No. 22-6338

United States Court of Appeals
FOR THE FOURTH CIRCUIT

GERALD TIMMS,
Plaintiff-Appellant,

v.

ATTORNEY GENERAL,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina

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BRIEF OF COURT-APPOINTED AMICUS CURIAE

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STATEMENT OF JURISDICTION

The district court had 28 U.S.C. § 1331 subject-matter jurisdiction over Mr. Timms' 28 U.S.C. § 2241 petition. It entered a final judgment denying his petition on March 11, 2022. JA032–033. Mr. Timms timely filed a notice of appeal on March 24, 2022. JA034–035. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the Attorney General's ultra vires actions—repeatedly moving Mr. Timms from a facility suitable for civil commitment into penal incarceration and then returning him to civil commitment—violates Mr. Timms' due process rights.

II. Whether that due process claim needed to be exhausted in 18 U.S.C. § 4248 civil commitment proceedings that assess only whether a committed person is sexually dangerous.

III. Whether the district court erred in sua sponte dismissing Mr. Timms' Fifth Amendment conditions of confinement claim when habeas provides his only remedy for this claim.

STATEMENT OF THE CASE

Mr. Timms, a person civilly committed as sexually dangerous pursuant to the Adam Walsh Act, 18 U.S.C. § 4248, appeals the dismissal of his pro se habeas petition. JA028, JA034–035. He claims that the Attorney General violated his due process rights by civilly detaining him without new § 4248 proceedings after he served two intervening criminal sentences and that his conditions of confinement are punitive in violation of the Due Process Clause. JA006–009.

Statement of Facts

Less than three weeks before Mr. Timms' scheduled October 2008 release from federal criminal custody at FCI Butner Medium I (Butner I) on a child pornography conviction, the government certified him for civil commitment pursuant to § 4248(a). JA068–072. The government's certificate stayed Mr. Timms' release pending the resolution of the civil commitment action against him. *See* 18 U.S.C. § 4248(a); JA075. The commitment action was then held in abeyance while the Supreme Court decided the constitutionality of 18 U.S.C. § 4248 in *United States v. Comstock*, 560 U.S. 126 (2010). *See Timms v. Johns*, 627 F.3d 525, 532

(4th Cir. 2010). Mr. Timms remained confined at Butner I pending the resolution of *Comstock*. *Id.* at 527–28.[1]

Three years after his certification, Mr. Timms had an 18 U.S.C. § 4247(d) certification hearing. JA072, JA075. The district court held that the necessary conditions for commitment had been satisfied and remanded Mr. Timms to the custody of the Attorney General. JA083. The Attorney General continued to detain Mr. Timms at Butner I, where the federal government holds all people civilly committed under § 4248 because it is the only facility that has the Bureau of Prison's Commitment and Treatment Program (CTP).[2] JA085.

Since Mr. Timms' original § 4248(a) certification almost fifteen years ago, the Attorney General has twice moved him out of and back into Butner I. Those moves are set forth in the following table and described in more detail below.

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[1] While Mr. Timms was waiting for his commitment hearing, he filed a habeas petition, and the district court hearing that petition held that § 4248 was unconstitutional. *Timms v. Johns*, 627 F.3d at 529–530. This Court reversed, holding that Mr. Timms had failed to exhaust remedies available in the civil commitment court. *Id.* at 530.

[2] *See* U.S. Dep't of Just., Fed. Prison Sys., *FY 2022 Performance Budget*, 42, https://www.justice.gov/jmd/page/file/1398306/download.

Estimated Dates[3]	Facility	Type of detention
10/08–10/12	Butner I	Detained in civil commitment facility pending § 4248(d) hearing after the BOP's § 4248(a) certification. *Timms v. Johns*, 627 F.3d 525, 527–28 (4th Cir. 2010); JA081–082.
10/12–after 10/16	Butner I	Civilly committed after district court's § 4248(d) finding. JA075–076, JA083, JA085, JA087.
After 10/16–08/17	Butner II	Served criminal sentence in Case No. 5:15-cr-00169. JA087, JA093, JA110.
08/17–11/19	Butner I	Confined in civil commitment facility. JA110, JA190.
11/19–02/20	Piedmont Reg. Jail	Pre-trial criminal detention in Case No. 5:19-cr-00428. JA190.
02/20–after 08/20	Butner II	Pre-trial detention and post-sentence confinement. JA190, JA204, JA213.
After 08/20–06/21	USP Marion	Served criminal sentence in Case No. 5:19-cr-00428. JA204, JA213, JA009, JA018.
07/21–present	Butner I	Confined in civil commitment facility. JA009, JA018, JA034–035.

While confined at Butner I in 2015, Mr. Timms was indicted on one count of possessing contraband in violation of 18 U.S.C. § 1791(a)(2). JA085, JA087, JA136. Mr. Timms allegedly possessed a tattoo gun and a colored marker with a 7/8-inch blade attached to the end, which he said was used to work on radios and headphones. JA147–148. After being found guilty

[3] These dates are derived from the available records. Some dates are approximate because the records are not clear about when the move happened.

at a bench trial in August 2016, Mr. Timms was sentenced to thirty months' incarceration and three years' supervised release. JA146, JA150–152.

At some point after October 2016, the government removed Mr. Timms from the civil commitment unit designated for § 4248 detainees and incarcerated him at FCI Butner Medium II (Butner II) to serve this sentence. JA087, JA093. Butner II is a penal prison for incarcerated individuals serving criminal sentences.[4] It does not detain civilly-committed people, and the Bureau of Prison's CTP is not available to those imprisoned at Butner II. *Id.*

Mr. Timms filed a pro se emergency motion with the civil commitment court to clarify whether his civil commitment continued during his criminal sentence. JA112. In November 2017, the civil commitment court rejected his motion, explaining that Mr. Timms could only be discharged from commitment upon a court order finding that he is no longer sexually dangerous to others through discharge proceedings

[4] *Compare* Fed. Corr. Inst. I Butner, N.C., *Inmate Handbook*, 6–7, https://www.bop.gov/locations/institutions/but/BUT_aohandbook.pdf, *with* Fed. Corr. Inst. II Butner, N.C., *Inmate Handbook*, 6–7, https://www.bop.gov/locations/institutions/btf/BTF_aohandbook.pdf.

initiated by (1) the BOP warden under § 4248(e), or (2) Mr. Timms' counsel under § 4247(h). JA115. And although habeas corpus was available to Mr. Timms, he had not "been granted a writ" ordering his release. *Id.*; 18 U.S.C. § 4247(g).

Mr. Timms was released from his thirty-month sentence on July 31, 2017. JA015. In August 2017, the government removed Mr. Timms from Butner II and immediately detained him in Butner I, the designated § 4248 unit. JA093, JA110. In May 2019, while confined at Butner I, Mr. Timms was indicted on two counts of possessing sharpened objects, which he asserted were for building vehicle replicas. JA177–178; *see United States v. Timms*, 844 F. App'x 658, 659 (4th Cir. 2021). Mr. Timms waived his right to a detention hearing and was remanded to the custody of the United States Marshals Service, which detained him at Piedmont Regional Jail in Farmville, Virginia. JA183. Mr. Timms was incarcerated with "sentenced and convicted state and federal inmates in an open dormitory style jail without any officer supervision." JA179–180.

On February 19, 2020, the government moved Mr. Timms from Piedmont Regional Jail to Butner II, a penal prison. JA190. In June 2020, after being found guilty at a jury trial of the two charges of

possessing contraband in prison, Mr. Timms was sentenced to concurrent terms of thirty months' incarceration and three years' supervised release on each count. JA029, JA197. At some point after August 2020, the government transferred Mr. Timms from Butner II to USP Marion in Illinois to serve his sentence. JA204, JA213.

Upon Mr. Timms' return to Butner I in July 2021, he had access to "voluntary" participation in the CTP. JA009, JA018, JA013. Mr. Timms declined that treatment. JA017. He alleges that as a result, he has been confined in a separate unit with others who are not participating in the CTP. *Id.* They have been denied "privileges allowed to persons participating in treatment." *Id.* For instance, they are forced to wear uniforms even though treatment participants are not. *Id.* They are also separated from treatment participants and "essentially punished for refusing sex offender treatment." *Id.*

Procedural History

Mr. Timms filed a pro se 28 U.S.C. § 2241 habeas corpus petition in the Eastern District of North Carolina in July 2021 asserting two claims: (1) that the government's failure to file a § 4248(a) certification after each of his intervening criminal sentences renders his current civil detention

a violation of the Due Process Clause; and (2) that his conditions of confinement as a civilly-committed person have been punitive in violation of the Due Process Clause. JA005–009. Because Mr. Timms was in quarantine and unable to access the law library when he filed his petition, JA009, he later filed a motion for leave to amend his petition pursuant to Fed. R. Civ. P. 15. JA013. The amended complaint provided additional detail about the claims in his petition.[5] JA014.

Before the government entered an appearance or responded to Mr. Timms' petition, the district court sua sponte entered a final judgment on March 11, 2022.[6] JA032–033. The district court granted Mr. Timms' motion for leave to amend and dismissed his first claim for failure to exhaust his remedies before the civil commitment court. JA031–032. It found that, although Mr. Timms sought relief from the civil commitment court after his 2017 criminal conviction, he neither appealed the denial of relief in that case nor sought relief after his 2020 conviction. JA031–032.

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[5] Mr. Timms raised two additional claims that are not included in this brief. JA017–025.

[6] The same district court judge both adjudicated Mr. Timms' civil commitment proceedings and dismissed Mr. Timms' habeas petition.

Alternatively, the district court dismissed Mr. Timms' claim "for the same reasons set forth" in his 2017 order denying Mr. Timms' pro se emergency motion in the civil commitment proceedings. JA031. In that earlier opinion, the civil commitment court dismissed Mr. Timms' claim because none of the § 4248 conditions of release were met: (1) "[t]he warden at F.C.I. Butner ha[d] not certified that Mr. Timms [was] no longer sexually dangerous," and (2) "the Court ha[d] not determined that Mr. Timms should be discharged on a motion filed by counsel." JA115. Nor had Mr. Timms "been granted a writ of habeas corpus." *Id.*

The district court also denied relief on the conditions of confinement claim, asserting that a habeas petition could not be used to challenge conditions of confinement. JA031–032. In the alternative, the district court determined that relief was not warranted. *Id.*

Mr. Timms timely filed a notice of appeal on March 24, 2022. JA034–035; Fed. R. App. P. 4(1)(B)(iii). This Court appointed undersigned counsel as amicus in support of Mr. Timms' position. It identified as an issue of particular interest whether Mr. Timms, as a civilly-committed person, "is required to exhaust constitutional claims in commitment proceeding[s] prior to filing [a] 28 U.S.C. § 2241 petition."

SUMMARY OF THE ARGUMENT

After initially receiving judicial approval to move Mr. Timms from criminal confinement to civil commitment in accordance with 18 U.S.C. § 4248, the Attorney General—without judicial approval and in a dizzying fashion—moved Mr. Timms from civil commitment to criminal confinement and back again without process. That detention, without any process or oversight from the judiciary, violated Mr. Timms' due process rights.

The Adam Walsh Act creates a limited, judicially-supervised route by which the Attorney General can designate an incarcerated individual as sexually dangerous and move him to civil commitment. 18 U.S.C. § 4248(a). The Attorney General followed the provisions of the Act in 2008 to obtain a § 4248 commitment order against Mr. Timms. JA068–074. But the Act only permits one-way movement; it does not establish a means by which an individual can be stripped of his liberty interest and hauled back and forth between civil commitment and penal incarceration. The Attorney General nonetheless assumed its own power to do just that. Because the Act provides no authority to remove Mr. Timms from civil commitment, the Attorney General's decision to place

Mr. Timms in penal confinement terminated his commitment order. This is particularly so because penal incarceration and civil commitment are mutually exclusive, and the Attorney General failed to detain Mr. Timms in a "suitable facility" when it ordered his transfer to penal custody. 18 U.S.C. § 4248(d). The commitment order against Mr. Timms did not survive his penal incarceration.

After removing Mr. Timms from civil commitment to serve his criminal sentence, the Attorney General exceeded its power when it again detained him as a civilly-committed person, this time without following the process § 4248 requires. Such a move is beyond the authority Congress granted the Attorney General in the Act; a usurpation of the judiciary's exclusive power to order an individual's detention; and an affront to Mr. Timms' constitutionally-enshrined right to due process. U.S. Const. amend. V. Only by following § 4248's procedural requirements could the Attorney General return Mr. Timms to civil commitment upon release from penal custody. Having failed to do so, the Attorney General's continued detention of Mr. Timms is arbitrary and unlawful.

The district court erred in holding that Mr. Timms must exhaust this claim before the § 4248 civil commitment court. Section 4248 does not contemplate the Attorney General transferring a civilly-committed person to criminal confinement. It therefore does not provide a remedy for Mr. Timms' claim that this removal terminated his civil commitment order and required a new § 4248(a) certification to civilly confine him. The statute only contemplates the civil commitment court discharging a civilly-committed person if a state agrees to accept responsibility for his custody and treatment, or the person demonstrates that he is no longer sexually dangerous. 18 U.S.C. §§ 4247(h), 4248(d)–(e). Mr. Timms cannot, and should not, be required to challenge the government's failure to hold him under a valid civil commitment order in proceedings meant only to determine sexual dangerousness. Habeas corpus is thus the only mechanism for Mr. Timms to challenge the illegality of his detention. 18 U.S.C. § 4247(g).

Mr. Timms properly brought his Fifth Amendment conditions of confinement claim in habeas under 28 U.S.C. § 2241. As this Court has recognized, the Great Writ has long encompassed conditions of confinement claims. Because this Court has held that conditions of

confinement claims can be brought under habeas and the Supreme Court has not held to the contrary, the district court erred in concluding that Mr. Timms could not raise this claim in habeas. Additionally, the district court erred in dismissing this claim for failure to state a claim. Civilly-committed people like Mr. Timms are treated, for purposes of assessing such claims, as pre-trial detainees, such that conditions are unconstitutional if explicitly imposed for a punitive reason or if a punitive purpose can be inferred because there is no alternative rationale. Because the government has offered no rationale for its treatment of Mr. Timms, the district court erred in sua sponte dismissing his claim.

ARGUMENT

Mr. Timms challenges: (1) the Attorney General's authority to continue detaining him pursuant to 18 U.S.C. § 4248 without judicial authorization after he completed his intervening criminal sentences, and (2) his conditions of confinement. JA006–009. Because resolution of the first issue turns on the statutory civil commitment procedures, key provisions are described here.

The Attorney General or the Director of the Bureau of Prisons initiates civil commitment proceedings against a federal prisoner by filing, in the district where the prisoner is confined, a certification that the person is a "sexually dangerous person" (SDP). 18 U.S.C. § 4248(a). A district court must then hold a commitment hearing, at which the government must show by clear and convincing evidence that the individual is an SDP. 18 U.S.C. § 4248(d). If the court determines that a person is an SDP, as it did with Mr. Timms, the statute requires that the Attorney General ask the state where the person was convicted or last domiciled to accept responsibility for the "custody, care, and treatment" of the person. *Id.* If the state does not accept that

responsibility, "the Attorney General shall place the person for treatment in a suitable facility" for civil commitment. *Id.*

The civil commitment court can discharge a committed person either when the state agrees to accept responsibility for his custody, care, and treatment, or when the person establishes by a preponderance of the evidence that he is no longer sexually dangerous. 18 U.S.C. § 4248(d)–(e). Discharge proceedings may be initiated by the director of the facility in which the person is detained, or the committed person's legal counsel can initiate discharge proceedings by moving for a sexual dangerousness hearing. 18 U.S.C. §§ 4247(h), 4248(e). The statute specifies that it does not prevent a committed person "from establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. § 4247(g).

All issues in this appeal turn on questions of law that this Court reviews de novo. *See United States v. Antone*, 742 F.3d 151, 158 (4th Cir. 2014).

I. MR. TIMMS' PETITION STATED A PLAUSIBLE CLAIM THAT HIS TRANSFER TO CRIMINAL CONFINEMENT SEVERED HIS CIVIL COMMITMENT, AND THE DISTRICT COURT ERRED IN DISMISSING FOR FAILURE TO EXHAUST.

Mr. Timms has plausibly alleged that the Attorney General discharged his civil commitment order by twice removing him from civil commitment and placing him in a penal prison. JA007–009. The district court erred in dismissing this claim for Mr. Timms' failure to exhaust remedies in his § 4248 civil commitment proceedings. JA030–031. No such remedies existed. It also erred in dismissing this claim because the Attorney General's failure to file a § 4248(a) certification seeking a new commitment hearing unconstitutionally deprived Mr. Timms of his liberty interest without due process. *Id.*; U.S. Const. amend. V. To hold otherwise would give the government unfettered discretion to move detainees between penal prisons and civil commitment without any judicial process, supplanting the court's role in deciding when individuals are subject to confinement. *See* U.S. Const. amend. V.

A. The District Court Erred in Denying Mr. Timms' Habeas Claim for Failure to Exhaust.

The district court failed to consider that only available remedies must be exhausted before bringing a habeas petition to challenge the

illegality of detention. In this case, § 4248 does not provide a remedy. And even if this Court finds that Mr. Timms needed to exhaust, the district court erred in sua sponte dismissing on this ground because exhaustion is a non-jurisdictional claims-processing rule that must be raised as an affirmative defense.

1. Mr. Timms has no available remedies to exhaust.

Mr. Timms' habeas petition asserted that the government was required to begin new § 4248(a) certification proceedings each time he was put back in civil confinement after serving his criminal sentences. JA030. The district court, relying on *Timms v. Johns*, 627 F.3d 525, 533 (4th Cir. 2010), dismissed this claim because Mr. Timms had not exhausted remedies in his § 4248 civil commitment proceedings.[7] JA030–031. The district court erred because 18 U.S.C. § 4248 provides no remedy for this claim.

[7] In 2017, the civil commitment court dismissed an emergency motion that Mr. Timms filed raising the substance of this claim. In ruling on his habeas claim, the district court said that Mr. Timms needed to have appealed this denial of relief to fully exhaust. But because he need not have raised this claim with the civil commitment court at all, his failure to appeal is irrelevant.

Courts only require exhaustion of *available* remedies before habeas corpus relief can be granted. *See Stack v. Boyle*, 342 U.S. 1, 6–7 (1951); *see also Timms v. Johns*, 627 F.3d at 531. But a remedy is only available if it provides an avenue for relief. *See Ross v. Blake*, 578 U.S. 632, 643–44 (2016). Section 4248 does not provide a remedy for Mr. Timms' claim. He cannot raise his claim—that his current detention is unlawful because an intervening criminal sentence terminated his prior civil commitment—in discharge proceedings under § 4248(e) or § 4247(h) because the purpose of those hearings is to determine if he is sexually dangerous. In fact, the § 4248 civil commitment court rejected Mr. Timms' similar claim in 2017 on precisely these grounds. JA114–115. Because the discharge proceedings to determine sexual dangerousness do not provide a remedy, Mr. Timms has no available remedies under § 4248 and is entitled to pursue habeas relief under 28 U.S.C. § 2241.

Nor does *Timms v. Johns,* 627 F.3d at 532, say anything to the contrary. In that case, Mr. Timms' civil commitment proceedings had been held in abeyance while the Supreme Court decided the constitutionality of § 4248 in *United States v. Comstock*, 560 U.S. 126 (2010). *Timms*, 627 F.3d at 525–26, 532. Mr. Timms brought a habeas

claim challenging both the court's failure to hold an evidentiary hearing on the issue of his sexual dangerousness and § 4248's constitutionality. *Id.* at 528. This Court held that Mr. Timms could have, but had not, challenged the abeyance order in the § 4248 civil commitment court. *Id.* at 532. Challenging that order would have allowed him to obtain the evidentiary hearing required by § 4248(a) to determine his sexual dangerousness. *Id.* And he could have raised his constitutional challenge to § 4248 as an affirmative defense to the commitment action brought by the government. *Id.* Because Mr. Timms had not availed himself of these § 4248 remedies, this Court held that he could not raise those claims in a habeas petition.

But the statute does not provide a remedy for Mr. Timms' claim in this case. Once civil commitment starts, the only relief contemplated by § 4248 is a court order finding that the committed person is no longer sexually dangerous or a writ of habeas corpus. JA114–115. Mr. Timms cannot raise his due process claim—that he was entitled to a new § 4248 determination—in discharge proceedings that are focused solely on his sexual dangerousness. 18 U.S.C. §§ 4247(h), 4248(e). Thus, his only

option is to bring a habeas corpus petition challenging the illegality of his confinement. 18 U.S.C. § 4247(g).

2. Even if Mr. Timms is required to exhaust, the district court erred in sua sponte invoking exhaustion.

Regardless whether this Court finds that Mr. Timms should have exhausted this claim, the district court erred in sua sponte dismissing Mr. Timms' § 2241 petition for failure to exhaust. JA031–032. Section 2241's judicially-created exhaustion requirement is a non-jurisdictional claims-processing rule. *See Stewart v. Iancu*, 912 F.3d 693, 700 (4th Cir. 2019) (recognizing that procedural requirements are jurisdictional only if Congress clearly makes them so). Such a claims-processing rule is an affirmative defense that cannot be invoked sua sponte by the district court, *see United States v. Muhammad*, 16 F.4th 126, 129 (4th Cir. 2021), unless the court provides "the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006).

The district court sua sponte dismissed Mr. Timms' habeas petition for failure to exhaust before the government had even entered an appearance, let alone asserted an exhaustion defense. JA031–032. And it did so without giving Mr. Timms any notice. *Id.* This Court has

repeatedly vacated such dismissals in light of *Muhammed*. *See, e.g.*, *United States v. Poyner*, No. 20-7156, 2021 WL 5412332, at *1 (4th Cir. Nov. 19, 2021) (vacating district court's order when government did not raise exhaustion); *see also United States v. Marshall*, No. 21-7554, 2022 WL 910664, at *1 (4th Cir. Mar. 29, 2022) (finding district court erred and remanding when government did not invoke threshold prerequisites to suit). It should do the same here.

B. Mr. Timms' Intervening Criminal Incarcerations Severed His § 4248 Civil Commitment and Required New Certification Proceedings.

In the past fifteen years of Mr. Timms' confinement, the Attorney General has thrice moved him from criminal custody to civil commitment, but only once has it done so pursuant to the Act's requirements. Upon Mr. Timms' initial release from criminal confinement, the Attorney General filed a § 4248(a) certification alleging that Mr. Timms was an SDP. JA068. The district court then conducted a hearing at which it determined Mr. Timms' SDP status by clear and convincing evidence and ordered him civilly-confined. He was detained at Butner I, the facility

the Bureau of Prisons (BOP) has deemed suitable for civil commitment as mandated by 18 U.S.C. § 4248(d).[8] JA083.

But after Mr. Timms was criminally charged during his Butner I confinement, the Attorney General unilaterally moved him *out* of that suitable facility and into penal incarceration despite the Act's suitability requirement. JA098, JA190. When Mr. Timms finished serving those sentences, the Attorney General unilaterally moved him back to Butner I as a civilly-committed person without any judicial oversight, much less that which § 4248 requires. *Id.* The Attorney General had no power to do so. The separation of powers doctrine requires that judges, not the Department of Justice, determine when a person is subject to confinement. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008). The government's continued imprisonment of Mr. Timms is an unjustified and unconstitutional deprivation of his liberty interest that denies him both substantive and procedural due process. U.S. Const. amend. V.

The Attorney General's authority to shuffle an individual between penal and civil commitment without providing the detained person any

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

procedural protections is a question of first impression in this (or any other) circuit. But the Act, the BOP's internal implementing guidance, and fundamental separation of powers principles demonstrate that the Attorney General cannot move a civilly-committed person to penal custody without thereby terminating his commitment. If the Attorney General seeks to commit an individual before his release from criminal incarceration, it must afford him the Act's process, which requires judges, not prosecutors, to determine the need for confinement.

1. The Attorney General failed to comply with its statutory obligation to detain Mr. Timms in a suitable facility.

The Act states that when a district court orders an incarcerated person civilly committed, "the Attorney General *shall* place the person for treatment in a suitable facility." 18 U.S.C. § 4248(d) (emphasis added). The statute thus envisions only the one-way transfer of individuals serving criminal sentences into civil custody—not from civil commitment back to incarceration—and it distinguishes criminal incarceration from civil confinement. Because criminal and civil confinement cannot run in parallel, the Attorney General ended Mr. Timms' civil commitment by moving him to criminal incarceration.

Further, by removing Mr. Timms from Butner I and instead holding him in an unsuitable facility, the Attorney General defied its statutory obligation regarding the detention of civilly-committed persons.

a. Mr. Timms' civil commitment terminated upon his criminal incarceration.

Mr. Timms could not have remained validly committed while incarcerated because civil commitment and criminal incarceration are mutually exclusive. The two avenues for confining an individual use different means to achieve different ends with different justifications. Because these processes and results diverge, an individual cannot lawfully endure both at once. Either civil or criminal confinement must cede to the other.

Permitting a punitive criminal sentence to run alongside non-punitive civil commitment would frustrate § 4248's purpose. *See* 18 U.S.C. § 4248 (requiring a facility to provide for a committed person's "care or treatment"); *see also* 18 U.S.C. § 4247(a)(2). Criminal imprisonment is contrary to the purpose of civil commitment under the Act: Section 4248 confinement seeks to isolate SDPs to maintain the safety of others and to provide treatment for the committed person's

mental disorder.[9] This measure, like civil commitment determinations generally, is decidedly non-punitive. *E.g.*, *Addington v. Texas*, 441 U.S. 418, 428 (1979) ("In a civil commitment state power is not exercised in a punitive sense."). By contrast, criminal incarceration is *necessarily* punitive. There, sentencing reflects the desire to provide just punishment for an offense and deter future misconduct, neither of which justifies civil commitment. 18 U.S.C. § 3553(a)(2). When Mr. Timms was convicted of a criminal offense in 2016, his transfer from Butner I's civil commitment unit to Butner II's general criminal unit terminated his civil commitment.

Criminal incarceration and civil commitment also have distinct rehabilitative goals that prohibit the two detention methods from running concurrently; to permit otherwise would frustrate the essential purposes of each detention. *See United States v. Johnson*, 529 U.S. 53, 59–60 (2000); *United States v. Neuhauser*, 745 F.3d 125, 129–31 (4th Cir. 2014). In *Neuhauser*, this Court reasoned that civil confinement could not run concurrently with supervised release because that would

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

undermine supervised release's rehabilitative purpose of reintegrating individuals to society. 745 F.3d at 130–31. And in *Johnson*, the Supreme Court unanimously held that the rehabilitative goals of supervised release were distinct from those of incarceration, and thus they could not be served simultaneously. 529 U.S. at 53–54.

The government could not have continued to accomplish its stated goals of civil commitment while Mr. Timms was in criminal custody: the rehabilitative environment and specific programming that the Act required the Attorney General to provide as part of his civil commitment were unavailable to Mr. Timms while he was incarcerated. Civil commitment and supervised release were incompatible in *Neuhauser*; criminal incarceration and supervised release were incompatible in *Johnson*. Civil commitment and criminal incarceration were likewise incompatible for Mr. Timms.

b. Butner I is the only suitable facility for § 4248 commitment.

The Attorney General ended Mr. Timms' civil commitment by moving Mr. Timms from Butner I—the only federal facility at which the specifically-tailored CTP is available to civilly-committed people—to

Butner II, a penal prison. JA087, JA093. The Act requires that "the Attorney General *shall* place [a designated SDP] for treatment in a suitable facility, until . . . the person's condition is such that he is no longer sexually dangerous to others." 18 U.S.C. § 4248(d) (emphasis added). Nowhere does the statute give the Attorney General the power to put an individual's commitment on hold to transfer him to a penal—i.e., unsuitable—institution; it describes certification and discharge *without* creating an abeyance provision. Section 4248 imposes an affirmative duty on the Attorney General to relocate an SDP from criminal incarceration to a facility suitable for civil commitment and to keep him there. It failed to discharge this duty when it moved Mr. Timms out of Butner I.

A plain reading of the Act's text demands that the Attorney General confine a civilly-committed person in a "suitable facility." 18 U.S.C. § 4248(d). This Court adopts a strict interpretation of the text of civil commitment statutes. *See, e.g.*, *United States v. Wayda*, 966 F.3d 294, 307–08 (4th Cir. 2020); *United States v. Charboneau*, 914 F.3d 906, 913 (4th Cir. 2019). Once an individual has been certified as an SDP

under § 4248, the plain language of the statute, which *requires* placement in a suitable facility, attaches.

But the Attorney General did not adhere to that statutory requirement, instead transferring Mr. Timms to an unsuitable facility. Indeed, detention in Butner II, where Mr. Timms was integrated with criminal inmates, fails the BOP's own test for a program's suitability to house civilly-committed people. The BOP requires that a suitable facility separate those civilly committed from inmates serving criminal sentences.[10] To be sure, limited, incidental overlap is permissible, such as between inmates serving food to civilly-committed people in designated cafeterias. *Id.* The BOP guidelines nonetheless mandate a wall of separation to ensure there is no contact between civil and criminal detainees except "with appropriate supervision and only when necessary to afford access to services or programming." *Id.* Indeed, the federal government has assured Congress that individuals certified as SDPs pursuant to § 4248 "will be transferred" to Butner I "for treatment."[11]

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[10] *See* Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 23–25, https://www.bop.gov/policy/progstat/5394.01.pdf.

[11] U.S. Dep't of Just., Fed. Prison Sys., *FY 2022 Performance Budget* 42, https://www.justice.gov/jmd/page/file/1398306/download.

The same statutory provisions requiring the Attorney General to detain individuals in a suitable facility also forbade it from transferring Mr. Timms out of a suitable facility while continuing to designate him as an SDP. *Cf. United States v. Shawar*, 865 F.2d 856, 860–61 (7th Cir. 1989) (interpreting as absolute § 4241's requirement that the Attorney General consider the suitability of a facility for civil commitment). Once an individual is committed, the Attorney General must assess the existence of appropriate rehabilitative programs. 18 U.S.C. § 4247(i)(C). But the statute does *not* provide a means—other than instituting a new § 4248 proceeding—for recommitting an individual based solely on his prior status as a committed person after he has been pulled out of a suitable facility. The Attorney General's ultra vires action detaining Mr. Timms at its complete discretion is especially egregious because it denied him any process or judicial oversight beyond an initial, obsolete certification. The Attorney General could only have removed Mr. Timms from the suitable facility at Butner I and into an unsuitable facility if he was simultaneously released from his civil commitment.

2. Recommitting Mr. Timms following criminal sentences without affording him a § 4248 proceeding exceeded the Attorney General's constitutional and statutory authority, violating Mr. Timms' due process rights.

The Attorney General has no power under § 4248 to civilly commit an individual at its own discretion and without judicial oversight. Nowhere does the Act permit, or even contemplate, an individual's transfer except via the one-way route from criminal custody to civil commitment. And the power to order an individual's detention rests squarely in the judiciary, not the Attorney General as an agent of the executive. Mr. Timms has been forced to endure back-and-forth transfers at the whim of the Attorney General and the Bureau of Prisons. The absence of any judicial oversight of his second and third periods of civil detention constitutes a gross denial of his right to due process guaranteed by the Fifth Amendment.

The text of § 4248 is unambiguous in curtailing the Attorney General's power to initiate discharge proceedings against a civilly-committed person. The Attorney General was required to hold Mr. Timms in a suitable facility until a state agreed to "assume responsibility

for his custody, care, and treatment" or a court determined that he would not be sexually dangerous if released. 18 U.S.C. § 4248(d)–(e).

But these are not the exclusive means by which the Attorney General has sought the release of civilly-committed individuals. In the past, the district court has granted motions filed by the United States Attorney for the Eastern District of North Carolina to discharge individuals from civil commitment without holding a hearing under 18 U.S.C. § 4247(d). *See United States v. Griffis*, Docket No. 5:07-hc-02131, Doc74, 78 (E.D.N.C. Aug. 4, 2016); *see also United States v. Nelson*, Docket No. 5:13-hc-02033, Doc46 (E.D.N.C. Jul. 14, 2015). And in both cases, the committed individuals were, like Mr. Timms, discharged to serve criminal sentences.

To be sure, both Griffis and Nelson were discharged to serve state criminal sentences, but the Act provides for release to state custody only for the person's "custody, care, and treatment." 18 U.S.C. § 4248(d). And that provision was established to dovetail with analogous state laws to ensure that federally-incarcerated individuals could be removed into state civil custody if determined to be SDPs. *See United States v. Tom*, 565 F.3d 497, 508 (8th Cir. 2009). Just as the Attorney General

unconstitutionally inflated its authority by requesting dismissal of § 4248 commitment through means other than a § 4247(h) proceeding in those cases, it has done the same thing here. The § 4248 order against Mr. Timms was dismissed so that he could be incarcerated, even though no formal hearing was held. The government's decision to transfer Mr. Timms from Butner I removed him from civil commitment and ended his § 4248 order; with no commitment order in effect, the Attorney General had no authority to later detain Mr. Timms as a civilly-committed person.

Nothing in §§ 4247 or 4248 empowers the Attorney General to remove an individual from civil commitment while asserting that the commitment order against that individual remains in effect. Civilly-committed persons who are removed to serve criminal sentences are no different. The Act envisions only one circumstance under which commitment can continue after an individual's transfer out of federal civil commitment, and that is when the individual is transferred into state civil commitment under state authority. 18 U.S.C. § 4248(d)(1). To read the statute otherwise yields the confounding conclusion that Congress, in enacting § 4248, granted the Attorney General plenary authority to usurp the role of the judiciary in ordering an individual's

commitment; that the Attorney General is permitted to transfer individuals out of and back into civil commitment without having to follow the exclusive means created by Congress; and that committed persons are stripped of any Fifth Amendment right to due process before enduring such a transfer.

The Attorney General's contortion of § 4248, one which permits the indefinite detention of individuals based on a single executive officer's allegations of dangerousness and evades all judicial scrutiny of this decision, is an affront to the basic principle that judges—not agency officials—must order a person's commitment. Permitting the executive to make commitment determinations also runs afoul of the Supreme Court's decision upholding § 4248's constitutionality, where the Court reasoned that the statute was a permissible exercise of Congress's Article I power but could *not* be justified as a general, federal police power. *Comstock*, 560 U.S. at 147–48.

Sections 4247 and 4248 mandate adjudication of commitment determinations by Article III judges: doing so provides a person facing commitment of unknown duration the opportunity to refute the government's allegations and, if committed, challenge the court's

determination itself. But the Attorney General has denied Mr. Timms both these opportunities, transporting civil commitment to constitutionally-suspect footing. *See Kansas v. Hendricks*, 521 U.S. 346, 352–53 (1997) (concluding that Kansas's sexual violence commitment statute survived constitutional scrutiny in part because individuals facing commitment proceedings were afforded extensive judicial oversight). The executive's disregard for the separation of powers has worked a shocking denial of Mr. Timms' due process protections.

II. MR. TIMMS' CONDITIONS OF CONFINEMENT CLAIM IS CORRECTLY BROUGHT IN HABEAS AND ALLEGES UNCONSTITUTIONALLY PUNITIVE CONDITIONS AT BUTNER I.

Mr. Timms alleges that his conditions of confinement at Butner I violate his due process rights. A habeas petition is the appropriate, and indeed only, means to challenge these unconstitutional conditions. The district court erred in dismissing Mr. Timms' claim at this early stage because his petition stated a plausible claim.

A. The District Court Erred in Holding that Mr. Timms Could Not Challenge His Conditions of Confinement in a Habeas Petition.

The writ of habeas corpus has long encompassed conditions of confinement claims. *See, e.g.*, *Johnson v. Avery*, 393 U.S. 483, 485–87

(1969); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975) (holding that there was habeas jurisdiction over federal prisoner's conditions of confinement claim). The district court thus erred in holding that Mr. Timms could not challenge his conditions of confinement in a habeas petition. To be sure, the Court has recognized that state prisoners may bring those claims under 42 U.S.C. § 1983. *See Muhammed v. Close*, 540 U.S. 749, 750 (2004). But it has not foreclosed habeas relief for such claims, particularly for individuals in federal facilities like Mr. Timms. Habeas is the proper remedy for Mr. Timms' conditions of confinement claim.[12]

The district court's reliance on *Preiser v. Rodriguez* and its progeny is misplaced because those cases say nothing that would limit the scope of habeas. 411 U.S. 475, 494, 498–99 (1973); JA031–032. In *Preiser*, the Court held that claims at the "core" of habeas corpus—challenging the fact or duration of one's confinement—must be brought in habeas rather than under § 1983. 411 U.S. at 488–89. It explained that allowing "core" habeas claims to be brought under § 1983 would permit petitioners to

[12] Mr. Timms' case is appropriately brought under § 2241 rather than § 2255 because he is not "in custody under *sentence* of a court." 28 U.S.C. § 2255(a) (emphasis added).

bypass the state exhaustion requirements of federal habeas corpus. *Id.* at 489–90. In other words, it would "wholly frustrate explicit congressional intent" to allow petitioners to evade habeas exhaustion requirements "by the simple expedient of putting a [§ 1983] label" on it. *Id.*

Neither that reasoning nor the Court's later opinions preclude habeas relief for claims like Mr. Timms' that traditionally sounded in habeas but are outside of *Preiser*'s defined core. After all, habeas claims require habeas exhaustion and thus do not raise the same concerns about petitioners evading that requirement. Indeed, the Supreme Court has explicitly left open whether claims outside of the core of habeas—like Mr. Timms' conditions of confinement claim—can also be brought in habeas. *Id.* at 499–500 (noting that the only question before it was "the extent to which [§] 1983 is a permissible alternative to the traditional remedy of habeas corpus"); *see also Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (leaving open "the reach of the writ with respect to claims of unlawful conditions of treatment or confinement"); *Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014) (explaining that the Court has left this question open).

Other circuits have recognized that "*Preiser* imposed a habeas-channeling rule, not a habeas-*limiting* rule" and does not restrict the Great Writ in any way. *Aamer*, 742 F.3d at 1036–38; *see also Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001) (holding that § 2241 is proper to challenge "the *execution* of a federal prisoner's sentence, including . . . type of detention and prison conditions."). They have thus respected their precedent finding habeas jurisdiction over conditions of confinement claims. *See Aamer*, 742 F.3d at 1036–38 (explaining that its circuit precedent still governed); *Jiminian*, 245 F.3d at 147.

Post-*Preiser*, this Court has continued to recognize conditions of confinement claims in habeas. *See Farabee v. Clarke*, 967 F.3d 380, 395 (4th Cir. 2020) (quoting *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975)) (noting that this Court had previously found habeas jurisdiction exists to review "'the imposition of segregated confinement without elementary procedural due process and without just cause'"). This Court should join other circuits that have held that *Preiser* does not disturb prior cases on this question and hold that its decision in *McNair*, 527 F.2d at 875, provides habeas jurisdiction over Mr. Timms' conditions of confinement claim.

Even if this Court were to find that *Preiser*'s holding about the availability of § 1983 also limits habeas relief, such a finding would not apply to individuals like Mr. Timms who are in federal confinement. The *Preiser* line of cases focuses on when state prisoners' claims may be brought under § 1983 and/or habeas. Section 1983 provides a civil rights remedy only against those acting under color of *state* law. Mr. Timms is civilly committed at a *federal* facility. The *Preiser* line of cases simply does not apply to claims brought by federal inmates like Mr. Timms.

Nor would *Bivens* provide a proper remedy. There has been no remedy under *Bivens* for a Fifth Amendment conditions of confinement claim, and extending *Bivens* to this new context would be "a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). The Great Writ is ultimately meant to test the legality of detention as an "avenue of last resort." *See Timms*, 627 F.3d at 531 (4th Cir. 2010) (citing *Martin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983)). And because neither § 1983 nor *Bivens* provides a remedy for federally civilly-committed people alleging constitutional violations like Mr. Timms', habeas is his measure of last resort. Indeed, the text of § 4248 goes even further to protect this remedy,

explicitly providing that nothing in the Act prevents those who are civilly-committed "from establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. § 4247(g). Mr. Timms therefore correctly raises his claim in habeas.

B. Sua Sponte Dismissal of this Claim Was Erroneous.

The district court erred in sua sponte dismissing Mr. Timms' conditions of confinement claims. At this stage in the proceeding, the district court had to accept the allegations in Mr. Timms' habeas petition as true. *See Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) (finding that a court must take factual allegations in the complaint to be true before dismissing on an issue of law). Mr. Timms has stated a Fifth Amendment claim that he has been placed in punitive conditions because he has refused to participate in what the BOP describes as "voluntary" treatment at Butner I. JA017. Civilly-committed people like Mr. Timms are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Matherly v. Andrews*, 859 F.3d 264, 274 (2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982)) (holding that the due process pre-trial detainee standard applies to claims brought by

civilly-committed people). Under *Bell v. Wolfish*, conditions are unconstitutional if they either (1) are explicitly imposed for the purpose of punishment and not merely incident to another legitimate government purpose, or (2) do not have an alternative rationale such that a punitive purpose can be inferred. 441 U.S. 520, 538 (1979).

Mr. Timms has plausibly alleged that he is being punished for choosing not to participate in the CTP at Butner I. BOP policy says that participation in the CTP is "voluntary,"[13] but those who refuse to participate in treatment are punished. They are "housed in a separate unit, refused portions of privileges allowed to persons participating in treatment, [and] forced to wear uniforms, where treatment participants are not." JA017. This states a plausible claim that these conditions were imposed to punish Mr. Timms. In dismissing, the district court cited to *Timms v. Holland*, where it had dismissed an earlier conditions-of-confinement claim that Mr. Timms brought. No. 5:17-HC-2113-BO, 2019 BL 349778, at *3 (E.D.N.C. Mar. 28, 2019). But that case did not address the allegations Mr. Timms raised in this petition that he is being

[13] *See* Fed. Bureau of Prisons, *Program Statement 5394.01: Certification and Civil Commitment of Sexually Dangerous Persons*, 20, https://www.bop.gov/policy/progstat/5394.01.pdf.

punished for opting not to participate in the voluntary CTP. *See id.* (addressing a "blanket argument that the BOP is implementing the Adam Walsh Act in an unconstitutional manner by subjecting civil committees to the same regulations and policies as [sentenced] prisoners").

The district court erred in sua sponte dismissing Mr. Timms' claim at this early stage without any proffered "alternative rationale" from the government and without the opportunity for any discovery about the government's reasons for its treatment of Mr. Timms. The government did not enter an appearance in the district court, let alone offer a reason for subjecting Mr. Timms to punitive conditions. *Bell* grants deference to prison administrators, *see Matherly*, 859 F.3d at 275, but it is impossible to grant that deference without a proffered non-punitive "rationale" for punitive conditions. 441 U.S. 520 at 538–39. The district court thus erred in sua sponte dismissing Mr. Timms' claim that the conditions in which he is being held are for a punitive purpose.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Mr. Timms' habeas petition and remand for further proceedings.

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Court-Appointed Amicus in Support of Appellant Gerald Timms

February 27, 2023

STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Local Rule 34(a). This case presents an important question about the judicial process required under 18 U.S.C. § 4248 to transfer a civilly-committed person to criminal incarceration and then back to civil commitment. Furthermore, this case presents the question of whether a civilly-committed person can challenge the conditions of their confinement through a 28 U.S.C. § 2241 habeas petition. The answers to these questions have significant implications for Mr. Timms and similarly situated individuals, and oral presentation would assist this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on February 27, 2023, a copy of Amicus's Brief was served on counsel for Appellee via the Court's ECF system and on Appellant Gerald Timms at the following address:

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