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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	NO. CV _____
Petitioner,)	MOTION TO DISMISS PETITION
v.)	OR ALTERNATIVELY TO SET
)	PROBABLE CAUSE HEARING;
)	DECLARATION OF COUNSEL
Respondent,)	

Respondent _____ hereby applies to this Honorable Court
for an order dismissing the petition or, alternatively, setting a probable cause hearing
in this matter

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This application is based on the attached Memorandum of Points and Authorities, the declaration of counsel, all files and records in this case, and such further information as may be provided to the court with respect to this application.

Respectfully submitted,
SEAN K. KENNEDY
Acting Federal Public Defender

DATED: June __, 2007

By _____
Deputy Federal Public Defender

1 A. 18 U.S.C. §4248 UNCONSTITUTIONALLY DENIES
2 INCARCERATED INMATES THE PROCESS THEY ARE DUE
3 BEFORE CIVIL COMMITMENT AND, AS APPLIED TO MR.
4 HARNDEN, RESULTED IN AN ERRONEOUS COMMITMENT.

5 The Constitution's Fifth Amendment provides that "no person shall
6 be...deprived of...liberty...without due process[.]" _____, subject to
7 release on _____, has a clear, independent liberty interest in being
8 out of custody now. He has completed his criminal sentence, and no court has
9 approved his continued custody. This deprivation of his liberty is unconstitutional,
10 and he should be released.

11
12 1. Mr. _____ Had a Liberty Interest Protected by Due Process In
13 Challenging His Civil Commitment Before His Release Date, and Has
14 Had a Liberty Interest in His Release Since Then.

15 Mr. _____'s current incarceration is under the apparent authority
16 of a statute passed in July, 2006, codified at 18 U.S.C. §§4241, 4247, 4248.
17 Congress purported to authorize the Attorney General or the Director of the Bureau
18 of Prisons to seek the civil commitment of Bureau inmates as "sexually dangerous
19 persons."¹ Adam Walsh Child Protection and Safety Act of 2006, ch. 313, §302, 120
20 Stat. 587 (2006) (codified as amended at 18 U.S.C. §§ 4241, 4247, 4248, *et al.*). The
21 new statutory scheme provides for a two-step process of certification and
22 commitment. This motion challenges the certification process insofar as it
23 unconstitutionally deprives to-be-released prisoners of their liberty without provision
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25 ¹ A "sexually dangerous person" is defined as "a person who has engaged
26 or attempted to engage in sexually violent conduct or child molestation and who is
27 sexually dangerous to others[.]" The term "sexually dangerous to others...means that
28 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." 18 U.S.C. §4247(a)(5), (6). "Child molestation" is not
defined.

1 for a prompt hearing to guard against erroneous civil commitment determinations.

2 The certification process occurs when either the Attorney General or the
3 Director of the Bureau of Prisons certifies a person as "sexually dangerous" and
4 transmits that certificate to the clerk of the court. Certification need not occur at any
5 particular time before the person's scheduled release and does not require any
6 process or protection against an erroneous certification, such as an adversarial
7 hearing before a court. The clerk serves the individual, his counsel, and the
8 government with the certification. Then, as to the second step, commitment, the
9 statute simply says,

10 The court shall order a hearing to determine whether the person is a
11 sexually dangerous person. A certificate filed under this subsection
12 shall stay the release of the person pending completion of procedures²
13 contained in this section.
14

15 These truncated procedures violate due process. Mr. _____ has an
16 immediate and urgent liberty interest in his release now that he has finished his term
17 of imprisonment. He has the same status, in this sense, as an ordinary citizen faced
18 with the prospect of a civil commitment. Of these individuals, it is beyond dispute
19 that a civil commitment "represents a 'massive curtailment of liberty' and [...]
20 must comport with the requirements of due process." *Jensen v. Lane County*, 312
21 F.3d 1145, 1146 (9th Cir. 2002), citing *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980)
22 (citation and internal quotation marks omitted) and *United States v. Budell*, 187 F.3d
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24 _____
25 ² These procedures call for a mental health examination and report to be
26 completed with the next 45 to 75 days. 18 U.S.C. §4247(b). Then, after a hearing,
27 the court may find a person to be sexually dangerous and commit him to the custody
28 of the Attorney General. The Attorney General may "release the person to the
appropriate official of the State in which the person is domiciled[.]" If the state does
not accept him, the Attorney General is to "place the person for treatment in a suitable
facility" until the state does accept him or until he is no longer sexually dangerous,
"whichever is earlier." 18 U.S.C. §4248(d).

1 1137, 1141 (9th Cir. 1999) (same). These liberty interests, the Supreme Court has
2 held, stem from the socially stigmatizing consequences of civil commitment,
3 *Addington v. Texas*, 441 U.S. 418, 425-426 (1979) (holding that the state must justify
4 a basis for an individual's civil commitment by clear and convincing evidence), and
5 the mandatory behavior modification and restraints that can be imposed during
6 treatment, *Vitek*, 480 U.S. at 492.

7 Even if Mr. _____ were still serving a custodial sentence -- which
8 he is not -- it is clear that he would be entitled to due process protections before he
9 could be transferred to an FMC. In *Vitek*, the Supreme Court held that incarcerated
10 inmates facing transfer to a hospital for mental health treatment within a state prison
11 system are entitled to due process. Congress responded by enacting the same
12 protections for federal inmates in 18 U.S.C. §4245,¹ which sets out the following
13 requirements before an incarcerated federal inmate is transferred to a hospital facility:

14 If a person serving a sentence of imprisonment objects either in writing
15 or through his attorney to being transferred to a suitable facility for care
16 or treatment, an attorney for the Government...may file a motion...A
17 motion filed under this subsection shall stay the transfer pending
18 completion of procedures contained in this section.
19

20 18 U.S.C. §4245(a). The court approves the transfer if it "finds by a preponderance
21 of the evidence that the person is presently suffering from a mental disease or defect"
22 requiring treatment. 18 U.S.C. §4245(d). The Attorney General must then
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25 ¹ Writing of §4245, Congress explained that it "requires a court hearing before
26 a prisoner may be transferred to a mental hospital if he objects....The necessity for
27 such a hearing in state cases was made clear by the Supreme Court in *Vitek v.*
28 *Jones*...". Congress concluded, like the Supreme Court and for many of the same
reasons, that in the federal system as well, "incarceration in a suitable facility is
sufficiently different from incarceration in a penal institution to require these
procedural safeguards." See S.Rep. 98-225 at 247 (1983), reprinted in 1984
U.S.C.C.A.N. 3182, 3429.

1 "hospitalize" the person until treatment is no longer necessary or the person's
2 sentence expires, whichever occurs earlier. *Id.* If an individual at liberty is entitled
3 to due process before his civil commitment, and an incarcerated inmate facing
4 involuntary hospitalization for mental health treatment is entitled to due process,
5 those same protections apply with at least as much force to an inmate being held
6 beyond the expiration of his term of incarceration. Plainly, then, the petition
7 authorized by §4248 must satisfy the fundamental requirements of due process before
8 a person at liberty may be either held pending a civil commitment, or committed at
9 all. It does neither.

10 Section 4248 is nearly identical to 18 U.S.C. §4246, which applies to already-
11 hospitalized inmates, but unlike §4246 it fails to meet the requirements of due
12 process: §4248 skips the step, found in §4245 and discussed earlier, that affords
13 individuals the procedural protections of due process before hospitalization. Instead,
14 §4248 bypasses these protections and permits the summary certification of inmates
15 serving custodial sentences. This procedure does not just "stay" the transfer of an
16 inmate serving a custodial sentence. It actually prevents the release of an individual
17 -- like Mr. _____ -- who is no longer subject to such a sentence, and who has
18 not been already ordered civilly committed by a court. For all of these reasons, it
19 violates due process on its face.

20 The complete absence of due process protections in §4248 also renders it
21 unconstitutional as applied here because classification as a sex offender is "precisely
22 the type of 'atypical and significant hardship on the inmate in relation to the ordinary
23 incidents of prison life'" that creates a liberty interest protected by due process. *Neal*
24 *v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997). In *Neal*, the Ninth Circuit addressed a
25 §1983 claim by an imprisoned state inmate whose circumstances were somewhat
26 similar to _____ = he had been charged with but never convicted of a sex
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1 offense, but was classified by the prison as a sex offender and rendered ineligible for
2 parole unless he accepted sex offender treatment. The court held that:

3 The liberty interest at stake in this case is similar in form and scope to
4 the interest at stake in *Vitek*: the stigmatizing consequences of the
5 attachment of the 'sex offender' label coupled with the subjection of the
6 targeted inmate to a mandatory treatment program whose successful
7 completion is a precondition for parole eligibility creates the kind of
8 deprivations of liberty that require procedural protections.

9 *Neal*, 131 F.3d at 830.

10 It cannot be disputed that Mr. _____ was completely denied the rights
11 required by *Vitek* and set forth in §4245, beginning with the grossly untimely manner
12 in which the certification occurred.

13 [INSERT FACTS]

14 2. Section 4248 Violates Due Process By Denying Mr. _____
15 His Right to a Prompt Hearing to Test the Basis for His Liberty
16 Deprivation.

17 Mr. _____ has been held without being able to have an independent,
18 neutral decision-maker determine whether Bureau of Prisons staff was correct in
19 certifying him under §4248. This statute is unconstitutional because it authorizes, at
20 a very minimum, up to a 75-day period before he is able to appear before such a
21 decision-maker. The real period may be longer, if the court does not start the clock
22 running by ordering an evaluation as soon as the government's commitment petition
23 is filed. Flexible as the Due Process Clause may be, it does not have as much
24 "stretch" as this. Section 4248 misconstrues the required process, who must
25 administer it, and when it must occur.

26 Central to the guarantee of due process is the requirement -- whatever the
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1 scenario leading to detention -- that the detained person be afforded an early hearing
2 before a neutral decision-maker to explore the correctness of the basis for his
3 detention. This requirement arises from the notion that an individual is entitled to a
4 judicial determination of probable cause as a prerequisite to the extended restraint of
5 his liberty. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). The neutral magistrate acts as
6 the decision-maker. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

7 These protections are also well-established with respect to individuals who are
8 detained by law enforcement because of mental illness that leads to the risk of
9 imminent danger to others. They are entitled to Fourth Amendment protections, and
10 can only be held based on probable cause to believe that they do indeed pose such a
11 risk, and suffer from such a condition. *Maag v. Wessler*, 960 F.2d 773, 775 (9th Cir.
12 1992) (finding that a §1983 plaintiff, rendered irrational after suffering from pesticide
13 poisoning, was properly arrested under Oregon's emergency-detention provision).

14 When such an individual is not to be prosecuted but is to be hospitalized
15 involuntarily, the lack of an *immediate* hearing is only justifiable "as an emergency
16 treatment. It is recognized that a probable cause hearing cannot be arranged
17 immediately." *Doe v. Gallinot*, 657 F.2d 1017, 1022 (9th Cir. 1981) (affirming
18 district court injunction requiring a hearing before individuals could be held up to 14
19 days more), emphasis added, citing *Doe v. Gallinot*, 486 F.Supp. 983, 993 (C.D.
20 Calif. 1979). However, the period before the hearing may only be delayed until such
21 a hearing can be arranged. *Id. Doe*, which was decided in this circuit and involved
22 the practice of mental health authorities in this district, held that such a hearing was
23 necessary if the state wished to confine a person in a mental health facility
24 involuntarily for *as long as* 14 days. *Id.* A common thread running through most
25 cases addressing this problem is the suggestion that the purpose of these
26 commitments is treatment, even the avoidance of a civil-commitment proceeding
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1 altogether if an individual's illness can be successfully addressed. The delay in any
2 hearing, to the extent that one is accepted, is justified for this reason.⁴

3 Here, of course, Mr. _____'s circumstances did not present the
4 emergent scenario contemplated in those cases. In a broad sense, sex-offender civil
5 commitment statutes differ from more conventional schemes in that they do not focus
6 on crisis situations and desperate circumstances. They may constitutionally focus on
7 the long-term goal of incapacitating possibly untreatable offenders, which necessarily
8 contemplates a lengthy detention. *See Kansas v. Hendricks*, 521 U.S. 346, 366
9 (1997) (recognizing that this was a permissible purpose of such laws). In these
10 circumstances, the calculus should change,⁵ and state statutes for the civil
11 commitment of sexually dangerous individuals reflect this view. For this reason,
12 consideration of the structure of those statutes is more useful than the cases cited by
13 the government. They usually *do* require adversarial hearings to determine probable
14 cause, not administratively but judicially, in short order following the filing of a
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17 ⁴ See discussion in *Logan v. Arafah*, 346 F.Supp. 1265, 1268-1269 (D.Conn.
18 1972), which the government cites as approving a 45-day detention without a hearing.
19 However, in fact it authorized involuntary commitments for no more than 15 days,
20 after which the individual either was to be released unless formal proceedings,
21 presumably subject to a court's review, were filed. Only then would a 30-day
22 continuance be available. *Id.* at 1267-1268. Even the cases that the government cites
23 require a determination by a neutral decision-maker, defined as one who is free to
24 make an independent evaluation, on the question of whether a longer hospitalization
25 is the correct result. Some recognized that periods of 48 hours to 5 days, *Bell v.*
26 *Wayne Co. Gen. Hospital*, 384 F.Supp. 1085 (E.D. Mich. 1974), 10 days, *Donahue v.*
27 *R.I. Dept. of Mental Health*, 632 F.Supp. 1456 (D.R.I. 1986), even 20 days, *Coll v.*
28 *Iyland*, 411 F.Supp. 905 (D.N.J. 1976), are acceptable. Moreover, in one respect
Gallinot, which should have more persuasive authority than *Logan*, differs
significantly from it: it held that the availability of habeas review did not save the
state's procedure, while *Logan* held that it did. Compare *Logan*, 346 F.Supp. at 1269
to *Gallinot*, 657 F.2d at 1023.

⁵ Although 18 U.S.C. §4246 has a similar goal of long-term commitment, these
commitments typically involve insanity acquittees, incompetent individuals, or
sentenced inmates with later-developing illnesses. These individuals *have* had the
right to hearings under §4245 while in custody on whether their civil commitments
are correct; the §4246 procedure seeks to continue those commitments.

1 commitment petition. *See, e.g., In re Parker*, 60 Cal.App.4th 1453, 71 Cal.Rptr.2d
2 167 (1998), review denied, April 29, 1998) (requiring that a probable cause hearing
3 for a sexually violent predator, statutorily required within 10 days under Cal. Welf. &
4 Inst. Code §6602, be more than a "paper review" of documents; *In re Young*, 122
5 Wn.2d. 1, 46 (1993) (expressly requiring a hearing within 72 hours on the issue of
6 whether probable cause for commitment is present, the same time frame set out for
7 other civil committees, on due process and equal protection grounds, later codified at
8 R.C.W. § 71.09.040). Indeed, a Kansas civil commitment scheme for sex offenders,
9 previously approved by the Supreme Court, included a requirement of a probable-
10 cause finding by a court at the outset of the proceedings. *Kansas v. Hendricks*, 521
11 U.S. 346, 352 (1997), n. 7; *see* K.S.A. §59-29a05(b) (adversarial probable-cause
12 hearing to be held within 72 hours of the filing of a petition). *See generally* Smulin,
13 "Protecting Life and Liberty: the Constitutionality and Necessity of Civil
14 Commitment of Sexual Predators," 52 DePaul L.Rev. 1245, 1250 (2003) (describing
15 Kansas procedure).

17 The Supreme Court has not had to address whether such a hearing is required
18 by due process because Kansas' law, and other state laws, already provide for it.
19 However, there is good reason, in the due process balancing, to require the protection
20 of a probable-cause hearing before a court in cases of this kind. The period in
21 question here is longer, the stigma is much greater, and the ultimate goal involves a
22 more serious liberty deprivation, than in other cases. When the stakes are this high,
23 the concern for avoiding erroneous determinations is necessarily heightened.
24 *Addington v. Texas*, 441 U.S. at 423-424 (discussing why a long-term civil
25 commitment is a reason for a heightened burden of proof at the final commitment
26 hearing).

27 The Supreme Court approved the procedures set forth in *Vitek* because "the
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1 risk of error...[was] substantial enough," the "inherent risk of a mistaken transfer"
2 great enough, to require that the proceeding be adversarial and impartially
3 adjudicated. *Vitek*, 480 U.S. at 495, 496. Indeed, the function of legal process is to
4 minimize the risk of erroneous determinations. *Addington*, 418 U.S. at 425. The
5 government certainly has *no* interest in incorrect certifications. To begin with, the
6 cost of detention is over \$200 per day higher than the cost of Mr. _____'s
7 placement in a community corrections center, or -- since his detention -- more than
8 \$8,400. *See* Declaration of Counsel. Space in treatment facilities is limited and
9 should be reserved for those individuals whose incapacitation while they receive
10 treatment is necessary to protect the public. This category of individuals should be
11 made up of individuals who, it is certain, have a pattern of committing serious sexual
12 offenses, and have been diagnosed as being unable to control *that* aspect of their
13 behavior. None of these things is true of Mr. _____.

15 An adversarial hearing before the district court, as required by §4245, would
16 have aired the serious limitations and flaws in the evaluative process here.

17 [INSERT HELPFUL FACTS SUGGESTING ERRONEOUS
18 CERTIFICATION HERE]

19 Mr. _____'s background and history make clear that he is not the type
20 of inmate that Congress intended to target under §4248. The sparse legislative
21 history of this provision reflects that its text has not changed since its original
22 introduction as part of a predecessor proposal, the Children's Safety Act of 2005.
23 *Compare* Children's Safety Act of 2005, H.R. 3132, 108th Cong. §511 (2005), and
24 18 U.S.C. §4248. Interestingly, Congress said in the 2005 law that it meant to
25 "draw[] the line on a simple principal [sic] -- if the offender was subject to
26 imprisonment for more than one year for a sex crime, then he should be treated
27 differently than a misdemeanor sex offense against a minor where the offender was
28

1 subject to a penalty of less than one year." [sic] See Exhibit 1, H.R. Rep. 109-218-1
2 (Sept. 9, 2005). Similarly, the analysis of the 2005 provision said that it was meant to
3 apply, "for example, [to] a pedophile who *was sentenced to prison for child*
4 *molestation offenses*, [and] states his intention to resume such conduct upon his
5 release from jail." Exhibit 1 at 6. This is consistent with an observation on the House
6 floor made by the sponsor of a companion grant authorization to states for sex
7 offender civil commitments, who said:

8 Texas prisoner Larry Don McQuay is an example of the kind of person
9 who would merit civil confinement. He is a convicted child molester
10 who describes himself alternatively as scum of the Earth and a monster.
11

12 He is currently serving a 20-year sentence for molesting three children.

13 Exhibit 2, p. 1, 151 Cong. Rec. H7887-02, H7913 (daily ed. Sept. 14, 2005)

14 (statement of Rep. Wasserman Schultz). Mr. _____ is in no way
15 comparable to this example.

16 The primary drafter of the 2005 bill that became the 2006 law, Congressman
17 Sensenbrenner, noted at the time of Rep. Wasserman Schultz' remarks that the civil
18 commitment programs to be funded would "ensure compliance with the Supreme
19 Court decisions approving of such laws[.]" Exhibit 4 at 2. The 2005 analysis
20 indicated that Congress meant the standard for commitment to be "substantively
21 similar to those approved by the Supreme Court in *Kansas v. Hendricks*, 521 U.S.
22 346 (1997), and *Kansas v. Crane*, 122 S.Ct. 867 (2002)." Exhibit 3 at 6. That
23 standard, though not subject to calculation with "mathematical precision," requires

24 [P]roof of serious difficulty in controlling behavior. And this, when
25 viewed in light of such features of the case as the nature of the
26 psychiatric diagnosis, and the severity of the mental abnormality itself,
27 must be sufficient to distinguish the dangerous sexual offender whose
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1 serious mental illness, abnormality, or disorder subjects him to civil
2 commitment from the dangerous but typical recidivist convicted in an
3 ordinary criminal case.

4 *Kansas v. Crane*, 534 U.S. 407, 413 (2002) .

5 There is no basis for making that critical distinction here. A comparison of Mr.
6 _____ to the civil committees in the Kansas cases makes that clear. Both
7 Hendricks and Crane had very different histories than Mr. _____. Crane was
8 convicted of “lewd and lascivious behavior and pleaded guilty to aggravated sexual
9 battery” and has been diagnosed as suffering from exhibitionism, which does
10 implicate a greatly reduced ability to control a form of sexual acting out. *Crane*, 534
11 U.S. at 407; *see also* DSM-IV §302.4 (cite). Hendricks was imprisoned three times
12 for sexually abusing children and is a diagnosed pedophile, which, again, involves an
13 inability to control deviant sexual urges. *Hendricks*, 521 U.S. at 354-355, 360. Mr.
14 _____ suffers from neither of these disorders.

15
16 While the *Crane* distinction will not always be so easy to make, here it is. Mr.
17 _____ does not have a history of the uncontrolled use of violence to
18 commit sex offenses. For all the reasons discussed above, and for others which Mr.
19 _____ will bring to this Court’s attention in future motions and pleadings, § 4248
20 is unconstitutional as violative of due process on its face and as applied to Mr.
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III.

CONCLUSION

The Court should dismiss the petition forthwith. Alternatively, the Court should set a prompt probable-cause hearing to address the validity of the certification that currently deprives Mr. _____ of his liberty.

Respectfully submitted,
SEAN K. KENNEDY
Federal Public Defender

DATED: June , 2007

By _____
Deputy Federal Public Defender

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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 UNITED STATES OF AMERICA,)

13 Petitioner,)

14 v.)

15 _____)
16 Defendant.)
17 _____)
18

NO. CV _____

(PROPOSED) ORDER SETTING
PROBABLE CAUSE HEARING

19 GOOD CAUSE HAVING BEEN SHOWN, IT IS HEREBY ORDERED
20 that defendant's Ex Parte Application is granted and the clerk is hereby ordered to
21 set a probable cause hearing for _____, at
22 _____ m.

23 DATED: June __, 2007

24 _____
25 HONORABLE
United States District Judge

26 Presented by:

27 _____
28 Deputy Federal Public Defender