No. 19-5487

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ANTHONY NINO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 4241(d) -- which requires that a criminal defendant found incompetent to stand trial be committed to the custody of the Attorney General for hospitalization in a suitable facility "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 obtain the capacity to permit the proceedings to go forward" -- violates the Due Process Clause of the Fifth Amendment.

2. Whether the requirement of commitment in Section 4241(d) violates the Excessive Bail Clause of the Eighth Amendment.

3. Whether Section 4241(d)'s requirement that the Attorney General "hospitalize the defendant for treatment in a suitable facility" allows a court to require the Attorney General to release the defendant into the community as part of an outpatient competency restoration program.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Nino, No. 16-cr-1937 (Dec. 15, 2017)

United States Court of Appeals (9th Cir.):

United States v. Nino, No. 17-10546 (Feb. 5, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 750 Fed. Appx. 589.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2019. A petition for rehearing was denied on April 26, 2019 (Pet. App. B1). On July 3, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 2, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Arizona on one count of making a false statement during the purchase of firearms, in violation of 18 U.S.C. 922(a)(6) and 924(a)(2). Indictment 1-2. Following a hearing, the district court found petitioner incompetent to stand trial and committed him to the custody of the Attorney General for evaluation and treatment in accordance with 18 U.S.C. 4241(d). Pet. App. A1. The court of appeals affirmed the commitment order. Id. at A1-A2.

1. In October 2016, a grand jury indicted petitioner on one count of making a false statement during the purchase of firearms, in violation of 18 U.S.C. 922(a)(6) and 924(a)(2). Indictment 1-2. The indictment charged that petitioner had falsely stated on a required form that he was the "actual transferee/buyer" of the firearm, even though he was in fact acquiring the firearm for another person. Indictment 2. Petitioner was released on bond. Pet. C.A. E.R. 12-14.

In July 2017, the district court, on petitioner's motion, ordered that petitioner be evaluated to his competency to stand trial. D. Ct. Doc. 31, at 1 (July 18, 2017). Two doctors evaluated petitioner and explained in a joint report that petitioner was not competent to assist in his defense, but that his competency might be restored within a reasonable period of time "at an approved outpatient or inpatient restoration program." C.A. E.R. 111

(emphasis in original). The report warned that the test results "potentially involve[d] considerable distortion" and were "highly suggestive of malinger[ing]." Id. at 97, 103 (capitalization omitted). The report stated that "a restoration program will need to further confirm or rule out attempts at malingering/ exaggerating deficits." Id. at 111 (emphasis omitted).

2. The government moved to find petitioner incompetent and to commit petitioner to the Attorney General's custody in accordance with 18 U.S.C. 4241(d)(1). D. Ct. Doc. 37, at 1-4 (Oct. 13, 2017). Under Section 4241(d)(1), if a court finds that a 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." 18 U.S.C. 4241(d). Section 4241(d) further provides that the Attorney General "shall hospitalize the defendant for treatment in a suitable facility * * * 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." 18 U.S.C. 4241(d)(1). The statute allows that four-month period to be extended "for an additional reasonable period of time" until the defendant's mental condition has improved enough

"that trial may proceed," or until "the pending charges * * * are disposed of," "whichever is earlier." 18 U.S.C. 4241(d)(2).

Petitioner did not object to the finding of incompetency to stand trial, but "move[d] the Court to order that he remain out of custody and be required to participate in an out-of-custody restoration-to-competency program." D. Ct. Doc. 42, at 1 (Nov. 1, 2017). Following a hearing, the magistrate judge granted the government's motion in part and denied petitioner's motion. D. Ct. Doc. 47, at 1 (Nov. 17, 2017). The magistrate judge found petitioner "not competent to stand trial but restorable." Ibid. The magistrate judge further ordered that petitioner be committed to a facility for up to four months once the Attorney General "designates a facility for treatment and a date to report." Ibid.

Petitioner sought review in the district court, which overruled petitioner's objection to the magistrate judge's order. D. Ct. Doc. 54, at 1-7 (Dec. 15, 2017). The court rejected petitioner's contentions that "mandatory detention pursuant to 18 U.S.C. § 4241(d) violates substantive due process," that "mandatory detention without bail violates the Excessive Bail Clause," and that Section 4241(d) allows a court to require the Attorney General to place a defendant in an outpatient competency restoration program. Id. at 3; see id. at 3-7.

3. The court of appeals affirmed. Pet. App. A1-A2. The court first rejected petitioner's contention that mandatory commitment under Section 4241(d) "violates substantive due

process," relying on the court's prior determination of the issue in United States v. Strong, 489 F.3d 1055 (9th Cir. 2007), cert. denied, 552 U.S. 1188 (2008). Pet. App. A1. The court also rejected petitioner's contention that Section 4241(d) "violates the Eighth Amendment's ban on excessive bail," which was premised on the theory that "mandatory commitment amounts to a categorical denial of bail for defendants found to be incompetent to stand trial." Id. at A1-A2. The court explained that "the Excessive Bail Clause does not prohibit Congress from 'mandat[ing] detention on the basis of a compelling interest other than prevention of flight,'" and it determined that, "[h]ere, 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." Id. at A2 (quoting United States v. Salerno, 481 U.S. 739, 754-755 (1987)). Finally, the court rejected petitioner's contention that Section 4241(d) "allow[s] courts to mandate 'custody' in outpatient competency restoration programs." Ibid. The court explained that "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," and that "[w]hether the Attorney General, in his discretion, could use a community restoration program as part of his 'custody' * * * [wa]s not a question that [the court] need[ed] to address at this time." Ibid.

ARGUMENT

Petitioner renews his contentions (Pet. 8-32) that mandatory commitment under Section 4241(d) violates the Due Process Clause and the Excessive Bail Clause and that the statute allows courts to require the Attorney General to release him into the community rather than to place him in a hospital. The court of appeals correctly rejected all of those contentions, and its decision does not conflict with any decision of this Court or of any other court of appeals. This case also would be an unsuitable vehicle for addressing the questions presented. Further review is unwarranted.

1. a. It is well settled that the government, as a general matter, may detain a defendant who has been found incompetent to stand trial so that the government may determine whether he can be restored to competency. The detention of incompetent defendants has a long history. Under the common law, an incompetent defendant could "not be tried," but "persons deprived of their reason might be confined till they recovered their senses." 4 William Blackstone, Commentaries on the Laws of England 24-25 (1769). And in the United States, "[t]he States have traditionally exercised broad power to commit persons found to be mentally ill." Jackson v. Indiana, 406 U.S. 715, 736 (1972). This Court, moreover, has recognized that "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences," and that

"confinement of such persons pending trial is a legitimate means of furthering that interest." Bell v. Wolfish, 441 U.S. 520, 534 (1979).

In Jackson v. Indiana, supra, this Court considered the limits of the government's authority to commit incompetent defendants. The Court stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738. Applying that standard, the Court held that the automatic "indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the [Constitution's] guarantee of due process." Id. at 731. The Court concluded that a criminal defendant "who is committed 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." Id. at 738. The Court further concluded that, "even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." Ibid.

Congress enacted Section 4241(d) in response to, and in an effort to comply with, this Court's decision in Jackson. See United States v. Strong, 489 F.3d 1055, 1061 (9th Cir. 2007), cert. denied, 552 U.S. 1188 (2008). The statute provides that a court must commit an incompetent defendant to the custody of the Attorney

General, and that the Attorney General must "hospitalize the defendant for treatment in a suitable facility." 18 U.S.C. 4241(d). That provision "bear[s] some reasonable relation to the purpose for which the individual is committed," Jackson, 406 U.S. at 738, because it serves the "overarching purpose of * * * enabl[ing] medical professionals to accurately determine whether a criminal defendant is restorable to mental competency," Strong, 489 F.3d at 1062. Further, in compliance with Jackson's requirement that an incompetent defendant's commitment last only for a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future," 406 U.S. at 738, Section 4241(d) provides that the commitment must last only "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 [the defendant] will attain the capacity to permit the proceedings to go forward," 18 U.S.C. 4241(d)(1). And in compliance with Jackson's requirement that an "continued commitment must be justified by progress toward th[e] goal" of enabling the defendant to stand trial, 406 U.S. at 738, the statute provides that the commitment may continue "for an additional period of time," but only "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," 18 U.S.C. 4241(d)(2)(A).

b. Petitioner does not meaningfully argue that Section 4241(d)(1) violates the standards set forth in Jackson. Petitioner instead suggests (Pet. 13) that Jackson is now "obsolescent," and that this Court should impose a variety of new restrictions on the commitment of incompetent defendants to reflect "today's standards." That contention lacks merit.

Petitioner first argues that Section 4241(d) violates the Due Process Clause because it provides for "automatic confinement," rather than for "'case-by-case determinations of the need for pretrial detention.'" Pet. 9, 13 (citation and emphasis omitted); see United States v. Salerno, 481 U.S. 739, 750 (1987). The Due Process Clause, however, allows "Congress to make a uniform rule rather than to have a determination made on a case-by-case basis," because "Congress could reasonably think that, in almost all cases, temporary incarceration would permit a more careful and accurate diagnosis before the court is faced with the serious decision whether to defer trial indefinitely and (quite often) to release the defendant back into society." United States v. Filippi, 211 F.3d 649, 651 (1st Cir. 2000). In addition, although "the statute is categorical in determining who shall be incarcerated, * * * it is much more flexible and case-oriented in determining" the nature and duration of the commitment. Id. at 652. For example, the facility in which the defendant is placed must be "suitable"; the initial period of confinement must be "reasonable" and "necessary"; and additional periods of confinement must be

"reasonable" and supported by a judicial "find[ing]" of a "substantial probability" that competency could be restored. 18 U.S.C. 4241(d).

Petitioner next argues (Pet. 9) that, "before a defendant * * * 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." Petitioner rests (Pet. 9-10) that argument on an analogy to Sell v. United States, 539 U.S. 166 (2003). Sell, however, involved the forced medication (rather than the commitment) of incompetent defendants, and relied on a defendant's "'significant'" interest in "'avoiding the unwanted administration of antipsychotic drugs'" and on the risk that the drugs could "have side effects that would interfere with the defendant's ability to receive a fair trial." Id. at 178-179 (citation omitted). This case, in contrast, involves a challenge to Section 4241(d), which "is a commitment statute, not an involuntary medication statute." United States v. Loughner, 672 F.3d 731, 767 (9th Cir. 2012).

Petitioner also argues (Pet. 10-11) that Section 4241(d) violates the Due Process Clause to the extent that it requires "inpatient" commitment rather than placement in "outpatient" programs. But the requirement of inpatient commitment bears a "reasonable relation to the purpose for which the individual is committed," Jackson, 406 U.S. at 738. Inpatient confinement

"enable[s] medical professionals to accurately determine whether a criminal defendant is restorable to mental competency" -- a determination that usually requires "'careful and accurate diagnosis.'" Strong, 489 F.3d at 1062. Petitioner cites (Pet. 11) "empirical evidence" that, in his view, suggests that "outpatient competency restoration" can also lead to "positive results," but those policy arguments are more properly addressed to Congress than to this Court.

Finally, petitioner contends (Pet. 22-28) that Section 4241 violates "'procedural' due process" because it fails to provide adequate "predeprivation process." Pet. 22, 24 (citation omitted). As an initial matter, that contention was "not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner's brief contained a passing reference to procedural due process, see Pet. C.A. Br. 15, but the court of appeals understood petitioner to be "argu[ing] that mandatory commitment under § 4241(d) violates substantive due process," and it accordingly did not discuss any procedural challenge, Pet. App. A1. No sound basis exists for this Court -- which is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) -- to consider that contention in the first instance.

In any event, petitioner's procedural argument lacks merit. Under the challenged federal statute, a defendant may be committed only after a grand jury finds probable cause to believe that he

has committed on or more federal crimes, and a court finds, after a hearing in which the defendant was represented by counsel and afforded an opportunity to cross-examine witnesses, that the defendant is incompetent to stand trial for those crimes. See 18 U.S.C. 4241(d), 4247(d). Petitioner identifies no sound basis for concluding that those procedures fall short of what the Due Process Clause requires. Petitioner relies (Pet. 25-27) on Vitek v. Jones, 445 U.S. 480 (1980), but that reliance is misplaced. In that case, this Court held that a State had violated the Due Process Clause by transferring an inmate serving a term of imprisonment to a mental institution, where the inmate received no hearing, claimed that he was not mentally ill in the first place, faced involuntary treatment at the mental institution, and could have been confined to the mental institution for the entire duration of his sentence. See id. at 482. The commitment here, by contrast, follows an adversary hearing and a district court's finding of incompetence, and is limited in purpose and duration.

c. As petitioner appears to acknowledge (Pet. 10-11, 20), every federal court of appeals to consider the issue has determined that Section 4241(d) is consistent with the Due Process Clause. See Filippi, 211 F.3d at 651-652 (1st Cir.); United States v. Brennan, 928 F.3d 210, 216-218 (2d Cir. 2019); United States v. McKown, 930 F.3d 721, 728-730 (5th Cir. 2019), petition for cert. pending, No. 19-6361 (filed Oct. 21, 2019); United States v. Shawar, 865 F.2d 856, 863-864 (7th Cir. 1989); United States v.

Dalasta, 856 F.3d 549, 554 (8th Cir. 2017); Strong, 489 F.3d at 1060-1063 (9th Cir.); United States v. Donofrio, 896 F.2d 1301, 1303 (11th Cir.), cert. denied, 497 U.S. 1005 (1990); see also United States v. Anderson, 679 Fed. Appx. 711, 713 (10th Cir. 2017).

Petitioner asserts (Pet. 17-20) that the decision below conflicts with Carr v. State, 815 S.E.2d 903 (Ga. 2018). In that case, the Supreme Court of Georgia held that a Georgia statute violated the Due Process Clauses of the federal and state constitutions by requiring "automatic detention without an individualized determination of whether the confinement reasonably advances the government's purpose. Id. at 905-906; see id. at 908 n.8. That decision, however, "involved a distinguishable state law." McKown, 930 F.3d at 730. The Georgia statute treated defendants charged with violent offenses differently from defendants charged with non-violent offenses, making detention mandatory for the former but discretionary for the latter. Carr, 815 S.E.2d at 907-908. The Supreme Court of Georgia accordingly observed that the statute's treatment of nonviolent offenders "itself tells us" that "confinement at a * * * facility is not required for the accurate evaluation the State seeks to obtain." Id. at 915. And in light of the "legislative judgment" reflected in that portion of the statute, the court concluded that mandatory confinement of defendants charged with violent offenses was not "reasonable." Id. at 913, 916. The Georgia Supreme Court's

rationale is inapplicable to the federal statute, which does not suggest that the government's interest in a custodial competency evaluation is an indirect proxy for, or otherwise influenced by, the nature of the crime with which the defendant is charged. See 18 U.S.C. 4241(d). In all events, "Carr [is] an outlier," McKown, 930 F.3d at 730, and any tension between the decision below and that case does not warrant this Court's review.

2. Petitioner separately contends (Pet. 28) that mandatory detention under Section 4241(d) violates the Excessive Bail Clause. That contention likewise does not warrant further review.

This Court has explained that the Excessive Bail Clause does not "accord a right to bail in all cases," but merely "provide[s] that bail shall not be excessive in those cases where it is proper to grant bail." Salerno, 481 U.S. at 754 (quoting Carlson v. Landon, 342 U.S. 524, 545 (1952)). The Court has also explained that, "even if [it] were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers" to deny bail altogether, the "only arguable substantive limitation" would be that "detention not be 'excessive' in light of the perceived evil." Ibid. For the same reasons that Section 4241(d) bears a "reasonable relation to the purpose for which the individual is committed," Jackson, 406 U.S. at 738; see pp. 7-8, supra, the provision also is not "'excessive' in light of the perceived evil," Salerno, 481 U.S. at 754. And petitioner does not assert that any court has held otherwise.

3. Finally, petitioner contends (Pet. 31) that Section 4241(d) does not require inpatient confinement, but instead allows a court to "release" a defendant into an outpatient "community-based restoration" program. That contention similarly does not warrant this Court's review.

The court of appeals correctly determined that "the plain language" of Section 4241(d) forecloses petitioner's argument. Pet. App. A2. Section 4241(d)(1) provides that "the court shall commit the defendant to the custody of the Attorney General," who "shall hospitalize the defendant in a suitable facility." The statute thus requires the court to commit the defendant "to the custody of the Attorney General," 18 U.S.C. 4241(d), a requirement that cannot be squared with outpatient programs that petitioner himself describes as "out-of-custody restoration," Pet. C.A. Br. 6. The statute instructs the Attorney General to "hospitalize" the defendant, 18 U.S.C. 4241(d), but an outpatient, by definition, is "[a] patient who is not an inmate of a hospital," Webster's New International Dictionary of the English Language 1734 (2d ed. 1958) (emphasis added). And the statute requires the Attorney General to place the defendant "in" a "facility," 18 U.S.C. 4241(d) -- not, as petitioner requests (Pet. 31), to "release" the defendant into the community.

Section 4241(e) confirms that analysis. It provides that, if a court finds that a defendant has been restored to competency, the court must "order his immediate discharge from the facility in

which he is hospitalized," 18 U.S.C. 4241(e) -- a requirement that would make little sense as to a defendant who has already been released into the community as an outpatient. Petitioner also does not assert any circuit conflict on his third question presented. Further review is therefore unwarranted.

4. In any event, this case would be an unsuitable vehicle to consider petitioner's contentions. Even if the Constitution or the statute required outpatient restoration programs for some defendants, petitioner has not shown that either the Constitution or the statute would require outpatient restoration in his case. The doctors who evaluated petitioner determined that petitioner's competency might be restored within a reasonable period of time "at an approved outpatient or inpatient restoration program." C.A. E.R. 111. The doctors also found that petitioner's test results "potentially involve[d] considerable distortion" and were "highly suggestive of malinger[ing]." Id. at 97, 103 (capitalization omitted). In those circumstances, "the constant observation and increased control afforded by" inpatient hospitalization would "promote the government's purpose of accurate evaluation." Carr, 815 S.E.2d at 916.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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