same peer for sex." [D.E. 59-1] 5.

On August 21, 2015, after the Fourth Circuit affirmed this court's judgment committing Welsh as a sexually dangerous person under the Adam Walsh Act, a CTP participant reported that Welsh had voiced a desire to return to South America "in order to avoid rules and restrictions," "expressed his dislike for the USA's outlook on sex with minors," and expressed a belief that "the laws in Belize are a lot more lenient when it comes to sex with minors." Id. at 6. Welsh admitted that the participant's report was correct and explained that his behaviors were expressions of his religious belief in Satanism, that Satan commands him to engage in inappropriate sexual conduct, and that he would continue to follow what he believes to be Satan's commands. Id. at 6–7. On November 23, 2015, Welsh admitted to engaging in inappropriate sexual conduct with another CTP participant. Id. at 7.

On November 24, 2015, Welsh withdrew from the CTP. Id. On December 31, 2015, due to "extensive[] misconduct and apparent behavioral non-consent," Welsh was suspended from the CTP. Id. at 8. Although a forensic psychologist concluded during Welsh's first annual review that Welsh "made some progress in the CTP" during his first year of treatment, [D.E. 52-1] 7, on January 29, 2016, that same forensic psychologist concluded that Welsh "made negligible progress" during his second and third years of treatment. [D.E. 59-1] 5–6, 9. On January 20, 2016, Welsh "indicated that he was unsure" whether he was ready to be released into the community and that he was "on the borderline, fifty-fifty." Id. at 9. On February 1, 2016, the BOP's forensic psychologist observed that Welsh "has not yet addressed many of the identified treatment needs which would significantly reduce his risk of recidivism and he is currently not an active participant in treatment." Id. at 10. The forensic psychologist concluded that Welsh "continues to suffer from a severe mental illness, abnormality, or disorder that would cause him to experience serious difficulty in refraining from sexually violent conduct or child molestation if he was released to the community." Id.

On August 2, 2016, the District of Oregon granted Welsh's motion to vacate his 2010 criminal conviction for failing to update his sex-offender registration in the District of Oregon before traveling from Oregon to Belize on or about September 30, 2009. See Stipulation and Order, United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. Aug. 2, 2016) [D.E. 63]. The District of Oregon vacated Welsh's 2010 conviction because, under United States v. Nichols, 136 S. Ct. 1113, 1118 (2016), Welsh's statute of conviction did not require sex offenders to update their registration in the jurisdiction they were leaving. Id.; see Nichols, 136 S. Ct. at 1118; 18 U.S.C. § 2250(a).

On August 28, 2016, Welsh moved in this court for relief from this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act [D.E. 60]. Welsh seeks relief under Federal Rule of Civil Procedure 60(b)(4), (5), and (6). Id. As

explained below, the court denies Welsh's motion for relief from this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act.

I.

Federal Rule of Civil Procedure 60 codified and simplified "the equitable practice with respect to the correction of judgments after the time for appeal has expired." Lafferty v. Dist. of Columbia, 277 F.2d 348, 351 n.6 (D.C. Cir. 1960); see Charles Alan Wright et al., Federal Practice and Procedure, § 2851 (3d ed. 2016). To obtain relief under Rule 60(b), a movant must first show (1) that the Rule 60(b) motion is timely, (2) that he has a meritorious claim or defense, and (3) that the opposing party will not suffer unfair prejudice if the judgment is set aside. See, e.g., Heyman v. M.L. Mktg. Co., 116 F.3d 91, 94 n.3 (4th Cir. 1997); Nat'l Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). Next, the movant must show that he is entitled to relief under one of the six grounds for relief in Rule 60(b). Nat'l Credit Union Admin. Bd., 1 F.3d at 266. Finally, the movant must show that exceptional circumstances justify the court exercising its discretion to vacate the judgment. Compton v. Alston S.S. Co., 608 F.2d 96, 101–02 (4th Cir. 1979); see McLawhorn v. John W. Daniel & Co., 924 F.2d 535, 538 (4th Cir. 1991).

A motion under Rule 60(b)(4), (5), or (6) is timely if it is brought "within reasonable time." Fed. R. Civ. P. 60(c)(1). On April 4, 2016, the Supreme Court announced its decision in Nichols. On August 2, 2016, the District of Oregon granted Welsh's motion to vacate his conviction. See Stipulation and Order, United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. Aug. 2, 2016) [D.E. 63]. On August 28, 2016, Welsh filed his motion under Rule 60(b) [D.E. 60]. For purposes of the threshold requirements under Rule 60(b), the government does not argue that Welsh's Rule 60(b) motion is untimely, and the court finds that his Rule 60(b) motion is timely. See Moses v. Joyner, 815 F.3d 163, 166–67 (4th Cir. 2016); United States v. Blackstock, 513 F.3d 128, 133–34 (4th Cir.

2008); McLawhorn, 924 F.2d at 538.

Likewise, for purposes of the threshold requirements under Rule 60(b), the government does not argue that it would suffer unfair prejudice if this court were to set aside its judgment of February 5, 2013, and the court finds that the government would not suffer unfair prejudice if this court were to do so. As for the "meritorious claim or defense" threshold requirement, the court discusses that requirement in connection with its Rule 60(b)(5) analysis.

II.

After meeting the threshold requirements, a movant must show that he is entitled to relief under one of Rule 60(b)'s six subsections. Nat'l Credit Union Admin. Bd., 1 F.3d at 266; Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993). Under Rule 60(b), "the court may relieve a party . . . from a final judgment, order, or proceeding" in certain circumstances. Welsh seeks relief under subsections (b)(4), (5), and (6). Subsection (4) applies when "the judgment is void." Subsection (5) contains three clauses and applies when "the judgment has been satisfied, released, or discharged" ("the satisfaction clause"); when the judgment "is based on an earlier judgment that has been reversed or vacated" ("the reversed-or-vacated clause"); or when "applying [the judgment] prospectively is no longer equitable" ("the no-longer-equitable clause"). Welsh argues that subsection (5)'s reversed-or-vacated and no-longer-equitable clauses apply to him. Subsection (6) applies if "any other reason . . . justifies relief."

A.

Rule 60(b)(4) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." United States Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010). Although lack of subject-matter jurisdiction may render a judgment void, "[f]ederal courts

considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction. Id. at 270–71 (quotation omitted); see Wendt v. Leonard, 431 F.3d 410, 412–13 (4th Cir. 2005) (holding that Rule 60(b)(4) applies only to "egregious" jurisdictional errors). "In practice, a 'federal court judgment is almost never void because of lack of federal subject matter jurisdiction.'" Hawkins v. Borsey, 319 F. App'x 195, 196 (4th Cir. 2008) (per curiam) (unpublished) (quoting Wendt, 431 F.3d at 413).

Section 4248(a) provides for civil commitment of individuals (1) "who [are] in the custody of the Bureau of Prisons," (2) "who ha[ve] been committed to the custody of the Attorney General pursuant to [18 U.S.C. §] 4241(d)," or (3) "against whom all criminal charges have been dismissed solely for reasons relating to the mental capacity of the person." 18 U.S.C. § 4248(a); see United States v. Joshua, 607 F.3d 379, 382 (4th Cir. 2010). The parties agree that (2) and (3) did not apply to Welsh on October 27, 2011, when the United States filed its Certification of a Sexually Dangerous Person for Welsh pursuant to 18 U.S.C. § 4248(a). They dispute, however, whether (1) applied on October 27, 2011, in light of the District of Oregon's 2016 decision to vacate Welsh's 2010 conviction for failure to update his sex-offender registration.

Section 4248(a) requires only that the person be "in the custody of the Bureau of Prisons" when the "Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons" certifies that the person "is a sexually dangerous person," not when the court actually orders the person committed under 18 U.S.C. § 4248(d). See 18 U.S.C. § 4248(a). Nevertheless, Welsh argues that the court should grant him relief from this court's judgment of February 5, 2013, under Rule 60(b)(4) because, in light of Nichols, the BOP lacked legal custody over him when, on October 27, 2011, the government certified him as a "sexually dangerous person"

under section 4248(a). Thus, according to Welsh, this court's judgment of February 5, 2013, is void. In support, Welsh cites United States v. Joshua, 607 F.3d 379 (4th Cir. 2010), and argues that "custody" in section 4248 means "legal custody," which he contrasts to his allegedly illegal custody under Nichols on October 27, 2011.

The court rejects Welsh's argument. First, section 4248(a)'s custody provision is not jurisdictional. See, e.g., Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity . . . . Other rules, even if important and mandatory . . . should not be given the jurisdictional brand."); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163–65 (2010). Subject-matter jurisdiction refers to the court's "power to decide a justiciable controversy, and includes questions of law as well as of fact." United States v. Williams, 341 U.S. 58, 66 (1951) (quotation omitted). "Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." Id. "Where a federal court has power . . . to proceed to a determination on the merits, that is jurisdiction of the proceedings." Id. at 68. "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime . . . , [the court] has proceeded with jurisdiction . . . ." Id. at 68–69. Thus, for example, even though the District of Oregon applied Nichols retroactively in 2016 and vacated Welsh's 2010 criminal conviction because the "facts stated in [Welsh's 2010] indictment do not constitute a crime," the District of Oregon always had subject-matter jurisdiction over Welsh's criminal case. See id. at 69.

In Joshua, the Fourth Circuit addressed the "custody" provision in section 4248(a). Joshua had been convicted in a court-martial for violating the Uniform Code of Military Justice ("UCMJ"). Joshua, 607 F.3d at 381. The Army transferred Joshua to a BOP facility under a Memorandum of

Agreement with the BOP. Id. While serving his UCMJ sentence in the BOP facility, the government filed a Certification of a Sexually Dangerous Person under section 4248(a) against Joshua. Id. at 382. The district court did not dismiss Joshua's certification under section 4248(a) for lack of subject-matter jurisdiction. Rather, the district court dismissed the certification because section 4248(a) did "not apply" to Joshua in that Joshua was not in "the custody of the Bureau of Prisons" within the meaning of section 4248(a) on the date he was certified under section 4248(a). Order, United States v. Joshua, No. 5:09-HC-2035-BR (E.D.N.C. Jan. 13, 2010) [D.E. 12] 6. Likewise, the Fourth Circuit affirmed the district court's judgment because Joshua was not "in the custody of the Bureau of Prisons" within the meaning of section 4248(a) on the date he was certified under section 4248(a). See Joshua, 607 F.3d at 387–91. Moreover, nowhere in Joshua did the Fourth Circuit state or suggest that the custody provision in section 4248(a) was jurisdictional. See id. Accordingly, the Fourth Circuit's holding in Joshua concerning section 4248(a)'s "custody" provision comports with the Supreme Court's discussion of subject-matter jurisdiction in Williams and its progeny and demonstrates that the "custody" provision in section 4248(a) is not jurisdictional. Rather, the "custody" provision in section 4248(a) is an element of the government's claim for relief under the Adam Walsh Act. Cf. Arbaugh v. Y&H Corp., 546 U.S. 500, 503–13 (2006) (holding that Title VII's employee-numerosity requirement for establishing a Title VII defendant's "employer" status is an element of a Title VII plaintiff's claim for relief, rather than a jurisdictional requirement that can be questioned at any stage of the litigation).

Second, even if section 4248(a)'s custody provision is jurisdictional, Welsh was "in the custody of the Bureau of Prisons" when, on October 27, 2011, he was certified as "a sexually dangerous person." See [D.E. 1]. In Joshua, the Fourth Circuit identified two common meanings of "custody": physical and legal. Physical custody referred to "directly limiting an individual's

physical freedom," whereas legal custody referred to "having lawful authority over an individual's detention." Id. at 386. The Fourth Circuit noted that 18 U.S.C. § 3551(a) instructs that persons convicted of federal crimes other than those in the UCMJ "shall be committed to the custody of the Bureau of Prisons." Id. at 389; see 18 U.S.C. § 3551(a). In contrast, the UCMJ merely authorized that those persons imprisoned under the UCMJ serve their confinement in a BOP facility. Joshua, 607 F.3d at 388–89. Although the Fourth Circuit addressed different factual circumstances in Joshua than are presented in Welsh's case, the Fourth Circuit in Joshua repeatedly stated the definition of "custody" under section 4248(a) was legal authority—as opposed to physical control—over a person's confinement. Id. at 382, 384–87 & n.4. Pursuant to Welsh's sentence of January 10, 2011, in the District of Oregon, the District of Oregon committed Welsh to the custody of the Bureau of Prisons. Judgment & Commitment, United States v. Welsh, No. 3:10-CR-211-BR-1 (D. Or. Jan. 10, 2011) [D.E. 36] 2. Thus, the BOP had "custody" of Welsh as that word is used in section 4248(a) when, on October 27, 2011, he was certified under section 4248(a) because the BOP had legal authority over Welsh's detention on the date of the certification. See [D.E. 1]; Joshua, 607 F.3d at 382, 384–87 & n.4.

Alternatively, even if the "custody" provision in section 4248(a) is jurisdictional, jurisdiction is traditionally assessed at the moment it attaches, and future events do not divest a court of jurisdiction. See, e.g., Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991) (collecting cases) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289–90 (1938) (holding that diversity jurisdiction is determined based on the residence of the parties and the amount in controversy at the time an action is commenced and is not altered by future events); Jones v. CertusBank NA, 605 F. App'x 218, 219

(4th Cir. 2015) (per curiam) (unpublished) (same); JTH Tax, Inc. v. Frashier, 624 F.3d 635, 638 (4th Cir. 2010) (same); Porsche Cars N. Am., Inc. v. Porsche.net, 302 F.3d 248, 255–56 (4th Cir. 2002) (same). Accordingly, the certification on October 27, 2011, did not suffer from a jurisdictional defect. Indeed, Welsh stipulated in his section 4248(c) trial that the court had jurisdiction over the Adam Walsh Act action, [D.E. 34] ¶¶ 2, 5, further demonstrating that the court had at least "an arguable basis for jurisdiction." Espinosa, 559 U.S. at 271. Furthermore, Welsh had notice of the proceedings and trial under 18 U.S.C. §§ 4247-4248 and fully contested his designation as a "sexually dangerous person" under 18 U.S.C. § 4248(c). After the trial under section 4248(c), this court properly entered judgment on February 5, 2013, finding that Welsh was a sexually dangerous person, and properly committed Welsh as a sexually dangerous person under the Adam Walsh Act. See [D.E. 45].

The court has considered the entire record and governing law and has balanced the equities. The court holds that this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act is not void under Rule 60(b)(4).

B.

"A party seeking modification of a [judgment] as 'no longer equitable' [under Rule 60(b)(5)] has the burden of establishing that a significant change in circumstances warrants the revision of the [judgment]." L.J. v. Wilbon, 633 F.3d 297, 304–05 (4th Cir. 2011) (quotation omitted). The no-longer-equitable clause may be applied if "significant change[s] either in factual conditions or in law" make continued enforcement of a judgment "detrimental to the public interest." Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 384 (1992); see Horne v. Flores, 557 U.S. 433, 447 (2009). But see Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 122 (4th Cir. 2000) ("[C]onsiderations of relative fault and public interest are irrelevant to the inquiry . . . under Rule

60(b)(5) on the grounds of a significant change in fact or law."). A court may grant relief under Rule 60(b)(5)'s no-longer-equitable clause "if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice," which may occur when the underlying facts or law have undergone a significant change. United States v. Interstate Gen. Co., 39 F. App'x 870, 873 (4th Cir. 2002) (per curiam) (unpublished) (quotation and alterations omitted); see Agostini v. Felton, 521 U.S. 203, 215–16, 236 (1997). The proper analysis under the no-longer-equitable clause is flexible and focuses on the particular facts of the case. See Thompson v. U.S. Dep't of Hous. & Urban Dev., 404 F.3d 821, 830 (4th Cir. 2005). The party seeking relief under Rule 60(b)(5)'s no-longer-equitable clause bears the "burden of establishing that a significant change in circumstances warrants revision of the decree." Rufo, 502 U.S. at 383; see L.J., 633 F.3d at 304–05.

Welsh does not argue that any circumstances have changed concerning this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act, except that, in 2016, due to the Supreme Court's 2016 decision in Nichols, the District of Oregon vacated his 2011 criminal judgment for failing to update his sex-offender registration. This court agrees that the Supreme Court's decision in Nichols, which rendered the conduct for which Welsh was convicted in 2010 and imprisoned in 2011 outside the scope of 18 U.S.C. § 2250(a), is a change in Welsh's circumstances. After all, Welsh no longer stands convicted of violating 18 U.S.C. § 2250(a).

Nevertheless, the public has a great countervailing interest in Welsh's continued commitment pursuant to this court's judgment of February 5, 2013, on the basis of Welsh's sexual dangerousness, which the government established by clear and convincing evidence at a trial under section 4248(c). See [D.E. 43]. When this court entered its judgment on February 5, 2013, Welsh was in the custody of the BOP, as he had been continuously since he was certified on October 27, 2011, as sexually

dangerous under section 4248(a). See 18 U.S.C. § 4248(a). Furthermore, Welsh's 2010 conviction for failing to update his sex-offender registration in the District of Oregon did not form the basis of the court's findings and conclusions under any prong of the Adam Walsh Act. [D.E. 34] ¶ 6; [D.E. 50] 8–13, 20, 23. Rather, Welsh's 2010 conviction for failing to update his sex-offender registration was simply a gateway that provided the BOP legal custody of Welsh on October 27, 2011, when Welsh was certified under section 4248(a).

Welsh's mental condition and failures in the CTP since 2013 bolster the public interest in Welsh's continued commitment as a sexually dangerous person pursuant to this court's judgment of February 5, 2013. This court already outlined Welsh's failures in the CTP from February 2013 through February 2016, and the forensic psychologist's view that Welsh remains a sexually dangerous person under the Adam Walsh Act. See [D.E. 52-1, 57-1, 59-1]. On February 10, 2017, this court received its annual update concerning Welsh under 18 U.S.C. § 4247(a)(5), (6). See [D.E. 64-1]. In that annual update, the forensic psychologist opined that Welsh continues to suffer 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 into the community. See id. at 5. The forensic psychologist stated that Welsh has not been in treatment during the last year. Id. at 3. Welsh was in "Phase II" of a four-phase treatment program when he was last in treatment, "but had reportedly made negligible progress." Id. at 5. The forensic psychologist opined on February 10, 2017, that Welsh "has not yet addressed many of the identified treatment needs which would significantly reduce his risk of recidivism." Id. "Dynamic risk factors, including intimacy deficits, problems with his general and sexual regulation, and a lack of cooperation with supervision still apply." Id. Moreover, Welsh's static risk factors remain the same as on February 5, 2013, and Welsh does not "possess any mitigating factors (e.g., a medical

condition that would preclude future molestation or significant time in the community since his last offense) that would reduce his risk of recidivism." Id. at 4. Thus, having considered the entire record and governing law and having balanced the equities, Welsh has failed to demonstrate that he is entitled to relief from this court's judgment of February 5, 2013, under the no-longer-equitable clause of Rule 60(b)(5). See Rufo, 502 U.S. at 383; L.J., 633 F.3d at 304–05.

C.

As for Welsh's request for relief under Rule 60(b)(5)'s reversed-or-vacated clause, a judgment or order is "based on" a prior judgment if the "judgment itself [was] necessarily considered in [the] later action." Werner v. Carbo, 731 F.2d 204, 207 (4th Cir. 1984). That is, the court in the later action must have relied on the now-vacated order or judgment in some way other than as precedent, usually in the sense of claim or issue preclusion. See Manzanares v. City of Albuquerque, 628 F.3d 1237, 1240 (10th Cir. 2010); Dowell, 993 F.2d at 48; Klein v. United States, 880 F.2d 250, 258 n.10 (10th Cir. 1989); Gilbert v. Deutsche Bank Trust Co. Ams., No. 4:09-CV-181-D, 2011 WL 10636412, *3 (E.D.N.C. June 15, 2011) (unpublished); Wright et al., Federal Practice and Procedure, § 2863.

This court's order of February 5, 2013, committing Welsh as a sexually dangerous person under section 4248(d) "necessarily considered" Welsh's 2011 judgment of conviction in the District of Oregon. See Werner, 731 F.2d at 207. Specifically, when the BOP certified Welsh under section 4248(a) on October 27, 2011, the BOP had custody of Welsh because it had the "legal authority" over his confinement. See Joshua, 607 F.3d at 382, 384–87 & n.4. That legal authority at the time of the certification under section 4248(a) on October 27, 2011, existed solely because of the District of Oregon's 2010 conviction and the ensuing 2011 judgment and sentence that committed Welsh to the custody of the BOP. If Welsh's 2011 judgment and sentence had not existed, the BOP would

not have had legal custody over Welsh on October 27, 2011, and would not have filed a certification under section 4248(a) on that date concerning Welsh. Thus, under Rule 60(b)(5)'s reversed-or-vacated clause, this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person was based, at least in part, on the now-vacated 2011 District of Oregon judgment, in that the 2011 District of Oregon judgment was a gateway to the trial under section 4248(c). Accordingly, this court assumes without deciding that it has discretion under Rule 60(b)(5) to grant Welsh's motion to relieve Welsh of this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person.

Welsh's motion under Rule 60(b)(5) interacts strangely with the threshold requirement under Rule 60(b)—announced by the Fourth Circuit in cases that did not consider the reversed-or-vacated clause—that a movant show he has a meritorious claim or defense. Here, Welsh was in the BOP's custody when, on October 27, 2011, the government certified Welsh under section 4248(a), even if the BOP's custody on that date was based on the now-vacated 2011 criminal judgment in the District of Oregon. But applying the "meritorious claim or defense" requirement strictly or literally to motions under Rule 60(b)(5)'s reversed-or-vacated clause could essentially nullify that clause. Rule 60(b)(5)'s reversed-or-vacated clause assumes that the challenged judgment was valid at the time but has subsequently been reversed or vacated. In this peculiar case, the court assumes 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. See Boyd v. Bulala, 905 F.2d 764, 769 (4th Cir. 1990) (per curiam) (noting that the "meritorious claim or defense" requirement exists to ensure "that granting . . . relief will not in the end have been a futile gesture").

Although this court considered Welsh's now-vacated 2011 criminal judgment in the District of Oregon as a gateway under section 4248(a) to the section 4248(c) trial, the court's consideration of the now-vacated 2011 criminal judgment in the District of Oregon was minimal in the context of Welsh's section 4248(c) trial and this court's judgment of February 5, 2013, committing Welsh. Before committing Welsh on February 5, 2013, as a sexually dangerous person under the Adam Walsh Act, the court had to find by clear and convincing evidence: (1) that Welsh "has engaged or attempted to engage in sexually violent conduct or child molestation"; (2) that Welsh "suffers from a serious mental illness, abnormality, or disorder"; (3) and that as a result of Welsh's mental illness, abnormality, or disorder, Welsh "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5)-(6); Matherly v. Andrews, 817 F.3d 115, 117 (4th Cir. 2016); United States v. Ebel, 578 F. App'x 201, 202 (4th Cir. 2014) (per curiam) (unpublished). The third prong is satisfied when the government proves by clear and convincing evidence that a person has a "volitional impairment" from which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released. See United States v. Hall, 664 F.3d 456, 463 (4th Cir. 2012); 18 U.S.C. § 4247(a). Welsh's now-vacated 2011 criminal judgment in the District of Oregon for failing to update his sex-offender registration before leaving the District of Oregon for Belize was not mentioned during the presentation of evidence for Welsh's section 4248(c) trial, although the witnesses did discuss Welsh's conduct of absconding from supervision in Oregon to flee to Belize as evidence of Welsh's lack of volitional control. See [D.E. 51] 31–33, 35, 51–52, 71, 116, 130–31, 143–44, 147, 155, 178, 226, 230, 234–35, 238–39. Moreover, this court did not rely on that now-vacated 2011 criminal judgment to support this court's findings on any prong under the Adam Walsh Act. See [D.E. 50].

As for the first prong, Welsh stipulated that the government met its burden of proof on prong one because Welsh "ha[d] engaged in or attempted to engage in sexually violent conduct or child molestation." [D.E. 34] ¶ 6. The court's finding that the government proved the first prong by clear and convincing evidence was supported by evidence reflecting decades of child molestation by Welsh. [D.E. 50] 8–13, 20, 23.[3] As for the second prong under the Adam Walsh Act, the court found "by clear and convincing evidence that Welsh suffers from a serious mental illness, abnormality, or disorder, to wit, pedophilia, sexually attracted to males, non-exclusive type." Id. at 23; see id. at 15–21 (summarizing the testimony of expert witnesses); see also id. at 21–23 (addressing Welsh's expert witness, Dr. Joseph Plaud, who opined that Welsh no longer suffered from pedophilia, and finding that Dr. Plaud's conclusions were not credible). As for the third prong under the Adam Walsh Act, the court found that Welsh "would have serious difficulty in refraining from sexually violent conduct or child molestation if released" as a result of Welsh's pedophilia combined with mood disorder, not otherwise specified, and borderline intellectual functioning. Id. at 16–21; 23–26. As Welsh's counsel correctly argued in closing at the end of Welsh's trial under section 4248(c), Welsh's 2010 conviction for failure to update his sex-offender registration in the District of Oregon was not evidence of any prong of the court's Adam Walsh Act analysis, and Welsh's failure to update his sex-offender registration in the District of Oregon was "not a sexual

[3] Welsh's first conviction occurred in 1979 when Welsh was 24 years old and was for Immoral Acts Before a Child. See Gov't Trial Ex. 32 ¶ 25 (Dec. 2, 2010, Presentence Investigation Report from the District of Oregon). In 1980, Welsh was convicted in California of Annoying Children. See id. ¶ 26. In 1982, Welsh was convicted in California of Annoying Children. See id. ¶ 27. In 1986, Welsh was convicted in Oregon of Sodomy in the First Degree, Sexual Abuse in the First Degree, and Sodomy in the Second Degree. See id. ¶ 29. These sexual offenses involved four minor male victims ages 8, 10, 11, and 12, and 16. See id. In 1999, Welsh was convicted in Oregon of Using a Child in Display of Sexually Explicit Conduct. See id. ¶ 30. Welsh's offense conduct involved Welsh molesting two minor males ages 15 and 16, one of whom had autism and limited intellectual functioning. See id.

offense. It's not evidence of a serious mental disorder or disability . . . . It's not evidence of serious difficulty from refraining from acts of sexual violence or child sex abuse." [D.E. 51] 238–39.

On February 5, 2013, this court considered Welsh's custody on October 27, 2011, when he was certified under section 4248(a). The consideration, however, was limited to the gateway question of whether the BOP had legal custody of Welsh on October 27, 2011, and did not affect the rest of the Adam Walsh Act proceedings, including this court's detailed findings and conclusions on February 5, 2013, under the three prongs of the Adam Walsh Act. Although the court assumes without deciding that the minimal effect of the now-vacated 2011 criminal judgment in the District of Oregon does not take Welsh's case wholly outside the ambit of Rule 60(b)(5)'s reversed-or-vacated clause, it will inform the court's equitable analysis when deciding whether to use its discretion to grant Welsh relief under Rule 60(b)(5). The court will discuss the equities after analyzing Rule 60(b)(6).

D.

Rule 60(b)(6) allows a court to alter a final judgment for "any other reason that justifies relief." This "catchall provision . . . allows a court to grant relief for" a limited number of reasons, two of which the Fourth Circuit has recognized. Dowell, 993 F.2d at 48. First, a significant change in the law may justify modifying a judgment under Rule 60(b)(6) just as under Rule 60(b)(5). Id. Second, a court also may grant relief from a judgment if "such action is appropriate to accomplish justice," Klapprott v. United States, 335 U.S. 601, 615 (1949), but only under extraordinary circumstances. See Gonzalez v. Crosby, 545 U.S. 524, 535 (2005); Ackermann v. United States, 340 U.S. 193, 202 (1950); Dowell, 993 F.2d at 48. In determining whether extraordinary circumstances exist, a court may consider a wide range of factors, including (where appropriate) "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process."

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863–64 (1988). A court, however, cannot grant relief under Rule 60(b)(6) if relief is justified under another provision of Rule 60. Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011) (en banc).

If the grounds for the Rule 60(b)(6) motion "could have been addressed on appeal from judgment," the motion is merely a substitute for an appeal and is improper. Id. at 501. Even when federal decisional law has changed, not every change in federal decisional law will justify relief under Rule 60(b)(6). For example, changes to the procedural requirements for habeas petitions generally will not justify relief under Rule 60(b)(6). See Gonzalez, 545 U.S. at 536; Moses, 815 F.3d at 167–69 (collecting cases). Rule 60(b)(6)'s requirement of "extraordinary circumstances" promotes finality. See Valero Terrestrial Corp., 211 F.3d at 120. Nevertheless, Rule 60(b)(6) confers "broad discretion" on the district court. See Boyd, 905 F.2d at 768–69; Consol. Masonry & Fireproofing, Inc. v. Wagman Const. Corp., 383 F.2d 249, 251 (4th Cir. 1967).

When Welsh appealed this court's judgment of February 5, 2013, to the Fourth Circuit, Welsh could not have raised any arguments about his now-vacated 2011 criminal judgment in the District of Oregon. At that time, the Supreme Court had not decided Nichols, and Welsh had been properly certified under section 4248(a) on October 27, 2011. Arguably, however, Welsh's present circumstances are more "extraordinary" than a simple change in the habeas procedure, in that this case involves a change in substantive law that, had it occurred before Welsh's certification under section 4248(a) on October 27, 2011, could have prevented his certification. Thus, the court assumes without deciding that if it did not have discretion under Rule 60(b)(5) to grant Welsh's motion for relief from this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act, it would have discretion to grant Welsh's motion under Rule 60(b)(6).

E.

Having assumed without deciding that the court has discretion to grant Welsh's motion under Rule 60(b)(5)'s reversed-or-vacated clause or, in the alternative, under Rule 60(b)(6), the court now must decide whether to do so. Rule 60(b) states that a court "may" exercise its power to vacate a judgment under certain circumstances, but relief under Rule 60(b) is nevertheless an "extraordinary" remedy and exceptional circumstances must justify such relief. Compton, 608 F.2d at 101–02; see McLawhorn, 924 F.2d at 538. Before granting relief under Rule 60(b), a court "must engage in the delicate balancing of the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of [a]ll the facts." Compton, 608 F.2d at 102 (quotation omitted). Ultimately, deciding whether to grant relief under Rule 60(b) is within the court's broad discretion. See Werner, 731 F.2d at 206–07.

The equitable concerns guiding the court's discretion in this case are serious, but not complicated. On the one hand, the court must weigh Welsh's substantial personal interest in release from civil commitment as a sexually dangerous person under the Adam Walsh Act. On February 5, 2013, this court committed Welsh as a sexually dangerous person under the Adam Walsh Act after a trial under section 4248(c). At the time of Welsh's certification on October 27, 2011, and throughout the course of the proceedings under the Adam Walsh Act leading to February 5, 2013, Welsh was in the legal custody of the Bureau of Prisons. Welsh argues that his legal custody on October 27, 2011, was a jurisdictional requirement and that the District of Oregon's 2016 vacatur of his 2011 criminal judgment divested this court of jurisdiction over Welsh and the judgment of commitment entered on February 5, 2013. As discussed, however, section 4248(a)'s custody provision is not jurisdictional. Even if it were, subsequent events generally do not divest a court of jurisdiction, and Welsh has provided no reason why his case presents an exception to that rule.

Moreover, because the government met the custody requirement under section 4248(a) on October 27, 2011, and throughout the ensuing proceedings leading to this court's judgment of February 5, 2013, it becomes more difficult for Welsh to overcome the judicial system's interest in finality of this court's judgment of commitment of February 5, 2013, particularly given that the judgment of February 5, 2013, arose after a trial under section 4248(c) at which the government proved its case by clear and convincing evidence under section 4248(d).

When this court weighs the public interest, Welsh's case for relief from this court's judgment of February 5, 2013, becomes even weaker. As discussed, on February 5, 2013, the court found by clear and convincing evidence that Welsh is a sexually dangerous person, that is, someone who had "engaged or attempted to engage in sexually violent conduct or child molestation," and who "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." 18 U.S.C. §§ 4247(a)(5)-(6), 4248(d); [D.E. 38, 43]. On April 3, 2014, the Fourth Circuit affirmed this court's judgment of February 5, 2013. See Welsh, 564 F. App'x at 728–29. Although this court would not have held the hearing under section 4248(c) had Welsh not been in the legal custody of the BOP on October 27, 2011, when he was certified under section 4248(a), the court based its February 5, 2013, order of commitment on clear and convincing evidence well beyond the mere fact of Welsh's 2011 judgment in the District of Oregon. The court's findings and conclusions on February 5, 2013, focused heavily on Welsh's mental condition and conduct, making only one brief mention of Welsh's now-vacated 2011 judgment in the District of Oregon, and not did not rely on that judgment to satisfy any prong of the Adam Walsh Act analysis. See [D.E. 50] 3–28.

The public interest in Welsh's continued civil commitment is even stronger in light of Welsh's mental condition and conduct since this court's February 5, 2013 judgment of commitment.

See [D.E. 52-1, 57-1, 59-1, 64-1]. Although Welsh consented to treatment under the CTP on February 6, 2013, he has been unable to refrain from inappropriate sexual conduct and was suspended from the CTP due to "extensive[] misconduct." See [D.E. 52-1; 57-1; 59-1]. On October 5, 2015, Welsh stated that he would follow Satanic commands to commit inappropriate sexual acts. [D.E. 59-1] 6–7. On January 20, 2016, Welsh stated that he was "unsure" that he was ready to be released into the community and was "on the borderline, fifty-fifty." Id. at 9. The BOP's forensic psychologist was even less optimistic, noting that Welsh had not sufficiently progressed in his treatment to the point where he was no longer sexually dangerous and concluding that Welsh would have serious difficulty refraining from acts of sexual violence or child molestation if released. Id. at 10. The BOP's forensic psychologist's report of February 10, 2017, continues to include that same opinion. See [D.E. 64-1] 2–5.

The court recognizes Welsh's unusual predicament. The court is unaware of another case in which a person pleaded guilty to a crime, served his criminal sentence, was properly certified under section 4248(a), was properly civilly committed under section 4248(d), and then had the conviction underlying his custody at the time of his section 4248(a) certification vacated as a result of an intervening Supreme Court opinion that held the conduct underlying the conviction to be outside the scope of the criminal statute of conviction. Nevertheless, having balanced the equities and considered the entire record and the governing law, Welsh's now-vacated 2011 judgment is insufficient to overturn this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act. Although the now-vacated 2011 judgment in the District of Oregon served as the gateway to the Welsh's certification under section 4248(a), this court's reasons under section 4248(d) for finding on February 5, 2013, that Welsh suffered 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" essentially had nothing to do with Welsh's now-vacated 2011 judgment. Rather, in deciding to commit Welsh as a sexually dangerous person under the Adam Walsh Act, the court focused on the overwhelming evidence on prongs one, two, and three under the Adam Walsh Act. See [D.E. 50]. Welsh's mental condition and conduct from February 5, 2013, to date reinforces that it would not be in the public interest to release Welsh from this court's February 5, 2013, order of commitment. Thus, the court finds that exceptional circumstances do not justify relief and declines to exercise its discretion under Rule 60(b)(5) or 60(b)(6) to vacate this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act.[4]

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[4] Welsh and the government discuss United States v. Schmidt, No. 5:16-HC-2076-BO (E.D.N.C. May 13, 2016) [D.E. 18], appeal pending, No. 16-6731 (4th Cir. argued Sept. 23, 2016), but the court does not find Schmidt informative. On July 8, 2004, Schmidt pleaded guilty to one count of travel by a United States citizen in interstate and foreign commerce with intent to engage in a sexual act with a minor and one count of travel by a United States citizen in interstate and foreign commerce and engaging in illicit sexual conduct with a minor. Id. at 1; see United States v. Schmidt, No. 1:04-CR-00052-JFM-1 (D. Md. July 8, 2004) (unnumbered docket notation of Schmidt's guilty plea). On May 26, 2005, the District of Maryland sentenced Schmidt to 180 months' imprisonment. Judgment, United States v. Schmidt, No. 1:04-CR-00052-JFM-1 (D. Md. May 26, 2005) [D.E. 28]. On September 11, 2015, the District of Maryland granted Schmidt's section 2255 motion to vacate his conviction on the grounds that the conduct to which Schmidt had pleaded guilty was not criminal. Order, United States v. Schmidt, No. 1:04-CR-00052-JFM-1 (D. Md. Sep. 11, 2001) [D.E. 97]; Order, United States v. Schmidt, No. 5:16-HC-2076-BO (E.D.N.C. May 13, 2016) [D.E. 18] 1–2. After the District of Maryland's section 2255 ruling, the government did not seek to stay Schmidt's release beyond the 14-day period provided for in Federal Rule of Civil Procedure 62(a). Order, United States v. Schmidt, No. 5:16-HC-2076-BO (E.D.N.C. May 13, 2016) [D.E. 18] 3. On April 13, 2016, months after the 14-day period under Rule 62(a) expired, the government filed in the Eastern District of North Carolina a certificate of a sexually dangerous person under section 4248(a) regarding Schmidt. Id. at 2.

On May 13, 2016, the Honorable Terrence W. Boyle of the Eastern District of North Carolina granted Schmidt's motion to dismiss the certification under section 4248(a) because, after "the automatic stay of the District of Maryland's order and judgment granting Schmidt's § 2255 motion expired prior to any motion by the government, the BOP's lawful authority over Schmidt was permitted to expire as well." Id. at 4; see Joshua, 607 F.3d at 382, 384–87 & n.4. Judge Boyle's order, however, does not address whether the government properly could have certified Schmidt as sexually dangerous under the Adam Walsh Act if the Bureau of Prisons had legal custody of Schmidt

III.

In sum, Welsh's motion for relief from this court's judgment of February 5, 2013, committing Welsh as a sexually dangerous person under the Adam Walsh Act [D.E. 60] is DENIED.

SO ORDERED. This 16 day of March 2017.

JAMES C. DEVER III
Chief United States District Judge

on the date of certification (which it did in Welsh's case). Furthermore, Judge Boyle's order does not mention the standards under Rule 60, and Rule 60 is not the focus of ongoing proceedings in the Fourth Circuit in Schmidt's case. Thus, Schmidt does not alter this court's analysis in Welsh's case.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA, **Case No. 3:10-cr-00211-BR**

STIPULATION AND ORDER

v.

WILLIAM CARL WELSH,

Defendant.

This matter has come before the Court on the defendant's motion to vacate the judgment and dismiss the underlying indictment because, based on the Supreme Court's ruling in *United States v. Nichols*, 136 S. Ct. 1113 (2016), the factual basis for the guilty plea in this case did not constitute a federal crime. The parties agree that the Court has jurisdiction to provide a remedy by vacating the judgment and dismissing the indictment under 28 U.S.C. § 2241, through the escape hatch of 28 U.S.C. § 2255(e), because the § 2255 motion would be inadequate or ineffective to test the legality of the detention. The defendant has consulted with counsel and agreed to waive any right he may have to be present for the resolution of these proceedings.

Based on the foregoing, and the Court concurring,

IT IS HEREBY ORDERED that the judgment and commitment order entered in this case dated January 7, 2011, is VACATED and the underlying indictment is DISMISSED with prejudice.

Dated this 2nd day of August, 2016.

HONORABLE ANNA J. BROWN
United States District Court Judge

Presented upon agreement of the parties by:

s/ Stephen R. Sady
STEPHEN R. SADY
Chief Deputy Federal Public Defender
Counsel for Defendant

BILLY J. WILLIAMS
United States Attorney

s/ Gary Y. Sussman
GARY Y. SUSSMAN
Assistant United States Attorney

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-6369

UNITED STATES OF AMERICA,

Petitioner - Appellee,

v.

WILLIAM CARL WELSH,

Respondent - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever, III, Chief District Judge. (5:11-hc-02209-D-JG)

Submitted: March 31, 2014 Decided: April 3, 2014

Before KING and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Thomas P. McNamara, Federal Public Defender, Eric J. Brignac, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant. Thomas G. Walker, United States Attorney, R.A. Renfer, Jr., Assistant United States Attorney, Michael E. Lockridge, Special Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

William Carl Welsh appeals the district court's order committing him as a sexually dangerous person under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 4248 (2012). We affirm.

To civilly commit a person pursuant to 18 U.S.C. § 4248, the government must prove by clear and convincing evidence that the individual "(1) has engaged or attempted to engage in sexually violent conduct or child molestation . . . , (2) suffers from a serious mental illness, abnormality, or disorder, and (3) as a result would have serious difficulty refraining from sexually violent conduct or child molestation if released." United States v. Comstock, 627 F.3d 513, 519 (4th Cir. 2010) (internal quotation marks and alteration omitted). "When applying the clear and convincing standard, the court must identify credible supporting evidence that renders its factual determination highly probable." United States v. Antone, 742 F.3d 151, 159 (4th Cir. 2014) (internal quotation marks omitted). Clear and convincing evidence is that which supports "a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Id. (internal quotation marks omitted).

On appeal, we review a district court's factual findings under § 4248 for clear error and its legal conclusions

de novo. United States v. Wooden, 693 F.3d 440, 451 (4th Cir. 2012). Accordingly, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it." Id. (internal quotation marks omitted). "Nevertheless, . . . we may set aside a district court's factual findings if the court failed to properly take into account substantial evidence to the contrary or its factual findings are against the clear weight of the evidence considered as a whole." United States v. Springer, 715 F.3d 535, 545 (4th Cir. 2013) (internal quotation marks and alteration omitted).

Welsh first argues that the district court clearly erred by focusing on his past criminal conduct and ignoring the fact that he had been able to refrain from sexually violent conduct and child molestation while unsupervised in the community. We conclude that the district court did not err by emphasizing Welsh's past criminal conduct, as it provided valuable insight on Welsh's likelihood of reoffending. See Wooden, 693 F.3d at 458 (describing prior criminal conduct as "a critical part of the answer" in civil commitment proceedings). Welsh's prior criminal conduct demonstrated that: (1) strict supervision is not a deterrent to Welsh; (2) Welsh is willing to go to elaborate measures to avoid detection; (3) Welsh has a pattern of giving gifts or money to his victims in exchange for

sexual favors and silence; and (4) Welsh has spent little time in the community between sanctions.

We also conclude that the court did not ignore Welsh's recent conduct. Rather, the record reveals that Welsh has repeated the same patterns and has shown little to no signs of reform. Specifically, Welsh's fantasies have not subsided, as he reported having fantasies about prepubescent males as recently as 2009. Welsh has also continued his pattern of giving gifts to groom potential victims by buying commissary items for younger-looking inmates. His grooming of younger-looking inmates while awaiting the civil commitment hearing also establishes that Welsh's behavior has remained unmodified by the threat of sanctions. Thus, far from ignoring recent events, the court found that Welsh's recent behavior was consistent with Welsh's "abysmal" criminal history.

Although Welsh attempts to place a positive spin on his time in Belize by noting that he did not engage in any sexual activity with children while unsupervised there, we conclude that the district court did not clearly err by rejecting that interpretation of the evidence. See Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (holding that, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"). Indeed, Welsh's flight demonstrates that he is still willing to

go to elaborate measures to avoid detection. Moreover, his activities with prostitutes in Belize only confirm the district court's conclusions that Welsh is still sexually preoccupied and that Welsh lied about his sexual urges at the commitment hearing.

We further conclude that Welsh's citation to the opinion of Dr. Plaud is also unavailing, as the district court discredited Dr. Plaud's opinion and found more credible the opinions of Drs. Arnold and Perkins. Welsh has not provided any reason to second guess the district court's credibility determination. See United States v. Hall, 664 F.3d 456, 462 (4th Cir. 2012) (noting that this court is "especially reluctant" to second guess district courts' evaluation of expert credibility and assessment of conflicting expert opinions (internal quotation marks omitted)).

Welsh next argues that the district court clearly erred by not giving enough weight to the fact that Welsh will be subject to lifetime supervision if released. We conclude that the district court adequately weighed the potential effect of Welsh's lifetime term of supervised release and thoroughly considered Welsh's options for treatment inside and outside the prison environment. It was not clear error for the district court to: (1) conclude that Welsh would receive better treatment in prison; and (2) minimize the effect of the lifetime term of

supervised release in light of Welsh's utter failure to abide by the terms of supervision in the past.

Because Welsh has failed to demonstrate clear error, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-HC-2209-D

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
	)	
WILLIAM CARL WELSH,	)	
	)	
Respondent.	)	

The United States ("petitioner") seeks to civilly commit William Carl Welsh ("Welsh" or "respondent") as a "sexually dangerous person" under the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"), codified at 18 U.S.C. §§ 4247–48. Pursuant to the Adam Walsh Act, if the court finds by clear and convincing evidence, after a hearing, that a person is a "sexually dangerous person," the court must commit the person to the custody of the Attorney General. Id. § 4248(d). A "sexually dangerous person" is one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." Id. § 4247(a)(5). A person is considered "sexually dangerous to others" if "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." Id. § 4247(a)(6).

To obtain a commitment order against Welsh, the government must establish three facts by clear and convincing evidence: (1) that Welsh "has engaged or attempted to engage in sexually violent conduct or child molestation," id. § 4247(a)(5); (2) that Welsh currently "suffers from a serious mental illness, abnormality, or disorder"; and (3) as a result of the serious mental illness,

abnormality, or disorder, that Welsh "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." Id. § 4247(a)(6); see United States v. Caporale, 701 F.3d 128, 130 (4th Cir. 2012); United States v. Wooden, 693 F.3d 440, 442 (4th Cir. 2012); United States v. Francis, 686 F.3d 265, 268, 274 (4th Cir. 2012); United States v. Hall, 664 F.3d 456, 461 (4th Cir. 2012); United States v. Comstock, 627 F.3d 513, 515–16 (4th Cir. 2010), cert. denied, 131 S. Ct. 3026 (2011).

On September 6, 2012, the court held a bench trial. On February 5, 2013, the court announced its findings and conclusions from the bench. The transcript is incorporated herein by reference. The United States has proven by clear and convincing evidence that Welsh has engaged in sexually violent conduct or child molestation and suffers from a serious mental illness, abnormality, or disorder. The United States also has proven by clear and convincing evidence that, as a result of his serious mental illness, abnormality, or disorder, Welsh "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6). Thus, the United States has proven that Welsh is a sexually dangerous person as defined in the Adam Walsh Act. Accordingly, judgment shall be entered in favor of petitioner, the United States, and against respondent, William Carl Welsh. Welsh is hereby committed to the custody and care of the Attorney General pursuant to 18 U.S.C. § 4248.

SO ORDERED. This 5 day of February 2013.

JAMES C. DEVER III
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
PETITIONER,	)	
	)	
VS	)	CASE NO. 5:11-HC-2209-D
	)	
	)	
	)	
WILLIAM CARL WELSH,	)	
	)	
RESPONDENT.	)	

RULING

FEBRUARY 5, 2013

CHIEF DISTRICT JUDGE JAMES C. DEVER, PRESIDING

APPEARANCES:

MR. RUDY RENFER
ASSISTANT UNITED STATES ATTORNEY
310 NEW BERN AVENUE
RALEIGH, NC 27601
(FOR THE GOVERNMENT)

MR. ROBERT WATERS
ASSISTANT FEDERAL PUBLIC DEFENDER
150 FAYETTEVILLE STREET
SUITE 450
RALEIGH, NC 27601
(FOR THE RESPONDENT)

APPEARANCES:

MS. CINDY BEMBRY
ASSISTANT FEDERAL PUBLIC DEFENDER
150 FAYETTEVILLE STREET
SUITE 450
RALEIGH, NC 27601
(FOR THE RESPONDENT)

SHARON K. KROEGER, COURT REPORTER
MACHINE SHORTHAND REPORTER, COMPUTER AIDED TRANSCRIPTION

THE COURT: GOOD MORNING. WE ARE HERE IN THE MATTER OF UNITED STATES VERSUS WILLIAM CARL WELSH. THE COURT HAS COMPLETED ITS REVIEW AND WILL NOW ANNOUNCE ITS DECISION.

AS I HAVE DONE IN PRIOR CASES, I WILL READ MY DECISION. I WILL THEN SIGN A SHORT ORDER THAT INCORPORATES THE FINDINGS AND CONCLUSIONS BY REFERENCE.

PETITIONER, THE UNITED STATES, SEEKS TO CIVILLY COMMIT RESPONDENT, WILLIAM CARL WELSH, AS A SEXUALLY DANGEROUS PERSON UNDER SECTION 302(4) OF THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, CODIFIED AT 18 U.S.C. SECTIONS 4247 AND 4248.

THE UNITED STATES MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT WELSH IS SEXUALLY DANGEROUS. A PERSON IS SEXUALLY DANGEROUS IF HE (QUOTE) "HAS ENGAGED OR ATTEMPTED TO ENGAGE IN SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION AND IS SEXUALLY DANGEROUS TO OTHERS" (END QUOTE), 18 U.S.C. SECTION 4247(A)(5).

TO DETERMINE THAT A PERSON IS SEXUALLY DANGEROUS TO OTHERS, A COURT MUST FIND THAT HE (QUOTE) "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" (END QUOTE). ID. SECTION 4247(A)(6). SEE UNITED STATES VERSUS CAPORALE, 701 F. 3D

128, FOURTH CIRCUIT, 2012; UNITED STATES VERSUS WOODEN, 693 F. 3D 440, FOURTH CIRCUIT, 2012; UNITED STATES VERSUS FRANCIS, 686 F. 3D 265, FOURTH CIRCUIT, 2012; UNITED STATES VERSUS HALL, 664 F. 3D 456, FOURTH CIRCUIT, 2012; UNITED STATES VERSUS COMSTOCK, 627 F. 3D 513, FOURTH CIRCUIT, 2010.

SEXUALLY VIOLENT CONDUCT INCLUDES ANY UNLAWFUL CONDUCT OF A SEXUAL NATURE WITH ANOTHER PERSON THAT INVOLVES, AMONG OTHER THINGS, THREATENING OR PLACING THE VICTIM IN FEAR THAT THE VICTIM OR ANY OTHER PERSON WILL BE HARMED. SEE 28 CFR SECTION 549.92(B).

CHILD MOLESTATION INCLUDES ANY UNLAWFUL CONDUCT OF A SEXUAL NATURE WITH OR SEXUAL EXPLOITATION OF A PERSON UNDER THE AGE OF 18. SEE 28 CFR SECTION 549.93.

THE EVIDENTIARY HEARING IN THIS MATTER WAS HELD ON SEPTEMBER 6, 2012. THE COURT HAS REVIEWED THE ADMISSIBLE EVIDENCE AND MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IN DOING SO, THE COURT IS AWARE OF THE GOVERNING LEGAL STANDARD. (QUOTE) "CLEAR AND CONVINCING EVIDENCE HAS BEEN DEFINED AS EVIDENCE OF SUCH WEIGHT THAT IT PRODUCES IN THE MIND OF THE TRIER OF FACT A FIRM BELIEF OR CONVICTION, WITHOUT HESITANCY, AS TO THE TRUTH OF THE ALLEGATIONS SOUGHT TO BE ESTABLISHED AND AS WELL AS EVIDENCE THAT PROVES THE FACTS AT ISSUE TO BE HIGHLY

PROBABLE" (END QUOTE). JIMENEZ VERSUS DAIMLER CHRYSLER CORPORATION, 269 F. 3D 439, 450, FOURTH CIRCUIT, 2001; SEE ALSO ADDINGTON VERSUS TEXAS, 441 U.S. 418, 423 AND 24, 1979.

THE PRINCIPLES ARE ALSO DISCUSSED IN DIREX ISRAEL LIMITED VERSUS BREAKTHROUGH MEDICAL CORPORATION, 952 F. 2D 802, 810, FOURTH CIRCUIT, 1992, AND DISCUSSED IN THE FOURTH CIRCUIT'S DECISIONS IN NUMEROUS 4248 CASES INCLUDING CAPORALE, WOODEN, FRANCIS, HALL AND COMSTOCK.

ON OCTOBER 27, 2011, THE UNITED STATES CERTIFIED WELSH PURSUANT TO 18 U.S.C. SECTION 4248. WELSH WAS SET TO BE RELEASED FROM FEDERAL PRISON IN NOVEMBER 2011, BUT INSTEAD WAS MOVED TO THE MARYLAND UNIT AT BUTNER AFTER HIS CERTIFICATION TO AWAIT THE COURT'S DETERMINATION ON WHETHER HE SHOULD BE CIVILLY COMMITTED.

ON AUGUST 30, 2012, THE COURT ENTERED AN AMENDED PRETRIAL ORDER. THE COURT HELD A COMMITMENT HEARING IN THIS CASE ON SEPTEMBER 6, 2012, DURING WHICH IT HEARD TESTIMONY, RECEIVED EVIDENCE AND HEARD ARGUMENTS FROM BOTH PARTIES. THE COURT HAS CONSIDERED ALL OF THE ADMISSIBLE EVIDENCE IN REACHING ITS DECISION.

WELSH WAS BORN IN 1954 IN PORTLAND, OREGON, AND IS 58 YEARS OLD. HE HAS ONE SISTER, KIT WELSH. SHE IS STILL ALIVE. SHE TESTIFIED AT THE HEARING. WELSH WAS ADOPTED AT A YOUNG AGE AND RAISED BY HIS ADOPTIVE PARENTS

IN WASHINGTON STATE. HE APPARENTLY DID NOT KNOW HIS BIOLOGICAL PARENTS.

WELSH'S ADOPTED FATHER DIED IN 1986. WELSH GRADUATED FROM HIGH SCHOOL IN SEATTLE IN 1972. NONETHELESS, HIS SISTER, KIT WELSH, CLAIMED THAT WELSH HAS BEEN DIAGNOSED WITH LEARNING DISABILITIES SINCE HE WAS ABOUT 5 YEARS OLD. THESE DISABILITIES AFFECTED HIS INTERACTIONS WITH OTHER CHILDREN. HE WAS OFTEN CALLED (QUOTE) "WEIRD BILL" (UNQUOTE).

ACCORDING TO KIT WELSH, HIS BROTHER HUNG AROUND BAD KIDS, BUT THEY DID ATTEMPT TO PROTECT HIM.

WELSH CLAIMS THAT HE IS BISEXUAL. WELSH HAS NEVER BEEN MARRIED OR COHABITATED WITH A ROMANTIC PARTNER. LIKEWISE, HE HAS NEVER HAD A SERIOUS RELATIONSHIP WITH ANYONE OR FATHERED ANY CHILDREN.

WELSH CLAIMS THAT HE WAS SEXUALLY ABUSED AS A CHILD BETWEEN THE AGES OF 9 AND 12 YEARS OLD BY AN ADULT MALE BABYSITTER. HE CLAIMS THAT HE TOLD HIS ADOPTIVE PARENTS ABOUT THE ABUSE, BUT THEY DID NOT BELIEVE HIM. HE CLAIMS THAT THE ABUSER FONDLED HIS GENITALS, ORALLY COPULATED HIM, FORCED HIM TO TOUCH THE MAN'S PENIS, AND TRIED TO ANALLY PENETRATE HIM.

WELSH HAS HELD FEW JOBS SINCE HE HAS BEEN AN ADULT. THE JOBS THAT HE HAS HELD INCLUDE COMMERCIAL CRABBING AND FISHING. HE DOES NOT HAVE ANY CHOSEN

VOCATION OR PARTICULAR SKILL. HE CLAIMS THAT HE HAS OBTAINED SOCIAL SECURITY DISABILITY BENEFITS IN THE PAST WHEN HE QUALIFIES.

HE ALSO CLAIMS THAT HE RECEIVES APPROXIMATELY $750 IN FUNDS EVERY MONTH FROM A FAMILY TRUST FUND.

WELSH STATED THAT HE DOES NOT AND HAS NEVER ABUSED DRUGS OR ALCOHOL. HOWEVER, WELSH HAS GIVEN ALCOHOL TO SOME MINOR VICTIMS, SPECIFICALLY IN 1999, WELSH GAVE ALCOHOL TO BOYS HE SEXUALLY MOLESTED.

WELSH HAS A LONG HISTORY OF MENTAL PROBLEMS. HIS I.Q. IS IN THE BORDERLINE RANGE AND THERE IS EVIDENCE THAT HE IS MILDLY MENTALLY RETARDED.

WELSH TESTIFIED THAT HE IS NOT CURRENTLY CAPABLE OF ACHIEVING AN ERECTION DUE TO SURGERY FOR PROSTATE CANCER IN 2008. NEVERTHELESS, WELSH ADMITS THAT HE PERFORMED ORAL SEX ON PROSTITUTES IN BELIZE IN 2009 AND ATTEMPTED TO MASTURBATE IN 2010.

HE REMAINS, IN THIS COURT'S VIEW, USUALLY SEXUALLY PREOCCUPIED.

IN 2011, WELSH WAS REMOVED FROM THE MARYLAND UNIT AT BUTNER FOR ATTEMPTING TO (QUOTE) "GROOM" (END QUOTE) YOUNGER LOOKING DETAINEES BY GIVING THEM GIFTS. WELSH HAS BEEN REFERRED FOR SEX OFFENDER TREATMENT AT LEAST ONCE BEFORE. HE HAS NOT SUCCESSFULLY COMPLETED ANY SEX OFFENDER TREATMENT UPON THE ADVICE OF COUNSEL. WELSH

REFUSED TO PARTICIPATE IN THE SEX OFFENDER TREATMENT PROGRAM WHEN OFFERED SUCH TREATMENT AT BUTNER.

WELSH DOES NOT HAVE A VIABLE RELEASE PLAN. HE HAS A LIFETIME SUPERVISION DUE TO HIS MOST RECENT FEDERAL CONVICTION, BUT NO JOB PROSPECTS OR PLACES TO LIVE. HIS SISTER TESTIFIED THAT WELSH CANNOT LIVE WITH HER IF RELEASED DUE TO THE PRESENCE OF HER MINOR CHILDREN IN THE HOME.

KIT WELSH ALSO TESTIFIED THAT WELSH OVERSTATED HER ROLE IN HIS PROPOSED RELEASE PLAN. IN ADDITION, THERE IS NO RECORD EVIDENCE THAT SEX OFFENDER TREATMENT FOR A LOWER INTELLECTUALLY FUNCTIONING PERSON LIKE WELSH IS AVAILABLE IN THE PLACE IN OREGON WHERE HE PROPOSES TO LIVE.

AS FOR WELSH'S CRIMINAL HISTORY AS IT RELATES TO PRONG ONE, THE HISTORY IS ABYSMAL. ON APRIL 16, 1979, WELSH WAS ARRESTED IN LOS ANGELES COUNTY, CALIFORNIA, FOR ANNOYING, MOLESTING A CHILD. ON JUNE 21, 1979, HE PLED GUILTY AND WAS SENTENCED TO TWO YEARS OF FORMAL PROBATION.

WHILE ON PROBATION IN CALIFORNIA FOR HIS FIRST MOLESTATION CONVICTION, WELSH WAS ARRESTED ON AUGUST 2, 1980, AND CHARGED WITH LEWD ACTS UPON A CHILD.

ON OCTOBER 30, 1980, HE PLED GUILTY TO TWO COUNTS OF ANNOYING, MOLESTING A CHILD. WELSH WAS

SENTENCED TO 90 DAYS CONFINEMENT IN COUNTY JAIL AND THREE YEARS OF PROBATION.

ON SEPTEMBER 5, 1982, WHILE ON PROBATION, WELSH WAS AGAIN ARRESTED FOR COMMITTING LEWD ACTS UPON A CHILD. ON DECEMBER 16, 1982, WELSH WAS CONVICTED OF MOLESTING A CHILD AND WAS SENTENCED TO SERVE ONE YEAR CONFINEMENT IN THE COUNTY JAIL AND THREE YEARS OF PROBATION.

AFTER HIS RELEASE FROM JAIL IN CALIFORNIA, WELSH MOVED TO OREGON. WELSH'S MOLESTATION PLOYS DID NOT END. WELSH WAS CHARGED IN OREGON IN 1986 WITH NINE DIFFERENT SEXUAL CRIMES INVOLVING FOUR DIFFERENT BOYS. WELSH ULTIMATELY PLEADED GUILTY TO ONE CHARGE PER VICTIM AND WAS SENTENCED TO SERVE A TOTAL OF 15 YEARS CONFINEMENT IN THE OREGON DEPARTMENT OF CORRECTIONS.

SPECIFICALLY, WELSH PLED GUILTY TO ONE COUNT OF SODOMY IN THE FIRST DEGREE, ONE COUNT OF SODOMY IN THE SECOND DEGREE, AND TWO COUNTS OF SEXUAL ABUSE IN THE FIRST DEGREE. THE BOY VICTIMS RANGED FROM AGES 8 TO 12 YEARS OLD AT THE TIME.

WELSH BEGAN TO SEXUALLY ABUSE THEM WHEN THEY WERE THIS AGE. WELSH SEXUALLY ABUSED TWO OF THE VICTIMS OVER THE COURSE OF 18 MONTHS. WELSH ABUSED THE OTHER TWO VICTIMS FOR A NUMBER OF WEEKS BEFORE BEING DETECTED.

WELSH FIRST CAME INTO CONTACT WITH ONE OF THE

VICTIMS BY GIVING THE VICTIM SMALL AMOUNTS OF MONEY SUCH AS $5 OR $10 IN RETURN FOR SEXUAL FAVORS AND TO ENSURE THAT THE VICTIM WOULD NOT TELL ANYONE ABOUT WELSH'S SEXUAL ACTIVITIES WITH HIM.

WELSH STATED TO OFFICERS THAT WHEN THEIR SEXUAL RELATIONSHIP BEGAN, THE VICTIM TOLD WELSH THAT HE WOULD LET WELSH PLAY WITH HIS PENIS IF WELSH WOULD PAY HIM $5 OR $10. OVER A PERIOD OF A YEAR AND A HALF WELSH PERFORMED FELLATIO ON THE VICTIM SEVERAL TIMES.

ON OR ABOUT APRIL 22, 1986, WELSH ASKED THE VICTIM TO ENGAGE IN ANAL INTERCOURSE WITH HIM. THE VICTIM CONSENTED. WELSH THEN PENETRATED THE VICTIM'S ANUS WITH HIS ERECT PENIS. THE VICTIM ASKED WELSH TO STOP BECAUSE IT HURT, BUT WELSH WOULD NOT STOP AND DID NOT STOP UNTIL HE WAS FINISHED.

ON ONE OTHER OCCASION, WELSH OFFERED THE VICTIM $40 IF HE WOULD PERMIT HIM TO HAVE ANAL INTERCOURSE HIM AGAIN, BUT THE VICTIM REFUSED.

ON ONE OCCASION, THE VICTIM STATED THAT WELSH THREATENED TO BEAT HIM UP IF THE VICTIM DID NOT PERMIT WELSH TO PERFORM -- EXCUSE ME -- PERMIT WELSH TO PERFORM FELLATIO.

AS FOR CASE NUMBER CC-86-1182, IT ALSO RESULTED IN A CONVICTION FOR SODOMY IN THE SECOND DEGREE. POLICE OFFICERS WHO WERE ON ROUTINE PAROLE DECIDED TO

CHECK WELSH'S HOUSE TO DETERMINE WHY WELSH HAD NOT SHOWED UP FOR COMMUNITY SERVICE THAT DAY. THE OFFICERS NOTED THAT ALL OF THE DOORS, WINDOWS AND CURTAINS TO WELSH'S RESIDENCE WERE CLOSED. WHEN THE OFFICERS WENT UP TO THE DOOR AND KNOCKED, THEY HEARD SOMEONE INSIDE THE APARTMENT TALKING AND HURRYING AROUND. APPROXIMATELY ONE MINUTE LATER, WELSH OPENED THE DOOR.

WELSH STATED TO OFFICERS THAT HE DID NOT GO TO WORK BECAUSE HE WAS SICK. THE OFFICERS PERSISTED AND WERE NOT SATISFIED WITH WELSH'S ANSWER AND ASKED WHAT WAS GOING ON, WHO ELSE WAS IN THE APARTMENT.

WELSH INVITED THE OFFICERS IN TO SEE FOR THEMSELVES. THE OFFICERS THEN DISCOVERED A 12 YEAR OLD VICTIM HIDING IN THE BATHROOM. THE OFFICERS ASKED THE VICTIM WHAT HE WAS DOING THERE, AND THE VICTIM REPLIED THAT HE WAS NOT IN SCHOOL BECAUSE HE WAS HIDING FROM SOME BIGGER KIDS WHO HAD BEEN AFTER HIM.

THE VICTIM DISCLOSED THAT HE HAD BEEN AT WELSH'S RESIDENCE ALL DAY. ONE OF THE OFFICERS THEN STATED TO WELSH THAT HE WAS NOT SUPPOSED TO HAVE KIDS AT HIS RESIDENCE. WELSH, ACCORDING TO THE OFFICERS, JUST SMILED.

THE OFFICERS AND THE VICTIM LEFT. THE OFFICERS WENT TO THE VICTIM'S RESIDENCE TO ASK THE VICTIM SOME MORE QUESTIONS. THE VICTIM TOLD THE OFFICERS THAT

WELSH HAD PERFORMED SEXUAL ACTS ON HIM. THE OFFICERS THEN RETURNED TO WELSH'S RESIDENCE AND CONFRONTED WELSH WITH THE VICTIM'S ACCUSATIONS.

WELSH AGREED TO ACCOMPANY THE OFFICERS TO THE POLICE STATION TO GIVE A VOLUNTARY STATEMENT. WELSH STATED THAT HE HAD BEEN HAVING SEXUAL RELATIONS WITH THE VICTIM FOR APPROXIMATELY ONE AND A HALF YEARS. WELSH STATED THAT HE HAD PERFORMED FELLATIO ON THE VICTIM.

WELSH ALSO STATED THAT ON ONE OCCASION HE HAD ANAL INTERCOURSE WITH THE VICTIM. IN A SUBSEQUENT INTERVIEW WITH POLICE, THE VICTIM STATED THAT WELSH HAD TRIED TO SEXUALLY PENETRATE HIM ON MAY 23, 1986. THE VICTIM SAID THAT WELSH PERFORMED SEX ACTS ON HIM DURING THE VICTIMIZATION.

THE VICTIM STATED THAT WELSH WOULD USUALLY PAY HIM $5 SO HE WOULDN'T TELL ANYONE ABOUT THE SEX ACTS, AND ON ONE OCCASION WELSH THREATENED TO BEAT THE CRAP OUT OF HIM IF HE TOLD ANYONE.

THE VICTIM FURTHER RELATED THAT ON ONE OTHER OCCASION WELSH GAVE HIM A PEPSI AND THE VICTIM BECAME VERY SLEEPY AFTER DRINKING IT. THE VICTIM FELT WELSH MAY HAVE PUT DRUGS IN THE PEPSI.

AS FOR CASE NUMBER CC-86-1186, THAT CASE RESULTED IN WELSH'S CONVICTION FOR SEXUAL ABUSE -- SEXUAL ABUSE IN THE FIRST DEGREE. ON MARCH 21, 1986 WELSH

TOUCHED A 10-YEAR OLD BOY'S PENIS. THE VICTIM SAID THAT WELSH PUSHED HIM DOWN, SAT ON HIM, AND PLAYED WITH HIS PENIS AND DID NOT ALLOW HIM TO GET UP. THE INCIDENT TOOK PLACE AT WELSH'S RESIDENCE.

ULTIMATELY, AFTER SERVING HIS PRISON SENTENCE FOR THE 1986 CONVICTIONS, WELSH WAS RELEASED. UNFORTUNATELY, WELSH CONTINUED TO MOLEST MINOR MALES.

IN 1999, WELSH ENGAGED IN SEX ACTS WITH A 15 YEAR OLD BOY AND A 16 YEAR OLD BOY IN WELSH'S RESIDENCE. WELSH SHOWED THE VICTIMS PORNOGRAPHIC IMAGES AND GAVE THEM ALCOHOLIC BEVERAGES. WELSH REPEATEDLY FONDLED THE VICTIM'S GENITALIA AND PERFORMED ORAL SEX ON ONE OF THE VICTIMS.

WELSH REPEATEDLY BRIBED THE VICTIMS WITH GIFTS, DID NOT DISCLOSE THE SEXUAL ACTIVITIES. WELSH PLED GUILTY TO TWO COUNTS OF USING A CHILD IN DISPLAY OF SEXUALLY EXPLICIT CONDUCT. HE WAS SENTENCED TO EIGHT YEARS IMPRISONMENT AND THREE YEARS OF SUPERVISED RELEASE IN OREGON.

ON JUNE 15, 2007, WELSH WAS PAROLED FROM THE 1999 TERM OF CONFINEMENT IN OREGON. WHILE ON PAROLE IN OREGON, WELSH WAS PLACED ON STRICT PARAMETERS THROUGHOUT HIS POST SUPERVISION. THE PARAMETERS INCLUDED CLOSE MONITORING AND POLYGRAPHS.

ON JUNE 11, 2008, WELSH FAILED A MAINTENANCE

POLYGRAPH ON QUESTIONS REGARDING EXPOSING HIMSELF TO MINORS AND SEXUAL CONTACT WITH MINORS.

ON JUNE 15, 2009, WELSH REPORTED HAVING DREAMED OF HAVING SEX WITH A 13 YEAR OLD MINOR MALE THE NIGHT BEFORE.

WELSH ALSO REPORTED THAT WHEN HE HAD RECENTLY BEEN IN A STORE IN WARRENTON, OREGON HE HAD LOOKED AT YOUNG BOYS IN SHORTS AND TOLD HIMSELF I THINK THEY WOULD LIKE ME TO GIVE THEM ORAL SEX.

HE ALSO REPORTED THAT ON ONE OCCASION IN A CLOTHING STORE HE WAS BENT OVER WHEN A YOUNG BOY AROUND AGE 12 ACCIDENTALLY BUMPED INTO HIM. HE WENT HOME AND FANTASIZED ABOUT PERFORMING ORAL SEX AND HAVING THE MINOR MALE PERFORM ORAL SEX ON HIM.

ON JUNE 16, 2009, WELSH PROPOSED A RESIDENCE LOCATED A COUPLE OF BLOCKS AWAY FROM WHERE HE SEXUALLY OFFENDED AGAINST A PREVIOUS VICTIM. THE PAROLE OFFICER DENIED WELSH'S REQUEST TO MOVE TO THAT RESIDENCE.

WELSH DID NOT LIKE BEING ON INTENSIVE SUPERVISION IN 2009. ON JULY 15, 2009, WELSH ABSCONDED SUPERVISION, LEFT OREGON WITHOUT PERMISSION, AND FLED TO BELIZE. BEFORE ABSCONDING, WELSH HAD SECRETLY SAVED APPROXIMATELY $10,000.

WELSH ADMITTED TO PERFORMING ORAL SEX ON FEMALE PROSTITUTES WHILE IN BELIZE. WELSH DENIES ANY

SEXUAL CONTACT WITH MINOR MALES WHILE IN BELIZE. WELSH CHOSE TO ABSCOND TO BELIZE BECAUSE HE BELIEVED THAT THERE WAS NO EXTRADITION TREATY BETWEEN BELIZE AND THE UNITED STATES.

ON SEPTEMBER 30, 2009, WELSH WAS APPREHENDED AND RETURNED TO THE UNITED STATES. THEREAFTER, OREGON REVOKED HIS PAROLE. HE WAS SCHEDULED FOR RELEASE IN MAY 2010 WITH SUPERVISION EXPIRING IN APRIL 2011.

IN 2010, HOWEVER, WELSH WAS CONVICTED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON OF FAILURE TO REGISTER AS A SEX OFFENDER IN VIOLATION OF 18 U.S.C. SECTION 2250(A). AS PART OF THAT CASE, THE UNITED STATES PROBATION OFFICE PREPARED A DETAILED PRESENTENCE REPORT WHICH IS AT GOVERNMENT'S EXHIBIT 32.

IN JANUARY 2011, THE DISTRICT OF OREGON SENTENCED WELSH TO 673 DAYS IMPRISONMENT AND A LIFETIME OF SUPERVISED RELEASE. THE JUDGMENT IS AT GOVERNMENT'S EXHIBIT 33.

THREE EXPERT WITNESSES TESTIFIED IN THIS CASE. DR. DALE ARNOLD IS A FORENSIC PSYCHOLOGIST WHO HAS EVALUATED HUNDREDS OF SEX OFFENDERS IN HIS WORK AND HAS TESTIFIED IN NUMEROUS ADAM WALSH TRIALS. HIS CURRICULUM VITAE IS AT GOVERNMENT'S EXHIBIT 1. HIS FORENSIC EVALUATION DETAILING HIS EVALUATION OF WELSH FOR CIVIL COMMITMENT AS A SEXUALLY DANGEROUS PERSON IS AT

GOVERNMENT'S EXHIBITS 2 AND 3.

DR. ARNOLD OPINED THAT WELSH MEETS THE CRITERIA FOR CIVIL COMMITMENT AS A SEXUALLY DANGEROUS PERSON AND IS AT A HIGH RISK FOR SEXUAL REOFFENSE WITHIN THE MEANING OF THE ADAM WALSH ACT. IN FORMING HIS OPINION, DR. ARNOLD REVIEWED THE WRITTEN DISCOVERY PROVIDED TO WELSH.

DR. ARNOLD ALSO REVIEWED THE DEPOSITION OF WELSH, INTERVIEWED WELSH, AND LISTENED TO WELSH'S TESTIMONY AT THE 4248 TRIAL.

THE WRITTEN DISCOVERY INCLUDES INFORMATION RELATED TO WELSH'S CRIMINAL HISTORY, SOCIAL HISTORY, INSTITUTIONAL REPORTS, INVESTIGATIVE RECORDS RELATED TO HIS SEXUAL CONDUCT AND PSYCHOLOGICAL EVALUATIONS BY OTHER MENTAL HEALTH CARE PROVIDERS.

DR. ARNOLD ALSO CONSIDERED WELSH'S RANGE OF RISKS ON ACTUARIAL TOOLS IN THE PRESENCE OF STRONG EXACERBATING DYNAMIC FACTORS. DR. ARNOLD DETERMINED THAT WELSH HAD PREVIOUSLY COMMITTED OR ATTEMPTED TO ENGAGE IN SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IN 1979, 1982, 1984, 1986, 1999 AND 2007.

DR. ARNOLD DIAGNOSED WELSH WITH THE FOLLOWING MENTAL DISORDERS -- WITH THE FOLLOWING SERIOUS MENTAL DISORDERS: PEDOPHILIA, SEXUALLY ATTRACTED TO MALES, NON-EXCLUSIVE TYPE, MOOD DISORDER, NOS, BY RECORD, AND

BORDERLINE INTELLECTUAL FUNCTIONING BY RECORD.

IN HIS REPORT, DR. ARNOLD SCORED WELSH ON TWO ACTUARIAL INSTRUMENTS, THE STATIC-99R AND STATIC-2002R TO ASSESS HIS RISK OF SEXUAL REOFFENSE. DR. ARNOLD SCORED WELSH A VI ON THE STATIC-99R WHICH PLACED HIM IN THE HIGH RISK CATEGORY. DR. ARNOLD SCORED WELSH AN VIII IN THE STATUTE 2002R WHICH PLACED HIM IN THE MODERATE HIGH RISK CATEGORY.

DR. ARNOLD ALSO EXPLAINED WHY HE PLACED WELSH IN THE HIGH RISK, HIGH NEEDS GROUP WITH RESPECT TO THESE ACTUARIALS. DR. ARNOLD ALSO EXPLAINED THE BENEFITS AND LIMITS OF THE ACTUARIALS.

THE FOURTH CIRCUIT ALSO HAS DISCUSSED ISSUES CONCERNING SUCH ACTUARIALS IN WOODEN, 693 F. 3D AT 447, NOTE 2, AND HALL, 664 F. 3D AT 464 AND 465.

DR. ARNOLD ALSO USED THE STRUCTURED RISK ASSESSMENT FORENSIC VERSION, SRA-FV LIGHT, TO EVALUATE WELSH'S FUTURE RISK.

DR. ARNOLD OPINED THAT WELSH'S SCORE ON THE SRA-FV WAS VERY HIGH WHICH SUPPORTED DR. ARNOLD'S OPINION WELSH WOULD HAVE SERIOUS DIFFICULTY REFRAINING FROM COMMITTING ANOTHER ACT OF CHILD MOLESTATION OR SEXUAL VIOLENCE IN THE FUTURE.

DR. ARNOLD ALSO NOTED THAT WELSH QUICKLY REOFFENDED MULTIPLE TIMES INCLUDING WHILE UNDER

SUPERVISION.

DR. ARNOLD NOTED WELSH'S PERSISTENT, DEVIANT DESIRES. DR. ARNOLD OPINED THAT WELSH STATED HIS SEXUAL FANTASIES WERE PRIMARILY ABOUT BOYS. WELSH ALSO IDENTIFIED EMOTIONALLY WITH CHILDREN AND WHILE AT BUTNER DR. ARNOLD FELT THAT WELSH SOUGHT OUT AND GROOMED YOUNGER LOOKING DETAINEES.

DR. ARNOLD ALSO NOTED THAT WELSH'S CLAIM THAT HE IS NO LONGER SEXUALLY ACTIVE IS CONTRADICTED BY HIS SEXUAL CONDUCT IN BELIZE AND HIS ATTEMPT TO MASTURBATE IN 2010.

DR. ARNOLD ALSO PERSUASIVELY EXPLAINED HOW WELSH'S SELF REPORTS CONTAINED NUMEROUS MATERIAL INCONSISTENCIES AND WHY WELSH LACKED SELF AWARENESS CONCERNING REOFFENDING.

DR. ARNOLD ALSO EXPLAINED WHY HE CONTINUED TO BELIEVE THAT WELSH WAS SEXUALLY PREOCCUPIED WITH PREPUBESCENT BOYS AND WHY WELSH'S PEDOPHILIA WAS CHRONIC. SEE ALSO GOVERNMENT'S EXHIBIT 12, 39 AND 46.

DR. ARNOLD ALSO PERSUASIVELY DISCUSSED HIS USE OF A SCREENING SCALE OF PEDOPHILIC INTEREST AND EXPLAINED WELSH'S SCORE OF V.

DR. ARNOLD ALSO PERSUASIVELY EXPLAINED HOW WELSH'S PEDOPHILIA INTERACTED WITH WELSH'S MOOD DISORDER AND BORDERLINE INTELLECTUAL FUNCTIONING. THE PEDOPHILIA

DRIVES WELSH TO MOLEST, ACCORDING TO DR. ARNOLD. THE MOOD DISORDER AND BORDERLINE INTELLECTUAL FUNCTIONING INTERFERE WITH WELSH'S ABILITY TO GET TREATMENT IN A NON-CUSTODIAL SETTING.

DR. ARNOLD OPINED THAT WELSH HAS BECOME TOO PREOCCUPIED WITH SEX AND CANNOT REGULATE HIMSELF SEXUALLY. MOREOVER, DR. ARNOLD OPINED THAT WELSH COULD GET EFFECTIVE SEX OFFENDER TREATMENT IN BUTNER, NOTWITHSTANDING HIS MOOD DISORDER AND INTELLECTUAL FUNCTIONING.

DR. ARNOLD DID NOT FIND THAT WELSH'S AGE, TIME IN THE COMMUNITY AND SUPERVISED RELEASE AND/OR HEALTH ISSUES WHICH COULD HAVE BEEN PROTECTIVE FACTORS THAT MIGHT HAVE REDUCED HIS RISKS APPLIED IN THIS CASE.

ALSO, DR. ARNOLD FOUND IT SIGNIFICANT THAT WELSH HAD NOT SUCCESSFULLY COMPLETED SEX OFFENDER TREATMENT SINCE HIS LAST SEXUAL MISCONDUCT AND HAD HAD REPEATED PROFOUND DIFFICULTY IN COMPLYING WITH SUPERVISION IN THE PAST.

DR. REBECCA PERKINS IS A FORENSIC PSYCHOLOGIST WHO WORDS FOR THE B.O.P. AT FCI-BUTNER. HER CURRICULUM VITAE IS AT GOVERNMENT'S EXHIBIT 4.

DR. PERKINS' FORENSIC PRE-CERTIFICATION EVALUATION OF WELSH IS AT GOVERNMENT'S EXHIBIT 5. DR. PERKINS OPINED THAT WELSH MEETS THE CRITERIA FOR CIVIL

COMMITMENT AS A SEXUALLY DANGEROUS PERSON UNDER THE ADAM WALSH ACT.

IN FORMING HER OPINION, DR. PERKINS HAS REVIEWED THE SAME MATERIALS AS DR. ARNOLD, BUT DID NOT CONDUCT AN INTERVIEW BECAUSE WELSH DECLINED TO BE INTERVIEWED. DR. PERKINS ALSO ATTENDED THE TRIAL AND OBSERVED THE TESTIMONY.

DR. PERKINS DETERMINED THAT WELSH HAD PREVIOUSLY COMMITTED OR ATTEMPTED TO ENGAGE IN SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION AS TO PRONG ONE.

DR. PERKINS DIAGNOSED WELSH WITH THE FOLLOWING MENTAL DISORDERS: MOOD DISORDER, NOS, AND BORDERLINE INTELLECTUAL FUNCTIONING. MOREOVER, DR. PERKINS ORIGINALLY DIAGNOSED WELSH WITH PEDOPHILIA, EXCLUSIVE, BUT BASED ON THE RECORD, INCLUDING WELSH'S TESTIMONY AT THE HEARING, DR. PERKINS REVISED HER DIAGNOSIS TO PEDOPHILIA, SEXUALLY ATTRACTED TO MALES, NON-EXCLUSIVE TYPE.

DR. PERKINS USED THE STATIC-99R TO ASSESS WELSH'S RISK TO REOFFEND. DR. PERKINS SCORED WELSH A VI ON THE STATIC-99R WHICH PLACED HIM IN THE HIGH RISK CATEGORY. SHE ALSO PLACED WELSH IN THE HIGH RISK, HIGH NEEDS SAMPLE. SHE ALSO EXPLAINED THE BENEFITS AND LIMITS OF THESE ACTUARIAL TOOLS.

DR. PERKINS ALSO CONSIDERED OTHER EMPIRICALLY

EVALUATED DYNAMIC RISK FACTORS THAT SHE BELIEVED EXACERBATED WELSH'S OVERALL LEVEL OF RISK.

DR. PERKINS PERSUASIVELY DISCUSSED NOT ONLY WELSH'S PSYCHOLOGICAL CONDITIONS, BUT ALSO HIS INTIMACY DEFICITS, HIS EMOTIONAL IDENTIFICATION WITH CHILDREN, HIS POOR GENERAL SELF REGULATION, HIS POOR COPING SKILLS, HIS DEVIANT SEXUAL AROUSAL TO PREPUBESCENT BOYS AND HIS POOR COOPERATION WITH SUPERVISION AS REFLECTED IN NUMEROUS CRIMINAL ACTS WHILE ON SUPERVISION AND REFLECTED IN HIM HAVING ABSCONDED TO BELIZE.

DR. PERKINS ALSO PERSUASIVELY DISCUSSED WELSH'S RECENT GROOMING BEHAVIOR OF THREE YOUTHFUL LOOKING LOWER INTELLECTUAL FUNCTIONING DETAINEES AT BUTNER.

DR. PERKINS ALSO OPINED THAT BUTNER CAN AND DOES TREAT SEX OFFENDERS WITH COGNITIVE IMPAIRMENTS AND LIMITED INTELLECTUAL FUNCTIONING.

FINALLY, DR. PERKINS CONSIDERED WELSH'S AGE, HEALTH AND ALLEGED RELEASE PLAN UNDER SUPERVISION TO DETERMINE IF THOSE PROTECTIVE FACTORS MIGHT MITIGATE HIS RISK.

SHE PERSUASIVELY OPINED THAT THESE ALLEGED PROTECTIVE FACTORS DID NOT MITIGATE HIS OVERALL RISK IN THIS CASE.

WELSH HAD ONE EXPERT WITNESS WHO TESTIFIED,

DR. JOSEPH PLAUD. DR. JOSEPH PLAUD'S CURRICULUM VITAE AND REPORT ARE IN THE RECORD. DR. PLAUD IS A PSYCHOLOGIST WHO OPINED IN BOTH HIS REPORT AND WHILE TESTIFYING THAT WELSH DOES NOT SUFFER FROM A SERIOUS MENTAL DISEASE, DISORDER OR ABNORMALITY.

DR. PLAUD OPINED THAT ALTHOUGH WELSH PROBABLY QUALIFIES AS A PEDOPHILE IN THE 1980'S AND 1990'S, THERE WAS NOT SUFFICIENT EVIDENCE TO FIND THAT WELSH HAS A DEVIANT SEXUAL INTEREST IN CHILDREN TODAY. THEREFORE, DR. PLAUD DID NOT DIAGNOSE WELSH WITH PEDOPHILIA, ALTHOUGH AT POINTS DR. PLAUD'S TESTIMONY WAS NOT ALL THAT CLEAR. AT ONE POINT HE APPEARED TO INDICATE THAT WELSH'S PEDOPHILIA MAY BE IN REMISSION.

IN ANY EVENT, BASED ON WELSH'S LIMITED INTELLECTUAL FUNCTIONING, DR. PLAUD ELECTED TO DISCREDIT WELSH'S ADMISSIONS TO PRIOR DEVIANT SEXUAL ACTS AND FANTASIES ABOUT BOYS.

NEVERTHELESS, DR. PLAUD INCREDIBLY WAS ABLE TO CONCLUDE THAT WELSH WAS TRUTHFUL WHEN HE EXPRESSED REMORSE FOR HIS PAST CONDUCT, AND DR. PLAUD ALSO CREDITED WELSH'S STATEMENTS THAT HE WOULD NOT SEXUALLY OFFEND AGAINST CHILDREN, AGAINST BOYS IN THE FUTURE. EVEN THOUGH DR. PLAUD DID NOT DIAGNOSE WELSH AS A PEDOPHILE, DR. PLAUD CONCEDED THAT WELSH WOULD BENEFIT FROM SEX OFFENDER TREATMENT.

THE COURT DID NOT FIND DR. PLAUD'S INCREDIBLE TESTIMONY FOR ANALYSIS TO BE HELPFUL OR PERSUASIVE.

WELSH'S SISTER, KIT WELSH, ALSO TESTIFIED AT THE TRIAL. MS. WELSH TESTIFIED THAT WELSH HAD LIMITED INTELLECTUAL FUNCTIONING SINCE HIS CHILDHOOD AND THAT CLASSMATES WOULD PICK ON WELSH BECAUSE OF HIS LIMITED INTELLECT.

SHE ALSO ADMITTED THAT WELSH COULD NOT LIVE WITH HER IF RELEASED BECAUSE SHE STILL HAD MINOR CHILDREN IN THE HOME AND DUE TO HER WORK SCHEDULE.

IN ADDITION, WELSH MISREPRESENTED HIS SISTER'S AVAILABILITY TO SUPERVISE HIM IN CONNECTION WITH A PROPOSED RELEASE PLAN.

TURNING TO THE THREE FACTORS, THE THREE PRONGS UNDER THE ADAM WALSH ACT, THE UNITED STATES HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT WELSH HAS ENGAGED OR ATTEMPTED TO ENGAGE IN SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IN THE PAST.

SECOND, THE UNITED STATES HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT WELSH SUFFERS FROM A SERIOUS MENTAL ILLNESS, ABNORMALITY OR DISORDER, TO WIT, PEDOPHILIA, SEXUALLY ATTRACTED TO MALES, NON-EXCLUSIVE TYPE.

THIRD, THE UNITED STATES HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT AS A RESULT OF THIS

SERIOUS MENTAL ILLNESS, ABNORMALITY OR DISORDER, WELSH WOULD HAVE SERIOUS DIFFICULTY IN REFRAINING FROM SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IF RELEASED.

IN REACHING THESE FINDINGS, THE COURT RECOGNIZES THAT THE UNITED STATES MUST SHOW THAT WELSH'S DIFFICULTY IN REFRAINING, WILL BE (QUOTE) "SERIOUS" (END QUOTE), BUT IT NEED NOT ESTABLISH THAT WELSH WILL OR IS LIKELY TO REOFFEND. SEE AMONG OTHERS CASES, UNITED STATES VERSUS WOODEN, 693 F. 3D 430, FOURTH CIRCUIT, 2012.

INSTEAD, THE ANALYSIS FOCUSES ON WELSH'S VOLITIONAL CONTROL UNDERSTOOD IN RELATION TO HIS SERIOUS MENTAL ILLNESS. THIS DETERMINATION REQUIRES MORE THAN RELYING ON RECIDIVISM RATES OF PAST OFFENDERS, BUT REQUIRES ANALYSIS OF A RANGE OF DIFFERENT FACTORS, INCLUDING WELSH'S HISTORY BEFORE INCARCERATION, HIS TIME WHILE INCARCERATED, AND THE OPINIONS OF EXPERTS.

THE COURT MUST CONSIDER THE CONSTITUTIONAL CONSTRAINTS ON THE CIVIL COMMITMENT SCHEME IN MAKING A DECISION ON THIS THIRD PRONG OF THE ANALYSIS. THIS COURT HAS CONSIDERED THE CONSTITUTIONAL CONSTRAINTS IN THIS CASE.

IN KANSAS VERSUS CRANE, 534 U.S. 411, 2002, THE UNITED STATES SUPREME COURT HELD THAT IN ORDER TO CIVILLY COMMIT SOMEONE FOR SEXUAL DANGEROUSNESS, THERE

MUST BE PROOF OF SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR. ID. AT 413.

THE COURT NOTED THAT THIS STANDARD ALLOWED COURTS WIDE DISCRETION IN RELYING ON A NUMBER OF DIFFERENT FACTORS RELATIVE TO SEXUAL DANGEROUSNESS. THE STANDARD DID NOT HAVE ANY KIND OF NARROW OR TECHNICAL MEANING, NOR WAS IT DEMONSTRABLE WITH MATHEMATICAL PRECISION.

IN OTHER WORDS, IN ITS ANALYSIS OF POTENTIAL FUTURE RISK, THE COURT HAS CONSIDERED MORE THAN JUST WELSH'S TRAITS SHARED BY OTHER RECIDIVISTS. RATHER, THE COURT HAS CONSIDERED WELSH'S VOLITIONAL CONTROL IN LIGHT OF SUCH FEATURES OF THE CASE AND THE NATURE OF THE PSYCHIATRIC DIAGNOSES, THE SEVERITY OF THE SERIOUS MENTAL ABNORMALITY ITSELF IN SUCH A WAY THAT DISTINGUISHES WELSH FROM THE DANGEROUS, BUT TYPICAL RECIDIVIST CONVICTED IN AN ORDINARY CRIMINAL CASE.

WELSH'S PEDOPHILIA, SEXUALLY ATTRACTED TO MALES, NON-EXCLUSIVE TYPE, MOOD DISORDER, NOT OTHERWISE SPECIFIED, RECORD AND BORDERLINE INTELLECTUAL FUNCTIONING, AS DR. ARNOLD EXPLAINED, ARE UNIQUE IN CONNECTION WITH THIS INDIVIDUAL CASE.

THE PEDOPHILIA IS A SERIOUS MENTAL ILLNESS, ABNORMALITY OR DISORDER FOR PURPOSES OF THE ADAM WALSH ACT. MOREOVER, AS DR. ARNOLD PERSUASIVELY EXPLAINED, IN

COMBINATION THE THREE CONDITIONS OPERATE TO CREATE A SITUATION WHERE WELSH HAS LITTLE TO NO ABILITY TO MANAGE HIS SERIOUS MENTAL ILLNESS.

THE EVIDENCE IN THIS CASE, INCLUDING THE TESTIMONY OF WELSH AT TRIAL, SUPPORTS THE CONCLUSION THAT WELSH WOULD HAVE SERIOUS DIFFICULTY IN REFRAINING FROM SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IF RELEASED.

THE COURT REJECTS DR. PLAUD'S OPINION THAT WELSH DOES NOT MEET CRITERIA FOR COMMITMENT. DR. PLAUD'S OPINION ON PRONGS TWO AND THREE WAS NOT PERSUASIVE FOR THE REASONS EXPRESSED EARLIER, AND THE REASONS OUTLINED IN THIS DECISION.

THE COURT GIVES MUCH GREATER WEIGHT TO THE OPINIONS OF DR. ARNOLD AND DR. PERKINS. THEIR ANALYSIS OF WELSH'S SEXUAL DANGEROUSNESS AND SERIOUS MENTAL ILLNESS IS MUCH BETTER REASONED AND BETTER SUPPORTED BY THE RECORD. THEREFORE, THE COURT AGREES WITH THEIR MORE CONVINCING AND CONSISTENT OPINIONS.

IN DOING SO, THE COURT HAS CONSIDERED THE FOURTH CIRCUIT'S STATEMENT IN WOODEN THAT WHEN A PERSON SUFFERS FROM PEDOPHILIA, THE NATURE OF THE DETAINEE'S PRIOR CRIMES PROVIDE A CRITICAL ANSWER TO THE ISSUE OF WHETHER THE PERSON WILL HAVE SERIOUS DIFFICULTY REFRAINING FROM SEXUALLY VIOLENT CONDUCT OR CHILD

MOLESTATION. SEE WOODEN, 693 F. 3D 458. HERE, WELSH'S REPEATED CRIMES OF CHILD MOLESTATION REFLECTS SUCH SERIOUS DIFFICULTY.

SECOND, THE COURT HAS CONSIDERED WELSH'S VERY POOR PERFORMANCE ON SUPERVISION AND HIS GROOMING BEHAVIOR WHILE AWAITING HIS CIVIL COMMITMENT HEARING. SEE ID. AT 457 THROUGH PAGE 459.

THIRD, THE COURT HAS CONSIDERED WELSH'S MATERIALLY INCONSISTENT TESTIMONY, THE UNTRUTHFUL MINIMIZATION OF THE NUMBER OF VICTIMS, HIS UNTRUTHFUL DENIAL OF SEXUAL FANTASIES ABOUT PAST MINOR MALE VICTIMS, HIS UNTRUTHFUL CLAIM TO NO LONGER BE ATTRACTED TO 8 TO 12 YEARS OLD BOYS, AND HIS COGNITIVE DISTORTIONS THAT REFLECT THAT WELSH WOULD NOT BE ABLE TO CONTROL HIS DEVIANT SEXUAL INTERESTS IN PREPUBESCENT MALES IF RELEASED WITHOUT TREATMENT. SEE ID. AT 459.

THE COURT ALSO HAS CONSIDERED WELSH'S POOR PERFORMANCE ON SUPERVISION, INCLUDING HIS ABSCONDING TO BELIZE. THE COURT ALSO BELIEVES THAT WELSH RETAINS CAPACITY TO PERFORM FELLATIO ON MINOR MALES AND CONTINUES TO HAVE SUCH DEVIANT DESIRES.

THE COURT DOES NOT BELIEVE THAT OUTPATIENT TREATMENT IS A VIABLE OPTION IN CONNECTION WITH WELSH, NOTWITHSTANDING THE LIFETIME OF SUPERVISION FROM HIS MOST RECENT CRIMINAL JUDGMENT.

FINALLY, THE COURT HAS CONSIDERED THE RECIDIVISM RATES, THE ENTIRE RECORD AND THE TESTIMONY OF THE EXPERTS. THE COURT ALREADY HAS EXPLAINED WHY IT BELIEVES THAT DR. ARNOLD AND DR. PERKINS WERE MUCH MORE PERSUASIVE THAN DR. PLAUD. THE COURT WILL NOT REPEAT THAT EXPLANATION.

IN SUM, THE COURT CONCLUDES THAT WELSH HAS ENGAGED IN SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IN THE PAST, CURRENTLY SUFFERS FROM A SERIOUS MENTAL ILLNESS, ABNORMALITY OR DISORDER, AND WILL HAVE SERIOUS DIFFICULTY IN REFRAINING FROM SEXUALLY VIOLENT CONDUCT OR CHILD MOLESTATION IF RELEASED.

THE GOVERNMENT HAS MET ITS BURDEN OF PROOF. WELSH IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL UNDER THE ADAM WALSH ACT UNTIL SUCH TIME AS HE NO LONGER IS A SEXUALLY DANGEROUS PERSON.

I HAVE SIGNED A BRIEF ORDER THAT WILL INCORPORATE BY REFERENCE MY FINDINGS THAT I HAVE READ HERE TODAY.

I THANK COUNSEL FOR THEIR WORK HERE IN CONNECTION WITH THE CASE.

ANYTHING ELSE, MR. RENFER?

MR. RENFER: NO, YOUR HONOR.

THE COURT: ANYTHING ELSE, MR. WATERS.

MR. WATERS: NO, THANK YOU, YOUR HONOR.

THE COURT: WE WILL BE IN RECESS UNTIL 1:00 P.M. TOMORROW.

(WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)

CERTIFICATE

THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF PROCEEDINGS TAKEN IN THE UNITED STATES DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF THE SHORTHAND NOTES, CONSISTING OF THE WHOLE THEREOF, OF THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

DATED THIS 31ST DAY OF MAY, 2013.

/S/ SHARON K. KROEGER
COURT REPORTER

APPENDIX G
86a

FILED: July 18, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6355
(5:11-hc-02209-D)

UNITED STATES OF AMERICA

Petitioner - Appellee

v.

WILLIAM CARL WELSH

Respondent - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Judge Thacker filed a statement on petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Judge Diaz, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

Statement of Judge Thacker on Petition for Rehearing En Banc:

This case presents a unique set of circumstances where an individual remains in federal custody, pursuant to a civil commitment order under the Adam Walsh Act -- **despite having his underlying conviction vacated**. As a result, he has been in custody for *seven years* without a valid conviction to justify his continued detention. For this reason, with all due respect for the differing view of my colleagues in the majority, I am compelled to expound upon my dismay with respect to the result in this case.

William Welsh ("Appellant") was convicted in 2010 for an alleged violation of the Sex Offender Registration and Notification Act ("SORNA"). As a result, he was sentenced to a term of imprisonment of 673 days (one year and ten months). Just prior to his scheduled release, the Bureau of Prisons certified Appellant as a sexually dangerous person pursuant to the Adam Walsh Act, and the district court entered a civil commitment order in 2012. Appellant has remained in custody ever since.

But, in 2015, the Supreme Court held that the underlying conduct of Appellant's 2010 conviction does not constitute a SORNA violation. *See Nichols v. United States*, 136 S. Ct. 1113 (2016) (concluding that SORNA does not require individuals to update their registration upon leaving the country). Thus, Appellant had his conviction vacated. Nonetheless, the civil commitment order remained in force.

Federal Rule of Civil Procedure 60(b) permits a district court, in its discretion, to grant relief from a judgment that "is based on an earlier judgment that has been reversed or vacated" or if "applying it prospectively is no longer equitable." Appellant sought relief

pursuant to those provisions. But, on the basis that Appellant remained sexually dangerous, the district court denied Appellant's motion in its entirety. In light of his vacated underlying conviction, I believe Appellant's sexually dangerous proclivities are insufficient to justify his continued detention. How can a person legitimately be detained absent a valid conviction?

Congress does not have "general 'police power'" to freely detain citizens on the basis of their proclivities. *United States v. Comstock*, 560 U.S. 126, 148 (2010) (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)). Instead, civil commitment is only justified as a "reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* The Government's interest in the administration of its prisons is strained in cases like this where the committed individual, detained indefinitely, has no valid underlying conviction. Upholding Appellant'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.

Finally, if Appellant is released, the Government's interest in public safety would not be left unaddressed. Appellant would still be subject to SORNA reporting requirements for his lifetime. *See* 34 U.S.C. §§ 20911(4), 20915.

Because I am not willing to sacrifice individual liberty absent a valid conviction, I am disturbed by the result in this case.