No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Freedom from confinement before or without trial is a fundamental right. *United States v. Salerno*, 481 U.S. 739, 750 (1987). Under this Court's precedents, the government cannot infringe upon a fundamental right unless the infringement is narrowly tailored to serve a compelling government interest.

Under 18 U.S.C. § 4241(d), the district court—upon finding that a defendant lacks the mental competency to proceed to trial—"shall commit the defendant to the custody of the Attorney General," who in turn "shall hospitalize the defendant in a suitable facility" for competency-restoration evaluation and treatment "for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability" that he can attain competency in the foreseeable future. The period of hospitalization may then be extended for "an additional reasonable period of time" until he attains competency, if the court makes certain findings.

Inpatient confinement is not always necessary to achieve the government's interests in competency restoration. In recent years, outpatient competency-restoration programs have been successfully implemented in many states, including Arizona.

Nevertheless, under current federal practice, many nondangerous intellectually disabled defendants, who were released under the Bail Reform Act but later found incompetent to stand trial, are automatically and unnecessarily incarcerated for competency restoration. Federal courts of appeal have sanctioned this practice as complying with due process, but they did so either before outpatient programming became widely available or without confronting the impact of that development. The Georgia Supreme Court, however, recently rejected the analysis of these federal courts and held that automatic incarceration for competency restoration violates due process. Current federal practice also violates American Bar Association standards.

The questions presented are:

(1) Does automatic confinement for competency restoration, without an individualized determination of whether confinement is necessary, violate due process?

(2) When confinement is unnecessary to achieve the government's interests in competency restoration, does it violate the Eighth Amendment?

(3) Is the federal competency statute amenable to a construction that requires a district court's finding of necessity before a defendant released under the Bail Reform Act may be confined before trial for competency restoration?

PARTIES AND PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation. There are no proceedings that are directly related to the case in this Court.

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INTRODUCTION

Under current federal practice, all defendants found incompetent to stand trial—regardless of the nature of their charges (felony or misdemeanor, violent or nonviolent), the nature of their disability (mild or severe, intellectual disability or psychosis), or their status under the Bail Reform Act (released or detained)—are incarcerated in a Bureau of Prisons (BOP) medical center for competency-restoration evaluation and treatment, typically far from their home for several months or longer. This occurs even if local outpatient programs regularly used with success by state courts are available to provide services to federal defendants at a much lower cost.

For example, some defendants, including Petitioner Nino, are found incompetent based on a mild intellectual disability, with no circumstances that would justify custodial treatment or pretrial segregation from society. In these cases, certified, forensically trained outpatient providers, who meet regularly with defendants for weeks or months as needed, can often provide treatment and education that is at least as effective as what BOP can provide in an inherently stressful setting of incarceration. Thus, such defendants, initially released under the Bail Reform Act, are automatically and unnecessarily deprived of pretrial liberty merely because they have such a disability, while otherwise similarly situated defendants with higher intellectual functioning are able to remain at liberty. As the Supreme Court of Georgia recently held, such a blanket practice of depriving presumptively innocent, disabled individuals of pretrial liberty, with no

consideration of necessity or even reasonableness based on the individual defendant's circumstances, violates due process. It also offends basic human decency.

A substantial majority of states now allow outpatient competency restoration when appropriate in light of a defendant's individual circumstances, which means that this due process issue is not likely to arise with frequency in state courts. But every federal court of appeals to address the issue has sanctioned the automatic pretrial incarceration of presumptively innocent incompetent defendants—with no individualized consideration of the necessity or even the reasonableness of that incarceration—as complying with due process. Most of these federal cases predated the development of successful outpatient restoration programs in many states, but these legal holdings continue to bind district courts and three-judge appellate panels. Due process analysis requires consideration of whether deprivations of liberty are justified under *today's* standards. A recent Fifth Circuit case, which involved a defendant with a severe psychiatric disorder, followed the precedent in other circuits without confronting how the contemporary availability of outpatient programming impacts the analysis. A recent Second Circuit case, however, strongly suggested that confinement for competency evaluation and restoration *would* violate due process under some circumstances.

This Court should grant the writ (1) to address the due process and related Eighth Amendment issues in light of the contemporary availability of outpatient competency-restoration treatment, (2) to resolve the split between the federal courts

of appeal and the Supreme Court of Georgia, and (3) to ensure that presumptively innocent, disabled individuals are not unfairly and unnecessarily deprived of pretrial liberty because—through no fault of their own—they have a disability that renders them incompetent to stand trial.

OPINION BELOW

The court of appeals' decision (Appendix A) is unpublished, *United States v. Nino*, No. 17-10546, 750 F. App'x 589 (9th Cir. 2019), but it relies on a prior published opinion, *United States v. Strong*, 489 F.3d 1055 (9th Cir. 2007).

JURISDICTION

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 Mr. Nino's petition for rehearing and rehearing en banc on April 26, 2019. Appendix B. The Honorable Justice Kagan extended the time for filing the petition for eight days, from July 25, 2019, to August 2, 2019. Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the "collateral order" doctrine, because the district court's interim decision (1) "conclusively determine[d] the disputed question," (2) "resolve[d] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Sell v. United States*, 539 U.S. 166, 176, 178-81 (2003) (holding that government may forcibly medicate incompetent defendant only when it is necessary to significantly further important governmental trial-related interests).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excessive bail shall not be required.

STATUTORY PROVISIONS

Under 18 U.S.C. § 4241(d), if a district court finds by a preponderance of the evidence that a defendant is incompetent to stand trial, "the court shall commit the defendant to the custody of the Attorney General," and "[t]he Attorney General shall hospitalize the defendant for treatment in a suitable facility" for a "reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity" to proceed. § 4241(d)(1). The court may later extend the period of commitment for "an additional reasonable period of time until . . . his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward." § 4241(d)(2).

"Suitable facility" is defined as "a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant." § 4247(a)(2). The Attorney General "may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care,

or treatment of, or the provision of services to, a person committed to his custody," and "shall, before placing a person in a facility pursuant to the provisions of section 4241 . . . consider the suitability of the facility's rehabilitation programs in meeting the needs of the person." § 4247(i)(A) & (C). *See also* Appendix D (providing full text of 18 U.S.C. §§ 4241, 4247).

The Attorney General has delegated its duties under 18 U.S.C. § 4241(d) to BOP. 28 C.F.R. § 0.96(j). Under BOP policy, all defendants committed to its custody under 18 U.S.C. § 4241(d) are designated to a Federal Medical Center. BOP Program Statement P5070.12, pp. 6-7 (4/16/2008).[1]

STATEMENT OF THE CASE

A. District Court Proceedings

In October 2016, Mr. Nino was indicted for the nonviolent crime of making a false statement during the purchase of a firearm. He was released on his own recognizance under the Bail Reform Act, subject to standard release conditions. He was later found incompetent to stand trial based on a mild intellectual disability. *See* Opening Brief of Appellant in No. 17-10546 (9th Cir.) (filed under seal) ("Opening Brief") at 4-8.

Despite Mr. Nino's compliance with pretrial release conditions, the district court affirmed the magistrate judge's commitment order, which requires Mr. Nino's incarceration for purposes of competency restoration, without an individualized determination of whether such confinement is necessary to achieve the

[1] available at https://www.bop.gov/PublicInfo/execute/policysearch?todo=query.

government's interests in competency restoration. Appellant's Excerpts of Record in No. 17-10546 (9th Cir.) (filed under seal), Volume 1 ("ER1") at 3-4, 7; Volume 2 ("ER2") 47-49, 52-72. ("'ER3" refers to Volume 3 of these Excerpts of Record).

The district judge, who is a former Arizona state judge familiar with the efficacy of Arizona's outpatient competency-restoration programs (ER2 57-59, 68-70), did not determine whether, given Mr. Nino's individual circumstances, inpatient custodial confinement for competency restoration is necessary or reasonable, because the court interpreted the statutory language as requiring such confinement and was bound by *Strong*, the Ninth Circuit precedent on the due process issue. ER2 68-70; ER1 at 3-7.

Applying *Strong*, 489 F.3d 1055, the district court ordered Mr. Nino's incarceration without finding that this deprivation of his pretrial liberty is necessary or reasonable (ER1 3-4), even though local outpatient competency-restoration programs regularly used by Arizona state courts are available, Mr. Nino is willing to participate in such a program as a condition of release (ER2 57-61), and the doctors who evaluated him opined that he "may be able to be restored within a reasonable period of time at an approved outpatient . . . restoration program." ER3 111.

Under the district court's order, Mr. Nino shall remain "out of custody, subject to the terms of previously imposed conditions of release" until the BOP or the Attorney General designates a "facility for treatment and a date for the defendant to report," at which time he "shall report and be committed for a period of

up to four months." ER2 47. Mr. Nino may only be "released from the treatment facility" upon restoration to competency. ER2 48. If he remains incompetent at the end of the four-month period, he "shall remain at the medical facility" pending further court order. *Id.* If, at any time during the commitment, he is found not restorable, he likewise "shall remain at the medical facility" pending further court order.

The district court stayed its commitment order (ER2 74), and Mr. Nino remains out of custody, pending the resolution of his interlocutory appeal.

B. Ninth Circuit Proceedings

The Ninth Circuit held that Mr. Nino's due process argument was "foreclosed" by *Strong*, but it acknowledged that he made "compelling arguments about changes to competency restoration programs since 2007," when *Strong* was decided. *Nino*, 750 F. App'x at 589-90. The court rejected Mr. Nino's Eighth Amendment claim and his argument that 18 U.S.C. § 4241(d) should be interpreted to allow district courts to mandate "custody" in outpatient competency-restoration programs. *Id.* at 590. The Ninth Circuit stayed the mandate pending this Court's disposition of Mr. Nino's petition for a writ of certiorari. DktEntry 98 in No. 17-10546 (9th Cir.).

REASONS FOR GRANTING THE WRIT

I. Automatic confinement for competency restoration violates due process.

A. Federal courts of appeal sanctioning automatic confinement for competency restoration have not applied the guiding principles of *Salerno* and *Sell* in light of the contemporary availability of outpatient competency-restoration alternatives.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Accordingly, in *Salerno,* this Court made clear that freedom from pretrial confinement is a "fundamental" right. *Id.* at 750; *see also Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992). To pass constitutional muster, government action that infringes on a fundamental right must be narrowly tailored to achieve a compelling government interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)

In upholding the Bail Reform Act, 18 U.S.C. § 3142, et. seq., against a substantive due process challenge, this Court applied this stringent standard and determined that the government had met its burden. *Salerno*, 481 U.S. at 748-52. The Court explained that the provision at issue was narrowly tailored because it "operates only on individuals who have been arrested for a specific category of extremely serious offenses," and it requires the government not only to demonstrate "probable cause to believe that the charged crime has been committed by the arrestee" but to also convince—"[i]n a full-blown adversary hearing"—a "neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750.

Thus, *Salerno* established that, because pretrial liberty is a fundamental right, substantive due process requires "case-by-case determinations of the need for pretrial detention" and the government must prove by "clear and convincing evidence" that "no conditions of release c[ould] reasonably" address the government's interest in detention. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784-85 (9th Cir. 2014) (en banc) (citing *Salerno*, 481 U.S. at 750). In other words, pretrial detention cannot be based on "an overbroad, irrebuttable presumption rather than an individualized hearing" to determine whether less restrictive means are sufficient to meet the government's objectives. *Id*. at 784.

The Bail Reform Act satisfies these requirements. *Salerno*, 481 U.S. 739. Title 18 U.S.C. § 4241(d) does not, however, specify that these conditions must be met before a defendant found incompetent to stand trial may be incarcerated for competency-restoration treatment, and federal courts of appeal, including the Ninth Circuit, *Strong*, 489 F.3d at 1060-63, have held that no individualized determination of necessity is required before a district court may order the pretrial confinement of a defendant for this purpose.

Due process, however, requires that, before a defendant released under the Bail Reform Act may be incarcerated for inpatient custodial competency restoration, the government must prove by clear and convincing evidence that any less restrictive alternative is substantially unlikely to achieve the same result. This Court last addressed the requirements of due process in the context of competency restoration in *Sell*, 539 U.S. 166, in which the Court characterized the defendant's

liberty interest in refusing antipsychotic medication as "significant." *Id.* at 178. (Mr. Sell was detained under the Bail Reform Act before his competency-restoration proceedings commenced. *Id*. at 170.) The Court held that the government may forcibly medicate a defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if treatment is "medically appropriate," is "substantially likely to render the defendant competent to stand trial," and, "taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.* at 179-81.

Under the rationale of *Sell* and *Salerno*, pretrial confinement for competency restoration requires proof by clear and convincing evidence that no less restrictive alternative than confinement could reasonably address the government's interest in restoring a defendant to competency for purposes of prosecution. Indeed, freedom from pretrial confinement is a "fundamental" right, not just a "significant" liberty interest. Without such a showing, confinement for competency restoration is excessive in relation to the government's regulatory interest and, thus, also violates due process because it impermissibly imposes punishment without an adjudication of guilt. *Salerno*, 481 U.S. at 747-48; *Lopez-Valenzuela*, 770 F.3d at 789-91.

The contrary ruling in *Strong*, 489 F.3d 1055—which engaged in no analysis of *Salerno* and did not even address *Sell*—was based on a faulty premise, i.e., that inpatient confinement is always necessary to achieve the government's interests in competency restoration. The *Strong* Court relied on federal cases dating from the 1970s to the early 2000s. *See Strong*, 489 F.3d at 1061-62 (citing *Jackson v.*

Indiana, 406 U.S. 715 (1972)); *United States v. Ferro*, 321 F.3d 756, 762 (8th Cir. 2003); *United States v. Filippi*, 211 F.3d 649, 652 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990); *United States v. Shawar*, 865 F.2d 856, 864 (7th Cir. 1989)).

In *Jackson*, 406 U.S. 715, this Court did not address whether automatic confinement for competency restoration violates due process. *Jackson* merely held that the indefinite detention of defendants found incompetent to stand trial violates due process; the defendant challenged only his prolonged detention, not the initial decision to detain him. *Id.* at 719-20, 737-38; *see also* Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 24-26 (2017) ("Orihuela"). In any event, this Court specified in *Jackson* that a person detained "solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time *necessary* to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." 406 U.S. at 738 (emphasis added).

Recent empirical evidence refutes the premise underlying *Strong* and the earlier federal circuit cases. Today, a substantial majority of states allow for or provide outpatient competency restoration in criminal proceedings, with positive results, including high rates of restoration and low rates of negative incidents (with no reports of incidents involving serious violence). W. Neil Gowensmith, et. al., *Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration As A Promising Approach to Modern Challenges*, 22 PSYCHOL. PUB. POL'Y & L. 293, 296-

301 (2016) ("Gowensmith"). *See also* Amicus Brief of the Arizona Center for Disability Law (DktEntry 14 in Ninth Circuit No. 17-10546), pp. 17-24 ("ACDL Amicus Brief"); Hogg Foundation for Mental Health, *Evaluation Report: Texas Outpatient Competency Restoration Programs* (2015);[2] Graham S. Danzer, et. al., *Competency Restoration for Adult Defendants in Different Treatment Environments*, THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW ONLINE (2019).[3]

In Arizona, for example, outpatient competency restoration is now commonplace. The governing state statute requires the court to select the "least restrictive treatment alternative" after considering individualized circumstances. ARIZ. REV. STAT. § 13-4512. As defense counsel and the district court agreed in this case, defendants in Arizona state courts routinely participate in outpatient restoration programs. ER2 57-59. The outpatient program proposed in this case involves ongoing education and evaluation by highly trained professionals over a period of weeks or months, but in an outpatient setting rather than a prison hospital. *See* ER2 at 45.

The *Strong* court and the earlier federal cases simply did not have the benefit of now available evidence that outpatient competency-restoration programs are, in many circumstances, at least as effective as in-custody programs and are typically much less expensive. *See* Gowensmith and ACDL Amicus Brief, *supra*. Instead, the

[2] available at http://hogg.utexas.edu/project/evaluation-outpatient-competency-restoration.

[3] available at aapl.org/content/early/2019/02/08/JAAPL.003819-19.

Strong Court looked "first and foremost" to this Court's 1972 opinion in *Jackson*, despite its obsolescent historical context and its consideration of a different issue. 489 F.3d at 1060.

But the language of the *Jackson* Court's holding was prescient, despite the limited options for treating mental illness and intellectual disability in 1972. With the advent of outpatient restoration programs across the country in the wake of the deinstitutionalization movement and heightened legal protections for individuals with disabilities, *see* ACDL Amicus Brief at 5-16, it is sometimes simply *unnecessary* to detain a presumptively innocent individual before trial in order to restore competency or to determine that it cannot be restored. Given this contemporary reality, *automatic* confinement for this purpose under 18 U.S.C. § 4142(d), without an individualized determination that confinement is necessary to achieve the government's competency-restoration goals given a particular defendant's impairments and circumstances, not only contravenes the general requirements of due process in the context of fundamental rights but also contravenes the explicit holding of *Jackson,* which prohibits pretrial detention due to competency concerns unless it is *necessary*. 406 U.S. at 738.

Due process analysis requires consideration of whether deprivations of liberty are justified under *today's* standards. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603, 2602-08 (2015) (intersection of fundamental liberty and equal protection concerns justified striking down same-sex marriage prohibitions despite traditional deference to legislatures). American Bar Association standards mirror the requirements of

due process. Under these standards, a defendant may be ordered to undergo treatment for competency restoration only if the court finds that there is a substantial probability that treatment will restore the defendant to competency in the foreseeable future. *Criminal Justice Mental Health Standards*, std. 7-4.10(a)(i) (Am. Bar Ass'n 2016).[4] These standards further provide that a "defendant should not be involuntarily hospitalized to restore or sustain competence unless the court determines by clear and convincing evidence that: (A) treatment appropriate for the defendant to attain or maintain competence is available in the facility; and (B) no appropriate treatment alternative is available that is less restrictive than placement in the facility." *Id.* at 7-4.10(a)(iii). "A defendant has a right to treatment in the least restrictive setting appropriate to restore competence to proceed." *Id.* at 7-4.11(c).

Nevertheless, under the government's current policy, all federal defendants found incompetent to stand trial and committed to the custody of the Attorney General under 18 U.S.C. § 4241(d) are incarcerated in BOP medical centers—prisons where inmates with serious medical or mental health issues are also designated to serve their prison terms.[5] In some circumstances, this incarceration is not just unnecessary but counterproductive. The stress of being detained, especially at a BOP facility far from the defendant's legal counsel and support

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[4] available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf.

[5] available at https://www.bop.gov/about/facilities/federal_prisons.jsp (Administrative facilities).

network, can exacerbate mental health issues or make it more difficult for intellectually disabled individuals to learn and gain the necessary understanding of the criminal justice system. *See* Susan McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 GEO. L.J. 601, 613-16 (2019); University of California – Irvine, *Short-term Stress Can Affect Learning and Memory*, SCIENCEDAILY (March 13, 2008);[6] WEBMD MEDICAL REFERENCE, *Sleep Deprivation and Memory Loss* (August 24, 2017)[7] (lack of sleep impairs focus, learning, and memory consolidation); Lindsay Dewa, et al., *Trouble Sleeping Inside: A Cross-Sectional Study of the Prevalence and Associated Risk Factors of Insomnia in Adult Prison Populations in England*, SLEEP MEDICINE 32, 129-26 (2017)[8] (88% of 237 prisoners reported poor sleep quality).

While *any* such deprivation of pretrial liberty is significant, defendants sent to BOP prisons for competency restoration often languish there for long periods of time. Once a defendant has been found incompetent to stand trial, the statute provides for an initial period of up to four months for evaluation and treatment, which can then be extended for an additional unspecified "reasonable" period of time. 18 U.S.C. §§ 4241(d)(1) and (2). Some of the federal cases sanctioning automatic confinement for competency restoration as complying with due process reason that the period of confinement could be very short, because the statute

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[6] available at https://www.sciencedaily.com/releases/2008/03/080311182434.htm.

[7] available at https://www.webmd.com/sleep-disorders/sleep-deprivation-effects-on-memory#1.

[8] available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5390769/#bib45.

allows the possibility of release before the conclusion of the initial four-month period. *See*, *e.g.*, *Strong*, 489 F.3d at 1062. But that is irrelevant, and it is not what usually happens. Ongoing medical staffing shortages hinder BOP's ability to provide adequate treatment, especially in a timely manner. Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges* (March 2016);[9] David Thorton, *DOJ IG Highlights Data, Staffing Issues at BOP, Department Wide*, FEDERAL NEWS NETWORK (May 17, 2019).[10] Thus, requests for extensions of time are common. *See*, *e.g.*, 2:13-cr-00267-GEB (E.D. Cal.), Doc. 92; 4:17-cr-01503-JGZ-DTF-1 (D. Az.), Docs. 31, 35, 37; 4:14-cr-00609-JGZ-BGM (D. Az.), Doc. 87. *See also United States v. Esquibel*, No. CR 08-0837, 2010 WL 11623616, at *3 (D.N.M. Feb. 1, 2010) (noting that confinement under 18 U.S.C. § 4241(d) often lasts longer than four months).

Incompetent defendants charged with misdemeanors or relatively minor non-violent felonies can easily spend more time incarcerated for competency restoration than they would ever face if ultimately convicted. And, for defendants who are ultimately acquitted or receive probation, or whose cases are ultimately dismissed, even one day of pretrial incarceration is an unjustified deprivation of liberty if that incarceration is unnecessary to further the government's competency-related interests. *See Sandin v. Conner*, 515 U.S. 472, 487 (1995) (state action that affects duration of inmate's sentence implicates due process liberty interest); *Teague v.*

[9] available at https://oig.justice.gov/reports/2016/e1602.pdf.

[10] available at https://federalnewsnetwork.com/justice-department/2019/05/doj-ig-highlights-data-staffing-issues-at-bop-departmentwide.

Quarterman, 482 F.3d 769, 771 (5th Cir. 2007) (state must afford due process before depriving inmate of any previously earned good-time credits, however slight). *Cf. Glover v. United States,* 531 U.S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance").

B. The Georgia Supreme Court recently rejected the reasoning of the federal courts and applied the principles of *Salerno* and *Sell* in holding that automatic confinement for competency restoration violates due process.

In June 2018, the Supreme Court of Georgia—cognizant of outpatient restoration in many states—explicitly rejected the reasoning of *Strong* and the other federal cases on which it relied and held that automatic inpatient confinement for competency restoration—"[n]o matter how short the duration of the detention"—violates due process. *Carr v. State*, 815 S.E.2d 903, 911-12, 914 (Ga. 2018) (citing *Strong*, 489 F.3d 1055, *inter alia*); *see also McGouirk v. State,* 815 S.E.2d 825 (Ga. 2018). The Georgia statute at issue only mandated inpatient competency-restoration treatment for defendants charged with violent felonies. *Carr*, 815 S.E.2d at 905. That difference underscores the due process concerns raised by the district court's order in this case, and federal competency-restoration practice under 18 U.S.C. § 4241(d). The federal statute makes no exceptions for defendants charged with non-violent crimes, or even those charged with misdemeanors.

The *Carr* court emphasized that the federal statute provides no legislative findings on the necessity of incarceration to achieve the government's competency

restoration goals,[11] *Carr*, 815 S.E.2d at 913-14, and that many other states also allow outpatient restoration treatment. *Id*. at 914 n.16. Although the *Carr* court agreed with federal courts of appeal that determination of a defendant's likelihood to regain competency requires a "careful and accurate diagnosis," it observed that "these courts have [not] explained why commitment is reasonable in every case to achieve this," because a defendant may be carefully evaluated by qualified professionals on an outpatient basis. *Id.* at 914. The *Carr* court also recognized that confinement may actually impede the government's purpose of achieving competency restoration in some circumstances. *Id.* at 915. It concluded that a court must consider each defendant's individualized circumstances in determining whether custodial confinement is necessary and appropriate to further the government's interests in competency restoration. *Id.* at 906, 916-17.

If outpatient treatment is suitable for state defendants in some circumstances, then it is also suitable for federal defendants in some circumstances. The same federal competency standard applies in federal and state courts in this country. *Drope v. Missouri,* 420 U.S. 162 (1975); *Dusky v. United States*, 362 U.S. 402 (1960); *State v. Amaya-Ruiz*, 800 P.2d 1260, 1269-70 (Ariz. 1990). The federal competency statute explicitly authorizes the Attorney General to contract with state and private providers in order to provide competency-restoration treatment suitable

[11] The federal competency statute, 18 U.S.C § 4241, was enacted in 1984, long before outpatient competency-restoration treatment was widely available.

to the needs of the individual defendant. 18 U.S.C. § 4247(a)(2) & (i)(A) & (C). And, in this appeal, Mr. Nino demonstrated that outpatient restoration programs in Arizona and other states are often adequate to achieve the government's interests in competency restoration. Indeed, the Ninth Circuit acknowledged his "compelling" arguments about changes to competency restoration programs since 2007. *Nino*, 750 F. App'x at 590.

Additionally, in reaching the conclusion that automatic confinement for competency restoration violates due process, the Georgia Supreme Court relied on the same authorities upon which Mr. Nino primarily relies—*Salerno*, 481 U.S. 739, and *Sell*, 539 U.S. 166. *Carr*, 815 S.E.2d at 908-915 (citing *Salerno* and *Sell*). In citing *Salerno*, the *Carr* court repeatedly emphasized an individual's strong interest in pretrial liberty. *Id*. at 908, 909, 915 (citing *Salerno*, 481 U.S. at 750-51). In citing *Sell*, the *Carr* court emphasized this Court's requirement that the government show that a significant deprivation of liberty (in *Sell*, forced medication) is "*necessary*" to further its interests in competency restoration. *Carr*, 815 S.E.2d at 915 (quoting *Sell*, 539 U.S. at 180-181) (emphasis in original).

The *Carr* court also emphasized that:

> [T]he [Supreme] Court has never held, that so long as the duration of detention is reasonable, the government may detain *every* defendant found incompetent *automatically,* without any sort of individualized finding as to whether the detention bears a reasonable relation to the purpose for that defendant's commitment. Such a holding would run against the reasoning of cases like *Salerno*, as well as the *Jackson* Court's discussion of the importance of individualized determinations supporting commitment in the equal protection section of its opinion and its discussion in the due process section of the process Jackson was not afforded.

Carr, S.E.2d at 912 n.14 (emphasis in original) (citing *Jackson*, 406 U.S. at 727-30). In short, the *Carr* court faithfully applied this Court's precedents in holding that automatic confinement for competency restoration violates due process. The majority of the federal cases addressing the issue either predate or do not address *Sell* and either overlook *Salerno* or engage in no analysis of the legal principles underlying *Salerno's* holding. *Strong*, 489 F.3d at 1060 (including only one citation to *Salerno* with no analysis of its principles in the context of pretrial confinement for competency restoration; no citation to *Sell); Ferro*, 321 F.3d 756 (no citation to *Salerno*; predates *Sell*); *Donofrio*, 896 F.2d 1301 (no citation to *Salerno*; predates *Sell*); *Shawar*, 865 F.2d at 862 n.9 (cites *Salerno* on an unrelated point; predates *Sell*). *Filippi*, 211 F.3d at 651-52 (predates *Sell*). Although, in *Filippi*, the First Circuit did acknowledge that, under *Salerno* and the Due Process Clause, the defendant enjoyed a fundamental right to pretrial liberty, it upheld automatic confinement for competency restoration based solely on its assumption that inpatient confinement is necessary to achieve the government's competency-restoration goals. It did not consider that, in some circumstances, outpatient restoration treatment could be sufficient to achieve the government's interest. *Id.* at 651-52.

Mr. Nino acknowledges that the Fifth Circuit recently joined other federal circuits in holding that automatic confinement for competency restoration complies with due process. *See United States v. McKown,* No. 18-20467, 2019 WL 3281414 (5th Cir. July 22, 2019). But the *McKown* Court did not meaningfully address the

possibility that outpatient evaluation and treatment could meet the government's interests in competency restoration, because—in the court's view at least—the facts did not reasonably suggest that possibility. The *McKown* court's holding was premised on "the seriousness of McKown's condition and the doctors' divergent prognoses." 2019 WL 3281414, at *6. McKown suffers from grandiose and persecutory delusional disorder and was charged with threatening to assault and murder federal officials. *Id.* at *1. McKown was opposed to taking medication to treat his disorder. *Id.* One doctor opined that inpatient hospitalization was necessary to ensure compliance with the treatment regimen, and the other also feared that he would refuse to take medication—and without it—it could take up to five years of outpatient psychotherapy to achieve meaningful change. *Id.*

The Second Circuit also recently addressed the due process concerns presented by automatic confinement for competency restoration under 18 U.S.C. § 4241(d), but merely held that *as applied* to Brennan, automatic confinement complied with due process "because Brennan's continued detention is reasonably related to resolving open questions regarding the likelihood that Brennan will regain competency to stand trial in the foreseeable future." *United States v. Brennan*, 928 F.3d 210, 218 (2d Cir. 2019). In *Brennan,* the defendant claimed a due process violation because his degenerative condition was unlikely to improve with treatment. *Id.* at 211. But the doctor who performed the initial evaluation did not render any opinion on that point, *id.* at 217, and the Second Circuit did not address the possibility that further evaluation could be conducted on an outpatient basis.

Again, the facts do not suggest that outpatient treatment would be appropriate because the defendant's severe drinking problem exacerbated his neurocognitive disorder and his attempts at rehabilitation had been unsuccessful. *Id.* at 212. Importantly, however, the Second Circuit strongly suggested that if, after an initial evaluation, medical professionals "conclusively considered [the defendant's condition] substantially unlikely to improve," then detention for the purpose of further evaluating a defendant's prognosis or providing competency restoration treatment *would* violate due process. *Id.* at 217-18.

In Mr. Nino's case, the district court declined to even make findings on whether outpatient restoration would be sufficient to meet the government's interests because it believed it was bound by precedent and the statutory language in any event. Mr. Nino's court-appointed evaluators, however, opined that the local outpatient program would be suitable for him, ER3 111, and the fact that the district court—familiar with the efficacy of Arizona's outpatient restoration programs—stayed its commitment order indicates a significant probability that the court would find outpatient treatment to be sufficient given Mr. Nino's individual circumstances.

C. At a minimum, due process requires greater procedural protections in light of the liberty interest at stake.

"When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner," in accordance with "procedural" due process. *Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). This Court weighs the

following factors to determine the procedural protections required in a particular circumstance:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

In most circumstances, the Fifth Amendment requires a hearing before a deprivation of liberty occurs. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) (hearing required before forfeiture of prisoner's good-time credits). A predeprivation hearing is unnecessary only in unusual circumstances. *Zinermon*, 494 U.S. at 128. Such unusual circumstances include when predeprivation process is impractical, or when "the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures are sufficiently reliable to minimize the risk of erroneous determination." *Id.* at 128 (internal citations and alternations omitted). For example, this Court has held that predeprivation process is not required before an individual is deprived of property by the intentional or negligent actions of government employees, because the government cannot be expected to control and anticipate unauthorized conduct by its employees. *Id.* at 129-30 (citing *Hudson v. Palmer*, 468 U.S. 517, 534-35 (1984)).

Here, there is no question that a defendant's liberty interest in freedom from

pretrial confinement during competency restoration is strong. The right to pretrial liberty is "fundamental," *Salerno*, 481 U.S. at 750, and confinement for treatment in a mental hospital produces a "massive curtailment of liberty," which includes not only a loss of physical liberty but also social stigmatization. *Vitek v. Jones*, 445 U.S. 480, 491 (1980). *See also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (there is no constitutional basis for confining mentally ill persons involuntarily "if they are dangerous to no one and can live safely in freedom"). As explained above in relation to substantive due process, there is a significant risk that pretrial defendants found incompetent to stand trial will be unnecessarily deprived of liberty if they are confined automatically, with no process for determining if the confinement is a necessary or even a reasonable means of achieving the government's objectives.

Providing predeprivation process in this context would entail few if any additional burdens on the government. If questions arise about a defendant's competency to stand trial, the district court already typically appoints one or more experts to evaluate the defendant's competency and prepare a report. *See* 18 U.S.C. §§ 4241(b), 4247(b).[12] In addition to rendering opinions about the defendant's present competency to stand trial, these experts could also render opinions about whether inpatient confinement is necessary to either restore competency or to determine that restoration is unlikely within a reasonable period of time. The

[12] When the defendant is released under the Bail Reform Act, the expert's initial evaluation often takes place in an outpatient setting. *See* § 4247(b) (district court "may" commit defendant to custody of Attorney General for up to 30 days for initial evaluation).

statute already requires the district court to conduct a hearing to determine whether the defendant is incompetent to stand trial. 18 U.S.C. §§ 4241(c), 4247(d). Questions related to the necessity or efficacy of inpatient confinement could be addressed at that hearing, where the government and the defendant are already represented by counsel. *See* § 4247(d). If the experts lack sufficient information, or disagree about whether inpatient or outpatient treatment is most suitable, the district court may find that inpatient confinement is necessary or reasonable under the circumstances.

This Court's precedent, as well as the text of the competency statute itself, requires a hearing on these issues before the deprivation of liberty in this context. The statutory language provides for the hospitalization of the defendant for competency-restoration treatment, but only in a "suitable" facility, 18 U.S.C. § 4241, and only for the amount of time "necessary" to determine whether there is a substantial probability in the foreseeable future he will attain competency. § 4241(d)(1).

In *Vitek*, this Court held that due process requires an adversarial hearing before a neutral decisionmaker before a convicted state inmate may be transferred to a mental hospital based on a prison doctor's determination that appropriate treatment is not available in the prison. 445 U.S. at 489-95. The state statute at issue provided that a prisoner could be transferred to a mental hospital if a designated physician found that the prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment in the prison." *Id.* at 489. The Court

explained that, once the government creates an expectation that "adverse action will not be taken against [an individual] except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Id.* at 489 (quoting *Wolff,* 418 U.S. at 558). Similarly here, the competency statute creates the expectation that a person will not be hospitalized for competency-related treatment unless such treatment is both suitable and necessary.

The *Vitek* Court also held that—independent of the expectations created by the state statute —the minimum requirements of due process compelled a predeprivation hearing on the *necessity* of the transfer because of the magnitude of the liberty interest at stake. *Id.* 491-92. Even though the prisoner no longer had a right to physical liberty by virtue of his conviction, he still faced the stigmatization associated with institutionalization in a mental hospital, as well the mandatory behavior modification therapy used at that hospital. *Id.* at 491-94.

Vitek's holding applies with even greater force here, because pretrial defendants released under the Bail Reform Act have a stronger liberty interest than convicted inmates. Indeed, the *Vitek* Court recognized that a prisoner's interest in liberty is diminished. *Id*. at 493. Under *Vitek*'s rule, a neutral decisionmaker—here, the district court—must determine that outpatient programs in the defendant's community are inadequate before the defendant may be confined in an institution for purposes of competency restoration. *Cf. Sell*, 539 U.S. at 180-81 (district court

must make findings necessary to order forced medication to achieve competency restoration).

In *McKown*, the Fifth Circuit rejected the defendant's claim that greater process is required in this context. 2019 WL 3281414, at *6-8. But, in assessing whether process on the necessity of confinement is required, the court did not even acknowledge the strong and fundamental interest in freedom from confinement retained by a presumptively innocent pretrial defendant, *id.* at *7-8, an interest much stronger than the liberty interest retained by the convicted inmate in *Vitek*.

The *McKown* court also inappropriately diminished the stigmatizing consequences flowing from a pretrial defendant's institutionalization for competency restoration in reasoning that such consequences did not exist because McKown had conceded that he was incompetent to stand trial. *Id.* at *8. Under the competency statute, a determination of incompetency is beyond an individual defendant's control. The government or the court, on its own motion, may move for a determination of competency, 18 U.S.C. § 4241, and a defendant's attorney may be ethically obligated to move for a competency determination despite the defendant's wishes. *See Criminal Justice Mental Health Standards*, § 7-4.3(c) (Am. Bar Ass'n 2016). And attending outpatient programming for competency restoration is far less stigmatizing than being segregated from society in a prison medical center. Outpatient programming allows the opportunity to maintain employment and familial activities, whereas institutionalization increases the likelihood of negative social consequences.

The *McKown* court also improperly assumed that the risk of the erroneous deprivation of liberty from automatic commitment for competency restoration is low. 2019 WL 3281414, at *8. As explained above, the Fifth Circuit did not consider, for example, the case of defendants whose incapacity to stand trial stems from an immutable mild intellectual disability but who could possibly become competent by learning about legal rights and court procedures in a supportive, community-based educational environment.

II. Automatic confinement for competency restoration violates the Eighth Amendment.

In *Salerno,* this Court rejected a claim that the Excessive Bail Clause of the Eighth Amendment affords a right to bail "calculated solely upon reasons of flight" and expressed its belief that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight . . . the Eighth Amendment does not require release on bail." 481 U.S. at 752-55. But the Court acknowledged an "arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." *Id*. at 754.

As explained above, inpatient confinement is not always necessary to achieve the government's interests in competency restoration. If such pretrial detention is not necessary to achieve the government's interests in attempting to restore a defendant's competency in order to bring him to trial, then it is indeed excessive in light of the perceived evil and violates the Eighth Amendment.

III. The language of 18 U.S.C. § 4241(d) does not mandate inpatient confinement for competency restoration.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (citations omitted).

The competency statute, 18 U.S.C. § 4241(d), has not been carefully construed in light of constitutional concerns, because courts have assumed that the term "hospitalize" requires inpatient confinement and that judicial commitment to "custody" requires the same degree of restraint as post-conviction custody under the sentencing statutes. *See*, *e.g., Strong*, 489 F.3d at 1062; *Shawar*, 865 F.2d at 859-63; *McKown*, 2019 WL 3281414, at *6.

The text of the statute is amenable to a construction that forecloses the automatic incarceration of conditionally released pretrial defendants. The statute simply uses the term "custody," without any restriction preventing the district court from defining the scope of that custody: "the court shall commit the defendant to the custody of the Attorney General." 18 U.S.C. § 4241(d). Even pretrial conditional release constitutes "custody." *Hensley v. Mun. Court*, 411 U.S. 345, 345-46 (1973) (holding that "a person released on his own recognizance is 'in custody' within the meaning of the federal habeas corpus statute").

When Congress wants to limit a district court's authority to place conditions on custody, it knows exactly how to do so, as it did when it specified that the sentencing judge cannot order "community corrections" as part of a term of imprisonment in 18 U.S.C. § 3621(b) ("Any order, recommendation, or request by a

sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person"). "Drawing meaning from silence is particularly inappropriate" where "Congress has shown that it knows how to" limit the district court's authority "in express terms.'" *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (citation and internal alterations omitted).

Mr. Nino acknowledges that the statutory language not only requires commitment to the "custody" of the Attorney General, but also requires the Attorney General to "hospitalize" the defendant in a "suitable facility." The term "hospitalize," however, is not defined in the statute. *See* 18 U.S.C. § 4247(a). But, in the Medicare context, Congress broadly defined "hospitalization" to include both "inpatient hospital services," 42 U.S.C. § 1395x(b), and "partial hospitalization services." § 1395x(ff). Partial hospitalization services encompass services consistent with outpatient, community-based competency restoration, including "individual and group therapy with physicians or psychologists . . . services of social workers, trained psychiatric nurses, and other staff trained to work with psychiatric patients . . . (and) patient training and education." § 1395x(ff)(2). "Hospital services" includes services "rendered to outpatients and partial hospitalization services incident to such services." § 1395x(s)(2)(B).

This broad understanding of "hospitalize" is also consistent with the competency statute's requirement to use a "suitable" facility for competency

restoration, 18 U.S.C. § 4241(d), which is one that is appropriate "to provide care or treatment given the nature of the offense and the characteristics of the defendant." 18 U.S.C. § 4247(a)(2). Thus, a district court retains authority to determine that "custody" includes release on conditions, because the statute does not require the Attorney General, in "hospitalizing" the defendant, to do so on an inpatient basis.

Therefore, properly construed, the district court has full authority under 18 U.S.C. 4241(d) to limit the Attorney General's "custody" of an incompetent individual on pretrial release to participation in community-based restoration programming and treatment, when such treatment is appropriate given the circumstances of a particular defendant. This construction would avoid the constitutional concerns posed by the automatic confinement of presumptively innocent, incompetent defendants when such confinement is unnecessary or even unreasonable.

This construction would also harmonize the competency statute with the Rehabilitation Act, 29 U.S.C. § 794(a), which requires that individuals with disabilities receive treatment in the most integrated setting appropriate to the needs of the individual. *See* ACDL Amicus Brief at 9-24. This construction is likewise favored by the rule of lenity, which requires ambiguities in a criminal statute to be resolved in the defendant's favor. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Section 4241(d) is statute in the criminal code, and detention is "punishment" if it is excessive in relation to its non-punitive purpose. *Salerno*, 481 U.S. at 746-47. Such punitive detention occurs when confinement is not necessary to

serve the government's interest in competency restoration. Thus, the rule of lenity applies in this context.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari.

Respectfully submitted this 2nd day of August 2019.

JON M. SANDS
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s/M. Edith Cunningham
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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)

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APPENDIX B

FILED

APR 26 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

APPENDIX C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 3, 2019

Ms. Mary Edith Cunningham
Federal Public Defender's Office
407 W. Congress Street
5th Floor
Tucson, AZ 85701

Re: Martin Anthony Nino
v. United States
Application No. 19A27

Dear Ms. Cunningham:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on July 3, 2019, extended the time to and including August 2, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Redmond K. Barnes
Case Analyst

APPENDIX D

18 U.S.C. § 4241. Determination of mental competency to stand trial to undergo post release proceedings[1]

(a) Motion to determine competency of defendant.—

At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(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).

(c) Hearing.—

The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional

[1] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge.—

When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, 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 defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of finding of competency.—

A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

18 U.S.C.A. § 4241 (West) (2019).

18 U.S.C. § 4247. General provisions for chapter

(a) Definitions.— As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect[1] a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) Psychiatric or psychological examination.—

A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the

[1] So in original. Probably should be followed by "to".

court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, 4246, or 4248, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.—

A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is 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;

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.—

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.

(e) Periodic report and information requirements.—

(1) The director of the facility in which a person is committed pursuant to--

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) Videotape record.—

Upon written request of defense counsel, the court may order a videotape record made of the defendant’s testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.—

Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.—

Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.—

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

18 U.S.C.A. § 4247 (West) (2019).