MEMORANDUM

To: Defenders, CJA Counsel

From: Amy Baron-Evans, Sara Noonan

Re: Adam Walsh Act III: It's Not the Sentence, It's the Commitment . . .

Date: September 10, 2007, as revised September 25, 2007

Title III of the Adam Walsh Child Safety and Protection Act of 2006 ("Adam Walsh Act" or "the Act") established the Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, now codified at 18 U.S.C. §§ 4247, 4248. Under this new program, the AG or anyone authorized by the AG or the Director of BOP may seek to civilly commit anyone in BOP custody by "certifying" him (or her) as "sexually dangerous."

Civil commitment for sexual dangerousness is, as a practical matter, a life sentence. According to a recent New York Times article, 19 states have passed laws allowing for civil commitment of the sexually dangerous, under which over 2600 people have been civilly committed.[1] Of those, only 252 – less than 10% – have been granted a full discharge from custody. The Washington State Institute for Public Policy comes up with different numbers but a statistically similar discharge rate, reporting that 4,534 people have been committed under state sexually dangerous person laws, only 494 of whom have been discharged or released (an additional 85 people died while in custody).[2]

Defense counsel must act from the moment appointed to protect clients against the risk of civil commitment, and should contact clients serving sentences in BOP custody or on supervised release to warn them of the dangers. It is not only clients who are charged with or convicted of a sex offense who need to be warned and protected. To date, BOP has identified 10,000 to 12,000 inmates as eligible for review, has reviewed less than half of those, and has filed 46 "sexually dangerous" certifications. Those certified include inmates in BOP custody for non-contact or non-sex offenses such as felon in possession of a firearm, bank robbery, simple assault at a VA hospital, distribution of crack, and possession of child pornography. Many of the inmates certified as sexually dangerous had no federal sex offense convictions at all, but were certified based upon prior state convictions listed in the PSR, and, according to a proposed BOP regulation, a person may be certified based on any information from any source

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[1] *See* Monica Davey and Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. Times (March 4, 2007) (chart entitled "Civil Commitment Around the Country," setting forth statistics for sexually dangerous commitments in Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, Wisconsin between 1990 and 2006).

[2] *See* Washington State Institute for Public Policy, *Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators: 2006 Update* (Aug. 2007), available at http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf.

whatsoever, including uncorroborated admissions allegedly made during sex offender or other "treatment," or denial of child molestation or sexually violent conduct. The Attorney General recently bragged to Congress that "the Bureau of Prisons has 30 inmates [now 46] certified as sexually dangerous persons (not limited to those incarcerated for sex offenses)."[3]

This memorandum describes the new civil commitment law and how BOP is interpreting and using it, gives a status update on pending certification cases, and suggests ways to protect clients against being certified in the future. Please let us know if we have missed anything or gotten anything wrong, if you have additional suggestions for how best to deal with the issues, or if there have been any important developments in your cases that might be helpful to others.

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[3] *See* Statement of Alberto R. Gonzales before the Committee on the Judiciary, U.S. Senate, Concerning Oversight of the Department of Justice at 11 (April 17, 2007), available at http://www.c-span.org/pdf/Attorney%20General%20Gonzales%20Written%20Statement.pdf.

I. Who Can be Considered for Civil Commitment under § 4248?

Under 18 U.S.C. § 4248(a), the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons has the power to certify as "sexually dangerous" anyone in BOP custody. *See* 18 U.S.C. § 4248(a). In practice and in a rule published for comment on August 3, 2007, BOP interprets this to mean that **anyone in BOP custody is fair game**. *See* 72 Fed. Reg. at 43206 (BOP "may consider whether *any* person in its custody should be certified as a sexually dangerous person") (emphasis added). Pretrial detainees and those incarcerated for non-criminal supervised release violations are as vulnerable as those serving time for conviction of a crime. Those in BOP custody for a violation of the DC criminal code are also subject to certification. To date, 12 of the 46 people certified were in custody on supervised release revocations, 4 were DC prisoners who were simply being housed by BOP, and 2 were in custody for military convictions.

Importantly, **the inmate need not be in BOP custody for anything to do with a sex crime and need not have ever been convicted of a sex crime**. While everyone currently facing a certification does have at least one sex-related conviction (often under state law), such convictions are not a prerequisite. As discussed in Part IV, *infra*, the statute requires only that the person have "engaged or attempted to engage" in sexually violent conduct or child molestation; a criminal conviction or charge is not required. *See* 18 U.S.C. § 4247(a)(5). BOP recently confirmed that it will consider all "evidence" of sexually violent conduct or child molestation from any source, "whether or not a conviction resulted, and whether or not the person's present custody is based on the conduct in question." *See* 72 Fed. Reg. at 43207. Of the 46 people with pending sexually dangerous certifications, approximately 9 were in BOP custody for child pornography convictions and another 4 were in custody for offenses entirely unrelated to sex. Of those 4, none had ever been convicted of a federal sex offense.

There need not be any question about the inmate's sanity or competency before BOP can file a certificate, although those who have been adjudicated incompetent under 18 U.S.C. § 4241 or whose charges have been dismissed solely for reasons relating to their mental condition are also eligible for commitment under § 4248. *See* 18 U.S.C. § 4248(a); 72 Fed. Reg. at 43206. To date, only 1 of the 46 people BOP has certified as sexually dangerous was previously deemed incompetent. Notably, under the Adam Walsh Act, the government can now move for a competency hearing anytime after the commencement of probation or supervised release and prior to the completion of the sentence. *See* 18 U.S.C. § 4241(a). Thus, it as least possible that a client who has served his full prison term and is now on supervised release is at risk of being declared incompetent and, thereafter, civilly committed as a sexually dangerous person. A more likely risk – and one that we have already seen – is that a person on supervised release

will end up back in BOP custody on a technical violation, and will then be certified as sexually dangerous.

II. What Happens When BOP Certifies an Inmate as a "Sexually Dangerous Person"?

BOP is in the process of conducting an initial review of all inmates to determine whether or not they merit a closer look as a potential committee under § 4248, working backwards from those due to be released immediately to those due to be released later. At minimum, this involves reviewing each inmate's PSR and BOP file. If BOP believes an inmate merits further attention, BOP staff conducts a more searching evaluation. The evaluation usually occurs at FCI-Butner or FMC-Devens, although BOP will conduct it at the facility where the inmate is housed if it is administratively easier to do so. **No *Miranda* warnings are given and the inmate is not provided with an attorney during this process.** The inmate is given a form to sign which states that (1) he consents to an evaluation consisting of interviews, review of records, and testing, (2) he understands that it will be used to determine his eligibility for civil commitment as a sexually dangerous person after he serves his sentence, (3) he understands that the results will be related to BOP officials and "others with a need to know" including the court, the government, and his lawyer, and (4) the evaluation will be completed whether or not he participates. *See* Notice of Psychological Evaluation, available at http://www.fd.org/odstb_AdamWalsh.htm. Many inmates have made statements or admissions during this coercive process that are then used to support a sexually dangerous certification.

Based on a review of the certifications to date, BOP appears to be looking particularly for a prior contact sex offense conviction, though it has made clear that it need not limit itself to those offenders. *See* Part IV, *infra*, for further discussion of BOP's proposed criteria. Particular attention has been paid to those offenders who have been given a "sex offender" PSF. All inmates who are due to be released within a relatively short period of time are being "fast tracked" for review.

If BOP certifies that a person is sexually dangerous, the certificate is filed with the court for the district in which the person is confined. *See* 18 U.S.C. § 4248(a). **Filing the certificate stays the inmate's release pending a decision on the merits**. There is no bail, no probable cause hearing, and no other mechanism through which the basis for holding the inmate beyond his release date can be determined by a neutral judicial officer.[4] Many of the people currently facing certifications were due to be released in a matter of days (matter of hours, for a few) when their certifications were filed. Some

[4] This is different from similar state laws, the overwhelming majority of which provide for a judicial probable cause determination at the outset of proceedings. *See* Ariz. Rev. Stat. § 36-3705; Cal. Wel. & Inst. Code § 6602(a); Fla. Stat. § 394.915; 725 Ill. Comp. Stat. § 207/30; Iowa Code § 2297A.5; Kan. Stat. Ann. § 59-29a05(b); Mass. Gen. Laws ch. 123A, § 12C; Minn. Stat. § 253B.07(7); Mo. Rev. Stat. § 632.489; N.H. Rev. Stat. § 135-E:7; N.J. Stat. § 30:4-27.28; N.D. Cent. Code § 25-03.3-11; S.C. Code Ann. § 44-48-80; Va. Code Ann. § 37.2-906; Wash. Rev. Code § 71.09.040; Wis. Stat. § 980.04.

have now been incarcerated for upwards of ten months past their release dates.[5] BOP houses and treats these detainees exactly the same as prisoners serving time on a criminal conviction, with the only difference being that the § 4248 detainees do not have to work. If they choose to, however, they are paid the same amount as prisoners.

Section 4248 offers scant procedural protection to those facing pending certificates. In addition to the lack of a probable cause determination, there is no set time within which the hearing on the merits must occur. The statute does not require the government to prove sexual dangerousness beyond a reasonable doubt, which is the standard utilized by half of the states with similar laws,[6] but by clear and convincing evidence. *See* 18 U.S.C. § 4248(d). The person has no right to a jury trial and, if committed, will not be released until either a state assumes responsibility for his custody, care and treatment, or he is "no longer sexually dangerous to others, or will not be sexually dangerous to others" if released under a prescribed regimen. *See* 18 U.S.C. §§ 4247(d), 4248(c) & (d).

III. Litigation Update on Closed or Pending § 4248 Cases

AFPDs in four districts (C.D. Cal., E.D. N.C., D. Mass, and D. Haw.) have been handling all of the § 4248 certifications. Those with older cases have already filed copious dismissal motions challenging the constitutionality of § 4248. If you are appointed to represent a client facing a pending sexually dangerous certification, your first step should be to contact the AFPDs listed below to take advantage of the enormous amount of thought and work that has already gone into these challenges. CJA counsel should also contact their local Defender office to enable us to keep track of all § 4248 certifications.

All of the briefs and the two court decisions discussed here are available at http://www.fd.org/odstb_AdamWalsh.htm.

C.D. of Cal. (1 case). In the first § 4248 certification ever filed (and the only one filed in California), AFPD Myra Sun argued (among other things) that § 4248 violates due process because it permits the government to detain inmates past their release and stigmatize them as "sexually dangerous" without a prompt post-deprivation hearing before a neutral decision maker to test the correctness of the governmental action. To demonstrate the need for a prompt hearing, Myra pointed out that the government had certified her client as sexually dangerous despite disagreement between BOP staff who

[5] Even if a client has an immediately impending release date, do not relax your guard. Given BOP's ability to manipulate good time credits and the like and its policy of fast-tracking those due to be released sooner, release dates are not a reliable measure of risk. Clients are not safe until they are literally out the door and, even then, they run the risk of being sent back to BOP for violating their release conditions.

[6] *See* Ariz. Rev. Stat. § 36-3707; Cal. Wel. & Inst. Code § 6604; Ill. Comp. Stat. § 207/35(f); Iowa Code § 2297A.7; Kan. Stat. Ann. § 59-29a10; Mass. Gen. Laws ch. 123A, § 14(d); S.C. Code Ann. § 44-48-100; Tex. Health & Safety Code § 841.062; Wis. Stat. § 980.05(3)(a).

saw him and rated him "low-risk" and other BOP employees who considered him dangerous based on a paper review and the defendant's score of "4" on the Static-99.

The Static-99 is a widely-used actuarial tool that takes into account various characteristics or factors that have been shown to demonstrate some value in predicting recidivism in sex offenders. Although considered the standard test in the field, the actual predictive value of the Static-99 has been widely questioned, even by the test's authors. *See* Andrew Harris, Amy Phenix, R. Karl Hanson & David Thornton, Static-99 Coding Rules Revised – 2003 at 3 (acknowledging that the "weaknesses of the Static-99 are that it demonstrates only moderate predictive accuracy . . . and that it does not include all of the factors that might be included in a wide-ranging risk assessment") (citations omitted), available at http://www.fd.org/odstb_AdamWalsh.htm.

Very basically, the Static-99 reviews three types of factors: offender demographics, criminal history, and victim characteristics. *See id.* at 4-5. The "demographic factors" include the offender's age (no points are assessed for anyone who will be 25 or older at the time of release) and whether he has lived with an intimate sexual partner for two or more years (if yes, no points are assessed). *See id.* at 4-5, 23-26. The "criminal history factors" – which score convictions for nonsexual violent offenses committed at the same time as or prior to the most recent sex offense, sex offenses (both charges and convictions) committed prior to the most recent sex offense, convictions for non-contact sex offenses committed at the same time or prior to the most recent sex offense, and sentencing dates – can only be assessed based on an official record: "Self-report is generally not acceptable to score these five [criminal history] items." *See id.* at 11. The "victim factors" score convictions involving unrelated victims, stranger victims, and male victims (no points assessed if victims were related, known to the offender, or female). *See id.* at 48, 52, 54, 56. Victim information from non-sexual offenses or offenses relating to prostitution/pandering, possession of child pornography, or public sex with consenting adults is not scored. *See id.* at 11. Polygraph results may not be used to assess the criminal history or victim factors. *See id.* at 11. Scores of 6 and higher are treated as "high risk" of sexual or violent recidivism under the Static-99, though the actual extent of the risk varies over time. *See id.* at 57.[7]

[7] Although outside the scope of this memo, it should be noted that the authors of the Static-99 recommend numerous limitations on use of the test, including that the test not be used on:

- Women
- Young offenders
- Those whose only sex offenses consist of:
  - crimes relating to child pornography, including possessing, selling, transporting, and even creating if only pre-existing or digital images were used;
  - statutory rape where the ages were close and the sex was consensual;
  - prostitution-related offenses, including pimping or pandering, soliciting, seeking or hiring prostitutes, or offering prostitution services;
  - sex in public locations with consenting adults;
  - possession of obscene materials; or
  - indecent behavior without a sexual motive (e.g., urinating in public) and
- Anyone who has never had a sex offense conviction.

In her motion to dismiss, Myra pointed out that her client had received a "4," which represented only a "Moderately-High" risk, even assuming that the test was a valid predictive tool and that it had been properly administered and scored. Her motion became moot, however, when the court granted the government's own *ex parte* motion to dismiss the petition. The reason? The court-appointed expert had issued a report disagreeing with BOP and finding the defendant not appropriate for commitment, based in large part on his relatively low Static-99 score. The victory remains marred, however, by the sobering fact that by the time the government decided to reverse course, Myra's client – who was in BOP custody for a federal drug offense -- had been held by BOP (much of the time in solitary confinement) for close to 4 months past his release date.

E.D. of N.C. (35 cases). AFPD Jane Pearce, RWS Eric Brignac and paralegal Graham Hollett have borne the brunt of § 4248, representing 35 of the 46 people certified as sexually dangerous by BOP. Jane and her team won an early motion for an in-court hearing on the merits (the government wanted the defendant to attend the hearing via videoconference). They then filed two motions to dismiss raising a number of constitutional challenges to the statute.

First, they argued that Congress exceeded its power under the Commerce Clause and the Necessary and Proper Clause in enacting § 4248 because the statute's goal is to deter violent sex offenses, traditionally a matter of state police power, and because Congress failed to identify or draw any connection between that goal and any economic or commercial activity. Second, they argued that the statute violates due process because it permits individuals to be indefinitely detained without basic procedural protections, noting that the statute does not require a prior sex offense charge or conviction, the burden of proof is not beyond a reasonable doubt, key statutory terms are not defined, and the statute may be interpreted to shift the burden to the defendant to disprove sexual dangerousness following an initial commitment order. Third, they argued that § 4248 violates equal protection by arbitrarily drawing lines based on status as a federal prisoner rather than requiring at least the existence of a sex offense criminal history. Fourth, they argued that the statute operates as a form of preventive detention and constitutes criminal proceedings, in violation of the Double Jeopardy Clause, the Ex Post Facto Clause, the

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Id. at 5, 15. They further recommend that test results be adjusted when used on anyone who has been at liberty for long periods of time without committing another sex offense. *See id.* at 7 ("[t]he Static-99 is not applicable to offenders who have had more than 10 years at liberty in the community without a sexual offence before they were arrested for their current [non-sexual] offence"). Supervised release or probation violations are countable only when they constitute a chargeable offense; even "high risk" behavior such as a convicted sex offender loitering in an area where children are present is considered an uncountable "technical violation," not a "sex offense," because non-sex offenders could not be charged criminally for that behavior. *See id.* at 16. Arrests or charges, convictions overturned on appeal, institutional rules violations, and driving accidents or convictions for negligence causing injury or death never count (except in the rare instance that they fall within the definition of a "prior sex offense"), and felon in possession convictions count only if the weapon was actually used in the commission of a sexual or violent offense. *See id.* at 28, 32, 35-42. Any offenses that occurred after the most recent sex offense "do not count for Static-99 purposes." *Id.* at 21.

Sixth Amendment right to a jury trial, and the Eighth Amendment prohibition against cruel and unusual punishment.

On September 7, 2007, the district court issued a 59-page opinion finding that § 4248 "is not a necessary and proper exercise of Congressional authority and that the use of a clear and convincing burden of proof violates the substantive due process rights of those subject to commitment under the statute." *See* Memorandum and Order, dated Sept. 9, 2007 at 3 (Britt, J.), available at http://www.fd.org/odstb_AdamWalsh.htm. The opinion is required reading for anyone representing a § 4248 defendant.

With respect to the question of congressional authority, the court rejected the government's argument that civilly committing sexually dangerous people is "necessary and proper" to further the power to prosecute federal crimes, finding that power (which itself must be tied to an enumerated power) is not implicated when exercised against people who have already been punished for their crimes or against whom all charges have been dropped, as § 4248 would permit. *Id.* at 14-15. Nor is § 4248 "necessary and proper" under the Commerce Clause because it contains no jurisdictional nexus and because it attempts to regulate non-economic violence. *Id.* at 17-19; *see also US v. Morrison*, 529 U.S. 598 (2000); *US v. Lopez*, 514 U.S. 549, 561 (1995).

The court also rejected the government's argument that § 4248 derives from Congress's power to prevent the commission of crimes, which itself derives from the power to prosecute, which in turn derives from an (unspecified) enumerated power, because § 4248 is not limited to preventing specific federal crimes and "[t]he federal government simply does not have the broad power generally to criminalize sexually dangerous conduct and child molestation:"

> § 4248 is not a law aimed at preventing federal crimes by persons in federal custody; it is a law designed to prevent the commission of sexually violent conduct and child molestation generally, and it is designed to continue the confinement of certain individuals so they cannot commit crimes when released from federal custody.

Id. at 20, n.10; 24. In any event, the court found that § 4248 is not "necessary" because:

> Finding that a person has engaged in the statutorily undefined 'sexually violent conduct' or 'child molestation' and that a person has a mental abnormality inclining him or her to sexual deviance or violence of one kind or another is simply not a reliable indication of the likelihood that (s)he will commit a federal crime, i.e., a type of criminal conduct that the federal government has the authority to regulate, and thus commitment of such a person cannot accurately be described as an action necessary to the execution of an enumerated federal power.

Id. at 27. The court further found that § 4248 is not "proper" because it "deprives the states of *parens patriae* and police powers and impermissibly intrudes upon an area historically regulated by the states." *Id.* at 44-45.[8]

Turning to the burden of proof issue, the court held that because § 4248 requires the government to prove that an individual engaged or attempted to engage in sexually violent conduct or child molestation, the burden of proof as to that element must be beyond a reasonable doubt. *See id.* at 45-46 ("[w]here factual findings of criminal acts must precede the taking of an individual's liberty, those findings must be made beyond a reasonable doubt") (relying on *In re Winship*, 397 U.S. 358 (1970)). The court found that while a lesser standard may be appropriate for determining whether an individual is suffering from a mental illness or abnormality and is therefore unlikely to refrain from sexually violent conduct, requiring proof beyond a reasonable doubt to determine the initial "explicit factual question [relating to the defendant's past conduct] answerable only with specific, potentially knowable facts" will not overburden the government, render the commitment scheme less effective, or erect an unreasonable barrier to treatment, and will enhance the reliability of the result:

> Given the class of potential candidates for commitment, i.e., all federal prisoners regardless of their criminal backgrounds, and the intent of the statute to prevent sexually dangerous persons from engaging in further sexually dangerous conduct, there should be no reasonable doubt that those committed under § 4248 have actually engaged or attempted to engage in at least one previous act of sexual violence or child molestation.

Id. at 51-52, 55.

On the downside, the court rejected the argument that § 4248 is in effect a criminal statute, ruling that Supreme Court precedent "specifically dictates that § 4248 be characterized as a civil scheme." *Id.* at 7 (*citing Kansas v. Hendricks*, 521 U.S. 346 (1997)). The court found that Congress's choice to call § 4248 a "*civil* commitment" statute, and its apparent goal of protecting the community from sexually violent predators rendered the statute sufficiently similar to the Kansas statute reviewed in *Hendricks* to warrant the same result. It did not, however, address numerous differences between the two statutes, including the lack of congressional findings about recidivism rates or the effectiveness of treatment for the sexually dangerous, § 4248's inclusion in the criminal code, its failure to provide numerous procedural protections, and its requirement that the court engage in factual inquiries as to whether or not the defendant actually engaged in sexually violent conduct or child molestation.[9] *Compare Hendricks*, 521 U.S. at 351-53,

[8] Here, the court engages in a lengthy and useful comparison between §§ 4246 and 4248. *See id.* at 32-41. Keep in mind, though, that § 4246 may be an unconstitutional exercise of congressional power in its own right. *See, e.g., id.* at 21 n.11 (noting that the Supreme Court has not addressed the constitutionality of § 4246 to the extent it attempts to protect the general welfare of the community).

[9] Interestingly, the court did distinguish the Kansas scheme in the portion of the opinion addressing the standard of proof issue. *See id.* at 56-57.

361, 364, 368-69 (discussing Kansas statute's legislative findings, its procedural protections including requiring a sex offense conviction or charge, a probable cause hearing, proof beyond a reasonable doubt, and an annual re-hearing at which the government is subject to the same burdens, and its placement in the Kansas probate code); *see also Allen v. Illinois*, 478 U.S. 364, 371 (1986) (noting that "[t]he initial inquiry in a civil commitment proceeding is very different from the central issue in . . . a criminal prosecution. In the latter case[] the basic issue is a straightforward factual question – did the accused commit the act alleged?") (citation omitted).[10] The court did not reach the remainder of the defendants' arguments.

The decision was a huge victory for Jane's team, but the war is far from over. The defendants remain in custody pending the government's anticipated motion to stay release pending appeal and, depending on the resolution of that motion, may very well languish there for months, years or life, depending on the outcome in the Fourth Circuit and, potentially, the Supreme Court.

D. Mass. (9 cases). In Massachusetts, several AFPDs (including Page Kelley, Judith Mizner, Timothy Watkins, Stellio Sinnis, and William Fick), two co-counsel (Eric Tennen and John Swomley), and one intrepid RWS (Martin Vogelbaum) have been sharing responsibility for nine § 4248 certifications that are currently pending before four different judges. On May 16, 2007, the team filed a 75-page dismissal motion raising: (1) Congress's power to enact the statute under the Commerce and Necessary and Proper Clauses; (2) § 4248's punitive / criminal nature and its failure to provide for protections due under the Ex Post Facto Clause and the Fourth, Fifth, Sixth and Eighth Amendments; (3) equal protection on the grounds that the class of all federal prisoners is overbroad and irrational, and that prisoners with "serious difficulty refraining from" conduct under § 4248 are treated differently than prisoners who pose "substantial risk of serious bodily injury to another person" under § 4246; (4) due process on the grounds that the statute does not require a sex offense charge or conviction, a probable cause hearing, adequate notice, a sufficient burden of proof, or a jury; (5) due process based on the statute's failure to adequately define key terms; and (6) a particularly interesting due process challenge based on the government's inability to submit expert testimony on whether a person will have "serious difficulty in refraining from" certain conduct, because the available science in the field of "predicting recidivism" is not sufficiently reliable to meet current evidentiary standards, much less a "clear and convincing" burden of proof.

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[10] The court also referred to court decisions finding that another provision of the Adam Walsh Act – the Sex Offender Registration and Notification Act ("SORNA") – is a civil statute. The analogy is inapt; although both were created under Adam Walsh, SORNA and § 4248 are entirely different statutory schemes, motivated for different purposes and serving different (albeit related) goals. Even if it were appropriate to rely on SORNA caselaw for § 4248 purposes, a number of courts have determined that at least portions of SORNA are in fact punitive and subject to ex post facto challenges. *See, e.g.*, *United States v. Stinson*, Criminal Action No. 3:07-00055 (S.D. W. Va. Sept. 7, 2007); *United States v. Sallee*, No. CR-07-152-L (W.D. Okla. Aug. 13, 2007) (unpublished); *United States v. Muzio*, 2007 WL 2159462 (E.D. Mo. July 26, 2007); *United States v. Bobby Smith*, 481 F. Supp. 2d 846 (E.D. Mich., Mar. 8, 2007). *See generally* Adam Walsh II: Sex Offender Registration / Failure to Register, Adam Walsh II, Supplement 1, and Adam Walsh II, Supplement 2 (reviewing all cases to date), available at http://www.fd.org/odstb_AdamWalsh.htm.

Approximately two weeks before Judge Britt's decision in the E.D. N.C., Judge Tauro of D. Mass. issued a terse 11-page opinion denying the defendants' facial congressional authority and due process challenges on the ground that they failed to establish that there were "no set of circumstances" under which § 4248 could be constitutional.[11] The opinion also rejected (without serious analysis) the defendants' equal protection and vagueness challenges, found that § 4248 is civil, not criminal, and held that the challenge to the sufficiency of expert testimony was premature. The Mass. team will be arguing these same issues before Judge Saris later this month, who will have the benefit of Judge Britt's more recent decision when issuing her own ruling.

D. Haw. (1 case). AFPDs Peter Wolff and Pamela Byrne have the dubious distinction of representing the only defendant outside of North Carolina and Massachusetts who is facing a pending sexually dangerous certification. Their case is relatively new, but they will no doubt be raising similar constitutional challenges to those raised in the other cases.

IV. Who Is at Risk of Being Certified "Sexually Dangerous" by BOP?

In the world of § 4248, the biggest victory is to avoid a certification being filed against your client in the first place. Judging from the certifications filed to date, the clients most at risk for a "sexually dangerous" certification are those who have a history of at least one contact sex offense, whether it consists of a current or prior federal conviction or a prior state conviction. At the same time, BOP has published a regulation making clear that certifications need not be limited to persons with such a history. Thus, while BOP may have exhibited some restraint in the initial round of "test case" certifications, it may not continue to do so going forward.

By statute, a "sexually dangerous person" is "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." *See* 18 U.S.C. § 4247(a)(5). A person is "sexually dangerous to others" if s/he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *See* 18 U.S.C. § 4247(a)(6). Key terms such as "sexually violent conduct," "child molestation," and "serious difficulty" are not defined by statute.

BOP has recently published for comment a rule that would ostensibly interpret these terms but which, in fact, goes much further than permissible or necessary. The proposed rule begins with the ominous caveat that BOP's "interpretations" of the essential elements of § 4248(a) are not constrained by law: "Although the Bureau has, in

[11] In contrast to Judge Tauro, Judge Britt in the E.D.N.C. found that the issues of congressional authority and due process/burden of proof constituted cognizable facial challenges because if Congress lacked the authority to enact the civil commitment scheme at issue, or if the clear and convincing standard was insufficient as a matter of due process, the statute could not be constitutionally applied to anyone. *See* Memorandum (Britt, J.) at 6-7.

part, looked to federal criminal statutes for language to assist in defining these terms, we do not rely upon the provisions themselves, case law interpretations of them, or other related statutory history." *See* 72 Fed. Reg. at 43205. "Rather, the Bureau's primary intent is to create definitions of terms that are comprehensive, easily understood, familiar to the general public, and readily applicable by Bureau staff." *Id.* at 43205-06. In other words, the proposed definitions are overly broad, deceptively simplistic, malleable, and unsupported (and unsupportable) by federal law. Accordingly, **they ought to receive no deference from a reviewing court**.[12] This memorandum does not attempt to provide definitions that the courts *should* use. Presumably, that will be developed through caselaw with the assistance of qualified experts, as distinct from the Attorney General or BOP.

A. "Sexually violent conduct"

BOP has proposed the following:

> **§ 549.72. Definition of "sexually violent conduct."** For purposes of this subpart, "sexually violent conduct" includes:
>
> (a) Any unlawful conduct of a sexual nature with another person ("the victim") that involves:
>
> (1) The use or threatened use of force against the victim;
>
> (2) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;
>
> (3) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;
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> (4) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct;
>
> (5) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or is physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct; or
>
> (b) Engaging in any conduct of a sexual nature with another person with knowledge of having tested positive for the human immunodeficiency virus (HIV), or other potentially life-threatening sexually-transmissible disease, without the

[12] If an agency issues rules interpreting a statute rather than rules filling gaps that Congress implicitly or explicitly authorized the agency to fill, courts owe no *Chevron* deference to the agency's interpretation. *See U.S. v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Whatever deference is owed depends upon the degree of the agency's care or thoroughness in formulating the rule, its consistency in adhering to its interpretation, whether it promulgated the rule through formal notice and comment processes, its relative expertness in the area, and the persuasiveness or validity of its reasoning. *See Mead Corp.*, 533 U.S. at 228.

> informed consent of the other person to be potentially exposed to that sexually transmissible disease.

72 Fed. Reg. at 43208-09.

Subpart (a). The proposed rule is ostensibly based on 18 U.S.C. §§ 2241 and 2242.[13] In truth, however, BOP has ignored the statutory text in ways that allow the rule to reach conduct well beyond what §§2241 and 2242 actually prohibit. First and most obviously, the rule has no *mens rea* requirement. Both §§ 2241 and 2242 require that a defendant act knowingly; BOP's proposed rule would not require any culpable mental state. This omission might be acceptable if BOP otherwise limited the scope of the proposed definition, for instance by requiring an actual conviction. But by simultaneously rejecting the need for a conviction (or even a criminal charge) and dispensing with a *mens rea* requirement, BOP would leave open the possibility that reckless or negligent conduct (such as one extremely drunk person having sex with another extremely drunk person) could qualify as "sexually violent" for purposes of a "sexually dangerous" determination.

Even more troubling, the proposed rule greatly expands the *conduct* for which a person can be deemed "sexually violent." Both §§ 2241 and 2242 require that the defendant "cause[] another person to engage in a sexual act." *See* 18 U.S.C. §§ 2241(a), 2242(1). A "sexual act" consists of: (A) penile penetration of the vulva or anus, (B) contact between the mouth of one person and the genitals or anus of another, (C) genital or anal penetration with any object with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, or (D) the intentional touching, not through clothing, of the genitals of a minor under 16 with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. *See* 18 U.S.C. § 2246(2)(A)-(D). But BOP's proposed rule would count "*any* conduct of a sexual nature" as sexually violent so long as it is accomplished by one of the enumerated means. Fondling a sleeping adult on the train may be creepy or even criminal, but it is a far cry from the sexual violence inherent in forcible rape. BOP's proposed rule, however, makes no such distinction – unlike the criminal provisions on which it is purportedly based.

Subpart (a)(5). In addition to the above, subpart (a)(5) of BOP's proposed rule expands upon § 2242(2)[14] by including conduct of a sexual nature with a person who is "*mentally*" incapable of declining participation. *Cf.* 18 U.S.C. § 2242(2)(B) (proscribing engaging in a sexual act with a person who is "*physically* incapable of declining participation") (emphasis added). Here, again, the lack of any criminal conviction or

[13] There is some support for basing the definition of "sexually violent conduct" on the conduct proscribed by §§ 2241 and 2242. *See* 42 U.S.C. § 14071 (defining "sexually violent offense" to mean "any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18 or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of Title 18 or as described in the State criminal code)").

[14] BOP claims to have derived subpart (a)(5) from 18 U.S.C. § 2242(2). *See* 72 Fed. Reg. at 43206-07.

mens rea requirement raises significant questions. When is a person "mentally incapable" of declining participation? Are people with undisclosed mental illnesses or mental disabilities or diagnosed sexual addictions "mentally incapable of declining" an invitation to engage in any conduct of a sexual nature? If so, it would appear from BOP's proposed rule that an inmate could be considered "sexually violent" for engaging in such conduct even if he or she had no idea that an apparently willing participant was secretly "mentally incapable" of saying no.

In fact, it appears that BOP bases this definition not on § 2242(2) but rather on its own Program Statement regarding standard inmate "sex offender" classification. Under Program Statement 5100.08 (formerly, 5100.07), BOP can assign an inmate a Sex Offender Public Safety Factor if information in the PSR indicates that the inmate had sexual contact with a person who is "physically or mentally incapable" of granting consent. *See* Fed. Bureau of Prisons, U.S. Dept. of Justice, Program Statement 5100.08, Inmate Security Designation and Custody Classification Manual, ch. 5 at 8, Ex. 3 (2006). There is no equivalent prohibition in a federal criminal statute.[15] Thus, it appears that, at least in this context, BOP equates "sexually violent conduct" meriting civil commitment with conduct that is minimally necessary to be administratively classified a "sex offender."

Subpart (b). At subpart (b), BOP proposes to define "sexually violent conduct" as including any conduct of a sexual nature with another person with knowledge of having tested positive for HIV "or other potentially life-threatening sexually-transmissible disease, without the informed consent of the other person to be potentially exposed to that sexually transmissible disease." This is not a federal crime under §§ 2241 or 2242 or any other statute. BOP justifies its proposed rule in three ways. First, the proposed rule "acknowledges the growing concerns surrounding potential transmission of sexual diseases that have the potential to cause significant harm to the victim's health or even endanger life." *See* Fed. Reg. at 43207. Second, it refers to 18 states that "have enacted laws which criminalize such conduct." *Id.* Third, it asserts that "[s]uch conduct is similar in nature to the conduct of a poisoner, who uses no overt force or threat against the victim, but is properly regarded as a violent offender." *Id.*

None of these explanations supports the proposed rule. 18 U.S.C. § 4248 is not a public health statute, and BOP has no authority to define "sexually *violent* conduct" based on public health concerns. While there may be a rational correlation between sexual violence and people who engage in sexual acts *intending* to cause substantial bodily harm or death by transmitting a potentially deadly disease, *see, e.g.,* Cal. Health & Safety Code § 120291, BOP's proposed rule would not require any intent to harm or knowledge that the disease is potentially life threatening. Nor would it require that

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[15] Ironically, inmates being assigned a "sex offender" public safety factor have *more* protection than those being classified as "sexually dangerous" for purposes of civil commitment. To classify an inmate as a "sex offender," the inmate must have had either a criminal conviction for a sex offense or a sex-related charge that was dismissed as part of a plea bargain. *See* PS 5100.08, ch. 5 at 8. To classify an inmate as "sexually dangerous," however, an uncorroborated allegation is sufficient. *See* 72 Fed. Reg. at 43207.

transmission of the disease through the alleged conduct even be possible. In these respects, it is broader than any criminal law, state or federal.[16]

The lack of intent to harm renders BOP's analogy to a poisoner inapt. Poisoners intend to do harm to another person, though they accomplish it by surreptitious means. One who has sex knowing that s/he has tested positive for a "potentially life threatening disease" – which can include virtually any STD depending on how broadly BOP decides to interpret the potential threat[17] – may not know the disease is potentially life threatening or that it is capable or likely to be transmitted through his or her conduct.[18] Or, s/he may intentionally engage in "conduct of a sexual nature" knowing that it is unlikely or impossible to transmit the disease through that conduct, such as clothed contact or fondling. Such conduct, where the person has an intent *not* to harm cannot fairly or rationally be classified as "sexually violent." BOP, however, has not drawn such basic distinctions in its proposed rule. As a result, any inmate with a medical history of a sexually transmissible disease is potentially at risk for a determination that he or she engaged in "violent" sexual conduct.

B. "Child molestation"

As with "sexually violent conduct," the phrase "child molestation" is not defined in Title 18. Black's Law Dictionary defines "child molestation" as typically requiring a victim under the age of 14, and physical sexual contact. *See* Black's Law Dictionary, 8th Ed. (2004) ("child molestation" means "[a]ny indecent or sexual activity on, involving, or surrounding a child, usu[ally] under the age of 14" and "sexual activity" means "sexual intercourse" or other "physical sexual activity" in which both persons participate).

In contrast, BOP interprets "child molestation" to mean:

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[16] 16 of the 18 states cited by BOP limit their criminal statutes to cases involving the potential transmission of HIV or AIDS, and all require conduct likely to result in the transmission of the disease (e.g., sexual penetration and/or contact with the genitals of one person and the genitals, mouth or anus of another and/or the exchange of bodily fluids). *See* Ark. Code Ann. § 5-14-123(b); Cal. Health & Safety Code § 120291; Fla. Stat. Ann. § 796.08(5); Ga. Code Ann. § 16-5-60(c)(1); Ida. Code § 39-608(1); Ill. Comp. Stat. § 5/12-16.2; Ia. Code Ann. § 709C.1; La. Rev. Stat. § 14:43.5; Mich. Comp. Laws Ann. § 333.5210(1); Mo. Stat. § 191.677; Nev. Rev. Stat. § 201.205; N.J. Stat. § 2C:34-5; Okla. Stat. Ann. § 1031(B); S.C. Code § 44-29-145(1); S.D. Code § 22-18-31; Tenn. Code Ann. § 39-13-109; Va. Code Ann. § 18.2-67.4:1; Wash. Rev. Code § 9A.36.011(1)(b).

[17] For example, according to the National Institutes for Health, all but one of the most common sexually transmitted diseases can either be fatal in its own right or, if left untreated, can cause potentially fatal complications in later pregnancies. *See* http://www3.niaid.nih.gov/healthscience/healthtopics/sti/default.htm (HIV/AIDS, Chlamydia, gonorrhea, genital herpes, human papillomavirus and genital warts, pelvic inflammatory disease, and syphilis).

[18] For instance, a person may rationally believe that having sex with a condom will protect his or her partner from any transmission. *Accord* Cal. Health & Safety Code § 120291 (criminalizing uninformed sex only when performed without a condom *and* with specific intent to infect the other person with HIV).

> **§ 549.73. Definition of "child molestation."** For purposes of this subpart, "child molestation" includes any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.

See 72 Fed. Reg. at 43209, § 549.73.[19]

By equating "child" with a "person under the age of 18," BOP's proposal would reach any allegation of statutory rape regardless of the circumstances.[20] It would also reach non-contact offenses such as the transportation offenses proscribed in Chapter 117. And, of course, it would reach any "conduct of a sexual nature," whatever that is. In these ways, the proposed regulation is more expansive than even the broad definition of "child molestation" currently used in the Federal Rules of Evidence. *See* Fed. R. Evid. 414(d) ("child molestation" defined as a crime involving both a child under the age of 14 and (1) conduct proscribed by Chapter 109A committed in relation to that child; (2) conduct proscribed by Chapter 110; (3) contact with the genitals or anus of the child; (4) contact between the genitals or anus of the defendant and any part of the child's body; or (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury of physical pain on the child).

Note that, by including "sexual exploitation" of a person under the age of 18, BOP would treat possession of child pornography as a form of "child molestation" for purposes of civil commitment.

C. "Engaged or attempted to engage"

Under the plain language of the statute, a person need not have been charged with or convicted of **any** sex crime in order to be "sexually dangerous." *See* 18 U.S.C. § 4247(a)(5) (defining a "sexually dangerous person" as one who has "*engaged or attempted to engage* in sexually violent conduct or child molestation") (emphasis added).

According to BOP, "[r]elevant conduct may be any conduct of the person for which evidence or information is available, and is not limited to offenses for which he/she has been convicted or is presently incarcerated, or for which he/she presently faces charges." *See* 72 Fed. Reg. at 43206. In assessing sexual dangerousness, BOP will consider "any available information in its possession," *see* 72 Fed. Reg. at 43208, § 549.70(c), including the presentence report, the judgment and commitment order, the statement of reasons, records and information obtained from outside agencies (e.g., state or federal courts presiding over past criminal or civil proceedings, the USAO and/or federal law enforcement agencies, state prosecutors and/or law enforcement, federal or

[19] BOP has not defined "unlawful conduct of a sexual nature."

[20] Sexual contact with a person under the age of 18 could also be classified as "sexually violent conduct" under proposed § 549.72(a)(5) under the theory that a minor is always "mentally incapable" of accepting or declining participation. *See* PS 5100.08, ch. 5 at 8, Ex. 3 (directing a sex offender PSF for any inmate with a history of "[a]ny sexual contact with a minor or other person physically or mentally incapable of granting consent (indecent liberties with a minor, statutory rape, sexual abuse of the mentally ill, rape by administering a drug or substance")).

state probation offices, public or private treatment providers, etc.), records relating to conduct while in custody, medical and psychological records, and any statements or admissions made by the inmate. *See id.* at 43206; BOP Certification Review Panel Guidelines; Interim Procedures for Implementation of Walsh Act Civil Commitment of Sexually Dangerous Persons (Dec. 21, 2006), posted on http://www.fd.org/odstb_AdamWalsh.htm. Moreover, BOP would hold itself to a particularly low evidentiary burden, requiring only "information sufficient to provide reasonable cause to believe that the person satisfies the relevant statutory criteria." *See* 72 Fed. Reg. at 43206.

It is critically important to understand that it does not matter why the client is in BOP custody or whether he has any prior sex offense conviction. **If a client has *anything* in his past that suggests prior sexual misconduct, if he admits to prior misconduct or deviant desires or fantasies in "treatment," or if he is likely to fabricate sexual deviance for amusement, attention or to please his interrogators in "treatment," he is in jeopardy.**

D. "Serious mental illness, abnormality or disorder"

By statute, a person is "sexually dangerous to others" if he or she "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *See* 18 U.S.C. § 4247(a)(6). The Supreme Court has held that a sexually dangerous civil commitment scheme must at a minimum require "some proof of serious difficulty in controlling behavior" as shown by the nature of the psychiatric diagnosis and the severity of the mental abnormality, among other things. *See Kansas v. Crane*, 534 U.S. 407, 413 (2002). Whether or not specific types of mental disorders will suffice to show the requisite volitional element remains an open question. *Id.* As a constitutional matter, it is clear that the disorder must distinguish a person subject to civil commitment from other persons likely to recidivate but who are more properly dealt with through criminal proceedings. *Id.* at 412. Otherwise, civil commitment is a mechanism for retribution or general deterrence which are functions of the criminal law, not civil commitment. *Id*.

BOP has not attempted to define "serious mental illness, abnormality, or disorder," but a review of the certifications it has filed provides some sense of which diagnoses are likely to raise a red flag. All of the people certified as sexually dangerous to date appear to have been diagnosed with pedophilia, paraphilia, antisocial personality disorder, or some combination of those three. Many also have additional diagnoses for such conditions as exhibitionism, voyeurism, fetishism, sexual sadism, frotteurism, or bipolar, borderline, depressive, or histrionic personality disorders. Substance abuse and/or dependence is another commonly cited factor, whether it be alcohol, marijuana, hallucinogens, cocaine, opiates, or amphetamines. The diagnoses relied upon by BOP in its certifications have either been made by BOP or during previous contacts with criminal justice and/or mental health systems in connection with prior state or federal cases.

Many of these diagnoses, standing alone, apply too broadly to the general prison population to satisfactorily distinguish committable offenders from incorrigible ones. *See, e.g., Crane*, 534 U.S. at 412 (noting that 40% to 60% of the male prison population is diagnosable with antisocial personality disorder) (citation omitted). But any one of them combined with a history of sexual misconduct of any sort will almost certainly garner close scrutiny from BOP. At the very least, counsel should be extremely wary of submitting anything to the court, the USAO, the USPO, or BOP that reflects a diagnosis of pedophilia, paraphilia, any other disorder suggesting sexual deviance, or antisocial personality disorder.

E. "Serious difficulty in refraining from sexually violent conduct or child molestation"

In assessing whether a person will have "serious difficulty in refraining" from future misconduct BOP proposes the following:

> **§ 549.75. Determining "serious difficulty in refraining from sexually violent conduct or child molestation if released."** In determining whether a person will have "serious difficulty in refraining from sexually violent conduct or child molestation if released," Bureau, or Bureau-contracted, mental health professionals may consider, but are not limited to, evidence:
>
> (a) Of the person's repeated contact, or attempted contact, with one or more victims;
> (b) Of the person's denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation;
> (c) Established through interviewing and testing of the person, or other risk assessment tools, that are relied upon by mental health professionals;
> (d) Established by forensic indicators of inability to control conduct, such as:
> (1) Offending while under supervision;
> (2) Engaging in offense(s) when likely to get caught;
> (3) Statement(s) of intent to re-offend; or
> (4) Admission of inability to control behavior; or
> (e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program.

See 72 Fed. Reg. at 43209.

The emphasis on inmate admissions in proposed § 549.75(b), (c), (d)(3), (d)(4), and (e) makes clear that **any statements made by a client regarding past sexual conduct or thoughts, whether made in the context of "treatment" or otherwise, whether true or not, will be used by BOP to certify him as "sexually dangerous."** In

an internal document, BOP states that a "self-admission made in a clinical setting (e.g., during SOTP or SOMP programming activities or individual counseling) may be less probative than "[a]dmissions made and documented for an official proceeding or investigation where the inmate had an opportunity to contest factual assertions (e.g., Presentence Investigation Report (PSR), Statement of Reasons (SOR), court transcript)." *See* BOP Certification Review Panel Guidelines at 6, available at http://www.fd.org/odstb_AdamWalsh.htm. Yet in its proposed regulation, BOP states that it will assess dangerousness based upon "the person's denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation" (§ 549.75(b)), interviews with the inmate (§ 549.75(c)), statements of intent to re-offend (§ 549.75(d)), and admissions of an inability to control behavior (§ 549.75(e)). The proposed regulation allows BOP to use sex offender "treatment" as a two-edged sword. If an inmate participates in treatment, he will be required to make all sorts of damning admissions (true or not), which will then be used for a sexually dangerous certification (§ 549.75(c), (d)(3), (d)(4)). If he refuses to make such admissions, he will be deemed to be in denial or unable to appreciate the wrongfulness of his conduct and/or desires, or will otherwise fail to "successfully" complete treatment (§ 549.75(b), (e)).

Inmate admissions, which are made most often in the context of sex offender "treatment," have proven to be a particularly fertile source of evidence for BOP in § 4248 cases. For the past several years, BOP has offered two major programs for sex offenders in custody. The Sex Offender Treatment Program ("SOTP") was operated from 1990 to 2007 at FMC-Butner in North Carolina. BOP recently closed the SOTP at Butner, transferred the remaining participants to FMC-Devens, and has rededicated FMC-Butner to housing § 4248 inmates. During the time of its operation at Butner, the SOTP was a voluntary, 18-month program in which participants were housed and "treated" together through the use of intensive therapy, psychological tests, polygraph examinations, and phallometric / penile plethysmograph assessments. *See* Sex Offender Treatment Program (2003), available at http://www.fd.org/odstb_AdamWalsh.htm. Whether or not the SOTP will continue at FMC-Devens is still unclear. Early reports were that the BOP was closing the program entirely to new enrollees. We have recently received information, however, suggesting that BOP will be continuing the now-defunct Butner program in essentially the same form at FMC-Devens, meaning that it will continue to be available to inmates serving a sentence of 24 months or longer who request placement in the program.

The Sex Offender Management Program ("SOMP") was established in 2004 as an involuntary "inmate control" program at FMC-Devens in Massachusetts, to which certain inmates classified with a sex offender PSF are assigned. Although the SOMP itself is not "therapeutic," inmates are encouraged to participate in the same types of "treatment," tests, and risk assessments as in the SOTP. If an inmate in the SOMP chooses not to participate in treatment, he suffers repercussions such as maintenance level pay, assignment to the "least desirable housing" available, and denial of CCC placement. *See* Sex Offender Management Program (March 1, 2004), available at

http://www.fd.org/odstb_AdamWalsh.htm. After Adam Walsh, BOP is planning to expand the mandatory SOMP across the country.[21]

For inmates in both programs, failing to disclose additional, undetected offenses and/or victims has been viewed as indicative of a refusal or unwillingness to fully participate in therapy. Some inmates who volunteered for the SOTP but declined to admit any hands-on victims were expelled for being "in denial." Clients who participated in the program have recounted intense pressure to increase the number of hands-on victims over time in order to be deemed to be "making progress." BOP required updated "Victim Lists" every six months, encouraged inmates to compete with each other on who was more "forthcoming," and made no attempt to corroborate. As a result of this routine coercion, inmates kept scorecards in their cells so that they would remember to report a higher number of victims when next asked, and were never required to provide victim names or other identifying information. Ostensibly, this was to promote disclosure without fear of self-incrimination, but it has allowed BOP to "tally up" unlimited "evidence" of multiple hands-on victims with no corroboration whatsoever. Indeed, the numbers of hands-on victims BOP claims were admitted by child pornography offenders in its "treatment" program are incredible on their face. *See* Julian Sher & Benedict Carey, *Debate on Child Pornography's Link to Molesting*, New York Times (July 19, 2007) (describing "study" conducted by SOTP officials purporting to show that 155 inmates convicted only of simple child pornography possession had admitted to committing contact sex offenses against 1,777 victims and noting that BOP has since withdrawn the "study" from publication and refused to allow its authors to discuss their "findings" with law enforcement and others).

The overwhelming majority of inmates against whom BOP has filed "sexually dangerous" certifications participated in either the SOTP or the SOMP. In each case, BOP has used the statements, admissions, test results and other information gleaned during those programs to support its case for commitment, as well as statements made in state sex offender treatment-like programs, to the FBI or to probation. BOP has done so despite explicit warnings from the Static-99 authors not to rely on self-reports when assessing past conduct. *See* Harris et al., *Static-99 Coding Rules* at 4, 11, 13, 27, 31, 35, 43, 46. And it has done so even though none of the inmates received any warning that their statements could be used to have them civilly committed as "sexually dangerous."

Given the enormous risk to program participants, defense counsel must recommend against participation in sex offender "treatment" whether volunteering for sex offender treatment as a condition of release, volunteering for the SOTP, or participating "voluntarily" in treatment in the SOMP. The unfortunate (and ironic) result of BOP's use of sex offender "treatment" as a trap rather than revising its disclosure policies to permit inmates to safely engage in treatment is that **no client can safely receive any form of sex offender treatment while in the system.**

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[21] In addition to the SOMP at FMC-Devens, SOMPs are slated to open in Petersburg, Virginia, Marion, Illinois, and Seagoville, Texas. We are not aware of any plans to open stand-alone SOTPs in any BOP facility other than possibly FMC-Devens.

V. How to Best Protect Clients

A. When appointed

Assume from the moment you are appointed that your client is at risk of a civil commitment down the road. Everyone who has been charged with a federal crime – irrespective of the charge – is at some risk of civil commitment under § 4248, or at least of being certified by BOP. As things currently stand, it appears that the people most at risk are (1) those who have been convicted of a contact offense, (2) those whose PSRs contain any other information suggesting a previous contact offense or an inclination, however slight, toward sexual misconduct (e.g., formal charges, uncorroborated allegations, psychological diagnoses / reports), (3) those who have a history of undetected misconduct disclosed by the person before or during custody or while on probation or supervised release, (4) those who have a history of psychological treatment and/or diagnoses suggesting any form of sexual deviance and/or antisocial personality disorder, and (5) those likely to invent sex offense histories or interests to please their inquisitors. None of that would be apparent upon appointment, unless the client is charged with a sex offense. Any client, no matter the current charge, may have something in his background that will draw BOP's attention. Plan pretrial, trial, plea negotiation and sentencing strategy with an eye toward avoiding or minimizing the risk.

Make sure the client understands the risk. Whether or not a particular client fits into any of the "high risk" categories may not be apparent until well into the representation, if at all. Clients held pretrial are already in the custody of BOP and are immediately vulnerable. Those released on bail may be required to participate in a psychological evaluation or some form of treatment as a condition of release – information that will wind up in the hands of BOP or DOJ in the event your client is convicted. *See US v. Zehntner*, 2007 WL 201106 (N.D. N.Y. Jan. 23, 2007) (rejecting defense request to preclude BOP from obtaining psychological report prepared during court-ordered pre-sentence evaluation). Therefore, it is imperative that clients understand what § 4248 means for them and how to protect themselves when you are not at their side.

Explain early and often what § 4248 empowers the government to do. Clients must understand the importance of honestly confiding in counsel about their backgrounds so that we can better advise and protect them while they are in the system. They should also understand that the risk is both of a potential civil commitment and of a new federal prosecution, since, after the Adam Walsh Act, there is no longer a statute of limitations for federal sex offenses,[22] or a state prosecution, as federal authorities can report

[22] 18 U.S.C. § 3299 now reads, "Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or section 1591."

information of sexual abuse to state authorities. Clients must know the mantra: **Say nothing, sign nothing**.

This is a particularly crucial message for those clients who are naturally inclined to talk about their past behavior in order to justify or explain it and are thus ill-suited to follow advice to remain silent. If such clients, who tend to have an overdeveloped sense of their own persuasive abilities, have any sexual misconduct in their background, they must understand that there is no way they will be able to "mitigate" their past by "explaining" their point of view to federal authorities, whether a probation officer, a doctor, a counselor, an agent or a prosecutor. It may be worthwhile to emphasize that the government gives no credit for "substantial assistance" in a § 4248 evaluation, and to remind them that if they are offered anything that sounds like an offer to reduce or prevent commitment, they should be immediately on guard, remain silent, and ask to speak to an attorney.

B. On Pretrial Release / Probation / Supervised Release

Oppose any release conditions that require the client to discuss sexual history, answer questionnaires, or undergo polygraph or phallometrtic testing. Defendants on pretrial or presentence release are often required to undergo psychological evaluation, or ordered to participate in sex offender or other treatment as a condition of release. Similarly, those sentenced to probation or on supervised release are routinely required to answer all inquiries made by the probation officer, participate in treatment as required by the probation officer, and waive the confidentiality of any treatment session.

Counsel must oppose any condition that requires the defendant to answer questions about his sexual history, fill out sexual history questionnaires, or submit to polygraph or phallometric testing, as well as more seemingly benign requirements, such as that the defendant answer all questions put to him by pretrial services or probation without limitation.

There are two bases for the objection. The primary one has to be reasonable fear of self incrimination for use in the current or a future prosecution (quite credible now that there is no federal statute of limitations), since the courts may hold that civil commitment is not a "criminal prosecution."[23] The secondary one is fear of civil commitment. Explain to the court how the civil commitment process works. Because almost all of the § 4248 certifications are in E.D.N.C. and D. Mass., most district courts have no experience with the new law and no understanding of how the government has used "treatment" to amass "evidence" for civil commitment certifications.

Take the Fifth. The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also

[23] As discussed in Part III, supra., two courts have found that § 4248 is a civil statute, notwithstanding strong arguments to the contrary. *See* Motions to Dismiss Civil Commitment Proceedings, available at http://www.fd.org/odstb_AdamWalsh.htm.

privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The Ninth Circuit has held that a person on supervised release cannot be forced to detail his sexual history in treatment without being given use and derivative use immunity from future prosecution. *See US v. Antelope*, 395 F.3d 1128, 1130-31 (9th Cir. 2005). The court found a "real and appreciable" risk of self-incrimination where the treatment would have required the defendant to reveal his full sexual history and take a polygraph examination, and his counselor intended to turn over any evidence of past crimes to law enforcement. *Id.* at 1135.

Forcing a defendant to choose between potentially incriminating himself and having his pretrial or presentence release, probation, or supervision revoked constitutes compulsion in violation of the Fifth Amendment. *See id.* at 1138-39; *see also Lefkowitz*, 414 U.S. at 82-83 (state may not force public contractors to give potentially incriminating testimony before grand jury or be disqualified from performing public contract); *Garrity v. New Jersey*, 385 U.S. 493, 496-97, 499 (1967) (state may not use threat of discharge to secure incriminatory evidence against an employee); *US v. Fowlkes*, 2005 WL 1404776, *1 (9th Cir., June 16, 2005) (probationer ordered to participate in sex offender treatment has Fifth Amendment rights during any required polygraph testing); *US v. Saechao*, 418 F.3d 1073, 1075 (9th Cir. 2005) (government cannot require probationer to answer incriminating questions posed by probation officer or face probation revocation); *Zehntner*, 2007 WL 201106 at *1 (defendant retains Fifth Amendment right over statements made during mental health treatment that was required as condition of pre-sentence release if later used by BOP to penalize defendant). **Note**, however, that the right to remain silent in probation interviews or treatment sessions must be affirmatively invoked by the defendant, unless the government expressly or by implication asserts that invocation of the privilege will result in revocation, in which case failure to invoke is excused. *See Minnesota v. Murphy*, 465 U.S. 420, 427-29 (1984) (interview with probation officer not sufficiently compulsory to excuse defendant's failure to invoke right to silence). To be safe, you should **invoke it on your client's behalf at the hearing at which the condition is imposed**, before any questions can be posed to (and potentially answered by) your client. And the client must understand that, when he is out of your sight, he must say the magic words – "I invoke my Fifth Amendment right to remain silent" – even if he has good reason to believe he will suffer repercussions for doing so.

C. Plea and Sentencing

Keep the record clean. The client should say as little as possible at a change of plea or sentencing.

- Admit only the elements of the crime at the change of plea hearing. A guilty plea does not waive Fifth Amendment rights at sentencing. *See Mitchell v. US*, 526 U.S. 314, 325 (1999). Whatever is admitted at the plea colloquy can be used, but a defendant cannot be compelled to admit facts beyond the elements at sentencing and no adverse inference can be drawn from the defendant's silence. *Id.* at 325,

328-30. Even the Fifth Circuit agrees. *See Kincy v. Dretke*, 92 Fed. Appx. 87, 91 (5th Cir. 2004) (defendant retains Fifth Amendment rights through sentencing).

- Always attend the pre-sentence interview and do not allow probation to ask any questions about sexual history.

- Do not permit an evaluation if it would reveal *any* contact history or if there is a risk that it would result in one of the "red flag" diagnoses (pedophilia, paraphilia, any form of sexual deviance or antisocial personality disorder). If you are unsure and want to have your client evaluated, make sure that your expert has a comprehensive understanding of § 4248 and what BOP has been doing with it. The results of any evaluation should always be communicated to you orally and no report should be written without your express approval. If you must move for funds for an expert, do it *ex parte*. *See Ake v. Oklahoma*, 470 U.S. 68 (1975).

- Object to anything in the PSR that is inaccurate or exaggerated, have the information redacted, or reissued without the offending information, and have the court take custody of and destroy all copies of the earlier version. It may sound paranoid, but remember that BOP has pledged to review "evidence" from *any* source when evaluating defendants for sexual dangerousness.

- If you have had your client evaluated and the results are good, consider asking the court to find by clear and convincing evidence (at least) that your client is not a sexually dangerous person within the meaning of § 4248.

- Whenever there is a good faith belief of potential incrimination, assert the Fifth on the record as to any questions relating to sexual history for the entire period that the defendant is in the custody of BOP, or on probation or supervised release.

D. In Custody

Challenge a sex offender designation based on anything other than the current offense of conviction. For years, BOP has classified inmates as "sex offenders" based on old state convictions or even old state charges that were dismissed as part of a plea agreement. Several courts have struck down BOP's policy of classifying inmates as "sex offenders" and notifying local authorities of their release on the basis of something other than the current federal offense. *See Fox v. Lappin*, 409 F.Supp.2d 79, 86 (D. Mass. 2006) (policy invalid insofar as it classifies inmates as sex offenders based on prior *state* convictions); *Simmons v. Nash*, 361 F.Supp.2d 452, 456-57 (D. N.J. 2005) (classification as sex offender can be triggered only by *current federal* conviction); *accord Henrikson v. Guzik*, 249 F.3d 395, 399 (5th Cir. 2001) (only if current federal offense is a crime of violence or drug trafficking may BOP notify local authorities of inmate's release). Nonetheless, BOP has continued to designate inmates as "sex offenders" based on prior charges and/or convictions. A sex offender designation will render an inmate immediately eligible for placement in the SOMP, which in turn will expose him to pressure to admit undetected contact offenses whether true or not.

Advice: Say nothing, sign nothing, invoke the Fifth. The Fifth Amendment right to remain silent exists whenever a person must choose between potential incrimination and punitive governmental action. With no statute of limitations for federal sex offenses, an inmate cannot discuss his sexual history without fear of a new federal prosecution. There is no doubt that BOP will share information received in the course of "treatment" with state and federal law enforcement authorities. Participants in the SOTP are required to sign a form acknowledging that program staff, BOP, DOJ, and USPO "may share information regarding my case," that program staff "will report any incidents or suspicion of child abuse or neglect, past or present, to law enforcement agencies," and that "admission to unreported crimes may result in additional criminal prosecution." *See* Sex Offender Treatment Program Consent Form (June 2001), available at http://www.fd.org/odstb_AdamWalsh.htm. SOMP participants are told that their statements will not be kept confidential if staff suspects either "child abuse" or "potential harm to self or others." *See* Sex Offender Management Program (March 1, 2004), available at http://www.fd.org/odstb_AdamWalsh.htm. And those subjected to a sexually dangerous person evaluation are told to sign a form stating that they understand the information obtained will be shared with "others with a need to know," including the DOJ. *See* Notice of Psychological Evaluation, available at http://www.fd.org/odstb_AdamWalsh.htm.

While BOP may constitutionally impose "adverse consequences" for refusing to participate in treatment by denying certain privileges, it cannot cross the line into unconstitutional compulsion. *McKune v. Lile*, 536 U.S. 24, 43-44 (2002). Unconstitutional compulsion exists if the term of imprisonment is extended. *Id. at* 38, 52 (no majority opinion in *McKune*, but the four in the plurality and O'Connor in concurrence agree that if refusal to make admissions of guilt and discuss sexual history results in less desirable conditions, there is no problem, but if it raises the sentence, including by taking good time credits, then it is unconstitutional; the four in dissent would have held both results unconstitutional); *Donhauser v. Goord*, 314 F.Supp.2d 119 (N.D. N.Y. 2004) (prison cannot penalize inmate for refusing to participate in sex offender treatment by taking good time credits). Thus, although your client may be penalized while in custody, the *only* way he can be held longer than his sentence is if he talks and thereby provides the necessary support for a § 4248 certification.

Regularly check in on high-risk clients. Try to stay in contact with clients throughout their sentences, particularly those who have been designated a sex offender or who are otherwise vulnerable to an SDP certification. Tell clients to remain silent and contact you immediately if they are transferred to an SOMP, told they are going to be "further evaluated" for § 4248 purposes, or handed notice of § 4248 certification. If this happens to one of your clients, contact the Defender office for the district in which your client is being held immediately for further help and instructions. When clients are isolated in custody, they are at the greatest risk of waiving their Fifth Amendment rights. Ideally, go through old client files, look for those with contact sex offenses mentioned in the PSR, and advise them about § 4248 and their rights.