

## Double Time for One Crime: Criminal Sentencing and Civil Commitment for Sex Offenders

Bradley Small

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# **DOUBLE TIME FOR ONE CRIME: CRIMINAL SENTENCING AND CIVIL COMMITMENT FOR SEX OFFENDERS**

BRADLEY SMALL\*

## **INTRODUCTION**

Imagine spending 1,825 days in one place. That's five years. But not in Hawaii or California or Paris. This is no vacation. You go to sleep and wake up every morning staring at the same view of nothingness. You are left with nothing but your thoughts. After 1,610 days, you can taste the finish line. With just 215 days to go, you have survived more than 85 percent of your time. You start mentally preparing who you are going to see, what you are going to do, where you are going to eat your first real meal. Instead of a countdown that has an end filled with celebration and freedom, your countdown has no end. There is no timetable, no goal, nothing to look forward to. You have no idea when this will all end.

This is how Todd Carta felt when in October of 2002 he began serving a five-year prison sentence. But on March 9th, 2007, the Attorney General filed a notice of certification that Carta was sexually dangerous and requested a hearing, thus staying his release and creating no end for his countdown. More than two years later, on June 4, 2009, a hearing was finally held before a district judge to determine whether Carta was sexually dangerous. While serving his jail sentence, Carta never committed an offense. Yet, he was forced to serve an extra 20 months beyond his five-year sentence while he waited to be told that he was not considered sexually dangerous and was free to go.

One of the most important rights afforded to criminal defendants under the Constitution is the double jeopardy clause provided by the Fifth Amendment, which states that, “[no] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>1</sup> In 2006, Congress

\* J.D., St. John's University School of Law, 2012; B.A., Political Science, Binghamton University, 2009.

<sup>1</sup> U.S. CONST. amend. V.

passed and the President signed into law the Adam Walsh Child Protection and Safety Act (“the Act”). The Act allows for inmates to be civilly committed if the Government can prove they are considered “sexually dangerous.”<sup>2</sup> This provision of the Act allows for a form of double jeopardy where inmates can be civilly committed without committing a second sexual offense.<sup>3</sup>

This Note addresses the problems presented by 18 U.S.C. § 4248, the civil commitment statute.<sup>4</sup> Part I provides background information on criminal sentencing under the Sentencing Reform Act and civil commitment under the Adam Walsh Act. Part II compares the language of §§ 3553 and 4248 of chapter 18 of the United States Code to illustrate the similarities between the text of each statute. Part II also examines the legislative history and goals behind each of these statutes to show were both enacted to achieve a similar purpose. Part III looks at how §§ 3553 and 4248 are applied by district judges in the case *United States v. Carta*. Part III will also highlight the similarities between the criminal sentencing hearing and civil commitment hearing for Mr. Carta.

This Note argues that the purpose and goals behind § 4248 can be adequately achieved through the sentencing factors under § 3553. Further, this Note suggests that as applied § 4248 poses a potential threat to infringing on criminal defendants’ rights under the double jeopardy clause of the Fifth Amendment. The Note provides a resolution for how this dilemma can be fixed to better serve the nation by eliminating § 4248, while still providing criminal defendants with their constitutional rights and serving the intent of Congress. This Note concludes that §§ 3553 and 4248 were enacted to serve similar purposes and thus, no Congressional goals will be affected by the elimination of § 4248.

## I. CRIMINAL AND CIVIL SENTENCING OF SEX OFFENDERS

### A. *The Sentencing Reform Act*

In 1984, Congress passed the Comprehensive Crime Control Act.<sup>5</sup> The Crime Control Act’s purpose was to “overhaul[] the federal sentencing system and revise[] bail and forfeiture procedures along with other federal

<sup>2</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

<sup>3</sup> *Id.*

<sup>4</sup> 18 U.S.C. § 4248 (2006).

<sup>5</sup> Pub. L. No. 98-473, 98 Stat. 1837 (1984).

practices.”<sup>6</sup> The Sentencing Reform Act (“the Sentencing Act”) was one provision of the Crime Control Act.<sup>7</sup> It created the U.S. Sentencing Commission.<sup>8</sup> As part of its responsibilities, the Commission created factors to consider when imposing a sentence.<sup>9</sup> These factors became codified into the United States Code, chapter 18, section 3553.<sup>10</sup> Until 2005, all of the factors were considered mandatory for federal judges to follow. Subsequently, in *United States v. Booker*,<sup>11</sup> the Supreme Court held the mandatory sentencing guidelines, specifically the fourth factor listed in § 3553, violated the Sixth Amendment.<sup>12</sup> As a result they said the “[g]uidelines [are] effectively advisory.”<sup>13</sup>

There are seven factors considered at sentencing.<sup>14</sup> First, the court considers the “nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>15</sup> Second, the court will consider if the type and length of sentence is necessary.<sup>16</sup> Specifically, the court will consider four things: providing just punishment, deterring criminal conduct, protecting the public from future crimes, and providing training and treatment for the defendant.<sup>17</sup> Third, the court considers what sentences

<sup>6</sup> JoAnne O’Bryant & Lisa Seghetti, *Crime Control: The Federal Response*, ALMANAC OF POLICY ISSUES, Sept. 12, 2002, available at [http://www.policyalmanac.org/crime/archive/crs\\_federal\\_crime\\_policy.shtml](http://www.policyalmanac.org/crime/archive/crs_federal_crime_policy.shtml).

<sup>7</sup> Pub. L. No. 98-473, 98 Stat. 1837 (1984); see UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, available at [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (explaining the three purposes of the Sentencing Commission are: “(1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.”).

<sup>8</sup> UNITED STATES SENTENCING COMMISSION, *supra* note 8. The U.S. Supreme Court has rejected challenges to the creation of the Sentencing Act on the basis of a separation of powers argument. See *Mistretta v. United States*, 488 U.S. 361 (1989) (stating “[w]e conclude that in creating the Sentencing Commission – an unusual hybrid in structure and authority -- Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate branches.”) *Id.* at 412.

<sup>9</sup> 18 U.S.C. § 3553 (2006).

<sup>10</sup> *Id.*

<sup>11</sup> 543 U.S. 220 (2005).

<sup>12</sup> See *Booker* 543 U.S. at 220 (holding that section (a)(4) of the Act that makes the Federal Sentencing Guidelines mandatory violated the Sixth Amendment and thus they cannot be considered mandatory but rather advisory).

<sup>13</sup> *Id.* at 245.

<sup>14</sup> 18 U.S.C. § 3553(a) (2006).

<sup>15</sup> *Id.* at § 3553(a)(1).

<sup>16</sup> *Id.* at § 3553(a)(2).

<sup>17</sup> *Id.* at § 3553(a)(2)(A)–(D).

are available.<sup>18</sup> Fourth, the court looks at the “kinds of sentences and the sentencing range established.”<sup>19</sup> Fifth, the court considers “any pertinent policy statement.”<sup>20</sup> Sixth, the court factors in “the need to avoid unwarranted sentence disparities among defendants with similar records, who have been found guilty of similar conduct.”<sup>21</sup> Finally, the last factor the court considers is restitution for the victims.<sup>22</sup>

These factors are applied in conjunction with the advisory sentencing guidelines provided to federal judges. Although the guidelines are no longer mandatory, judges look to the guidelines to provide a framework for the length of sentence they should give to a criminal defendant.<sup>23</sup> A survey of judges has indicated that, despite rumors of judges’ disapproval of the guidelines, many of them in fact view the guidelines as extremely beneficial when they are imposing a sentence on a criminal defendant.<sup>24</sup> Despite the guidelines being ruled advisory, these guidelines and the § 3553 factors are both used during sentencing for criminal defendants.

### *B. The Adam Walsh Act*

At sentencing, a criminal defendant will find out the definitive length of his or her journey and when it will end, whether in jail or supervised release. However, those subject to civil commitment are tricked at sentencing into believing they will be released at a certain point. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (“the Act”), which aimed “to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety and to honor the memory of Adam Walsh and other child

<sup>18</sup> *Id.* at § 3553(a)(3).

<sup>19</sup> *Id.* at § 3553(a)(4). The court will look to “(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.” *Id.* The court will also consider “(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the sentencing Commission pursuant to section 994(a)(3) of title 28, *United States Code*, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the sentencing Commission into amendments issued under section 994(p) or title 28).” *Id.*

<sup>20</sup> *Id.* at § 3553(a)(5).

<sup>21</sup> *Id.* at § 3553(a)(6).

<sup>22</sup> *Id.* at § 3553(a)(7).

<sup>23</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012); see also, Michael Edmund O’Neill and Linda Drazga Maxfield, *Judicial Perspectives on the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 85 (Fall, 2004) (explaining that federal judges do not approve of the sentencing guidelines is a longstanding rumor).

<sup>24</sup> See O’Neil *supra*, note 24, at 109 (“[T]hose on the forefront of sentencing—the judges—largely appear to have accepted [the guidelines] existence and to embrace them as being beneficial in many areas.”).

crime victims.”<sup>25</sup> The Act is divided into seven parts, each implementing a different way to protect the public, primarily children, from sex offenders.<sup>26</sup> The Act creates the Sex Offender Registration and Notification Act (“SORNA”)<sup>27</sup> and the Internet Safety Act.<sup>28</sup> The Act also reforms immigration law to protect children and prevent the use and distribution of child pornography.<sup>29</sup> In addition, the Act funds programs for children and community safety.<sup>30</sup> It also increases penalties for those convicted of sexual offenses against children.<sup>31</sup> Finally, the Adam Walsh Act allows for the civil commitment of “sexually dangerous persons.”<sup>32</sup>

### *C. Civil Commitment of Sexually Dangerous Persons*

Title III of the Adam Walsh Act was created in memory of Jimmy Ryce, a nine-year old boy who was kidnapped and murdered by a sex offender.<sup>33</sup> This part of the Act became codified into law as 18 U.S.C. § 4248 (“§ 4248”).<sup>34</sup> The statute authorizes the Government to civilly commit those federal prisoners who are considered “sexually dangerous.”<sup>35</sup> If it is believed the inmate should be civilly committed the Attorney General or someone authorized by the Attorney General or the Director of the Bureau of Prisons can certify the inmate as “sexually dangerous.”<sup>36</sup> The certification must be sent to the district court where the person is being held.<sup>37</sup> The court must send the certification to the inmate and the Government’s attorney.<sup>38</sup> Finally, the court “shall order a hearing to

<sup>25</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; SORNA’s purpose is to establish “a comprehensive national system for the registration of [sex] offenders.” 42 U.S.C. § 16901 (2006). See Robin Morse, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1758 (December 2009). SORNA was also created to ensure that sex offenders who travel to different states are registered. See *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008) (citing H.R. Rep. No. 109-218, at 23-24, 26 (2005)).

<sup>28</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, §§ 701-707, 120 Stat. 587, 648-50 (codified as amended in scattered sections of 18 U.S.C.).

<sup>29</sup> *Id.* at §§ 401–507.

<sup>30</sup> See, e.g., *id.* at § 630 (providing grants for establishing programs on Internet safety for children).

<sup>31</sup> *Id.* at §§ 201 – 216.

<sup>32</sup> *Id.* at § 301; 18 U.S.C. § 4248 (2006).

<sup>33</sup> See 42 U.S.C. § 16901 (12) (2006) (“Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.”); 42 U.S.C. § 16971 (2006) (providing grants for the “Jimmy Ryce State civil commitment programs for sexually dangerous persons”).

<sup>34</sup> 18 U.S.C. § 4248.

<sup>35</sup> 18 U.S.C. § 4248(d).

<sup>36</sup> 18 U.S.C. § 4248(a).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

determine whether the person is a sexually dangerous person.”<sup>39</sup> Section 4248(a) provides no requirements or standards for certification, so long as the procedures are followed.<sup>40</sup> In essence, the Attorney General has a tremendous amount of power in the civil commitment scheme. Once the certification is made and all procedures under § 4248(a) are followed, the inmate’s release will be stayed until a hearing can be held.<sup>41</sup>

After the release of the prisoner is stayed, the Attorney General must prove by “clear and convincing evidence” that such person is “sexually dangerous.”<sup>42</sup> This is a lower standard than “beyond a reasonable doubt,” which is the standard used to convict the defendant of the underlying offense. Under the statute, a “sexually dangerous person” is one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”<sup>43</sup> For a district judge to civilly commit a prisoner, the Attorney General must prove both elements of the definition of a “sexually dangerous person.” First, the inmate must have “engaged or attempted to engage in sexually violent conduct or child molestation.”<sup>44</sup> Second, the court must believe the individual will be “sexually dangerous to others” in the future.<sup>45</sup> If the court finds by clear and convincing evidence that the person is sexually dangerous, the Attorney General will either turn over the inmate to the appropriate State official or retain custody over the individual.<sup>46</sup>

Those who may be civilly committed under § 4248 fall into three categories: (1) those in the custody of the Bureau of Prisons (“BOP”); (2) those who are incompetent to stand trial and thus committed to the custody of the Attorney General; and (3) those that have had their charges dismissed due to their mental condition.<sup>47</sup>

Once an individual is civilly committed they begin the next part of their marathon. They have completed phase one, serving jail time, and now begin phase two, civil commitment, which has no definitive ending. No new facts have developed in their criminal record yet their marathon will continue into a new phase. Those civilly committed will remain in custody of the State or the Attorney General until the “Director of the facility in

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 18 U.S.C. § 4248(d).

<sup>43</sup> 18 U.S.C. § 4247(a)(5).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 18 U.S.C. § 4248(d).

<sup>47</sup> 18 U.S.C. § 4248(a).

which a person is placed” believes that the individual should be released.<sup>48</sup> The Director must then “promptly file a certificate to that effect with the clerk of the court that ordered the commitment.”<sup>49</sup> The inmate will be discharged unless the court or the Government moves for a hearing to determine if the individual should be released.<sup>50</sup> The hearing is held “pursuant to the provision of section 4247(d).”<sup>51</sup> A “preponderance of the evidence” standard is applied to determine if release is appropriate.<sup>52</sup> If the court finds by a preponderance of the evidence that “he will not be sexually dangerous to others if released unconditionally, then the court shall order that he be immediately discharged.”<sup>53</sup> Alternatively, if the court finds that “he will not be sexually dangerous to others if released under a prescribed regiment of medical psychiatric, or psychological care or treatment,”<sup>54</sup> then several conditions apply. First, the court must “order that he be conditionally discharged under a prescribed regiment of medical, psychiatric, or psychological care or treatment that has been prepared for him that has been certified to the court . . . and that has been found by the court to be appropriate.”<sup>55</sup> In addition, the court must “order as an explicit condition of release, that he comply with the prescribed regimen of medical psychiatric, or psychological care or treatment.”<sup>56</sup> Assuming the individual falls within one of these classifications, the court will order his release.

## II. TWO STATUTES: SAME WORDS, SAME INTENT

When viewed in conjunction with one another, having §§ 3553 and 4248 in the United States Code is unnecessary because the purposes and goals behind § 4248 are already served under § 3553. Reading the text and legislative history of both §§ 3553 and 4248, it is clear that the statutes are duplicative and were intended to achieve the same two goals: protecting the public and rehabilitating the defendant. If § 4248 had never been codified, the goals of Congress would have still been achieved because of § 3553.

<sup>48</sup> 18 U.S.C. § 4248(e).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; 18 U.S.C. § 4247 (“At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.”).

<sup>52</sup> 18 U.S.C. § 4248(e).

<sup>53</sup> 18 U.S.C. § 4248(e)(1).

<sup>54</sup> 18 U.S.C. § 4248(e)(2).

<sup>55</sup> 18 U.S.C. § 4248(e)(2)(A).

<sup>56</sup> 18 U.S.C. § 4248(e)(2)(B).



Thus, the elimination of § 4248 will not defeat Congress' intent because § 3553 will still be codified in the United States Code.

*A. The Plain Meaning Says It All*

By reading the language of §§ 3553 and 4248, the similarities of both statutes are obvious. Section 3553 lists the factors that should be considered when a federal judge imposes a sentence on a criminal defendant.<sup>57</sup> Among these factors is the need “to protect the public from further crimes of the defendant,”<sup>58</sup> which is balanced with other factors, such as the severity of the offense and adequate deterrence.<sup>59</sup> The factors for civil commitment are not clearly stated in § 4248.<sup>60</sup> However, the court must find by the clear and convincing evidence standard that “the person is considered sexually dangerous.”<sup>61</sup> The court that civilly commits the sexually dangerous person will also follow the guidelines to determine if release is appropriate.<sup>62</sup> The court must determine by a “preponderance of the evidence”<sup>63</sup> that the inmate “will not be [a] sexually dangerous individual to others if released.”<sup>64</sup>

The text of §§ 3553 and 4248 illustrate that both statutes consider protecting the public a central motive for both criminal sentencing and civil commitment. The justification for this motive is apparent; criminals who are dangerous should not be released. Despite using different language, each statute requires a judge to consider the harm defendants may cause to the public upon their release. For example, § 3553 orders a court to consider the necessity of the sentence “to protect the public from further crimes of the defendant.”<sup>65</sup> Similarly, § 4248 requires a court to find by a preponderance of the evidence that the defendant “will not be sexually dangerous to others if released.”<sup>66</sup> The potential harm to the public is considered at sentencing; thus, civilly committing an inmate on the same grounds is duplicative and unfair.

In addition to protecting the public, both statutes attempt to provide for the rehabilitation or “curing” of a defendant's inclination toward illegal

<sup>57</sup> See 18 U.S.C. § 3553(a) (2006).

<sup>58</sup> *Id.* § 3553(a)(2)(C).

<sup>59</sup> See *id.* § 3553(a)(2).

<sup>60</sup> See *id.* § 4248.

<sup>61</sup> *Id.* § 4248 (d).

<sup>62</sup> See *id.* § 4248 (e).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* § 3553(a)(2)(C) (2006).

<sup>66</sup> *Id.* § 4248(e).

sexual conduct. For example, § 3553 requires a court “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”<sup>67</sup> Likewise, § 4248 allows a court to release a defendant “if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment.”<sup>68</sup> Based on the text of § 3553, the civil commitment statute can be eliminated and the sentencing factors can be adjusted to provide for a longer sentence or indefinite parole, therefore accomplishing the same goals of § 4248.

### B. Congressional Intent

In addition to the similar language used in § 3553 and § 4248, both statutes were enacted by Congress to serve similar purposes. The U.S. Sentencing Commission established the factors a federal judge considers when sentencing a criminal defendant in order to “incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation).”<sup>69</sup> After passing the Sentencing Act, the Senate issued a report that said, “[a] primary goal of sentencing reform is the elimination of unwarranted sentencing disparity. The bill requires the judge, before imposing a sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purpose of sentencing.”<sup>70</sup> The Senate Report discusses the four purposes of sentencing; just punishment, deterrence, incapacitation and rehabilitation, by stating that “[w]hile some of those who have commented on the bill prefer that one purpose or another be favored over the others . . . the Committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case.”<sup>71</sup> Two of the Committee’s main goals in sentencing reform were to “assure that sentences are fair both to the offender and to society,”<sup>72</sup> and to “assure that each stage of the sentencing and corrections process . . . is geared toward

<sup>67</sup> *Id.* § 3553(a)(2)(D).

<sup>68</sup> *Id.* § 4248(e)(2).

<sup>69</sup> UNITED STATES SENTENCING COMMISSION, *supra*, note 8. (explaining another goal is to provide certainty, fairness, and uniformity for offenders with similar characteristics who are convicted of similar criminal conduct while still allowing judicial flexibility to consider relevant aggravating and mitigating factors); *see also id.* (discussing the last goal of reflecting how increased knowledge of human behavior affects the criminal justice process). *Cf.* Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENT. R. 326 (May/June 1991) (“And the Commission is instructed to ‘insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant. . . .’” (citing 28 U.S.C. § 994(k)).

<sup>70</sup> S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

<sup>71</sup> *Id.* at 3250-51.

<sup>72</sup> *Id.* at 3222.

the same goals for the offender and for society.”<sup>73</sup>

Since the passage of § 3553, the creation of the guidelines, and the Supreme Court decision in *United States v. Booker*,<sup>74</sup> many district court judges have advocated both for and against the factors and guidelines used to calculate a sentence.<sup>75</sup> Professor Michael O’Neill, Commissioner of the U.S. Sentencing Commission, and Linda Maxfield, Senior Research Associate of the Office of Policy Analysis for the U.S. Sentencing Commission, stated that “the district court judges believe that the guidelines system is putting its greatest energy into discouraging offenders from committing future crimes.”<sup>76</sup> On behalf of the Sentencing Commission, they surveyed federal judges to “determine whether the judiciary believed the federal sentencing guidelines have met the goals and purposes of sentencing.”<sup>77</sup> The results of the survey indicate that “[m]ost judges perceived that the guidelines successfully provided convicted offenders with a sentence that accurately specified actual time to be served, and, in doing so, protected the public from future crimes that these offenders would otherwise commit.”<sup>78</sup> In sum, the purposes of protecting the public by deterring future crimes and “curing” the criminal are successfully accomplished when a federal judge sentences the defendant pursuant to the factors in § 3553.

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act.<sup>79</sup> He declared the purpose of the Act is “to protect our children from exploitation and danger.”<sup>80</sup> One section of the Act, the Sex Offender Registration and Notification Act (“SORNA”), states that its purpose is “to protect the public from sex

<sup>73</sup> *Id.*; see 133 CONG. REC. H10,014, at \*H10,018 (daily ed. Nov. 16, 1987) (explaining that § 3553(a) allows the court to depart from the sentencing guidelines if it finds that the guidelines call for a sentence that is greater than necessary to serve the purposes of sentencing); see also 1984 U.S.C.C.A.N. 3182, 3235 (stating that a judge may conclude that the guidelines do not consider an aggravating or mitigating circumstance and impose a sentence outside the guidelines).

<sup>74</sup> See generally 543 U.S. 220 (2005) (holding that the federal sentencing guidelines were advisory rather than mandatory).

<sup>75</sup> See generally O’Neill & Maxfield, *supra* note 24.

<sup>76</sup> *Id.* at 91.

<sup>77</sup> *Id.* at 86.

<sup>78</sup> *Id.* at 91.

<sup>79</sup> See Press Release, The White House, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>. President Bush listed four ways in which the law builds on the progress of protecting children: (1) expanding the National Sex Offender Registry; (2) increasing penalties for crimes against children; (3) authorizing task forces charged with funding and training states to combat sexual exploitation of children on the internet; and (4) creating a National Child Abuse Registry. *Id.*

<sup>80</sup> *Id.*; see Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV 697, 702 (2008).

offenders and offenders against children, and . . . vicious attacks by violent predators False Congress in this chapter establishes a comprehensive national system for the registration of those offenders.”<sup>81</sup> Another part of the Act, the civil commitment provision, has been codified into the United States Code, § 4248.<sup>82</sup>

Several courts have discussed the Congressional intent behind § 4248 while conducting civil commitment hearings. In *United States v. Trillo-Cerda*<sup>83</sup> the court said, “[u]nderlying §§ 4241-4248 ‘is the concept of some protection to society as well as the preservation of the rights of an accused person.’”<sup>84</sup> Later, the court said “[g]iven that by enacting §§ 4241-4248 Congress intended to provide protection for society . . .”<sup>85</sup> In *United States v. Abregana*<sup>86</sup> the court said, “Section 4248 recognizes the federal government’s interest in civilly committing a sexually dangerous person in its custody with the goal of protecting members of our society from sexually dangerous acts.”<sup>87</sup> Further “there is no clear proof that Congress intended to create anything other than a civil commitment scheme designed to protect the public from harm.”<sup>88</sup> These two cases are examples of how Congressional intent to protect the public is considered by courts during a § 4248 hearings.

Although the constitutionality of § 4248 has been challenged, the Supreme Court upheld it as constitutional in *United States v. Comstock*.<sup>89</sup> The Supreme Court settled the debate over Congress’ power to enact the civil commitment statute, but the Court’s reasoning is important. One factor the majority focused on in ruling in favor of the Government was “the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody.”<sup>90</sup> The Court recognized protecting the public as a main intent behind the statute, despite not addressing the duplicative nature of

<sup>81</sup> 42 U.S.C. § 16901 (2006).

<sup>82</sup> 18 U.S.C. § 4248 (2006).

<sup>83</sup> 244 F. Supp. 2d 1065 (S.D. Cal. 2002).

<sup>84</sup> *Id.* at 1068 (quoting *United States v. Barnes*, 175 F. Supp. 60, 65 (S.D. Cal. 1959)).

<sup>85</sup> *Id.* (citing *Barnes*, 175 F. Supp. at 65).

<sup>86</sup> 573 F. Supp. 2d 1123 (D. Haw. 2008).

<sup>87</sup> *Id.* at 1133. The Government argued that it “has a compelling interest in preventing the commission of crimes by persons in federal custody who present demonstrable dangers.” *Id.* at 1129 (citing Gov. Opp. At 18, Doc. 9).

<sup>88</sup> *Id.* at 1135.

<sup>89</sup> 130 S. Ct. 1949 (2010).

<sup>90</sup> *Id.* at 1965. (“[A]nd to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”) *Id.*; see generally Ilya Somin, *Federal Power: Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 CATO. SUP. CT. REV. 239 (2009-10).

§4248.

The purpose and legislative history behind §§ 3553 and 4248 indicate that Congress, in 1984 and 2006, had similar intentions when drafting and passing each statute. The main theme behind the enactment of both statutes is public protection from future harms. Each statute also serves to rehabilitate the criminal, in order to further the goal of preventing future criminal acts. As a result of the repetitive nature behind the creation of the criminal sentencing factors and the civil commitment provision, § 4248 could be eliminated. An amendment to the sentencing factors and guidelines of § 3553 providing for stricter sentences for sex offenses and indefinite supervised release would serve the same purpose as § 4248.

### III. APPLICATION OF §§ 3553 AND 4248 IN *UNITED STATES V. CARTA*<sup>91</sup>

Defendants subject to sentencing under § 3553 and civil commitment under § 4248 spend more time in the custody of the Government exceeds the amount of time they were initially sentenced for the underlying crime. As a result of pleading guilty to two sexual offenses, Todd Carta was sentenced for his crimes under § 3553. Before the completion of his sentence the Attorney General certified him as sexually dangerous under § 4248 before the completion of his sentence. The underlying facts of Mr. Carta's criminal case are important because they are the exact same facts used in his civil commitment hearing to determine if he was a sexually dangerous person. The trial court's reasoning behind Carta's criminal sentence for Transportation of Child Pornography identified many of the same goals and objectives that were cited by the court presiding over Carta's civil commitment hearing.

#### *A. Facts*

Todd Carta has been sentenced for one crime in his life. That crime was the only crime he committed prior to his § 4248 hearing. Carta was the victim of sexual abuse as a child.<sup>92</sup> For more than eight years, beginning when he was seven years old, Carta was forced to engage in sexual acts with other children his age, older children, and older men.<sup>93</sup> As a result of

<sup>91</sup> *United States v. Carta*, 620 F. Supp. 2d 210 (D. Mass. 2009).

<sup>92</sup> *Id.* at 212.

<sup>93</sup> *Id.* While he was seven years old, Carta was ordered by his fifteen year old neighbor to perform sex acts on another seven-year-old. *Id.* He was sexually abused by a family acquaintance on at least three occasions. *Id.* at 213. Carta was fifteen when he was forced to have sex with a 65-year old man at least weekly for over three years. *Id.*

the sexual abuse, Carta began to engage in initiate sexual acts on his own early in life.<sup>94</sup> He had his first relationship when he was 17 years old with a boy of a similar age.<sup>95</sup> Carta started to accumulate a criminal history of non-sex related offenses as an adolescent. He has committed a few sexual offenses over his adult life, none of which he was convicted for or relate to the underlying offense of his § 3553 sentence.<sup>96</sup> When Carta was in his thirties he began using the Internet in search of young boys.<sup>97</sup>

The crime resulting in Carta's criminal sentence was his first and only conviction for a sex offense.<sup>98</sup> On April 9, 2002, he pled guilty to a single count of Transportation of Child Pornography in the District of Connecticut.<sup>99</sup> During his sentencing hearing he admitted that he began viewing child pornography in 1995.<sup>100</sup> Carta had between 10,000 and 20,000 images in his possession.<sup>101</sup> He estimated that at some points he spent 70 hours per week viewing child pornography.<sup>102</sup> None of these facts related to the charged crime, only his sentence. When later questioned, however, he reduced that number to five hours per week.<sup>103</sup> Based on the sole charge of Transportation of Child Pornography Carta was sentenced to 60 months in prison and three years supervised release.<sup>104</sup>

### *B. Criminal Sentence*

On April 9, 2002, Carta entered a guilty plea before the Honorable Dominic Squatrito<sup>105</sup> confessing to "one count of transportation of child pornography . . . and one count of criminal forfeiture."<sup>106</sup> At the sentencing

<sup>94</sup> *Id.* When Carta was approximately 15 years old he shot another 15-year-old boy with a BB gun when he refused to engage in oral sex. *Id.* Carta was able to convince the boy to do it and they engaged in oral sex two times in the next five years. *Id.*

<sup>95</sup> *Id.* Carta, then 24 years old, began a relationship with a 17-year-old female named Lucille, whom he married one year later. *Id.* The marriage ended after nine months due to an affair. *Id.* Carta later had a four-year relationship with another woman named Brenda. *Id.*

<sup>96</sup> *Id.* He offered a 13-year-old boy oral sex in exchange for concert tickets. *Id.* Carta fondled an 18-year-old male who passed out from drug use in his van. *Id.* at 214.

<sup>97</sup> *Id.* at 214. At 31 years old, Carta described having a "boyfriend" who was 13. *Id.* Eventually he brought the boy with him from California to Connecticut to live with him. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Transcript of Hearing at 27, *United States v. Carta*, 620 F. Supp. 2d 210 (2009) (No. 3:02CR99) (D. Conn. April 9, 2002) (unpublished). Carta pled guilty to count one and two in violation of Title 18, United States Code, Section 2253. *Id.*

<sup>106</sup> Transcript of Hearing at 2-3, *supra* note 106.

hearing six months later, the court considered multiple factors in determining Carta's sentence, including the pre-sentence report by Mr. Joseph Monesti.<sup>107</sup> The pre-sentence report calculated a recommendation for Carta's sentence.<sup>108</sup> The court adopted the facts in the pre-sentence report that neither party objected to.<sup>109</sup>

Counsel for Carta, Mr. John Francis O'Brien, objected to two calculations contained in the pre-sentence report.<sup>110</sup> He argued that his client did not have an "abusive or exploitive relationship with a minor" as characterized by the report.<sup>111</sup> O'Brien also argued that Carta's use of child pornography was "not a systematic scheme" and thus he was not engaged in the "barter of materials."<sup>112</sup> The court agreed with Mr. O'Brien and concluded that Carta's activity did not fit within the category of sexual abuse or exploitation of a minor under the sentencing guidelines.<sup>113</sup> The court did, however, disagree with O'Brien on the issue of barter of materials and found that Carta "did distribute child pornography, quote, for receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain."<sup>114</sup> As a result of Carta's barter of materials, the court determined a five level increase, under the sentencing guidelines, was necessary.<sup>115</sup>

The court considered many factors before imposing Carta's criminal sentence. Some were the same factors later considered at his civil commitment hearing. In addition to the pre-sentence report and the sentencing guidelines, the court considered his criminal history and the need to protect the public.<sup>116</sup> As required under § 3553, Judge Squatrito factored the need "to protect the public from further crimes of the defendant."<sup>117</sup> He said, "This is a very long rap sheet . . . But, you've got to protect society."<sup>118</sup> He also said, "[t]he factors which a district court must take into consideration in determining a particular sentence to be imposed are stated in 18 U.S.C. Section 3553."<sup>119</sup> Before sentencing Carta, the Government made a 5K1 motion for a downward departure from the

<sup>107</sup> *Id.* at 7.

<sup>108</sup> *Id.* at 8.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 10.

<sup>113</sup> *Id.* at 12.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 13.

<sup>116</sup> *Id.* at 29.

<sup>117</sup> 18 U.S.C. § 3553(a)(2)(C) (2006).

<sup>118</sup> Transcript of Hearing at 29, *supra* note 106.

<sup>119</sup> *Id.* at 39.

sentencing guidelines.<sup>120</sup> The Government explained that Carta was “instrumental” in locating a man named Mark Ives, who was trading child pornography.<sup>121</sup> Finding Ives was extremely important to the Government because he “had some indication on his computer that [Ives] was about to adopt some boy in a foreign country.”<sup>122</sup> The court concluded that “a downward departure is warranted in this case” and granted the Government’s motion.<sup>123</sup> As a result of the downward departure, his sentence was reduced by more than two years.<sup>124</sup>

After evaluating the pre-sentence report, Carta’s criminal history, the 5K1 motion, and the statements of Carta and his attorney, Judge Squatrito imposed a sentence of 60 months and three years supervised release.<sup>125</sup> Special conditions were provided for Carta’s supervised release.<sup>126</sup> He would be required to participate in various programs, including mental health treatment, sex offender treatment, and substance abuse treatment, all of which would further the goal of rehabilitation under § 3553.<sup>127</sup> Another condition of his supervised release was that he would not be allowed to be with a child unless another adult were present.<sup>128</sup> Finally, Judge Squatrito explained to Carta what would happen if he violates his supervised release: “the Court will be free to sentence you to additional time in prison, without credit for time previously served on post release supervision, for a period of as much as two years.”<sup>129</sup> On October 16, 2002, after considering the factors listed in § 3553, the Judge imposed a sentence of five years prison time and three years supervised release.<sup>130</sup> Judge Squatrito recommended Carta to be incarcerated at the Devens medical facility, which is classified as an Administrative facility rather than a high security institution.<sup>131</sup>

<sup>120</sup> *Id.* at 19 (discussing the 5K1 motion made by the government for a downward departure from the sentencing guidelines).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 42.

<sup>124</sup> *Id.* at 51–53. The guidelines called for 92 to 115 months in prison before the 5K1 motion. *Id.* at 51. Carta was sentenced to 60 months in prison, thus his sentence was reduced by at least 32 months, or 2.6 years. *Id.* at 53.

<sup>125</sup> *Id.* at 54.

<sup>126</sup> *Id.* (“A special condition of supervised release will be that you not commit another federal, state or local crime during the term of supervision.”).

<sup>127</sup> *Id.* at 54–55.

<sup>128</sup> *Id.* at 55. (“Four. The defendant shall not be allowed to be in the company of any child under the age of 18 years without another adult present. The adult supervisor shall be first approved by United States Probation Office and the counselor for the sexual offender program.”).

<sup>129</sup> *Id.* at 56.

<sup>130</sup> 18 U.S.C. § 4247 (2006).

<sup>131</sup> See Transcript. of Hearing at 62, *supra* note 107; see also Federal Bureau of Prisons, *FMC Devens*, <http://www.bop.gov/locations/institutions/dev/index.jsp> (last visited Apr. 11, 2012).



*C. Civil Commitment*

Carta's marathon jail sentence was scheduled to end, but the Attorney General exercised his power under § 4248 and certified Carta as "sexually dangerous," thus allowing a district judge to stay his release.<sup>132</sup> On June 4, 2009, the United States District Court for the District of Massachusetts held a hearing to determine whether Carta fit within the definition of "sexually dangerous."<sup>133</sup> The court held that the government did not prove by clear and convincing evidence that Carta was a "sexually dangerous person."<sup>134</sup> The court said that to civilly commit Carta "the Government must make two primary showings: (1) that Respondent has 'engaged or attempted to engage in sexually violent conduct or child molestation' in the past; and (2) that Respondent 'is sexually dangerous to others.'"<sup>135</sup> To determine if Carta was sexually dangerous, the court required the Government to prove "(a) that Respondent 'suffers from a serious mental illness, abnormality, or disorder'; and (b) that Respondent 'would have serious difficulty in refraining from sexually violent conduct or child molestation if released.'"<sup>136</sup> The second prong of the analysis is nearly identical to a factor considered at sentencing: "protect[ing] the public from further crimes of the defendant."<sup>137</sup> Therefore, the purpose underlying Carta's § 4248 civil commitment hearing is the same purpose that was considered at his § 3553 criminal sentence.

At trial, the Government experts testified that some of Carta's sexual contact with minors could be considered child molestation under § 4247.<sup>138</sup> The Bureau of Prisons ("BOP") has defined the term child molestation to include "any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years."<sup>139</sup> Based on expert testimony and the BOP's definition of child molestation, the court found that Carta's conduct satisfied the child molestation element of civil commitment under §§ 4247 and 4248.<sup>140</sup> However, the conduct that the

<sup>132</sup> See *United States v. Carta*, Docket # 1:07-cv-12064-PBS (Mar. 9, 2007).

<sup>133</sup> *United States v. Carta*, 620 F. Supp. 2d 210, 229 (D. Mass. 2009).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 221 (quoting 18 U.S.C. § 4247(a)(5)).

<sup>136</sup> *Id.* (quoting 18 U.S.C. § 4247(a)(5)).

<sup>137</sup> 18 U.S.C. § 3553 (a)(2)(C) (2006).

<sup>138</sup> *Carta*, 620 F. Supp. 2d at 221. Carta's attorney argued that he had not committed child molestation because the minors he sexually abused were mature because they were not prepubescent.

*Id.*

<sup>139</sup> *Id.* (quoting 28 C.F.R. § 549.93 (2008)).

<sup>140</sup> *Id.* (holding that Carta's "sexual activity with a thirteen-year-old male whom he coerced into engaging in sexual activity in exchange for concert tickets when Respondent was twenty-eight" constituted child molestation under the Act).

experts testified about took place prior to Carta's sentence for transportation of child pornography and thus the sentencing court had an opportunity and did factor in his sexual conduct with minors when calculating his sentence.

Ultimately, Carta spent a year and a half in jail beyond the length of his criminal sentence, while he waited to be told that he was not a sexually dangerous person. The court held that the Government failed to meet its burden under the clear and convincing evidence standard that Carta currently suffers from "a serious mental illness, abnormality or disorder."<sup>141</sup> Several witnesses testified to Carta's condition. Each party called an expert witness. Carta's psychologist assigned by the BOP, Dr. J. Michael Wood, testified that Carta "enjoy[ed] therapy because it was the first time he could discuss his problems freely."<sup>142</sup> Dr. Amy Phenix, an expert for the Government, testified that Carta is "sexually dangerous" and, thus, satisfied the criteria to be civilly committed under the Act.<sup>143</sup> Pursuant to § 4247, the court appointed Dr. Leonard Bard as an expert at the request of Carta.<sup>144</sup> Dr. Bard found that Carta was not considered sexually dangerous under the definition in § 4247.<sup>145</sup>

In an attempt to diagnosis Carta with a "serious mental illness, abnormality or disorder,"<sup>146</sup> the Government focused on diagnosing him with "paraphilia NOS: hebephilia."<sup>147</sup> The Government's expert, Dr. Phenix, described a person suffering from "hebephilia" as someone having a "sexual interest in post-pubescent adolescents age seventeen and under."<sup>148</sup> This diagnosis is not one found within the DSM-IV-TR,<sup>149</sup> which "is a classification manual that contains all of the known research on

<sup>141</sup> *Id.* (quoting 18 U.S.C. § 4247 (a)(6)).

<sup>142</sup> *Id.* at 215.

<sup>143</sup> *Id.* at 212.

<sup>144</sup> *Id.* ("Respondent also called Dr. Randall Kent Wallace, who testified about the psychological services Respondent would be expected to receive on supervised release, and Paul Collette, a U.S. Probation Officer who provided testimony regarding Respondent's anticipated conditions of release.")

<sup>145</sup> *Id.*

<sup>146</sup> 18 U.S.C. § 4247(a) (2006).

<sup>147</sup> *Carta*, 620 F. Supp. 2d at 222. "The term 'paraphilia' refers to an individual who experiences over a period of at least six months, intense, recurrent, sexually arousing fantasies, urges, or behavior involving: (1) non-human objects; (2) humiliation of oneself or one's partner; or (3) children and other non-consenting person." *Id.* at 217. Dr. Phenix diagnosed Carta with "paraphilia not otherwise specified with a descriptor of hebephilia." *Id.* at 223. She said that "paraphilia NOS diagnosis is proper whenever a patient meets the criteria for paraphilia but none of the specified categories of the disorder applies." *Id.*

<sup>148</sup> *Id.* at 222.

<sup>149</sup> *Id.* at 223. The DSM-IV-TR is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. *Id.*

mental disorders.”<sup>150</sup> The court appointed psychologist, Dr. Bard, stated that a diagnosis not found in the DSM-IV-TR is usually not accepted by the psychiatric and psychological community.<sup>151</sup> Accordingly, the court did not find Carta to fall within the definition of paraphilia NOS: hebephilia.<sup>152</sup>

The court found two other problems with Dr. Phenix’s diagnosis. First, “hebephilia” and “paraphilia NOS: hebephilia” have no consistent criteria to use when diagnosing someone.<sup>153</sup> Second, the Government did not show that these diagnoses are supported by research in the field of psychology.<sup>154</sup> Despite Dr. Phenix testifying that “some” peer reviewed articles support hebephilia as a diagnosis, Dr. Bard stated that there is limited and problematic peer reviewed research supporting hebephilia.<sup>155</sup> The articles the Government submitted to support a diagnosis of hebephilia were published by Dr. Blanchard and Dr. Cantor.<sup>156</sup> Dr. Bard criticized the research of Blanchard/Cantor because they failed to include a control group and eliminated significant portions of the samples.<sup>157</sup> The court said “[i]n sum, the testimony of the psychologists in this case and the research presented to them at trial indicate that hebephilia is not generally recognized as a serious mental illness by the psychological and psychiatric communities.”<sup>158</sup> In holding that the Government did not satisfy its burden, the court emphasized the importance of a high standard in civil commitment proceedings because the Due Process Clause requires such protection.<sup>159</sup> Although the standard in civil commitment hearings is high, it is not as high as “beyond a reasonable doubt” which is the standard used to convict the defendant of the crime which underlies the potential civil commitment. Thus, it is easier to civilly commit individuals, despite the lack of a new offense, than it is to convict them of a crime.

<sup>150</sup> *Id.* The DSM-IV-TR is relied on in the field of clinical psychology because it “allows mental health workers to have an agreement on various mental disorders.” *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* “But there is at least some question whether the general criteria for paraphilia are in fact applicable to Respondent.” *Id.* “The DSM-IV-TR criteria thus do not clearly support a paraphilia NOS diagnosis for an individual who is sexually aroused by post-pubescent minors.” *Id.* at 224.

<sup>153</sup> *Id.* at 224. “In short, the term ‘hebephilia’ may have some value as a general descriptor of sexual interest in adolescents, but the lack of any clear criteria in the proposed definitions demonstrates that hebephilia is not a workable diagnosis.” *Id.* at 225.

<sup>154</sup> *Id.* at 226.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Dr. Bard also criticized their research because both Dr. Blanchard and Dr. Cantor are on the editorial board of the journal that published their research. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 222 (“[T]he individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity’ that this standard is required not only by the Act, but by the Due Process clause of the Constitution.”) (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

The third element of civil commitment, serious difficulty from refraining from sexually violent conduct, was not addressed because the government lost their case on the second prong.<sup>160</sup> However, it can be reasonably inferred that the court's analysis would focus on the need to protect the public from Carta if he could not refrain from sexually violent conduct, which is an element also considered at a § 3553 sentencing hearing. The court concluded that the Government failed to meet its burden of clear and convincing evidence and did not civilly commit Carta.<sup>161</sup>

#### *D. Carta: Two Hearings, Same Purposes*

The hearing before Judge Squatrito for Carta's criminal sentence and the opinion issued by Judge Tauro in the civil commitment proceeding have numerous similarities and underlying motives behind their rationales. There are two constant themes seen throughout the criminal sentencing hearing and the civil commitment opinion: protecting society from further crimes<sup>162</sup> and ensuring the defendant receives treatment so he does not commit future crimes.<sup>163</sup> As previously discussed, these are the same themes found in the text and legislative intent of §§ 3553 and 4248.<sup>164</sup> Even though Carta's sentencing and civil commitment hearings were conducted in front of different judges, pursuant to different statutes, more than six years apart, they show that the judiciary considers the same exact factors in both hearings.

Throughout Todd Carta's sentencing and civil commitment hearings relating to possession and trading of child pornography, both judges expressed a serious concern that Carta could potentially hurt people in the future. In the proceeding held before Judge Squatrito to determine Carta's sentence for his criminal conduct, "protecting the public" was referenced at least eight times throughout the sixty-page transcript.<sup>165</sup> The consistent reference by Judge Squatrito indicates his concern for public safety as a top

<sup>160</sup> *Carta*, 620 F. Supp. 2d at 229.

<sup>161</sup> *Id.*

<sup>162</sup> *See* Transcript of Hearing 29, *supra* note 106.

<sup>163</sup> *Id.* at 41.

<sup>164</sup> *See* 18 U.S.C. § 3553 (2006); *see also* 18 U.S.C. § 4248 (2006).

<sup>165</sup> *See* Transcript of Hearing, *supra* note 106. "My job here is to also protect society." *Id.* at 18; "I have to protect society." *Id.*; "But, you've got to protect society." *Id.* at 29; "But I've got to protect other people." *Id.* at 31; "[B]ut I have to protect other people." *Id.* at 31-32; "Quite truthfully I'm just afraid for society as a whole." *Id.* at 34; "I also want to comment about the danger to community and danger to children." *Id.* at 37; "A criminal sentence can protect the public by immobilizing an offender and isolating him or her from society, absolutely protecting society from the offender during the period of incarceration." *Id.* at 40.

priority in determining Carta's sentence.<sup>166</sup> Judge Squatrito said, "[r]ealistically the ultimate role here is deterrence, *protect society*. The only way to do that is put him in jail."<sup>167</sup> Later he said, "I may feel for you as a human being, which I do, but my job is to feel for all of the other human beings out there."<sup>168</sup> More than six years later an opinion was written by Judge Tauro regarding Carta's potential civil commitment.<sup>169</sup> The opinion focused mainly on the Government's alleged diagnosis of hebephilia.<sup>170</sup> However, specifically referenced in the section on the failure of the Government to meet its burden, the court says, "[i]n doing so, this court recognizes both the seriousness of Respondent's criminal conduct and the Government's strong interest in *protecting* post-pubescent minors from sexual coercion."<sup>171</sup> The sixty-page transcript from the sentencing hearing in the District of Connecticut and Judge Tauro's opinion from the civil commitment hearing in the District of Massachusetts both indicate protecting the public from Carta was one of the main concerns for both judges.

The other factor heavily considered by the district courts when considering Carta's case was the need to provide him with treatment to potentially rehabilitate and/or cure his sexual disorder, and mental health challenges. During sentencing for Carta's guilty plea, Judge Squatrito discussed his concern that Carta would be put back in jail if he did not correct his problems.<sup>172</sup> He continued to express his concern for helping Carta with his problems when he said, "[t]hen also there's the general purpose of rehabilitation that will provide you with education or vocational training or other medical or other training. In your case that may be just as important as anything."<sup>173</sup> Finally, three of the seven conditions Judge Squatrito imposed on Carta's supervised release related to helping him recover.<sup>174</sup> In the opinion issued by Judge Tauro for Carta's civil

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 29. (Emphasis added).

<sup>168</sup> *Id.* at 36.

<sup>169</sup> *See* Carta, 620 F. Supp. 2d at 212.

<sup>170</sup> *Id.* at 222.

<sup>171</sup> *Id.* at 226 (emphasis added).

<sup>172</sup> *See* Transcript of Hearing at 18, *supra* note 106. ("Unfortunately somehow you've got to correct this behavior over time. You just have to do it. Because even if you went, get out of jail, you'll be followed and they're going to be aware of everything you do and you will just be brought back in again.")<sup>4</sup>

<sup>173</sup> *Id.* at 41.

<sup>174</sup> *See id.* at 54-55. "One. The defendant shall participate in a program approved by the United States Probation Office for mental health treatment, either inpatient or outpatient, with a specific concentration of anger management counseling." *Id.* at 54; "Two. The defendant shall participate in a program approved by the United States Probation Office for sex offender treatment with a therapist who

commitment hearing he stated, “[t]he civil commitment regime, in contrast, if it is to maintain its non-punitive character, must concern itself not with punishment wrongdoing but with commitment and treatment of offenders suffering from serious mental illness and actual volitional impairment.”<sup>175</sup> At both the criminal sentencing and civil commitment hearings, the judges factored in the likelihood of finding Carta appropriate treatment while determining his fate.

The case of *United States v. Carta* is merely an example of a case that exemplifies the unnecessary and duplicative nature behind the civil commitment statute.<sup>176</sup> The fact that § 4248 is duplicative is a problem because it implicated the double jeopardy clause and confines defendants, such as Carta, for a period well beyond their criminal sentence. Carta was fortunate enough to escape civil commitment because the Government failed to meet its burden.<sup>177</sup> However, he remained in the custody of the United States almost two years beyond his scheduled release date.<sup>178</sup> As seen in *Carta*, the sentencing factors listed in § 3553 can achieve the intended goals of civil commitment.

#### CONCLUSION

This Note argues that the statute, which provides for the civil commitment of sex offenders, should be eliminated. It has shown that when interpreting the language of each statute, the texts contain many similarities. It also advocates that the legislative history indicate that both statutes were intended to serve identical purposes. Finally, it showed when §§ 3553 and 4248 were applied to a sex offender two different judges expressed similar concerns when deciding the criminal sentence and civil commitment.

Despite the obvious duplicative nature of § 4248 the question remains, how can this problem be fixed? Will the repeal of § 4248 solve this dilemma? Does § 3553 need to be amended to better serve society? The concerns currently associated with § 4248 justify its repeal. The solution

is licensed and experienced in the treatment of individuals with sexual disorders.” *Id.*; “Three. The defendant shall participate in a program approved by the United States Probation Office for substance abuse treatment, either inpatient or outpatient, which shall include random testing.” *Id.* at 55.

<sup>175</sup> *Carta*, 620 F. Supp. 2d at 227.

<sup>176</sup> 18 U.S.C. § 4248 (2006).

<sup>177</sup> *Carta*, 620 F. Supp. 2d at 226.

<sup>178</sup> See *United States v. Carta*, Docket # 1:07-cv-12064-PBS (March 9, 2007). On March 9, 2007, the United States certified Carta as “sexually dangerous” and thus stayed his release. On June 4, 2009, Judge Joseph Tauro entered a judgment and memorandum finding that Carta was not considered “sexually dangerous” within the meaning of § 4247.

may not seem apparent to many but the duplicative nature of § 4248 makes the decision obvious. To ease concerns about this challenging decision, an amendment to § 3553 to clearly incorporate § 4248 provides an ideal solution.