No. 22-6338

United States Court of Appeals for the Fourth Circuit

GERALD TIMMS,
Petitioner-Appellant

v.

ATTORNEY GENERAL,
Respondent-Appellee.

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

RESPONSE BRIEF OF THE U.S. ATTORNEY GENERAL

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STATEMENT OF JURISDICTION

Petitioner-Appellee Gerald Timms ("Petitioner") invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 2241. The district court entered a final judgment dismissing his application for a writ of habeas corpus on March 11, 2022. J.A. 32–33. Petitioner filed a timely notice of appeal on March 24, 2022. J.A. 34. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES[1]

1. The district court correctly held that a subsequent criminal conviction does not discharge a sexually dangerous person from civil commitment under 18 U.S.C. § 4248.

2. The district court correctly held that a sexually dangerous person committed under 18 U.S.C. § 4248 must exhaust available remedies in the commitment action prior to seeking habeas relief.

3. The district court properly dismissed this § 2241 action *sua sponte* pursuant to its habeas screening authority in 28 U.S.C. § 2243.

4. The district court correctly held that conditions-of-confinement claims are not cognizable in a habeas action.

5. The district court correctly held, in the alternative, that Petitioner failed to state a conditions-of-confinement claim because Petitioner did not plead facts plausibly suggesting that his conditions of confinement are unconstitutional.

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[1] Petitioner filed an informal brief prior to appointment of amicus counsel. Respondent-Appellee ("Respondent") responds only to the issues raised in amicus counsel's brief and respectfully reserves the right to respond to any issues amicus counsel has not raised. To the extent the Court feels there is potential merit to any such issue, Respondent respectfully requests that the Court order formal briefing on such issue to allow a response.

Third-year Duke University law student Marie Cepeda Mekosh assisted with drafting Respondent's brief.

STATEMENT OF THE CASE

The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 ("the Adam Walsh Act" or "the Act") authorizes the civil commitment of an individual to the "custody of the Attorney General" within the Federal Bureau of Prisons ("BOP") upon a district court determination that he is a "sexually dangerous person." *See* 18 U.S.C. § 4248; *id.* at § 4247(a)(5); *see also United States v. Savage*, 737 F.3d 304, 309 (4th Cir. 2013) (noting that, "for purposes of § 4248, there is no substantive difference between vesting legal custody in the Attorney General and legal custody in the BOP"). The United States initiated a civil commitment action against Petitioner under the Adam Walsh Act in 2008. *See United States v. Timms*, No. 5:08-hc-02156-BO (E.D.N.C.) (i.e., the "commitment action"); J.A. 38–67.

In 2012, the commitment court determined Petitioner was a "sexually dangerous person" under the Act and civilly committed him to the Attorney General's custody. J.A. 83. In the intervening years, Petitioner has been criminally prosecuted twice while remaining subject to the § 4248 civil commitment order. J.A. 150; J.A. 195. Most recently in February 2023, after a civil commitment hearing during which both Petitioner and Respondent introduced evidence, and Petitioner was represented by counsel, the

commitment court found that Petitioner was still a sexually dangerous person and could not be discharged from civil commitment under the Act. S.A. 9–21.

In Petitioner's current habeas proceeding under 28 U.S.C. § 2241—one of the many collateral attacks to his civil commitment he has pursued since 2008, *see* S.A. 146 & S.A. 163—Petitioner contends that he is civilly committed under the Adam Walsh Act in violation of the Due Process Clause and subjected to unconstitutional conditions of the confinement.

A. Statutory Background

In 2006, Congress enacted the Adam Walsh Act "to protect children from sexual exploitation and violent crime," "address the growing epidemic of sexual violence against children," and "address loopholes and deficiencies in existing laws" intended to protect children. H.R. Rep. No. 109-218 (Pt. 1) at 20 (2005). As one means of addressing these concerns, the Act amended and supplemented the longstanding provisions at chapter 313 of Title 18 that provide for the civil commitment of various types of mentally ill persons in federal custody. Pub. L. No. 109-248, Title III, § 302, 120 Stat. 618 (codified at 18 U.S.C. § 4248, and amending §§ 4241, 4247).[2] Accordingly, the Act added 18 U.S.C. § 4248,

[2] The statutory scheme for federal civil commitment codified at Chapter 313 dates back to the 1940s. *See* Act of Sept. 7, 1949, Pub. L. No. 81-285, ch. 535, 63 Stat. 686 (codified originally at 18 U.S.C. §§ 4244-48); Act of June 25,

authorizing the federal government to seek the civil commitment of "sexually dangerous person[s]" who are completing terms of imprisonment in BOP custody.

Under the Act, a "sexually dangerous person" is "a person who has engaged in or attempted to engage in sexually violent conduct or child molestation" and who "suffers from 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). Relevant to this appeal, a person civilly committed under § 4248 may not be discharged from the Attorney General's custody unless and until (1) "he will not be sexually dangerous to others if released unconditionally," or (2) "he will not be sexually dangerous to others if [conditionally] released under a prescribed regimen of medical, psychiatric, or psychological care or treatment." 18 U.S.C. § 4248(e).

B. Factual and Procedural History

Petitioner was convicted in 1988 of second-degree murder and sexual battery in the State of Florida. J.A. 71. The evidence supporting the murder charge showed that, during consensual sex with the victim, Petitioner pulled out a knife and began cutting off the victim's clothing. J.A. 71. "When he cut the

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1948, Pub. L. No. 80-772, ch. 313, 62 Stat. 855 (codified, as amended, at 18 U.S.C. §§ 4241-43).

victim's abdomen, causing her to bleed, she struggled." J.A. 71. So Petitioner hit the victim in the chest and throat. J.A. 71. Believing she was unconscious, Petitioner continued to have vaginal sex with her until ejaculation. J.A. 71. He then flipped the victim over and had anal sex with her until her body went limp and Petitioner realized she was deceased. J.A. 71.

The evidence supporting the sexual battery charge showed that, 17 days after the murder, Petitioner drove a female acquaintance of the murder victim to a wooded area, grabbed her by the throat, forced her to take her pants off, vaginally raped her, forced her to perform oral sex, threatened to kill her, and told her that he had been with the murder victim when she died. J.A. 71. Petitioner was sentenced to two concurrent sentences of 15 years' imprisonment. J.A. 70–72.

While serving his state imprisonment for the murder and sexual battery in Florida, Petitioner solicited child pornography from an undercover law enforcement officer via the mail. J.A. 70–72. He was convicted of federal child pornography charges in 2001 and sentenced to a 100-month term of imprisonment in BOP. J.A. 70–72. After lengthy challenges to the Adam Walsh Act's constitutionality, which the U.S. Supreme Court upheld in *United States v. Comstock*, 560 U.S. 126 (2010), the commitment court found Petitioner was a "sexually dangerous person" and committed him to the Attorney General's

custody under § 4248 on October 18, 2012. J.A. 82–83 ("These [expert] opinions, coupled with Mr. Timms' continued violations while incarcerated, his refusal to accept responsibility for his past conduct, and his lack of sex offender treatment persuade the Court that Mr. Timms will be unable to control his behavior and that he is a sufficiently distinguishable dangerous sex offender."). On August 9, 2013, this Court affirmed the commitment court's denial of Petitioner's motion for a new hearing. *United States v. Timms*, 537 F. App'x 265, 267 (4th Cir. 2013) (per curiam). The commitment court has received annual forensic reports on Petitioner's condition since October 15, 2013, as required under the Act. *See* J.A. 53–64; *see also* 18 U.S.C. § 4247(e)(1)(B) (mandating annual reports).[3]

While in the Attorney General's custody, on February 23, 2015, Petitioner possessed a prohibited object (i.e., a shank) in violation of 18 U.S.C. § 1791(a)(2). J.A. 136. On May 27, 2015, a federal grand jury sitting in the Eastern District of North Carolina returned a one-count indictment charging Petitioner with that federal crime in *United States v. Timms*, 5:15-CR-00169-BO.

[3] These reports were filed in the commitment court record on October 15, 2013 (D.E. 152); October 10, 2014 (D.E. 172); October 16, 2015 (D.E. 204); October 19, 2016 (D.E. 222); November 2, 2017 (D.E. 238); October 18, 2018 (D.E. 246); November 4, 2019 (D.E. 247); November 18, 2020 (D.E. 251); November 3, 2021 (D.E. 252); and November 10, 2022 (D.E. 282). J.A. 53–64.

J.A. 117–135. The matter was allotted to the same district judge presiding over Petitioner's § 4248 commitment action. J.A. 136. The United States filed writs of habeas corpus to produce Petitioner for his criminal proceedings. J.A. 118 (writ); J.A. 122 (same); J.A. 124 (same); J.A. 128 (same); J.A. 130 (same). Petitioner waived his right to a jury pursuant to Fed. R. Crim. P. 23(a) and was convicted after a day-long bench trial on May 11, 2016. S.A. 22–23.

While Petitioner was awaiting criminal sentencing, on July 14, 2016, the commitment court conducted a § 4248 review hearing under 18 U.S.C. § 4247(h). J.A. 59. Petitioner was represented by counsel. J.A. 59. The commitment court received evidence and expert testimony. J.A. 59; S.A. 1–8. On July 25, 2016, the commitment court concluded Petitioner had not met his burden to show by a preponderance of the evidence he was no longer sexually dangerous to others and should be discharged, whether conditionally or unconditionally. S.A. 1–8.

Then, on August 9, 2016, the district court in the criminal proceedings sentenced him to a 30-month term of imprisonment. J.A. 151. Petitioner appealed both the July 2016 civil commitment order and the August 2016 criminal judgment. On April 10, 2017, this Court affirmed the civil commitment order. *United States v. Timms*, 684 F. App'x 341, 342 (4th Cir. 2017). And on

April 24, 2017, this Court also affirmed Petitioner's criminal judgment. *United States v. Timms*, 685 F. App'x 285 (4th Cir. 2017).

Thereafter, on August 15, 2017, Petitioner filed an "emergency motion for clarification of whether civil commitment runs with criminal sentence and to order [his] immediate release from imprisonment" in the commitment action. J.A. 96–105. The commitment court summarized Petitioner's argument as, "[a]t bottom, Mr. Timms contends that his commitment under § 4248 ceased when he was criminally convicted and serving an active criminal sentence, and that, upon expiration of his criminal sentence . . . , and in the absence of a new certification filed under § 4248(a), he is no longer being lawfully held in the custody of the Bureau of Prisons." J.A. 114. The commitment court denied the motion and Petitioner did not file a notice of appeal. J.A. 112–116; J.A. 62.

On October 17, 2019, a federal grand jury sitting in the Eastern District of North Carolina again indicted Petitioner for possessing prohibited objects on May 16, 2019 (Count 1), and on September 19, 2019 (Count 2), in violation of 18 U.S.C. § 1791(a)(2). J.A. 177–178; *see United States v. Timms*, 5:19-cr-00428-FL. The United States again filed a writ of habeas corpus to produce Petitioner for the 2019 criminal proceedings. J.A. 157. Petitioner filed several motions turning on his status as a § 4248 civilly committed person and arguing he could not be criminally prosecuted. *See, e.g.*, S.A. 24–27. The court denied the motions.

J.A. 163. A jury convicted Petitioner on both counts and the district court sentenced him to a 36-month term of imprisonment. J.A. 195–203. On March 3, 2021, this Court affirmed the judgment in the 2019 criminal proceedings. *United States v. Timms*, 844 F. App'x 658, 659 (4th Cir. 2021).

After this Court's March 3, 2021 decision, Petitioner filed a *pro se* application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 that is at issue in this appeal. J.A. 5–11. The § 2241 action named the U.S. Attorney General as the Respondent[4] and was assigned to the same district judge presiding over the long-running commitment action. J.A. 5; J.A. 33; J.A. 83. While that habeas application was pending, Petitioner also requested a § 4248 review hearing in accordance with 18 U.S.C. § 4247(h) in the commitment action. J.A. 64–66. The parties engaged in discovery in the commitment action. J.A. 65–66. Petitioner, however, did not raise any of his instant constitutional challenges in the commitment action. J.A. 63–66. On January 18, 2023, the commitment court received evidence and expert testimony at a hearing. J.A. 66. On February 3, 2023, the commitment court concluded that Petitioner had failed to demonstrate by a preponderance of the evidence that he was not sexually

[4] Respondent notes that "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004).

dangerous and could be discharged, whether conditionally or unconditionally. J.A. 66; S.A. 9–21. At no time has the commitment court entered an order discharging Petitioner from civil commitment under 18 U.S.C. § 4248(e). J.A. 38–66.

Petitioner's § 2241 habeas application asserts 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." Amicus Br. 8–9. The district court screened the § 2241 action under 28 U.S.C. § 2243. J.A. 28. As the habeas application clearly demonstrated that Petitioner was not entitled to relief, the district court *sua sponte* dismissed this matter for failure to state a claim without seeking a response. J.A. 32. The district court concluded (1) Petitioner failed to exhaust his available remedies before challenging the constitutionality of his § 4248 civil commitment; (2) a subsequent criminal conviction does not discharge a sexually dangerous person from a civil commitment order under § 4248; (3) conditions-of-confinement claims are not cognizable under habeas; and (4) even assuming Petitioner could challenge his conditions of confinement under § 2241, he nevertheless failed to state a claim. J.A. 31–32.

SUMMARY OF ARGUMENT

1. Petitioner is lawfully committed to the Attorney General's custody pursuant to § 4248 and has suffered no deprivation of due process because a subsequent criminal conviction does not discharge a sexually dangerous person from a civil commitment order under § 4248. First, the statute's plain language makes clear that a subsequent criminal conviction does not terminate a civil commitment. The only relevant avenues specified in the statute to end a person's civil commitment to the Attorney General's custody is through a certificate filed by the warden or a court order finding the person is no longer sexually dangerous to others, either unconditionally or subject to a prescribed regimen of treatment. *See* 18 U.S.C. § 4248. Second, the statute's legislative history confirms this plain meaning. Congress's primary concern in enacting § 4248 was to protect the public from sexually dangerous persons who would commit further sexual misconduct if released. Discharging a person from § 4248 civil commitment absent a finding that the person is no longer sexually dangerous undermines the statute's purpose. H.R. Rep. No. 109-218, at 5 (2005). Third, Petitioner's interpretation leads to alternative absurd results, as it would either (a) prohibit the Attorney General from prosecuting crimes by sexually dangerous persons until they were deemed no longer sexually dangerous under § 4248, or (b) allow a civilly committed person to unilaterally end his commitment under § 4248

simply through commission of a criminal offense. *See, e.g., United States v. Rendelman*, 641 F.3d 36, 45 (4th Cir. 2011).

2. An individual seeking habeas relief under 28 U.S.C. § 2241 must first exhaust available remedies. *Timms v. Johns*, 627 F.3d 525, 531 (4th Cir. 2010). Indeed, this Court has held that a person committed under 18 U.S.C. § 4248 must raise constitutional challenges in the commitment action. *Id.* Petitioner has not raised his constitutional challenges in his commitment action and therefore has failed to exhaust his available remedies. *Id.*

3. The district court may dismiss a habeas action *sua sponte* under its screening authority set forth in 28 U.S.C. § 2243 without seeking a response. As "it appear[ed] from the application" that Petitioner was not entitled to relief, the district court properly dismissed this § 2241 action before Respondent noted an appearance below. *Id.*

4. Petitioner cannot assert a conditions-of-confinement claim in an application for a writ of habeas corpus under § 2241. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Wilborn v. Mansukhani*, 795 F. App'x 157, 164 (4th Cir. 2019) (per curiam). Thus, the district court properly dismissed Petitioner's conditions-of-confinement cause of action for failure to state a claim.

5. And finally, assuming *arguendo* conditions-of-confinement claims are cognizable in habeas, Petitioner's assertion he is being unconstitutionally

punished is an unsupported legal conclusion, which the Court is not obligated to accept. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Petitioner does not allege any facts plausibly indicating his conditions were "imposed with an expressed intent to punish." *Matherly v. Andrews*, 859 F.3d 264, 275 (4th Cir. 2017); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Thus, Petitioner has failed to sufficiently plead a constitutional claim regarding the conditions of his confinement. This Court should affirm the district court's judgment in its entirety.

STANDARD OF REVIEW

The dismissal of a habeas petition is reviewed de novo. *Gordon v. Braxton*, 780 F.3d 196, 200 (4th Cir. 2015). This Court may affirm the dismissal "on any grounds apparent from the record." *United States v. Riley*, 856 F.3d 326, 328 (4th Cir. 2017); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002).

ARGUMENT

A. The district court properly dismissed Petitioner's § 2241 habeas application challenging his § 4248 civil commitment for failure to state a claim.

The district court properly dismissed Petitioner's habeas application challenging his § 4248 civil commitment for failure to state a claim. First, consistent with the plain language of 18 U.S.C. § 4248, Congress's purpose in enacting the statute, and the statute's legislative history, a subsequent criminal conviction does not discharge a sexually dangerous person from civil commitment under § 4248. Second, Petitioner failed to exhaust other available remedies before challenging his civil commitment through a habeas action. Third, the Court was empowered to *sua sponte* dismiss Petitioner's habeas action pursuant to 28 U.S.C. § 2243 without seeking a response.

1. A subsequent criminal conviction does not discharge a sexually dangerous person from civil commitment under 18 U.S.C. § 4248.

The Adam Walsh Act's plain language makes clear that a subsequent criminal conviction does not discharge a sexually dangerous person from civil commitment. In cases involving statutory interpretation, the court "begins with the text of the statute." *Chesapeake Ranch Water Co. v. Bd. of Comm'rs*, 401 F.3d 274, 279 (4th Cir. 2005); *United States v. Searcy*, 880 F.3d 116, 121 (4th Cir. 2018).

Here, the statutory text provides two relevant methods to initiate discharge of a § 4248 civilly committed person from the Attorney General's custody beyond a writ of habeas corpus. 18 U.S.C. §§ 4248 & 4247(g). First,

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

18 U.S.C. § 4248(e). "If, after the hearing, the court finds by a preponderance of the evidence" that "he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged." *Id.* at § 4248(e)(1). Alternatively, "[i]f, after the hearing, the court finds by a preponderance of the evidence" that "he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall order that he be conditionally discharged under a prescribed regimen of [care]. . . ." *Id.* at § 4248(e)(2)(A) & (B).

Second, "[r]egardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of [18 U.S.C. § 4248(e)], counsel for the person or his legal guardian may, at any time

during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility." 18 U.S.C. § 4247(h).[5]

Petitioner's 2016 and 2020 federal criminal convictions did not discharge him from civil commitment under § 4248 because they did not meet any of the plain statutory requirements under the Act. First, the BOP Director did not file a certificate stating he is no longer sexually dangerous to others. *See* 18 U.S.C. § 4248(e)(1)–(2); J.A. 41–66. Second, the commitment court did not order his discharge, whether conditionally or unconditionally. J.A. 41–66. Rather, the commitment court conducted two review hearings—in 2016 and 2023—and concluded that Petitioner remains sexually dangerous to others and may not be discharged. *See* 18 U.S.C. § 4247(h); J.A. 59 (D.E. 217); J.A. 66 (D.E. 291). Therefore, Petitioner's subsequent federal criminal convictions did not result in his discharge from § 4248 civil commitment. He remains subject to a § 4248 civil commitment order.

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[5] *N.B.*: The Act also provides "[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment." 18 U.S.C. § 4248(d). That provision is not relevant here because no appropriate state official has been willing to assume responsibility for Petitioner's "custody, care, and treatment." J.A. 41–66.

Next, the Adam Walsh Act's legislative history and purpose supports this plain reading of § 4248—that a civilly committed person may be discharged from civil commitment only upon a finding that he is no longer sexually dangerous to others. Courts may use legislative history to reinforce a statute's plain meaning when a statute is unambiguous. *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (using "legislative history [to] reinforce[] the plain meaning of the statutory text"). In codifying the civil commitment portion of the Adam Walsh Act, Congress demonstrated a concern that existing civil commitment laws were inadequate. Legislative history makes clear that the Act was designed to be a "comprehensive bill to address the growing epidemic of sexual violence against children" and to "address loopholes and deficiencies in existing laws." H.R. Rep. No. 109-218, at 20 (2005). Section 4248 was one element of that effort, with the stated purpose of "establish[ing] procedures for civil commitment of Federal sex offenders who are dangerous to others because of serious mental illness, abnormality or disorder." *Id.* at 22. Congress was especially concerned about sexually dangerous persons who would continue to engage in sexual misconduct upon release from custody without proper treatment. *Id.* at 29. Therefore, Congress expanded the existing civil commitment procedures to cover a broader group of offenders who would be sexually dangerous to others, such as by expanding the

types of mental conditions that make one eligible for commitment and removing the requirement that individuals have a prior hospitalization. *Id.*

In light of the Congressional concerns motivating § 4248, allowing discharge from § 4248 civil commitment without a finding that the civilly committed person is no longer sexually dangerous to others would be inconsistent with legislative intent. Therefore, the legislative history of § 4248 confirms the plain language of the statute, which in Petitioner's case allows discharge from civil commitment only through a court order the offender is no longer sexually dangerous to others, whether unconditionally or conditionally with a prescribed treatment regimen. *See* 18 U.S.C. § 4248(e). Congress's clear intent to protect the public would be flouted if an individual could circumvent the discharge process merely by committing another federal offense. Because a criminal conviction does not constitute a finding regarding sexual dangerousness, a subsequent criminal conviction does not discharge the sexually dangerous person from § 4248 commitment.

Finally, Petitioner's interpretation of § 4248 would lead to absurd results. When it is possible for a court to construe a statute to avoid an absurd result, the court should choose the more sensible interpretation. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as

here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." (footnote omitted)); *Rendelman*, 641 F.3d at 45 ("[W]hen possible, we construe a statute to avoid an absurd result.").

Petitioner argues that civil commitment and criminal incarceration are "mutually exclusive." Amicus Br. 25. In other words, Petitioner contends a § 4248 civilly committed person cannot be imprisoned for a federal criminal sentence without first being discharged from civil commitment. *See* Amicus Br. 30. Even more curiously, Petitioner argues that prosecuting him for his own criminal conduct while in the Attorney General's custody amounts to an "unconstitutional[] inflat[ion of] [the Attorney General's] authority" because the Attorney General in effect achieved "dismissal of § 4248 commitment through means other than a § 4247(h) proceeding." Amicus Br. 33.

Petitioner's argument would produce two alternative and equally absurd results. First, taken to its logical conclusion, the Attorney General would be prohibited from prosecuting crimes that are committed within his custody without first obtaining a court order that the offender is no longer sexually dangerous to others. *See* 18 U.S.C. § 4248(d)–(e). Therefore, civilly committed persons who remain sexually dangerous to others could engage in criminal conduct with impunity, and the Attorney General essentially would be barred

from prosecuting such conduct. In a case like Petitioner's—where Petitioner has long refused treatment to address his sexual dangerousness, and his 2020 criminal conviction included allegations that he used the weapon to threaten others—this result would be particularly alarming. *See* J.A. 17; J.A. 82 (2012 commitment order noting refusal of sex offender treatment); S.A. 3 (2023 commitment order noting continued refusal). Nothing in the Adam Walsh Act or its legislative history suggests that Congress contemplated, much less intended, such a result. Although the criminal convictions for Petitioner's behavior while in the Attorney General's custody were not directly sexual in nature, J.A. 136, J.A. 177, such an interpretation could even go so far as to allow a sexually dangerous person to commit further sexual crimes in civil commitment, while tying the hands of the Attorney General. This result would directly undermine Congress's intent to prevent sexually dangerous persons from presenting a sexual danger to others.

Second, Petitioner's interpretation that a criminal conviction discharges a person from § 4248 commitment would allow him to unilaterally discharge himself from civil commitment at any time simply by committing a crime. Congress was clear in specifying how to initiate discharge from § 4248 civil commitment—through a certificate from the facility's director that the person is no longer sexually dangerous, or filing a motion for a hearing with the

commitment court. 18 U.S.C. §§ 4248(e) & 4247(h). Congress was also clear on how often a civilly committed person is entitled to a hearing—every 180 days. *See* 18 U.S.C. § 4247(h) ("[N]o such motion [for a discharge hearing] may be filed within one hundred and eighty days of a court determination that the person should continue to be committed."). Allowing a sexually dangerous person to force his discharge from § 4248 commitment by committing a crime would undermine Congress's carefully crafted procedure and create an alternate path to discharge beyond what Congress authorized. The Court should avoid such "judicial legislation," *see Armstrong*, 305 U.S. at 333, which would create perverse incentives that encourage criminal behavior.

Finally, Petitioner's concern about the lack of "judicial oversight" over the transfer of a § 4248 civilly committed person to criminal confinement is overstated. Amicus Br. 23. Petitioner urges that "judges, not prosecutors, [must] determine the need for confinement." Amicus Br. 24. Yet, federal judges have repeatedly determined the need for civil or criminal confinement at every stage of Petitioner's proceedings. To claim that Petitioner's transfers among BOP facilities has been without judicial oversight is at best misleading and at worst blatantly incorrect. Numerous district court judges and this Court have repeatedly ordered and/or reviewed the appropriateness of Petitioner's civil commitment and two terms of criminal confinement. *See Timms*, 627 F.3d at 532

("[N]or has the government detained Timms while depriving him of judicial oversight."); S.A. 146 (noting, in a March 2019 order dismissing one of Petitioner's § 2241 actions by the same district judge overseeing Petitioner's commitment action, that Petitioner "has filed numerous [i.e., 11] civil rights complaints and habeas petitions in [the Eastern District of North Carolina], none of which stated a viable claim"); S.A. 163 (similar summary, April 2020 order denying another one of Petitioner's § 2241 actions). Indeed, this Court alone has written at least nine opinions concerning Petitioner. *See, e.g.*, *Timms*, 844 F. App'x at 658 (2021); *Timms v. Sullivan*, 824 F. App'x 184 (4th Cir. 2020) (per curiam); *Timms v. Holland*, 776 F. App'x 809 (4th Cir. 2019) (per curiam); *Timms*, 685 F. App'x at 285 (2017); *Timms*, 684 F. App'x at 341 (2017); *Timms v. Johns*, 575 F. App'x 172 (4th Cir. 2014) (per curiam); *Timms*, 537 F. App'x at 265 (2013); *United States v. Timms*, 664 F.3d 436 (4th Cir. 2012); *Timms*, 627 F.3d at 525 (2010). And, forensic reports on Petitioner's condition have been submitted to the commitment court annually since October 15, 2013. *See* J.A. 53–64; *supra* footnote 3; 18 U.S.C. § 4247(e)(1)(B) (mandating annual reports). Every annual report has concluded that Petitioner remains sexually dangerous to others. In sum, Petitioner has received ample due process; he has suffered no constitutional deprivation in his continued commitment under the Adam Walsh Act.

2. Petitioner failed to exhaust his available remedies prior to seeking habeas relief.

An individual seeking habeas relief under 28 U.S.C. § 2241 first must exhaust available remedies. *Timms*, 627 F.3d at 531. A writ of habeas corpus is an "extraordinary remedy typically available only when the petitioner has no other remedy." *Id.* (quoting *Archuleta v. Hedrick*, 365 F.3d 644, 648–49 (8th Cir. 2004)). Habeas "is the avenue of last resort." *Id.* (quoting *Martin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983)). Consequently, an individual applying for a writ of habeas corpus under § 2241 must first exhaust available remedies before seeking habeas relief. *Timms*, 627 F.3d at 531 & n.5 ("[T]he general rule of exhaustion has been extended to federal detainees."); *Timms*, 664 F.3d at 442 ("In *Timms I*, we also reversed the district court's judgment, holding that habeas corpus relief was not appropriate because Timms failed to exhaust his remedies in the § 4248 commitment proceeding prior to pursuing the writ."); *McClung v. Shearin*, 90 F. App'x 444, 445 (4th Cir. 2004) (per curiam); *see also Blakney v. United States*, No. 22-6751, 2022 WL 4482062, at *1 (4th Cir. Sept. 27, 2022) (per curiam) (affirming dismissal of § 2241 petition because person civilly committed under 18 U.S.C. § 4246 "ha[d] not exhausted available remedies through the commitment proceeding"); *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010); *Richmond v. Scibana*, 387 F.3d 602, 604 (7th Cir. 2004); *Carmona*

v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001); *Asare v. U.S. Parole Comm'n*, 2 F.3d 540, 544 (4th Cir. 1993); *Little v. Hopkins*, 638 F.2d 953, 445 (6th Cir. 1981); *Banks v. Forbes*, No. 5:17-HC-2102-BO, 2017 WL 5640828, at *2 (E.D.N.C. Aug. 28, 2017) ("However, a civilly committed person must exhaust all available remedies before pursuing relief under § 2241."), *aff'd*, 707 F. App'x 771 (4th Cir. 2017).

When, as here, the relevant statute provides a procedure for the remedy sought, the petitioner first must follow that procedure prior to petitioning for habeas relief. *See Timms*, 627 F.3d at 531 (favorably citing *Archuleta*, 365 F.3d at 648–49, as an example of how the civil commitment procedures under 18 U.S.C. § 4243 provided an adequate procedure). And, as an "inmate" of a BOP facility, Petitioner must also exhaust his remedies under the BOP Administrative Remedy Program ("ARP") prior to seeking habeas relief.[6] *See* 28 C.F.R. § 541.10 *et seq.*; 28 C.F.R. § 542.10(b) (applying to "all inmates in institutions operated by the Bureau of Prisons"); 28 C.F.R. § 500.1(c) (defining "inmate" broadly to include civilly committed persons); *Williams v. Carvajal*, __ F.4th __, 2023 WL 2669652, at *4 (4th Cir. 2023) (describing ARP exhaustion process);

[6] *N.B.*: Petitioner is not subject to the exhaustion requirements of the Prison Litigation Reform Act of 1995 ("PLRA") because he is not a "prisoner" as defined in the PLRA. *See* 42 U.S.C. § 1997e(h).

Smith v. Bogan, 31 F. App'x 152 (5th Cir. 2001) (per curiam) (requiring exhaustion of BOP administrative remedies for a § 4246 civilly committed person).

While Petitioner filed a motion on these same grounds in the commitment action in 2017 relating to his 2016 conviction, he did not appeal the commitment court's order denying same. *See* J.A. 31; J.A. 61–62; J.A. 112–116. Nor did he pursue the argument in the commitment action following his 2020 conviction. J.A. 63–66; S.A. 9–21. Furthermore, at the time he filed the instant habeas petition, Petitioner had not filed any motion under § 4247(h) for a hearing in his commitment action. *See* J.A. 63–64. Since he filed this habeas action, the commitment court reviewed Petitioner's § 4248 commitment during a January 2023 hearing in which Petitioner was represented by counsel. J.A. 63–66; S.A. 9–21. Petitioner has chosen not to raise any challenge to § 4248's legality in the commitment action, even though this Court has confirmed—in prior opinion involving Petitioner himself—that he has "an adequate remedy before an Article III court to both legally and factually contest his detention under § 4248" in his commitment action. J.A. 63–66; S.A. 9–21; *Timms*, 627 F.3d at 533 & n.7 ("Because Timms has failed to exhaust the alternative remedies available for review of his detention in the pending Commitment Action and has failed to demonstrate exceptional circumstances sufficient to excuse his failure,

the district court should have refrained from exercising jurisdiction over Timms' habeas petition.").

Although Petitioner argues that further proceedings in the commitment action would be unavailing because "the only relief contemplated by § 4248 is a court order finding that the committed person is no longer sexually dangerous," Amicus Br. 20, the simple fact is he has not tried. J.A. 63–66; S.A. 9–21. This Court has confirmed that a § 4248 civilly committed person may raise constitutional challenges in a commitment action. *Timms*, 627 F.3d at 533. Rather than follow this Court's clear instructions, Petitioner seeks to "except his case from the normal rule of exhaustion," as he has done previously. *Id.* at 532. Petitioner's case is not exceptional. He cannot show he has no other remedy for seeking release from custody, and thus he is required to exhaust prior to seeking habeas relief.

3. The district court properly dismissed the petition *sua sponte* under 28 U.S.C. § 2243.

The district court properly dismissed Petitioner's habeas action *sua sponte* through its screening function under 28 U.S.C. § 2243. J.A. 28 ("This matter is before the court for an initial review under 28 U.S.C. § 2243."). When "it appears from the application that the applicant or person detained is not entitled

[to relief]," the court reviewing a habeas application is not required to seek a response. 28 U.S.C. § 2243. Therefore, the district court did not err in *sua sponte* dismissing this action without seeking a response. *White v. Stephens*, No. 5:10-HC-2010-D, 2010 WL 7765704, at *1 (E.D.N.C. Feb. 8, 2010) (dismissing § 2241 petition *sua sponte* under 28 U.S.C. § 2243 for failure to exhaust), *aff'd*, 396 F. App'x 911 (4th Cir. 2010) (affirming *sua sponte* dismissal, as there was "no reversible error in the court's conclusion that White failed to exhaust administrative remedies before filing his § 2241 petition and failed to demonstrate that exhaustion was futile"); *see also Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) ("Under this provision [28 U.S.C. § 2243], the District Court has a duty to screen out a habeas corpus petition which should be dismissed for lack of merit on its face.").

Petitioner's citation to *United States v. Muhammad*, 16 F.4th 126 (4th Cir. 2021) and cases applying *Muhammad* to argue otherwise is not persuasive. Amicus Br. 21–22. *Muhammad* addresses motions for compassionate release under Section § 3582(c)(1)(A) of the First Step Act of 2018, not petitions for habeas relief. *See Muhammad*, 16 F.4th at 129 ("The text of § 3582(c)(1)(A) plainly provides that a defendant may file a motion [for compassionate release] on his own behalf 30 days after the warden receives his request, regardless of whether the defendant exhausted his administrative remedies.").

Compassionate release motions are not subject to a screening procedure such as 28 U.S.C. § 2243, which is contained within Title 28 of the U.S. Code addressing habeas proceedings and the power of federal courts. As discussed above in Section A.2, it is well settled that a civilly committed person must exhaust alternative remedies before seeking a writ of habeas corpus under § 2241 and the screening court may dismiss for failure to exhaust. *See, e.g., Banks*, 707 F. App'x at 772 (affirming *sua sponte* dismissal of civilly committed person's § 2241 petition under § 2243 and citing *Timms*, 627 F.3d at 530); *Timms*, 824 F. App'x at 184 (affirming district court's *sua sponte* dismissal, available at S.A. 162–165, of one of Petitioner's prior § 2241 actions); *Timms*, 776 F. App'x at 810 (same, district court opinion available at S.A. 142–155). Accordingly, the district court properly dismissed Petitioner's § 2241 application *sua sponte* under § 2243.

B. The district court properly dismissed Petitioner's § 2241 habeas application challenging his conditions of confinement for failure to state a claim.

The district court properly dismissed Petitioner's conditions-of-confinement claim. Petitioner argues he is being unconstitutionally punished because, *inter alia*, he is required to wear a uniform. Amicus Br. 41. Such a claim is not cognizable under 28 U.S.C. § 2241. And, even assuming *arguendo* such a

claim were cognizable, Petitioner has not alleged any facts plausibly suggesting his conditions of confinement are unconstitutional.

1. Conditions-of-confinement claims are not cognizable in habeas under § 2241.

"[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser*, 411 U.S. at 484; *see Hill v. McDonough*, 547 U.S. 573, 579 (2006) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus.") (quoting *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam)). Challenges to "the fact of [a petitioner's] conviction or the duration of his sentence . . . fall within the 'core' of habeas corpus." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). By contrast, "constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core." *Id.*

In recent years, the Supreme Court has further observed that a purported habeas claim "that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody" would not only lie outside the "core of habeas," but would "utterly sever the writ from its common-

law roots." *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring); *see also Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (citing Justice Scalia's concurrence from *Dotson* and agreeing that there is "no case . . . in which the Court has recognized habeas as the sole remedy, *or even an available one*, where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody' ") (emphasis added); *Muhammad*, 540 U.S. at 754-755 (holding that inmate's claim was properly brought under 42 U.S.C. § 1983 because it could not be "construed as seeking a judgment at odds with his conviction or with the State's calculation of [his sentence]" and thus "raised *no claim on which habeas relief could have been granted* on any recognized theory") (emphasis added)). This view is in line with the writ's "common-law roots." *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring).

The Supreme Court has not yet decided when, if ever, habeas could properly extend to cover condition-of-confinement claims. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-1863 (2017) ("[W]e have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus."). In keeping with the writ's historical scope, however, most courts of appeals have held that claims that do not seek immediate or accelerated release from custody are not actionable in habeas. *See, e.g., Nettles v. Grounds*, 830 F.3d 922, 933 & n.9 (9th Cir. 2016) (en banc) (noting

that "[w]e have long held that prisoners may not challenge mere conditions of confinement in habeas corpus" and collecting cases); *Spencer v. Haynes*, 774 F.3d 467, 468-469 (8th Cir. 2014) (observing that "[o]ur precedent precludes conditions-of-confinement claims using the vehicle of a habeas petition," because habeas is for "challenging the validity of [one's] conviction or the length of [one's] detention" (quotation omitted)); *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013) (explaining that "§ 2241 is not the proper vehicle for a prisoner to challenge conditions of confinement"); *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035-1036 (10th Cir. 2012) (stating that "a prisoner who challenges the conditions of his confinement," including placement in a maximum-security facility, "must do so through a civil rights action"); *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (noting that habeas is limited to "[a]ttacks on the fact or duration of the confinement" and does not include "[c]hallenges to conditions of confinement"); *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (similar); *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (recognizing "habeas is the proper vehicle for presenting a claim if but only if the prisoner is seeking to 'get out' of custody in a meaningful sense" (quotation omitted)); *Carson v. Johnson*, 112 F.3d 818, 820-821 (5th Cir. 1997) (concluding that prisoner's claim challenging conditions of confinement was not actionable in habeas because "a favorable determination . . . would not

automatically entitle [him] to accelerated release") (quotation omitted). *But see Aamer v. Obama*, 742 F.3d 1023, 1036-1037 (D.C. Cir. 2014) (reaching contrary result and collecting cases).

Consistent with the majority view, within the last several years this Court has held in several unpublished decisions—including at least two involving Petitioner himself—that conditions-of-confinement claims are not cognizable in habeas proceedings. *See, e.g., Timms*, 824 F. App'x at 184 (4th Cir. 2020) (affirming district court's *sua sponte* dismissal, available at S.A. 162–165, of Petitioner's conditions-of-confinement claim asserted under § 2241); *Timms*, 776 F. App'x at 810 (4th Cir. 2019) (same, district court opinion available at S.A. 145–152); *Wilborn*, 795 F. App'x at 164 ("This case presents no basis to deviate from our previous holdings. Therefore, we conclude Wilborn's claim seeking to have the BOP reconsider where he is being housed is one that would not fall within the scope of habeas corpus."); *Rodriguez v. Ratledge*, 715 F. App'x 261, 266 (4th Cir. 2017) (per curiam) (holding that an inmate's challenge to his transfer to a maximum-security facility was "not a cognizable § 2241 claim, because th[e] petition challenge[d] the conditions of his confinement, not its fact or duration"). The *Rodriguez* Court noted that, although it had not yet "directly addressed whether a § 2241 petition may . . . be used to challenge conditions of confinement," "courts have generally held . . . § 2241 petitions are not" an

"appropriate means" of raising such challenges. *Rodriguez*, 715 F. App'x at 265–266.

Timms (2020), *Timms* (2019), *Wilborn*, and *Rodriguez* are consistent with this Court's prior resolution of similar questions. *See Braddy v. Wilson*, 580 F. App'x 172, 173 (4th Cir. 2014) (per curiam) (affirming dismissal of habeas petition where petitioner "alleged constitutional violations regarding only the conditions of his confinement and did not challenge the fact or duration of his sentence"); *Strader v. Troy*, 571 F.2d 1263, 1269 (4th Cir. 1978) (holding that a claim could not be treated "as a petition for a writ of habeas corpus" because the inmate "d[id] not assert that he [was] entitled to parole and should be released"); *Roberts v. Pegelow*, 313 F.2d 548, 549 (4th Cir. 1963) (stating that "[t]he traditional function of the writ of habeas corpus is to test the legality of the detention" and concluding that "[i]t [was] inappropriate" for the "kind of injunctive relief these petitioners seek"). Nor are this Court's prior decisions regarding habeas challenges to the imposition of segregated confinement without due process applicable here, as Petitioner does not allege he is in solitary confinement. *See Farabee v. Clarke*, 967 F.3d 380, 395 (4th Cir. 2020); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975).

Contrary to Petitioner's assertions, Amicus Br. 39–40, he has other avenues for bringing conditions-of-confinement claims. Suits in equity can

enjoin unconstitutional conduct. *See, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231-1232 (10th Cir. 2005); *see also Mitchell v. U.S. Parole Comm'n*, 538 F.3d 948, 952 (8th Cir. 2008) (per curiam) (holding that inmate "did not have a cognizable claim for habeas relief" and stating that "a writ of mandamus is the proper method to compel the [Parole] Commission to hold a timely early-termination hearing"). Inmates in BOP custody may also seek review of final agency action under the Administrative Procedure Act, when not foreclosed. *See* 5 U.S.C. §§ 701-706; *but see* 18 U.S.C. § 3625 (precluding APA review as to "the making of any determination, decision, or order under [§§ 3621-3626]"). [7] In sum, Petitioner may not bring a conditions-of-confinement claim under § 2241.

[7] The Supreme Court's recent decisions in *Abbasi*, 137 S. Ct. 1843 (2017), and *Egbert v. Boule*, 142 S.Ct. 1793 (2022), have made clear that expansion of an implied damages remedy under *Bivens* is a "disfavored judicial activity." *Abbasi*, 137 S. Ct. at 1857. But the scope of Congress's statutory grant of habeas jurisdiction under 28 U.S.C. § 2241 does not depend on the availability of an implied *Bivens* remedy. Indeed, even before *Bivens* was decided in 1971, numerous courts understood that habeas was not a proper vehicle for claims challenging a prisoner's conditions of confinement. *See, e.g., Long v. Parker*, 390 F.2d 816, 818 (3d Cir. 1968) ("[H]abeas corpus is not a proper proceeding to investigate complaints by prisoners of mistreatment since such complaints do not attack the legality of the confinement."); *United States ex rel. Knight v. Ragen*, 337 F.2d 425, 426 (7th Cir. 1964) (per curiam) (similar); *In re Hodge*, 262 F.2d 778, 780 (9th Cir. 1958) (similar); *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951) (similar).

2. Assuming *arguendo* a conditions-of-confinement claim is cognizable in habeas, Petitioner has not pled facts plausibly suggesting that his conditions of confinement are unconstitutional.

Petitioner has failed to allege facts plausibly suggesting his conditions of confinement are unconstitutional, which renders his claim ripe for dismissal.[8] Conditions of civil confinement are unconstitutional only when they are "(1) imposed with an expressed intent to punish or (2) not reasonably related to a legitimate nonpunitive governmental objective, in which case an intent to punish may be inferred." *Matherly*, 859 F.3d at 275 (quoting *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988)). When applying this standard, courts "give deference to the officials who administer the civil commitment program." *Id.* In this context, "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed." *Id.* (quoting *Allison v. Snyder*, 332 F.3d 1076, 1079 (7th Cir. 2003)). Petitioner bears the burden "to show the lack of a reasonable relationship between a condition of confinement and a legitimate nonpunitive governmental objective." *Id.* at 276.

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[8] And, again, the district court had authority to *sua sponte* dismiss Petitioner's conditions-of-confinement claim under 28 U.S.C. § 2243. *See supra* Section A.3.

Petitioner contends he is being unconstitutionally punished because, allegedly due to his refusal of sex-offender treatment, he is "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." Amicus Br. 41. This legal conclusion, however, is not sufficient to state a cognizable constitutional claim. *See Matherly*, 859 F.3d at 275. In *Matherly*, another § 4248 civilly committed person alleged "his confinement at FCI Butner violate[d] the Due Process Clause of the Fifth Amendment because certain conditions applicable to him are more restrictive than, identical to, or similar to conditions applicable to prisoners housed at FCI Butner." *Id.* at 269. He specifically complained about indignities such as "wear[ing] the same uniform as a prisoner," being "limited to purchasing the same items from the commissary that a prisoner can purchase," and "watch[ing] only those television programs that a prisoner can watch." *Id.* This Court concluded that Matherly failed to state a constitutional claim because "[a]ll of these conditions are incident to the legitimate nonpunitive governmental objective to confine individuals like Matherly who are sexually dangerous." *Id.* at 276; *see also Allison*, 332 F.3d at 1079 (holding placement of a civil detainee "in a prison, subject to the institution's usual rules of conduct," does not signify punishment); *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991) (noting that changes to "prisoners'

location, variations of daily routine, changes in conditions of confinement (including administrative segregation), and the denial of privileges . . . are necessarily functions of prison management that must be left to the broad discretion of prison administrators to enable them to manage prisons safely and effectively"); *Ballard v. Johns*, 17 F. Supp. 3d 511, 518 (E.D.N.C. 2014) ("[P]lacement of [§ 4248] civil detainees in a prison, subject to the institution's usual rules of conduct does not in and of itself equate to punishment of civil detainees and civil detainees are subject to the same security policies as those used at correctional facilities."), *aff'd*, 579 F. App'x 214 (4th Cir. 2014) (per curiam).

As the district court below recognized, "Disciplinary measures that do not substantially worsen the conditions of confinement of a lawfully confined person are not actionable under the due process clause," regardless of "whether the confinement is criminal or civil." *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011) (citing *Sandin v. Conner*, 515 U.S. 472, 485–86 (1995); *West v. Schwebke*, 333 F.3d 745, 748 (7th Cir. 2003); *Thielman v. Leean*, 282 F.3d 478, 484 (7th Cir. 2002); *Leamer v. Fauver*, 288 F.3d 532, 545–46 (3d Cir. 2002)). "Put another way, unless the deprivation of liberty is in some way extreme, then the Constitution does not require that a prisoner be afforded any process at all prior to deprivations beyond that incident to normal prison life." *Deavers v. Santiago*, 243

F. App'x 719, 721 (3d Cir. 2007) (emphasis omitted) (concluding patient who had been civilly committed pursuant to the New Jersey Sexually Violent Predator Act was not deprived of procedural due process by being placed in a Restricted Activities Program without the benefit of an opportunity to contest the decision). The Court is not bound to accept the conclusory legal allegation that Petitioner is being punished in violation of the Constitution simply because he says he is. *Matherly*, 859 F.3d at 277 ("Once again, however, Matherly has not shown that the BOP arranges these interactions with prisoners to punish—a conclusory allegation saying as much doesn't suffice."); *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. Petitioner must allege *facts* which—assuming they are true—plausibly suggest the challenged conditions are being "imposed with an expressed intent to punish." *Matherly*, 859 F.3d at 275. Petitioner has not pled any such facts. Thus, he failed to state a cognizable claim.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the district court's judgment should be affirmed.

Respectfully submitted, this 12th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this brief meets the page or type-volume limits of Rule 32(a) because, exclusive of the portions of the document exempted by Rule 32(f), this brief contains:

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/s/ K. Paige O'Hale
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