
IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN ANTHONY NINO

Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

***ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

**APPLICATION REQUESTING AN EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Sent by Federal Express on July 1, 2019, for delivery on July 3, 2019.

**APPLICATION REQUESTING AN EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

The petitioner, Martin Anthony Nino, by and through his court-appointed counsel, M. Edith Cunningham, Assistant Federal Public Defender, respectfully requests that the Honorable Justice Kagan grant an extension of time to file the petition for writ of certiorari pursuant to Supreme Court Rules 13.5 and 30. Petitioner asks the Court to extend the time for filing the petition for eight (8) days, from July 25, 2019, to August 2, 2019.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 5, 2019. Appendix A. The Court of Appeals denied Petitioner's petition for rehearing and rehearing en banc on April 26, 2019. Appendix B.

The extension is requested because of undersigned counsel's conflicting professional obligations. Undersigned counsel has not made as much progress on the certiorari petition as anticipated because of the need to consult with the client and file motions in another case, Ninth Circuit No. 14-10080, in the wake of this Court's recent decision in *United States v. Davis*, No. 18-431, -- S. Ct. --, 2019 WL 2570623 (U.S. June 24, 2019). Counsel also had to spend more time than anticipated supervising summer law clerks. Counsel will be out of the office July 2-July 7. Upon return, counsel must work full-time preparing for the oral argument set for July 15 in Ninth Circuit No. 16-10524 (requiring travel to and from San Francisco).

Petitioner therefore respectfully asks the Honorable Justice Kagan to extend the time for filing the petition for eight (8) days, from July 25, 2019, to August 2, 2019.

RESPECTFULLY SUBMITTED this 1st day of July 2019.

JON M. SANDS
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APPENDIX

A

750 Fed.Appx. 589 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Martin Anthony NINO, Defendant-Appellant.

No. 17-10546

Argued and Submitted December 20, 2018 San
Francisco, California

Filed February 5, 2019

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Arizona, James Alan Soto, District Judge, Presiding, D.C. No. 4:16-cr-01937-JAS-BPV-1
Before: BOGGS,* PAEZ, and OWENS, Circuit Judges.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

MEMORANDUM**

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendant Martin Anthony Nino appeals from the district court's decision upholding the magistrate judge's commitment order for pre-trial competency restoration pursuant to 18 U.S.C. § 4241(d). The district court concluded that § 4241(d) mandates commitment to the custody of the Attorney General upon a finding by a preponderance of the evidence that the defendant is mentally incompetent to stand trial. Nino did not oppose the finding of incompetence, but sought to remain out of custody and participate in a local outpatient restoration-to-competency program. We review de novo the district court's conclusions of law, including the constitutionality and interpretation of a statute. See *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc). We have jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine. See *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004) (holding that a "[c]ommitment [o]rder is an immediately appealable collateral order"). We affirm.

1. Nino argues that mandatory commitment under § 4241(d) violates substantive due process. He asserts that mandatory involuntary confinement is not narrowly tailored to further a compelling government interest, because community-based treatment programs are a less restrictive means to achieve competency restoration. This argument is foreclosed, however, by *United States v. Strong*, which held that mandatory commitment under § 4241(d) does not violate due process. 489 F.3d 1055, 1057 (9th Cir. 2007). And contrary to Nino's contentions, our decision in *590 *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc), is not "clearly irreconcilable" with *Strong*. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (holding that a three-judge panel is not bound by circuit precedent only if it "is clearly irreconcilable with the reasoning or theory of intervening higher authority"). Although Nino makes compelling arguments about changes to competency restoration programs since 2007, Nino cites no "intervening higher [legal] authority" that would justify revisiting *Strong*. *Id.*

2. Nino also argues that § 4241(d) violates the Eighth

Amendment's ban on excessive bail because mandatory commitment amounts to a categorical denial of bail for defendants found to be incompetent to stand trial. It is well-established, however, that the right to bail "is not absolute," and the Excessive Bail Clause does not prohibit Congress from "mandat[ing] detention on the basis of a compelling interest other than prevention of flight." *United States v. Salerno*, 481 U.S. 739, 753-55, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Here, Congress may limit pre-trial release in light of the government's interest in restoring a defendant to competency so the prosecution may move forward. See *Jackson v. Indiana*, 406 U.S. 715, 737, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) (explaining that commitment serves "the need for care or treatment"); see also *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (stating that "the conviction of an accused person while he is legally incompetent violates due process").

3. Finally, Nino argues that § 4241(d) should be interpreted to allow courts to mandate "custody" in outpatient competency restoration programs. His statutory construction arguments fail. There is no "grievous ambiguity" triggering the rule of lenity, *Chapman v. United States*, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (citation omitted), because the plain language of § 4241(d) provides that commitment to the custody of the Attorney General is mandatory if the court finds the defendant incompetent to stand trial. Whether the Attorney General, in his discretion, could use a community restoration program as part of his "custody"

over Nino is not a question that we need to address at this time. In addition, constitutional avoidance is not at issue because, as discussed above, Nino's constitutional arguments based on the due process and excessive bail clauses are unavailing. Moreover, the general anti-discrimination provisions cited by Nino, 29 U.S.C. § 794 and 42 U.S.C. § 15009(a)(2), do not override the prevailing interpretation of § 4241(d), a specific criminal provision. See *Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000) ("It is fundamental that a general statutory provision may not be used to nullify or to trump a specific provision....").¹

¹ Nino also argues, for the first time on appeal, that mandatory commitment under § 4241(d) violates the Equal Protection Clause and the Rehabilitation Act, 29 U.S.C. § 794. Because Nino did not raise these issues before the district court, we decline to address them. See *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). Nino may raise these arguments for the district court to consider in the first instance.

AFFIRMED.

All Citations

750 Fed.Appx. 589 (Mem)

APPENDIX

B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARTIN ANTHONY NINO,

Defendant-Appellant.

No. 17-10546

D.C. No.

4:16-cr-01937-JAS-BPV-1

District of Arizona,

Tucson

ORDER

Before: BOGGS,* PAEZ, and OWENS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Paez and Owens voted to deny the petition for rehearing en banc, and Judge Boggs so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.