SEAN K. KENNEDY (No. 145632)
Acting Federal Public Defender
(E-mail: Sean_Kennedy@fd.org)
MYRA SUN (No. 144190)
Deputy Federal Public Defender
(E-mail: myra_sun@fd.org)
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone (213) 894-2918
Facsimile (213) 894-0081

Attorneys for Respondent
DANIEL [redacted]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Petitioner, v. DANIEL [redacted], Respondent.	NO. CV 06-6960-DSF RESPONDENT'S REPLY TO GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS PETITION FOR 18:4248 HEARING AND FOR RELEASE

Respondent Daniel [redacted] by and through his attorney of record, Deputy Federal Public Defender Myra Sun, files the attached Reply to the government's opposition to his motion to dismiss the petition for hearing under 18 U.S.C. §4248.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: June , 2007

By
MYRA SUN
Deputy Federal Public Defender

RESPONDENT'S REPLY TO GOVERNMENT'S OPPOSITION

I.

INTRODUCTION

Daniel [redacted] is a misdemeanant. The government is holding him, now for nearly 45 days past the date of his scheduled release. It is now almost 45 days since the petition was filed as well. The government has taken the position, in conversations with defense counsel, that the 45-day period runs from the date -- whenever that may be -- that the court orders a mental health evaluation.

The government's purpose is to indefinitely commit Mr. [redacted] as a sexually dangerous person with a mental disorder that renders him unable to control himself with respect to committing sex offenses. Mr. [redacted] does not have a history of committing these sex offenses, and he does not have a mental disorder that involves a lack of control regarding these types of offenses. For these reasons, these proceedings should be terminated now. If the Court declines to do so, Mr. [redacted] should be released to a community corrections center pending further hearings in this case.

II.

ARGUMENT

A. 18 U.S.C. §4248 Is Facially Invalid.

The government suggests that §4248 is facially valid because it believes that defendants can receive the process that they are due prior to their release from prison. *See* Government's Opposition at 13-14. To this effect, it cites *Schall v. Martin*, 467 U.S. 253 (1984). There is some dispute as to whether the test for a statute's facial invalidity is that there must be *no* circumstances in which it is constitutional, *United States v. Salerno*, 481 U.S. 739 (1987), or whether it may be invalid if it is unconstitutional as to "a large fraction" of persons, *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-1176 (2006) (Stevens, J., on the denial of certiorari). That dispute does not matter here. The challenged last sentence of §4248 applies only to

defendants, like Mr. [redacted] who are subject to release, and the process being challenged here is the certification preventing their release. In *Schall* the court held that facial invalidity is not a matter of "sift[ing] through [an] entire class to determine whether the statute [has been] constitutionally applied." *Id.* at 268. Nor is facial validity determined by the compilation of statistics, as occurred there, because they can be ambiguous or flawed. Instead, the court looked to the "express language of the statute." *Id.* at 273. On that ground, §4248 is unconstitutional because it permits all individuals scheduled for release to be held for an extended period through a certification that cannot be contested before -- or even within a short time after -- its issuance.

Schall examined procedures for detaining juveniles based on dangerouness, and *Salerno* did the same as to federal pre-trial detainees. Nothing in *Schall* or *Salerno* suggests that the procedure here comports with due process; they actually support the finding that §4248 is unconstitutional on its face. This is because each provided a way for individuals to challenge their detention shortly after they were taken into custody. In *Schall*, it made a difference that the juvenile-detention statute at issue provided for "a formal, adversarial probable-cause hearing" within three to six days of the juvenile's first appearance in court. *Schall*, 467 U.S. at 277. In *Salerno*, similarly, the court dealt with a scheme entitling federal pre-trial detainees to a "prompt" hearing within three to five days on whether they fall into the narrow class of persons who are sufficiently dangerous to require detention. Nor were the conditions of the confinement in either *Schall* or *Salerno* as stringent as they have been for Mr. [redacted]. The juvenile detention scheme, deemed regulatory in nature, involved two possibilities: either non-secure detention, a "sort of 'halfway house,'...where the child receives schooling and counseling and has access to recreational facilities...," or "secure detention," in which detainees could "wear street clothes provided by the institution and partake in educational and recreational programs...". *Id.* at 271. The pre-trial detainee scheme is also regulatory and

provides for defendants to be held away from sentenced prisoners. *Salerno*, 481 U.S. at 748. The conditions at the Metropolitan Detention Center reflect these circumstances, providing a common area and allowing inmates freedom of movement within it. *See* Declaration of Counsel. In sum, in neither case did the Supreme Court approve of a statute which on its face permits detention without hearing for up to 75 days, where the expected restraint can be indefinite solitary confinement in a locked cell, without a prompt hearing.

As will be more fully discussed below, these two elements of various statutes -- the right to a prior or early hearing to protect against an erroneous determination, and less restrictive conditions of confinement consistent with the legislative purpose of the detention -- are missing from §4248, both on its face and as applied to Mr. [redacted] They are critical aspects of why this statute violates due process.

B. 18 U.S.C. §4248 is Unconstitutional As Applied.

The government maintains that §4248 is constitutional because, it says, a 45-day period before an individual receives a hearing is reasonable. Mr. [redacted] disagrees with this conclusion, but agrees that the process he is due is properly analyzed in the context of three factors: his substantial liberty interest; the goal of minimizing or eliminating the risk of erroneous detention; and the government's interest, consistent with its fiscal and administrative resources, in protecting the public from dangerous individuals who cannot control themselves with respect to their sexual behavior. *Parham v. J.R.*, 442 U.S. 584, 599 (1979).

1. Section 4248 Denies Mr. Harnden His Right to a Hearing to Test the Basis for His Detention.

Mr. [redacted] has been held without being able to have a neutral decision-maker determine whether Bureau of Prisons staff was correct in certifying him under §4248. This statute is unconstitutional because it authorizes up to a 75-day period before he is able to appear before such a decision-maker. If the government is right, that period may be longer, if -- as in this case -- the court does not start the clock

running by ordering an evaluation as soon as the government's commitment petition is filed. Flexible as the Due Process Clause may be, it does not have as much "stretch" as the government may imagine, and indeed the government misconstrues the required process, who must administer it, and when it must occur.

Central to the guarantee of due process is the requirement -- whatever the scenario leading to detention -- that the detained person be afforded an early hearing before a neutral decision-maker to explore the correctness of the basis for his detention. This requirement arises from the notion that an individual is entitled to a judicial determination of probable cause as a prerequisite to the extended restraint of his liberty. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). They specify the neutral magistrate as the decision-maker. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). These protections are also well-established with respect to individuals who are detained by law enforcement because of mental illness that leads to the risk of imminent danger to others. They are entitled to Fourth Amendment protections, and can only be held based on probable cause to believe that they do indeed pose such a risk, and suffer from such a condition. *Maag v. Wessler*, 960 F.2d 773, 775 (9th Cir. 1992) (finding that a §1983 plaintiff, rendered irrational after suffering from pesticide poisoning, was properly arrested under Oregon's emergency-detention provision). In the context of a law enforcement contact, due process requires a probable-cause hearing for these individuals within 48 hours of the detention. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

When such an individual is not to be prosecuted but is to be hospitalized involuntarily, the lack of an *immediate* hearing is only justifiable "as an emergency treatment. It is recognized that a probable cause hearing cannot be arranged immediately." *Doe v. Gallinot*, 657 F.2d 1017, 1022 (9th Cir. 1981) (affirming injunction to require a hearing before individuals could be held up to 14 days more), emphasis added, *citing Doe v. Gallinot*, 486 F.Supp. 983, 993 (C.D. Calif. 1979). However, the period before the hearing may only be delayed until such a hearing can

be arranged. *Id.* *Doe*, which was decided in this circuit and involved the practice of mental health authorities in this district, held that such a hearing was necessary if the state wished to confine a person in a mental health facility involuntarily for *as long as* 14 days. *Id.* A common thread running through most of these cases, including those cited by the government, is the suggestion that the purpose of these commitments is treatment, even the avoidance of a civil-commitment proceeding altogether if an individual's illness can be successfully addressed. The delay in any hearing, to the extent that one is accepted, is justified for this reason.[1]

Here, of course, Mr. [redacted]s circumstances did not present the emergent scenario contemplated in those cases. In a broad sense, sex-offender civil commitment statutes differ from more conventional schemes in that they do not focus on crisis situations and desperate circumstances. They may constitutionally focus on the long-term goal of incapacitating possibly untreatable offenders, which necessarily contemplates a lengthy detention. *See Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (recognizing that this was a permissible purpose of such laws). In these circumstances, the calculus should change,[2] and state statutes for the civil

---

[1] *See discussion in Logan v. Arafeh*, 346 F.Supp. 1265, 1268-1269 (D.Conn. 1972), which the government cites as approving a 45-day detention without a hearing. However, in fact it authorized involuntary commitments for no more than 15 days, after which the individual either was to be released unless formal proceedings, presumably subject to a court's review, were filed. Only then would a 30-day continuance be available. *Id.* at 1267-1268. Even the cases that the government cites require a determination by a neutral decision-maker, defined as one who is free to make an independent evaluation, on the question of whether a longer hospitalization is the correct result. Some recognized that periods of 48 hours to 5 days, *Bell v. Wayne Co. Gen. Hospital*, 384 F.Supp. 1085 (E.D. Mich. 1974, 10 days, *Donahue v. R.I. Dept. of Mental Health*, 632 F.Supp. 1456 (D.R.I. 1986), even 20 days, *Coll v. Hyland*, 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.

[2] 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* been given hearings under §4245 while in custody on whether their civil commitments are correct, and the §4246 hearing seeks to continue that.

commitment of sexually dangerous individuals reflect this view. For this reason, consideration of the structure of those statutes is more useful than the cases cited by the government. They usually *do* require adversarial hearings to determine probable cause, not administratively but judicially, in short order following the filing of a commitment petition. *See, e.g., In re Parker*, 60 Cal.App.4th 1453, 71 Cal.Rptr.2d 167 (1998), review denied, April 29, 1998) (requiring that a probable cause hearing for a sexually violent predator, statutorily required within 10 days under Cal. Welf. & Inst. Code §6602, be more than a "paper review" of documents; *In re Young*, 122 Wn.2d. 1, 46 (1993) (expressly requiring a hearing within 72 hours on the issue of whether probable cause for commitment is present, the same time frame set out for other civil committees, on due process and equal protection grounds, later codified at R.C.W. § 71.09.040). Indeed, as Mr. [redacted] has previously noted, the Kansas scheme previously approved by the Supreme Court included a requirement of a probable-cause finding by a court at the outset of the proceedings. *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997), n. 7; *see* K.S.A. §59-29a05(b) (adversarial probable-cause hearing to be held within 72 hours of the filing of a petition). *See generally* Smulin, "Protecting Life and Liberty: the Constitutionality and Necessity of Civil Commitment of Sexual Predators," 52 DePaul L.Rev. 1245, 1250 (2003) (describing Kansas procedure).

The Supreme Court has not had to address whether such a hearing is required by due process because Kansas' law, and other state laws, already provide for it. However, there is good reason, in the due process balancing, to require the protection of a probable-cause hearing before a court in cases of this kind. The period in question here is longer, the stigma is much greater, and the ultimate goal involves a more serious liberty deprivation, than in other cases. When the stakes are this high, the concern for avoiding erroneous determinations is necessarily heightened. *Addington v. Texas*, 441 U.S. 418 , 423-424 (1979) (discussing why a long-term civil commitment is a reason for a heightened burden of proof at the final commitment

hearing).

Mr. [redacted] situation provides an example of the kinds of error that can occur. As he has already noted in his initial filing, there was disagreement among the Bureau of Prisons staff, with those who saw Mr. [redacted] assessing him as low risk, while those who did not considered him a danger. A court, as opposed to a Bureau of Prisons administrator disinclined to explore the significance of differing viewpoints, could have objectively considered them, and accordingly found the basis for detention weaker. Moreover, Mr. [redacted] was scored as a "4" on a single actuarial instrument for sex offender risk, the Static-99 -- this was the basis for his detention. He has already noted that he contests the factual assumptions made by the long-distance evaluators who looked at his records. However, questions have also been raised about the efficacy of that one instrument, in particular, as a valid predictor of risk. *See* Abracen & Looman, "Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders," 1 J. of Sex. Off. Civ. Commitment: Sci. & the Law 124, 135 (2006), concluding from a study of high-scoring offenders on the Static-99, and other test instruments, that these commonly-used tools "fail[ed] to support the validity of the criteria commonly used in SVP assessments"). An adversarial hearing would have allowed Mr. [redacted] to present these questions as well. All of these matters legitimately would have gone to a *correct* determination of whether he should have been certified.

Indeed, the government would likely agree that it has absolutely *no* interest in incorrect certifications. To begin with, the cost of detention is over $200 per day higher than the cost of Mr. [redacted]s placement in a community corrections center, or -- since his detention -- more than $8,400. *See* Declaration of Counsel. Space in treatment facilities is limited and should be reserved for those individuals whose incapacitation while they receive treatment is necessary to protect the public. This category of individuals should be made up of individuals who, it is certain, have a pattern of committing serious sexual offenses, and have been diagnosed as being

unable to control *that* aspect of their behavior. None of these things is true of Mr. [redacted].

All of these considerations point to the constitutional necessity of a probable-cause hearing requirement that is utterly lacking here. It is apparent that the federal procedure set out in §4248 fails in a way that state statutes, with their provision for a probable-cause determination at the outset of a commitment proceeding, do not. It may seem odd for a federal litigant to be calling to a federal court's attention a failure of a federal statute by pointing to protections offered to state litigants under state laws. The fact is that the states have developed a procedure for guaranteeing the rights of individuals that they wish to commit as sex offenders. Congress failed to do so in §4248, and for this reason it fails.

2. Mr[redacted]'s Placement In Solitary Confinement at Is Not the Least Restrictive Alternative and Violates His Substantive Due Process Rights.

Mr.[redacted] disagrees with the government that his loss of liberty, when weighed against its interest in protecting the public, is of so little moment. He also disagrees that, as interpreted by the government, it is meant to be brief or temporary. Finally, what is most *wrong* is that the government could suggest that solitary confinement is a humane way of treating Mr.[redacted]. It appears to believe that this is the proper way to isolate him from pre-trial detainees. Opposition at 18. The government may, further, say that it is to protect him from them. To this Mr. [redacted] responds: that he needs protection from others around him in the place that the government has chosen to detain him is the best evidence that he should not be *there* at all.

This is not a case of oversight, or of a "falling through the cracks" of a *clear* case for commitment under this statute. Until the day before Mr.[redacted] was scheduled to be released, there was a difference of opinion among Bureau of Prisons officials who had reviewed his situation on whether he could safely be released to

community confinement. This difference of opinion -- together with the fact that he received no opportunity to present a case against the certification to begin with -- justifies Mr. [redacted]s release to the less restrictive placement contemplated by the Bureau of Prisons staff who did see him. Such a placement would also approximate more closely the conditions under which individuals civilly committed, for the same reason, live in state facilities. *See* Declaration of Counsel and attachment. If the government believes that ultimately Mr. [redacted] should be committed, and if the state were to accept him, those would be the conditions of his confinement. The government can advance no interest other than a bureaucratic one for housing him as it does now.

Contrary to the government's position, it is, of course, true that an individual who has been wrongly subjected to civil commitment by a state official *has* undergone an ordeal that may shock the conscience. *See O'Connor v. Donaldson*, 422 U.S. 563 (1975). Public intolerance or animosity toward Mr. [redacted] for his conduct in the original case cannot constitutionally justify the deprivation of his physical liberty. *Id.* at 575. Nor, if these proceedings must go forward, does it justify housing him in isolation while he awaits them.

III.

CONCLUSION

Mr. [redacted] asks that this petition be dismissed. If the Court does not dismiss the petition, he asks that it release him to a less restrictive environment. Nothing about his mental state or his history justifies the conditions of his current confinement.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: June __, 2007

By
MYRA SUN
Deputy Federal Public Defender

DECLARATION OF MYRA SUN

I, Myra Sun, hereby state and declare as follows:

1. I am a Deputy Federal Public Defender in the Central District of California appointed to represent Daniel [redacted] in the above-entitled action.

2. The government has taken the position, in conversations with me that the 45-day period runs from the date -- whenever that may be -- that the court orders a mental health evaluation. Mr. [redacted] believes that this time frame runs from the date the petition is filed. Even with a good-cause extension, then, he believes his hearing should be held no later than January 12, 2006.

3. I have visited the Metropolitan Detention Center on group tours. The floor plan for most detainees, though not Mr. [redacted], contain a large open space, with individual detainees' rooms arranged around that area, and detainees have freedom of movement within it. As I indicated in my previous declaration, Mr. [redacted] is being held in much more restrictive conditions.

4. With regard to the cost of incarceration compared to the less-restrictive release conditions we request; according to information provided to courts in current Presentence Reports, including one I received earlier this month, the cost of incarceration for the Bureau of Prisons is over $1,900 per day. The cost of housing an individual in community confinement is over $1,700 per day. Incarceration costs a little over $200 per day more, according to this information.

5. Mr. [redacted] is being held in a cell on 8-North at the Metropolitan Detention Center. He is there 24 hours a day, 7 days a week, except when he is taken to shower once every few days, and for visits with me, which have been fewer than once a week since his transfer there. He does not have access to a telephone to call me. His hair is longer than he wishes it to be, but he has not been permitted, despite his requests, to have his hair cut.

6. The attached information from the website of the Atascadero State Hospital, which houses individuals civilly committed under Calif. Welf. & Inst. Code §6600 *et seq.*, is attached for comparison to the conditions under which Mr. [redacted] currently lives.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: June __, 2007

MYRA SUN
Deputy Federal Public Defender