No. 18-____

IN THE

Supreme Court of the United States

DALTONIA DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may civilly commit a person under 18 U.S.C. § 4246 without first determining whether suitable arrangements for state custody are unavailable.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daltonia Duncan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished opinion is available at 740 F. App'x 33 (4th Cir. 2018); *see also infra*, Pet. App. 1a.

JURISDICTION

The Fourth Circuit issued its opinion on October 16, 2018. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATUTORY PROVISION INVOLVED

Section 4246 of Title 18 of the United States Code provides for indefinite federal civil commitment of an individual determined to be "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another" where "suitable arrangements for State custody and care of the person are not available." 18 U.S.C. § 4246(a). In full, 18 U.S.C. § 4246 provides as follows:

> (a) Institution of proceeding. If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d) [18 USCS § 4241(d)], or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d) [18 USCS § 4241(d)], to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.
>
> (b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report

be filed with the court, pursuant to the provisions of section 4247(b) and (c) [18 USCS § 4247(b) and (c)].

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)].

(d) Determination and disposition. If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge. When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the

Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d) [18 USCS § 4247(d)], to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge. The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without

unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to State of certain other persons. If the director of a facility in which a person is hospitalized pursuant to this chapter [18 USCS §§ 4241 et seq.] certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) Definition. As used in this chapter the term "State" includes the District of Columbia.

STATEMENT OF THE CASE

A. District Court Proceedings

This petition asks whether the district court was required to determine whether suitable arrangements for state custody were unavailable for Petitioner before committing him to indefinite federal custody under 18 U.S.C. § 4246. Accordingly, the relevant facts will focus on that question.

On December 21, 2015, the Honorable Charles R. Simpson, III, Senior United States District Judge for the Western District of Kentucky, found Petitioner not competent to stand trial on a single count of felon in possession of a firearm and ammunition. *United States v. Daltonia Duncan*, No. 3:15-CR-43 (W.D. Ken. Dec. 21, 2015). Judge Simpson subsequently ordered Petitioner evaluated for competency restoration. (Appellate Joint Appendix 16; hereinafter "J.A."). A forensic evaluation conducted at the Federal Medical Center in Butner, North Carolina ("FMC Butner"), recommended involuntary treatment with psychotropic medication to restore Petitioner's competency. (J.A. 16-27). Judge Simpson, however, denied the government's motion to involuntarily medicate Petitioner. (J.A. 30).

FMC Butner thereafter evaluated Petitioner for potential dangerousness under 18 U.S.C. § 4246. The resulting evaluation found that Petitioner had a significant history of mental illness, beginning with a diagnosis of schizophrenia when he was twenty-three. (J.A. 34). Further, the evaluation noted that Petitioner had been repeatedly hospitalized for psychiatric care and treatment at Kentucky Correctional Psychiatric Center and at Western State Hospital in Hopkinsville, Kentucky. (J.A. 34). Ultimately, the evaluation concluded that Petitioner's release would create a substantial risk of bodily injury to another person. (J.A. 30-52). Accordingly, on June 19, 2017, the warden of FMC Butner filed a certificate of mental disease or defect and dangerousness against Petitioner. Among other things, the certificate alleged that "suitable arrangements for State custody are not available." (J.A. 52).

The United States submitted the certificate against Petitioner for filing in the Eastern District of North Carolina on July 3, 2017. (J.A. 5-7). The submission included the allegation that "suitable arrangements for State custody are not available." (J.A. 7).

The district court held Petitioner's commitment hearing on October 31, 2017. (J.A. 62-90). At the hearing, the government presented testimony by Leslie Wheat, a forensic psychologist who served on a risk panel at FMC Butner to determine Petitioner's dangerousness. Dr. Wheat diagnosed Petitioner with schizophrenia, continuous, as well as alcohol and cannabis use disorder. (J.A. 66). She further opined that Petitioner met the criteria for commitment under § 4246. (J.A. 73).

In addition to Dr. Wheat's testimony, the court considered FMC Butner's forensic evaluation of Petitioner and an evaluation by an independent examiner, Dr. Hans Stelmach. (J.A. 63). Upon consideration of the evidence, the court found that the government had proven its case by clear and convincing evidence. (J.A. 89). The court made no findings on whether Kentucky (or any other state) was unwilling to provide custody and care for Petitioner. Instead, the court committed Petitioner to indefinite federal custody. The court entered a written order of commitment on October 31, 2017. (J.A. 10-11).

Petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 11-14).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued that the district court erred by failing to determine whether suitable arrangements for state custody and care were unavailable before indefinitely committing him to federal custody. The Fourth Circuit rejected this argument and affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether the district court erred by failing to determine whether suitable arrangements for state custody and care were unavailable before indefinitely committing Petitioner to federal custody was presented to the Fourth Circuit. The Court of Appeals rejected Petitioner's appeal and affirmed the district court. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration.

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in affirming the district court's order of indefinite civil commitment. Federal civil commitment constitutes "a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (stating that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that due process protects); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (observing that the transfer of a prisoner to a mental health facility "implicate[s] a liberty interest protected by the

Due Process Clause"). As one circuit court has said, federal civil commitment proceedings represent "a delicate balance between federal and state governments in the provision of mental health care to federal defendants." *United States v. Lapi*, 458 F.3d 555, 564 (7th Cir. 2006).

Mindful of the substantial liberty interest at stake and the need for due process protection, Congress set forth procedures to be followed in structuring the laws providing for civil commitment, including 18 U.S.C. § 4246, to maintain this "delicate balance." Section 4246(a) authorizes the director of a federal facility where an incompetent defendant is hospitalized to institute civil commitment proceedings by filing a certificate with the clerk of the court for the local district. At least two prerequisites must be established for the filing of such a certificate. *First*, the director must certify that the confined individual is "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another[.]" 18 U.S.C. § 4246(a). *Second*, the director must certify that "suitable arrangements for State custody and care of the person are not available[.]" *Id.*

The importance of this second requirement traces back to Section 4246's origins in the Insanity Defense Reform Act of 1984 and the general principle that the primary responsibility for mentally ill individuals lies with the states, not the federal government. As the Seventh Circuit has explained:

> The legislative history of the Insanity Defense Reform Act . . . . reflects the general principle that "care of insane persons is essentially the function of the several states." *United States v. Shawar*, 865 F.2d 856, 859 (7th Cir. 1989); *see also* S. Rep. No. 98-225, at 250, as reprinted in

> 1984 U.S.C.C.A.N. 3182, 3432. To carry out this intent, the statute was drafted narrowly, to make available a federal dangerousness hearing only in the "rare circumstance[]" that "State authorities will not institute civil commitment proceedings against a hospitalized defendant whose Federal sentence is about to expire." S. Rep. No. 98-225, at 250.

Lapi, 458 F.3d at 563; *see generally United States v. Comstock*, 560 U.S. 126, 140 (2010) (discussing the Insanity Defense Reform Act and its "required condition" that suitable state custody arrangements be unavailable).

Under § 4246, a civil commitment proceeding cannot move forward unless the director certifies that arrangements for state custody are unavailable. *See, e.g., United States v. Baker*, 807 F.2d 1315, 1324 (6th Cir. 1986). "The certificate not only serves a notification function under the Due Process Clause, but it also acts as a partial guarantee that the section 4246 commitment procedures will be 'used only in those rare circumstances where a person has no permanent residence or there are no State authorities willing to accept him for commitment.'" *Id.* at 1324 (quoting 1984 U.S. Code Cong. & Ad. News at 3432).

In accordance with these constitutional principles and statutory requirements, circuit courts have repeatedly made clear that a district court may not civilly commit a defendant without first determining that suitable arrangements for state custody are unavailable. *See, e.g., Lapi*, 458 F.3d at 562 ("Section 4246 authorizes a dangerousness hearing only if no 'suitable arrangements for State custody and care' are available[.]"); *United States v. White*, 681 F. App'x 544 (8th Cir. 2017) (Section 4246 only applies when "suitable arrangements for state care and custody are unavailable"); *United States v.*

Belknap, 26 F. App'x 600, 601 (8th Cir. 2002) (determining that lack of suitable state placement is an element of proof that the government must establish by clear and convincing evidence at the civil commitment hearing); *United States v. Copley*, 935 F.2d 669, 672 (4th Cir. 1991) ("A federal district court under section 4246 *must* take the following steps *before* it may civilly commit a defendant: the court must determine that there is no available state facility to house the defendant . . . .") (emphasis added) (citing *Addington*, 441 U.S. at 418, and *Baker*, 807 F.2d at 1323); *accord Baker*, 807 F.2d at 1324 ("[A] section 4246 hearing cannot be conducted and a section 4246 commitment order cannot be issued until it has been certified to the court that the state will not accept the individual."); *United States v. Combs*, 327 F. App'x 429, 430 (4th Cir. 2009) ("A district court must take the following steps under § 4246 before civilly committing a defendant: (1) determine there is no state facility available to house the defendant . . . .").

At a civil commitment proceeding, the government has the burden of proving the need for commitment by clear and convincing evidence. 18 U.S.C. § 4246(d); *Baker*, 45 F.3d at 844; *see also Belknap*, 26 F. App'x at 601 (government must establish lack of suitable state placement by clear and convincing evidence). The "clear and convincing" standard represents "a heavy burden, requiring evidence of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established, or evidence that proves the facts at issue to be highly probable." *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015) (quotation marks and

citation omitted). The "clear and convincing" standard is "mandated not only by the plain language of the statute, [18 U.S.C. § 4246(d)], but by constitutional due process constraints, as well." *United States v. Antone*, 742 F.3d 151, 159 (4th Cir. 2014) (citing *Addington*, 441 U.S. at 427).

In Petitioner's case, the United States failed to meet its "clear and convincing" evidentiary burden with regard to the unavailability of state custody arrangements for Petitioner. Indeed, the government offered *no* evidence to support its allegation that suitable arrangements for state custody were unavailable. The government presented only one witness, Dr. Wheat. Although she worked at FMC Butner and had participated in Petitioner's risk panel, Dr. Wheat offered no testimony regarding Kentucky's willingness to take Petitioner into its custody and care. Nor did the government introduce an affidavit or other testimonial evidence to show that Kentucky was unwilling to assume custody and care of Petitioner. On the contrary, the evidence showed that Petitioner is a life-long Kentucky native who has been repeatedly hospitalized at psychiatric hospitals in his home state. (J.A. 32-34; 56-57). These frequent hospitalizations indicate that Kentucky has the ability to offer Petitioner suitable treatment and care.

The district court likewise made no findings on whether suitable arrangements for state custody were available for Petitioner. Because there was no evidence to show that "suitable arrangements for State custody and care" for Petitioner were unavailable, as required by § 4246(a), and because the district court never determined that Kentucky was unwilling to accept custody and care of

Petitioner, the district court erred in committing Petitioner to indefinite federal custody. The Court of Appeals likewise erred in affirming the judgment of commitment. For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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