No. 19-5487

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

REPLY TO UNITED STATES OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The decision below is in conflict with the Georgia Supreme Court's due process decision in *Carr*, the rationale of which applies with even greater force to the federal statute.

Mr. Nino argues that his incarceration for competency-restoration treatment—without an individualized consideration of whether confinement is necessary to achieve the government's interests—violates due process under the United States Constitution. That is the same issue decided by *Carr v. State,* 815 S.E.2d 903, 908 & n.8, 913-17 (Ga. 2018). *See* Petition for Writ of Certiorari (Pet.) at 17-20.

The government contends that the issue is somehow different because the Georgia statute invalidated by the *Carr* court only mandated inpatient competency-restoration treatment for defendants charged with violent felonies. Brief for the United States in Opposition (BIO) at 13-14. But that difference only highlights the gravity of the due process violation resulting from the application of 18 U.S.C. § 4241(d) in this case. Unlike that Georgia statute, the federal statute makes no exceptions for defendants charged with non-violent crimes, or even misdemeanors. In such lower-level cases, it is even less likely that confinement will be necessary to further the government's prosecutorial interests and even more likely that pretrial confinement for competency restoration will result in a defendant overserving the appropriate sentence.

The government emphasizes the *Carr* court's discussion of the Georgia legislature's policy judgment—reflected by the trial court's discretion under the

Georgia scheme to order outpatient treatment for incompetent defendants charged with *non-violent* crimes—that inpatient evaluation is not always necessary to accurately determine whether competency can be restored. BIO at 13-14. But the *Carr* court also stressed that the federal statute provides no legislative findings justifying automatic incarceration to achieve the government's goals, and that many other states also allow outpatient restoration. *Carr*, 815 S.E.2d at 913-14 & n.16. If outpatient treatment is sufficient for state defendants in some circumstances, then it must also be sufficient for federal defendants in some circumstances, because the same federal competency standard applies. Pet. at 18-19.

The *Carr* court relied on the same federal precedents on which Mr. Nino primarily relies—*United States v. Salerno*, 481 U.S. 739 (1987), *Sell v. United States,* 539 U.S. 166 (2003), and *Jackson v. Indiana*, 406 U.S. 715 (1972)—in concluding that automatic confinement for competency restoration violates due process and in explicitly rejecting the analysis of the federal courts of appeal that have concluded otherwise. Pet. at 19-20. The federal competency statute, as construed by the government, has always been unconstitutional. The recent implementation of successful outpatient restoration programs in many states, including Arizona, confirms that *automatic* confinement for competency restoration is *not* necessary. *See* Pet. at 11-12.

II. Automatic confinement for competency restoration violates due process, and the contrary holdings of the federal courts of appeal are in conflict with the Court's reasoning in *Jackson, Salerno,* and *Sell.*

A. *Jackson*'s rationale does not permit inpatient confinement if it is unnecessary to achieve the government's interests.

Contrary to the government's suggestion, BIO at 7-8, *Jackson* does not stand for the proposition that automatic confinement for competency restoration complies with due process. As previously explained, that was not the issue before the *Jackson* Court, as the defendant challenged only his indefinite detention and not the initial decision to detain. Pet. at 11. But, even though *Jackson* long predated the development of successful outpatient restoration programs throughout the country, its holding—that a defendant may not be detained "solely on account of" his incompetency for any longer than the "reasonable period of time *necessary* to determine" if he will soon regain the capacity to proceed, 406 U.S. at 738 (emphasis added)—does not permit confinement if the government's objectives can be achieved on an outpatient basis. In that circumstance, detention of any length for purposes of competency restoration is *unnecessary*. Thus, while, in 1972, the Court likely did not foresee the proliferation of successful outpatient programs that has occurred in recent decades, *Jackson*'s rationale compels an individualized determination of whether confinement is *necessary* to achieve the government's interests. Courts cannot ignore the outpatient programming available to a defendant in assessing whether confinement is in fact necessary. *Cf. Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (in equal protection context, government must show that gender classification "substantially serve[s] an important governmental interest

today") (emphasis in original).

Therefore, even if Congress did enact 18 U.S.C. § 4241(d) with *Jackso*n in mind, the statute, as construed by the government, violates due process by mandating automatic confinement for competency restoration in all cases, even those in which confinement is unnecessary to achieve the government's interests. *Salerno* and *Sell* leave no doubt that an individualized determination of necessity is required to comply with due process. Pet. at 8-10.

B. Under *Salerno*, freedom from pretrial detention is a fundamental right, which cannot be infringed without an individualized showing that confinement is necessary to achieve governmental interests.

The government's arguments do not undermine Mr. Nino's claim that the rationale of *Salerno* requires the due process relief sought in his petition. *See* BIO at 9. Significantly, the government does not dispute *Salerno*'s clear statement of law that freedom from pretrial detention is a "fundamental" right. 481 U.S. at 750. And it does not dispute that, under this Court's binding precedent, 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). Locking up every presumptively innocent defendant found incompetent to stand trial—even when the government's competency-related objectives can be achieved through outpatient treatment—simply does not comply with this standard.

The government acknowledges Mr. Nino's argument that, under *Salerno*, due process requires individualized determinations of the need for pretrial detention, but then, citing to no other Supreme Court precedent, it claims that Mr. Nino's

interpretation is incorrect. BIO at 9. The government, like the Ninth Circuit in *United States v. Strong*, 489 F.3d 1055, 1062 (9th Cir. 2007), relies on *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000), which was explicitly rejected in *Carr*, 815 S.E.2d at 914-16, and called into question by the *Nino* panel. The *Nino* panel held that it was bound by *Strong* to reach the same conclusion, despite Mr. Nino's "compelling" arguments. *United States v. Nino*, 750 F. App'x 589, 589-90 (9th Cir. 2019).

But even *Filippi*—which did not even consider the potential efficacy of outpatient treatment—acknowledged that in *some* cases temporary incarceration would *not* be necessary to achieve the government's interests in competency restoration. 211 F.3d at 651 ("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 . . . .") (emphasis added). Thus, even by *Filippi's* logic, automatic detention of *all* defendants found incompetent to stand trial, without consideration of the individual's specific circumstances, violates due process. And the court's "almost all" language has no basis in legislative history or empirical fact. *See* S. REP. NO. 98-225, at 232-38 (1983).

C. *Sell* reinforces the requirement of an individualized showing of necessity prior to a defendant's pretrial confinement for competency restoration.

The government claims that *Sell* is inapposite because it considered forced medication rather than pretrial detention. BIO at 10. But *Sell* provides a framework

for balancing the government's interest in criminal prosecution against a defendant's liberty interest in the competency-restoration context. Granted, *Sell* addressed a different competency-restoration issue, i.e., when the government may force a defendant already detained under the Bail Reform Act to take medication in an effort to restore competency. 539 U.S. at 170-71. This Court concluded that a detained individual has a "significant" constitutionally protected "liberty interest" in avoiding the unwanted administration of drugs, which may not be abridged absent a countervailing "important" government interest and a showing that—given the individual defendant's circumstances—any alternative, less intrusive treatment is unlikely to achieve substantially the same result. *Id.* at 178-81.

Although the *Sell* Court never characterized the right of a detained individual to refuse medication as "fundamental," there is no question that freedom from bodily restraint before or without trial is a fundamental right. *Salerno*, 481 U.S. at 750; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Thus, at a minimum, to justify the pretrial incarceration of a defendant released under the Bail Reform Act for competency restoration, the government must prove that any less restrictive alternative is substantially unlikely to achieve the same result, in accordance with the framework of *Salerno*, 481 U.S. at 750-51, and *Sell,* 539 U.S. at 178-81.

The government suggests that forcing a defendant who is already incarcerated under the Bail Reform Act to take antipsychotic medication is somehow a more significant deprivation of liberty than locking up a defendant who

is undisputedly entitled to pretrial freedom under the that act. BIO at 10. It defies logic to think that the former requires consideration of necessity in light of individualized circumstances and the availability of less intrusive alternatives, but the latter does not. To be sure, medication can have detrimental side effects. But pretrial segregation from society also has serious side effects, especially for the intellectually disabled and mentally ill. Individuals with these conditions who have been found incompetent to stand trial are among the most vulnerable defendants for whom family and community support is most important. *See* Brief of Amicus Curiae National Association of Federal Defenders in Support of Petition for Writ of Certiorari (NAFD Amicus Brief) at 4-7. But even apart from those concerns, the physical restraint of an individual entitled to freedom is a deprivation of liberty at least as severe as requiring a defendant who is already incarcerated to take medication under a doctor's supervision.

The government's citation to Blackstone—that, at common law, "persons deprived of their reason [could not be tried but] might be confined until they recovered their senses," BIO at 6—does not advance its position and underscores a serious flaw in its argument. Blackstone spoke of prisoners whom he characterized as "idiots," "lunatics," and "madmen," words which connote severe infirmities. 4 WILLIAM BLACKSTONE, COMMENTARIES *24-25. Defendants today, however, may be found incompetent to stand trial due to a variety of conditions, ranging from severe psychosis that manifests in violence and requires inpatient treatment to mild intellectual disability that poses no danger to others and for which the only

available "treatment" is instruction on basic legal principles and court procedures to determine if the defendant can gain the understanding necessary to proceed to trial. The one-size-fits-all approach to competency restoration applied under the federal competency statute unnecessarily and unconstitutionally incarcerates *every* defendant regardless of the severity of his condition or the need for confinement to achieve the government's goals.

D. The procedural due process issue is ripe for this Court's review.

The government avers that this Court should not consider Mr. Nino's procedural due process argument because the Ninth Circuit did not discuss it in its memorandum disposition. *See* BIO at 11-12. As the government acknowledges, Mr. Nino raised the issue in his briefing. He not only cited *Matthews v. Eldridge*, 424 U.S. 319 (1976) and *Vitek v. Jones*, 445 U.S. 480 (1980), but he argued that the statutory scheme violates due process because it does not set forth a mechanism to determine the necessity of inpatient confinement to achieve the government's interests in competency restoration. Opening Brief at 14-15, 25-26; *see also* Opening Brief at 42 (arguing statutory language should be interpreted to require outpatient restoration unless the government proves that it is not suitable). If neither the Due Process Clause nor the statute requires an individualized determination of the necessity of confinement to achieve the government's interests, then the only process required to justify inpatient confinement would be that needed to determine whether the defendant is incompetent to stand trial. As the government points out, such process is already required by the statute. BIO at 12.

The Ninth Circuit rejected Mr. Nino's due process and statutory construction arguments. It therefore had no basis to reach the procedural due process issue, and this circumstance does not prejudice this Court's ability to address this purely legal issue, which is intertwined with Mr. Nino's substantive due process and statutory arguments. Indeed, unlike in *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), Mr. Nino's due process arguments are based on the very same clause of the Constitution. Further guidance from this Court on the questions presented in Mr. Nino's petition is a necessary prerequisite to the articulation of any procedural requirements beyond the competency determination itself. No further factual development is required, and nothing would be gained by declining to consider the procedural component of the Due Process Clause.

As in *Vitek*, both the statutory language and the magnitude of the due process liberty interest at stake compel a hearing on the necessity of inpatient confinement. Indeed, the need for this process is even more compelling than it was in *Vitek*, which considered the case of a convicted inmate who was already rightfully incarcerated by the state. *See* Pet. at 25-28.

III. The Court should also grant review of the questions presented on the Eighth Amendment and statutory construction.

Mr. Nino's Eighth Amendment argument is closely related to his due process argument. Both rely on *Salerno* and require consideration of whether pretrial detention is necessary to achieve the government's interest in pursuing prosecution. *See* Pet. at 28. If the Due Process Clause does not protect presumptively innocent pretrial defendants against unnecessary detention, then the Eighth Amendment

must.

Under the doctrine of constitutional avoidance, before reaching the constitutional issues, this Court must consider whether the statute can be fairly construed to avoid grave constitutional concerns. Under this doctrine and the rule of lenity, the federal competency statute can and should be construed to allow the district court to require outpatient competency-restoration treatment if inpatient confinement is unnecessary to achieve the government's interests. *See* Pet. at 29-32; NAFD Amicus Brief at 8-18.

In arguing that the statute mandates confinement, the government overlooks that "custody" includes release on conditions. *Hensley v. Mun. Court*, 411 U.S. 345, 345-46 (1973). *See* BIO at 15. It also overlooks that, while the term "hospitalize" is undefined in the competency statute, Congress broadly defined "hospitalization" to include outpatient treatment in the Medicare statute. *See* Pet. at 30. This broad construction logically applies to the competency statute under rules of statutory construction. Contrary to the government's suggestion, BIO at 15-16, 18 U.S.C. § 4241(e) likewise can be fairly construed to direct the district court to discharge the defendant from outpatient treatment upon a finding that he has been restored to competency.

Indeed, the government appears to concede that the statutory language does *not* permit inpatient confinement unless it is *necessary*. BIO at 9 (noting that, under 18 U.S.C. § 4241(d), "the initial period of confinement must be 'reasonable' and *'necessary*'") (emphasis added). If inpatient confinement is unnecessary and

therefore not permitted under the statute, outpatient treatment is the only alternative for a restorable defendant.

IV. This case provides an ideal vehicle to address the questions presented, which this Court urgently needs to decide.

The government claims that this case is an unsuitable vehicle because the evaluating doctors noted the possibility that Mr. Nino is malingering, and he therefore "has not shown that either the Constitution or the statute would require outpatient restoration in his case." BIO at 16.

But that is irrelevant to whether this Court should grant the writ. The questions presented require this Court to address pure questions of law. Any remaining factual issues can and should be resolved by the district court after this Court resolves the legal issues. *See Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (after appellate court identifies legal error, it must remand "for further proceedings to the tribunal charged with the task of factfinding in the first instance").

In any event, there is a strong likelihood that, if Mr. Nino prevails in this Court, the district court will ultimately order outpatient restoration. The same doctors who noted the possibility of malingering also opined that Mr. Nino could be placed in an outpatient restoration program. ER3 at 111. The program suggested by Mr. Nino's counsel is specifically designed to detect malingering. ER2 at 45. And the district court, who is familiar with Arizona's outpatient programming, stayed its commitment order in Mr. Nino's case despite its recognition of the possibility of malingering. ER2 at 58-61, 68-70, 74. Mr. Nino remains on pretrial release.

Moreover, because Mr. Nino's petition involves a recurring issue of national importance, this Court should resolve the matter as soon as possible. This case is important not only to him, but to the many federal defendants routinely incarcerated for competency restoration without any individualized determination of necessity, some of whom end up spending more time incarcerated than the length of the appropriate sentence if they are ultimately convicted.[1]

CONCLUSION

This Court should grant the writ. Alternatively, it should retain jurisdiction over the case until resolution of the petition in *McKown v. United States*, No. 19-6361, and enter any appropriate orders that the resolution of *McKown* may require.

Respectfully submitted this 13th day of December, 2019.

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[1] The urgency of the issue is underscored by ongoing staffing and bed-space shortages in the BOP prisons used for competency restoration. Currently, male defendants must wait three to five months after the finding of incompetency to be transferred to the BOP facility for treatment. *See United States v. Alvarez-Dominguez*, No. 4:18-cr-00589-JAS (D. Ariz.), Document 107 at 16 (10/18/19) (testimony of BOP official), Document 114 at 2-6 (11/12/19) (noting 153-day delay in defendant's case). Defendants released under the Bail Reform Act who could be treated expeditiously on an outpatient basis are occupying bed space at these facilities that could otherwise be filled by defendants with more severe conditions requiring inpatient treatment or by those who are not eligible for release.