No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY ALAN MCKOWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does mandatory, involuntary commitment of an incompetent defendant to the Bureau of Prisons for the sole purpose of evaluating whether he can attain competency violate substantive Due Process absent some individual showing that this "massive curtailment of liberty"[1] will materially assist in the evaluation?

II. Do the *Mathews v. Eldridge* procedural due process factors require basic procedures (*e.g.*, notice and a hearing addressing the individual circumstances) before the government determines that involuntary pretrial commitment is necessary to evaluate or restore an incompetent defendant?

[1] *See Vitek v. Jones*, 445 U.S. 480, 491–492 (1980).

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MISCELLANEOUS

OPINIONS BELOW

The published opinion of the court of appeals (Appendix A) is reported at 930 F.3d 721 (5th Cir. 2019). The district court did not issue a published opinion, but issued an unpublished, sealed memorandum containing findings of fact and conclusions of law as well as an unpublished, sealed order. The district court also entered an order staying proceedings pending Mr. McKown's appeal. The order, memorandum and order staying proceedings are included as Appendices B, C, and D to this Petition, but have not been electronically filed pursuant to this Court's electronic filing guidelines.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2019. This petition is filed within 90 days of that date and is therefore timely. *See* SUP. CT. R. 13.1. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Though this appeal is not from a final judgment, this Court has jurisdiction under the collateral order doctrine because this appeal "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *See Sell v. United States*, 539 U.S. 166, 176 (2003) (internal quotations and brackets omitted); *see also United States v. Dalasta*, 856 F.3d 549, 551 (8th Cir. 2017); *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007); *United States v. Filippi*, 211 F.3d 649, 650–51 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990).

DIRECTLY RELATED PROCEEDINGS

There are no state or federal proceedings "directly related" to petitioner's case in this Court. *See* SUP. CT. R. 14.1(b)(iii).

Issues similar to those raised in this petition are also raised by a pending petition for certiorari in *Martin Anthony Nino v. United States of America*, No. 19-5487. The Court has requested that the government respond to the petition in *Nino*, and the government's response is due on November 25, 2019.

In addition, the National Association of Federal Defenders has filed an amicus brief in *Nino*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

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

2. Section 4241(d) of Title 18, United States Code, provides:

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 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.

STATEMENT OF THE CASE

Greg McKown wants a trial. More than two years ago, the United States charged him with threatening Social Security Administration employees, and Mr. McKown has wanted a trial ever since. Our system refuses to give him one, however, because—through no fault of his own—Greg McKown is mentally ill.

The issue in this case is what happens next. Mr. McKown—who has been released pretrial—has offered to participate in whatever mental health treatment the United States wishes, but he opposes involuntary commitment to a Bureau of Prisons institution.

The United States insists that the law requires it to take custody of Mr. McKown, despite a complete lack of evidence that doing so will improve the efficiency or effectiveness with which Mr. McKown is evaluated, and if possible, rendered competent. The Fifth Circuit agreed that the government can do this, and Mr. McKown now seeks this Court's review of that decision.

The federal competency-restoration statute and its construction.

At issue in this appeal is the federal competency-restoration statute, 18 U.S.C. § 4241. Congress enacted 18 U.S.C. § 4241 as part of the Insanity Defense Reform Act of 1984.[2] The statute divides responsibility for determining and restoring incompetent defendants between the district court and the Attorney General.[3] The Attorney General has, in turn, delegated all authority under the Act to the Bureau of Prisons.[4]

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[2] *See* Insanity Defense Reform Act of 1984, Pub. L. No. 98–473, § 403.

[3] *See, e.g.*, 18 U.S.C. § 4241(d)(1).

[4] *See* 28 C.F.R. § 0.96(j). Because the Attorney General has delegated all authority and responsibilities under the

When a question arises about a defendant's capacity to stand trial, the district court must first determine whether the defendant is competent.[5] The Act provides procedures for the district court to make this determination, including a hearing, representation by counsel, and the rights to present and confront witnesses.[6]

If the court finds the defendant to be incompetent, the court must commit the defendant to the custody of the Bureau of Prisons.[7] At this point, the Bureau must "hospitalize" the defendant in a "suitable facility" for "a reasonable period of time, not to exceed four months."[8] But any "hospitalization" to evaluate competency must be "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."[9]

The Bureau of Prisons provides no process to individual defendants whatsoever with respect to what initial evaluation period is "reasonable," what type of facility is

relevant provisions of the Insanity Defense Reform Act to the Bureau of Prisons, Mr. McKown refers to the Bureau as the actor where appropriate.

[5] *See* 18 U.S.C. § 4241(a)–(d).

[6] *See Id.* § 4247(d).

[7] *See id.*

[8] *Id.*

[9] *Id.*

"suitable," or whether any period of hospitalization is "necessary to determine" the individual defendant's likelihood of attaining capacity.[10] Instead, upon commitment, the Bureau classifies all such individuals as "pretrial inmate[s]."[11] This classification presumptively subjects those being evaluated to the second highest level of security and staff supervision available.[12]

In addition, the Bureau's interpretation of the word "hospitalize," requires confining incompetent defendants at either a "Medical Referral Center (MRC)"—a secure Bureau facility with medical capabilities—or a "correctional institution that provide[s] the required care," *i.e.*, a federal prison.[13] This construction enables the Bureau to "hospitalize" incompetent defendants potentially thousands of miles from where these individuals live and work regardless of the particular defendant's offense, medical condition, or personal circumstances.

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[10] *See* BOP Program Statements 5100.008, 6010.003.

[11] 28 C.F.R. § 551.101(a)(2).

[12] *See id.* § 551.105(a); BOP Program Statement 5100.08 (definition of "IN CUSTODY").

[13] Bureau regulations define "hospitalization in a suitable facility" to include "the Bureau's designation of inmates to medical referral centers or correctional institutions that provide the required care or treatment." 28 C.F.R. § 549.41. A Bureau Program Statement clarifies that housing outside a medical referral center is available only when "an institution can capably meet [the inmate's] psychiatric needs." BOP Program Statement 6010.003. Because the Bureau defines "institution" to include only Bureau of Prisons facilities, *see* 28 C.F.R. § 500.1(d), the regulations do not contemplate evaluating an incompetent defendant committed to the Bureau's custody on an outpatient or community basis.

In addition, research has identified no Bureau of Prisons or Department of Justice regulation, procedure, or program to accommodate "outpatient hospitalization" for the purpose of determining an individual's likelihood of regaining competence or for attempting to restore competence. The absence of such procedures is particularly striking because, as discussed below, 18 U.S.C. § 4247 specifically authorizes the Attorney General to contract with State, local, and private agencies for services and specifically *requires* the Attorney General to individually determine the suitability of any placement for competency evaluation or restoration. *See* 18 U.S.C. § 4247(i)(A), (C); *see also* Section I.B.2.a., below.

If the Bureau determines that the defendant is unlikely to attain competence in the foreseeable future, then it must release the defendant (unless some other basis for detention exists).[14] If the Bureau determines that capacity can be attained in the foreseeable future, and the district court agrees, the Bureau can hospitalize the defendant for "an additional reasonable period" until competence is obtained or the case is disposed of.[15]

Gregory McKown and the alleged offense.

Gregory McKown has suffered from grandiose and persecutory delusional disorder for over thirty-eight years. As a result of the disorder, Mr. McKown believes—despite overwhelming evidence to the contrary—that he "has been anointed the Christ Peter, God Almighty, whose purpose is to thwart the efforts of Satan."

This case arose after Mr. McKown allegedly sent emails and left voicemails threatening two Social Security Administration employees. In response to these communications, the Social Security Administration wrote Mr. McKown a letter requesting that he not return to the office. Mr. McKown complied with this request. After learning of Mr. McKown's alleged communications, law enforcement contacted Mr. McKown, asked his whereabouts, and arrested him at a public library.[16] By this time, the delays in his social security benefits had left Mr. McKown homeless.

After a detention hearing in August of 2017, the court released Mr. McKown on

[14] *See Jackson*, 406 U.S. at 738.

[15] *See* 18 U.S.C. § 4241(d)(2)(A).

[16] Because the United States charged Mr. McKown with violating a law of the United States, 18 U.S.C. § 115, the district court exercised jurisdiction under 18 U.S.C. § 3231.

an unsecured bond with the condition that he attend mental health treatment. Once his social security benefits began arriving, Mr. McKown obtained a stable residence, where he still lives. He has been attending court-ordered mental health treatment ever since his release.

District court competency proceedings.

Concerns about Mr. McKown's competence to stand trial eventually arose, and the government moved for a competence evaluation.[17] The court appointed a forensic psychiatrist to evaluate Mr. McKown. Mr. McKown also hired his own psychiatrist for this purpose.

Both doctors concluded that Mr. McKown was not competent to stand trial. The doctors also both testified as to the likelihood that Mr. McKown could attain competence to permit the proceedings to go forward.

Though the doctors reached differing conclusions as to whether Mr. McKown was likely to attain competence, both agreed that involuntary commitment or hospitalization of Mr. McKown was unnecessary to make this determination. They also agreed that they had reached their conclusions to a reasonable degree of medical certainty without Mr. McKown being involuntarily committed. The court-appointed expert went further still, testifying that he had never—in his thirty years of practicing clinical psychology—recommended inpatient commitment for the purpose of determining the likelihood that a patient like Mr. McKown could attain competence. Mr. McKown's retained expert also

[17] *See* 18 U.S.C. § 4241(a).

emphasized that committing Mr. McKown would likely traumatize him and exacerbate his condition.

The doctors also both testified about the appropriate treatment for Mr. McKown—long-term talk therapy and, according to the court-appointed doctor, anti-psychotic medication. Both doctors agreed that Mr. McKown could receive such treatment without being committed or hospitalized—though the court-appointed doctor expressed concerns over whether Mr. McKown would voluntarily take medication. The doctor conceded, however, that Mr. McKown had never been ordered to take medications and had otherwise complied with all court orders related to his mental health treatment for the previous ten months.

Following the hearing, Mr. McKown filed legal objections to his commitment raising both substantive and procedural due process arguments. Among other things, Mr. McKown argued that this Court's opinion in *Sell v. United States*,[18] which required individualized consideration of several substantive factors before involuntarily medicating an incompetent defendant, also applied to involuntary commitment.

Mr. McKown also submitted a sworn declaration. Among other things, Mr. McKown stated:

> I want a trial on the charges against me, but I understand that the Court and others have expressed concerns that I am not competent to stand trial. While I believe that I am competent—and want nothing more than to demonstrate my innocence to a jury—I understand that the concerns about my competence must be addressed.

[18] 539 U.S. 166, 176 (2003).

Mr. McKown's declaration went on to explain that he would comply with whatever treatment regimen the government wished, but that he did not want to be involuntarily committed because he would lose his social security benefits, [19] his housing, all of his property, and he had no one to care for his cat. The government, for its part, introduced no evidence that commitment of Mr. McKown, either for evaluation or restoration would be more efficient or effective than outpatient options.

Following the hearing, the district court made a number of findings, but made no findings regarding the necessity of committing Mr. McKown to determine his likelihood of attaining competence. The district court then ordered Mr. McKown committed to the custody of the Attorney General.[20] The court stayed its order pending Mr. McKown's appeal, however, and as a result, Mr. McKown remains on pretrial release as of this filing.

Fifth Circuit proceedings.

In a published opinion affirming the district court's order of commitment, the Fifth Circuit joined what it characterized as "the unanimous chorus of circuit courts . . . holding that . . . mandatory, limited confinement accords with due process."[21] Mr. McKown timely filed this petition.

[19] *See* Social Security Program Operations Manuel System GN 02607.330.B.2, Title II Incompetent to Stand Trial Provisions, https://secure.ssa.gov/poms.nsf/lnx/0202607330 (last visited Oct. 18, 2019) ("confinement" triggering loss of benefits begins on the later date of the order of commitment or admission and confinement of the social security beneficiary in an institution).

[20] Pet. App. B, at 1b.

[21] Pet. App. A, at 1a.

REASONS FOR GRANTING THE PETITION

The current competency-restoration regime works deprives vulnerable incompetent defendants of their liberty, but requires no substantive showing that the extreme constraint of involuntary commitment will aid restoration in the individual case and no procedures addressed to this issue. As a result, the current system violates both substantive and procedural due process requirements under the Fifth Amendment.

A grant of certiorari is thus appropriate in this case under Rule 10(c) because the Fifth Circuit decided an important question of federal law that has not been, but should be, settled by this Court.[22] The Fifth Circuit also resolved this question in a manner that conflicts with several of this Court's decisions, including *Jackson v. Indiana,*[23] *Sell v. United States,*[24] and *Vitek v. Jones*.[25]

In addition, Rule 10(a) supports a grant of certiorari because the Fifth Circuit decided an important federal question I, a way that conflicts with the *Carr v. State*,[26] a recent Georgia Supreme Court decision.[27]

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[22] *See* SUP. CT. R. 10(c).

[23] 406 U.S. 715 (1972).

[24] 539 U.S. 166 (2003).

[25] 445 U.S. 480 (1980).

[26] 815 S.E.2d 903, 912 (Ga. 2018).

[27] *See* SUP. CT. R. 10(a).

I. This case involves an important question of federal law that has not been, but should be, addressed by this Court, and the Fifth Circuit's resolution of the issue conflicts with a number of this Court's precedents.

Involuntarily committing someone to a mental hospital is a "massive curtailment of liberty."[28] Those who live with mental illness relish their freedom no less than the rest of us, and involuntary mental health commitment deprives them of the most fundamental right—Liberty.

For this reason, the government's ability to involuntarily commit incompetent defendants is a matter of enormous importance. Indeed, the pendency of another petition addressing these issues, *Martin Anthony Nino v. United States of America*, No. 19-5487, and the amicus brief of the National Association of Federal Defenders in that case demonstrate that the issue is an important one that arises with some frequency in federal criminal practice.

As discussed below, this Court should define the substantive requirements for the government to involuntarily commit incompetent defendants, notwithstanding the apparent unanimity of the courts of appeals on this issue. It has been almost fifty years since this Court last addressed the issue, and the approach taken by the courts of appeals are in significant tension with this Court's opinions on mental health commitment and competence restoration.

[28] *Vitek*, 445 U.S. at 491.

A. The question presented here is unaddressed by this Court, important, and impacts the most vulnerable participants in our criminal justice system.

Despite the importance of involuntary pretrial commitment, this Court last addressed this issue in *Jackson v. Indiana*,[29] almost fifty years ago. *Jackson* limits pretrial competency-related commitment to circumstances where such commitment is "necessary"—or at least "reasonably related"—to the commitment's purported purpose.[30] Unfortunately, the courts of appeals, including the Fifth Circuit in this case, have misinterpreted *Jackson* as permitting statutes that *require* commitment with no individualized consideration whether commitment in any way advances the government's objectives.[31] Thus, clarifying *Jackson*'s limitations is important because the courts are getting it wrong, as discussed below.

But, equally important, much has changed since this Court decided *Jackson*. Indeed, crucial developments in both the law and mental health treatment since *Jackson* further underscore the constitutional requirement for individualized consideration, and this Court should explain the interplay between these developments and *Jackson*'s holding.

1. Legal developments.

First of all, in 1984, Congress revamped the federal competency-restoration statute that this Court endorsed in *Jackson* to remove the district court's discretion as to whether

[29] 406 U.S. at 715.

[30] *Id.* at 738.

[31] *See* Pet. App. A, at 14a (calling claim that a defendant cannot be committed upon a mere finding of incapacity without some showing that commitment will aid government interests "false"); *see also United States v. Dalasta*, 856 F.3d at 549 (8th Circuit); *Strong*, 489 F.3d at 1055 (9th Circuit); *Filippi*, 211 F.3d at 649 (1st Circuit); *Donofrio*, 896 F.2d 1301, 1303 (11th Circuit); *United States v. Shawar*, 865 F.2d 856 (7th Cir. 1990).

to commit incompetent defendants.[32] This led to the current statute which delegates decisions about the means used to evaluate and restore incompetent defendants to the Bureau of Prisons. As discussed below, assuming this delegation is permissible, the massive authority given to the Bureau to decide fundamental questions about the liberty of incompetent defendants must be subject to some substantive and procedural due process checks.[33] This Court should outline what these limitations are.

And there another important legal development left essentially unaddressed by the court of appeals has constrained the government's ability to commit incompetent defendants. In *Sell v. United States*,[34] twenty years after *Jackson*, this Court held that the United States must clear significant *substantive* hurdles to treat an incompetent defendant in order to restore competence.

Sell involved involuntary medication and requires courts to *individually consider* (1) the government interest in the particular case (for example, the nature of the crime and likely sentence); (2) whether the proposed medication will significantly further those interests (including the side effects); (3) whether the medication is necessary (*i.e.*, that less intrusive alternatives won't suffice); and (4) whether the drugs are medically appropriate.[35] Despite these significant requirements limiting the government's ability to medicate an

[32] *Compare* 18 U.S.C. § 4246 (1952) (providing that "the court may commit the accused" upon a finding of incompetence) *with* 18 U.S.C. 4241(d) (providing that, upon a finding of incompetent, (the court "shall commit the defendant").

[33] *See* Section I.B.2.b., below.

[34] 539 U.S. at 180–81.

[35] *Id.*

incompetent defendant, the circuit courts have held that no individualized consideration is necessary before involuntarily committing incompetent defendants to the Bureau of Prisons.[36]

If this seems odd, that's because it is. Involuntary commitment certainly seems at least as intrusive as involuntary medication, so why would one receive such close scrutiny and the other none at all? As discussed below, the Fifth Circuit's attempt to distinguish *Sell* falls short.[37]

In any event, if it is true that the Constitution permits the executive branch to commit incompetent defendants without any individualized showing that commitment will be helpful, this Court should explain why. This Court's cases, including *Sell*, provide no explanation whatsoever for the significant discrepancy between the procedures that the Constitution requires to medicate an incompetent defendant and the Constitution's complete indifference to committing one.

2. Medical developments.

Attitudes and options regarding incompetent defendants have also changed significantly in the almost 50 years since *Jackson*. In particular, a substantial majority of states now allow outpatient competency restoration in criminal proceedings.[38]

And these programs have been effective. In Texas, where Mr. McKown lives, a

[36] Pet. App. A, at 1a.

[37] *See* Pet. App. A, at 10a.

[38] *See* 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 (2016) ("Statutes from 36 states (70.6%) allowed outpatient competency restoration, while statutes from seven states (13.7%) explicitly prohibited outpatient competency restoration.").

study of 589 criminal defendants, the majority of whom were schizophrenic, found that almost three-quarters attained competence without commitment to an institution.[39]

These developments since *Jackson* further support the conclusion that *Jackson*'s individualized consideration is entirely appropriate from an empirical perspective. This case raises an important question: How can incarceration for competency restoration with no individualized consideration be constitutional when significant empirical evidence establishes that, in many cases, such commitment is unnecessary to competency restoration—the commitment's purported purpose?

And how can this square with *Jackson*'s requirements that the commitment be reasonably related to its purported purpose and *necessary* to determine the likelihood of restoration?[40] And what about *Sell*'s requirements that less restrictive alternatives, the likely punishment, and other case-specific factors be considered before depriving incompetent defendants of their liberty?[41] Because the federal government has embraced the minority (and empirically unsupported) approach requiring inpatient competency restoration in all cases, this Court should resolve the tension between this approach and its longstanding close scrutiny of liberty deprivations in the name of competency restoration.

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[39] *See* Hogg Foundation for Mental Health, *Evaluation Report: Texas Outpatient Competency Restoration Programs* (2015), http://hogg.utexas.edu/project/evaluation-outpatient-competency-restoration.

[40] *See Jackson*, 406 U.S. at 715.

[41] 539 U.S. at 180–81.

3. A final consideration—the most vulnerable of criminal defendants.

Finally, it warrants emphasis that incompetent defendants are particularly vulnerable. By definition, these defendants cannot understand the courts, their lawyers, or both.[42] And, by definition, the federal government's executive branch seeks to deprive these individuals of their liberty through its most coercive and powerful of mechanisms—criminal prosecution. As a result, more than others, incompetent defendants cannot protect themselves and must rely upon the Constitution and this Court for even the most basic protection.

The current mandatory-commitment regime places zero value on the autonomy, self-determination, and physical freedom of these vulnerable individuals—all of whom are presumed innocent, but cannot be tried. They are figuratively trapped in a system that, under the current regime, literally traps them in a Bureau of Prisons facility without any showing that this confinement will help bring them to trial. The current system does not consider what these individuals are charged with, what mental illness they suffer from, or how involuntary commitment might impact their lives. It deprives all alike of their liberty in a devastating manner that appears in many cases to be unnecessary.

The Constitution does not permits this, and this Court should address the issue.

[42] *See* 18 U.S.C. § 4241(d); *see also Dusky v. United States*, 362 U.S. 402 (1960).

B. The Fifth Circuit's decision is incorrect because it conflicts with this Court's relevant decisions in *Jackson v. Indiana*, *Sell v. United States*, *Vitek v. Jones*, and the relevant statute itself.

In its opinion in this case, the Fifth Circuit stated that it was "join[ing] the unanimous chorus of circuit courts" in upholding the mandatory, involuntary commitment of incompetent defendants. In reaching this conclusion the court rejected "Mr. McKown's claim . . . that he cannot be automatically committed upon a mere finding of incapacity" as "false."[43]

As discussed below, the chorus may be unanimous, but it is singing a tune that contradicts this Court's precedents. Indeed, this Court's opinions in *Jackson* and *Sell* are irreconcilable with the Fifth Circuit's analysis in this case. In addition, given the paramount liberty interest at issue, the lack of individual process that the Fifth Circuit endorsed in this case violates the procedural due process balancing required by *Mathews v. Eldridge*.[44]

1. The Fifth Circuit's conclusion that mandatory commitment comports with substantive Due Process is irreconcilable with this Court's decisions in Sell and Jackson.

The Fifth Circuit's opinion relied heavily upon *Jackson v. Indiana*,[45] to conclude that the Constitution permits mandatory, *temporary* detention.[46] But *Jackson* held that a state cannot hold an incompetent defendant without trial forever—placing a *limitation* upon

[43] Pet. App. A, at 14a.

[44] 424 U.S. 319 (1976).

[45] 406 U.S. at 738.

[46] Pet. App. A, at 8a–10a.

the state's authority to commit without trial.[47] Thus, nowhere does *Jackson* say or suggest that a state can *mandate* involuntary pretrial commitment, particularly absent a showing that such commitment will aid in restoring competence. To the contrary, to the extent *Jackson* addressed the issue it strongly suggested the opposite.

In addition, the Fifth Circuit's opinion is contrary to this Court's longstanding principle that, generally speaking, "there is . . . no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom,"[48] and the particular application of substantive protections for incompetent defendants that this Court applied in *Sell*.[49]

a. This Court's opinion in Jackson does not permit unnecessary commitment to evaluate the likelihood of competence restoration—and in fact suggests that the Constitution prohibits unnecessary commitment.

The Fifth Circuit's conclusion that *Jackson* prohibits only *indefinite* commitment, while permitting *unnecessary* commitment[50] ignores crucial language in the *Jackson* opinion. To be sure, *Jackson* held that the initial commitment to determine competency could only be for a "reasonable period."[51] But the case also expressly held that the commitment must be "necessary to determine whether there is a substantial chance of his attaining the

[47] 406 U.S. at 738.

[48] *See O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

[49] *See* 539 U.S. at 180–81.

[50] Pet. App. A, at 8a–10a
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[51] 406 U.S. at 738.

capacity to stand trial in the foreseeable future."[52] In this way, the opinion clearly addresses *both* duration *and* necessity.[53]

The Fifth Circuit rejected this argument and instead concluded that, if mandatory commitment had troubled this Court in *Jackson*, then *Jackson* would have held mandatory commitment unconstitutional.[54] The odd thing about the Fifth Circuit's analysis is that *Jackson* did hold exactly that, saying: "*We hold*, consequently, that a person . . . 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."[55] One struggles to see how this Court could have more clearly stated (given that *Jackson* did not raise the issue) that the initial commitment must be "necessary" to determine of whether the possibility of competence restoration.

And this Court went further still, saying, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* This Court also lamented that—like Mr. McKown—"Jackson was not afforded any formal commitment proceedings *addressed to* his ability to

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[52] *Id.*

[53] *Id*

[54] To the extent this Court did not explicitly invalidate the Indiana statute on this basis, the reason is obvious: The issue was not before the Court. Jackson did not complain about his initial confinement, but about the refusal to release him when he had spent three-and-a-half years in a state mental hospital and still had no prospect of ever becoming competent. *See id.* at 738. Under these circumstances, this Court focused its analysis on the issue actually raised, *i.e.*, could the state hold Jackson forever based upon his incompetence and the pending charge. That said, as discussed above, the case's holding is broad enough to prohibit unnecessary commitment full stop.

[55] *Jackson*, 406 U.S. at 738 (emphasis added).

function in society, or to *society's interest in his restraint*, or *to the State's ability to aid him in attaining competency through custodial care or compulsory treatment*, the ostensible purpose of the commitment." *Id.* (cleaned up and emphasis added). This Court thus addressed the lack of process addressed to the very issues that Mr. McKown raises in this case even though Jackson's appeal did not challenge his initial commitment.

This Court's concerns in *Jackson* parallel the considerations that *Sell* explicitly required to constitutionally medicate an incompetent defendant involuntarily, *i.e.*, the government's interest and whether the course of treatment is necessary.[56] In this way, the comments in *Jackson*—particularly when read in light of the Court's subsequent opinion in *Sell*—make clear that this Court *did believe* that mere incompetence could not justify involuntary commitment without a close fit between the commitment sought and the competence-restoring justification.

Indeed, nowhere does *Jackson* say or suggest that the government has a blank check to commit an incompetent defendant regardless of whether doing so would be necessary or helpful. Nor does *Jackson* say that Congress can constitutionally mandate such a commitment regardless of whether the court, the defendant, or even the Attorney General believes it appropriate in the particular case.

To the contrary, this Court analyzed the federal competence-restoration statute then in effect, endorsing its "rule of reasonableness" and noting that the trial court retained discretion over whether to commit a defendant at all.[57] The Fifth Circuit's analysis of *Jackson*

[56] *See id.* at 738; *Sell*, 539 U.S. at 180–81.

[57] *See Jackson*, 406 U.S. at 731–32.

fails even to mention that Congress stripped the district courts of this discretion when it amended the statute in 1984.[58]

In short, *Jackson* went to exceptional lengths to say that competence-related commitment must be "necessary." And with good reason, a holding that allowed the government to commit a defendant without any individualized showing that commitment would be either necessary or helpful would contradict significant precedent regarding commitment in other contexts.[59]

b. The Fifth Circuit's opinion is irreconcilable with this Court's opinion in Sell—and the Fifth Circuit's opinion lacks any explanation for its refusal to apply Sell's substantive considerations in the involuntary commitment context.

With the possible exception of *Jackson*, *Sell*—which addressed the requirements to involuntarily medicate incompetent defendants—most closely addresses the issues in this case. The government's interest in committing Mr. McKown is identical to its interest in medicating the defendant in *Sell*: bringing an incompetent defendant to trial.[60] And, as in *Sell*, the government's aim in depriving Mr. McKown of his liberty is primarily medical: Mr. McKown is to be hospitalized for a medical evaluation.[61]

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[58] *See* Pet. App. A, at 8a–10a.

[59] *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992) (government can only detain insanity acquittee until "he has regained his sanity or is no longer a danger to himself or society"); *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (committing a prisoner requires evidence adequate treatment not available in prison and a hearing); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *see also* Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 27 (2017) (under various lines of this Court's cases, "mental illness, on its own, cannot serve as the sole basis for the government's authority to detain consistent with substantive due process").

[60] *See Sell*, 539 U.S. at 179–80.

[61] *Id.* at 180–81.

Despite the obvious similarities between the issue here and the issue in *Sell*, the Fifth Circuit dismissed *Sell* entirely because *Sell* addressed "whether the government may forcibly medicate a defendant to render him competent to stand trial," while this case addresses "whether a defendant c[an] be temporarily detained upon a finding of incompetency."[62]

This is a difference, to be sure, but no obvious basis exists to subject one competence-related liberty deprivation (medication) to extensive individualized procedure and analysis, while another (involuntary commitment) requires none. The Fifth Circuit's opinion certainly provided no Constitutional basis for treating the two intrusions so dramatically differently. Indeed, in many respects involuntary commitment of a free individual to the Bureau of Prisons works a much greater deprivation of liberty than requiring the individual to take medication, even involuntarily.[63]

In any event, *Sell* necessarily stands for the proposition that the government's intrusion on an incompetent defendant's liberty must hew closely to the government's interest in bringing the defendant to trial.[64] There can be little dispute that the Fifth Circuit's opinion—by allowing commitment with no individualized determination whatsoever as to whether commitment will be necessary or helpful—falls well short of what *Sell* required.

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[62] Pet. App. A, at 10a.

[63] *See, e.g. Vitek*, 445 U.S. at 491–492 (commitment is "a massive curtailment of liberty," even for someone already in prison).

[64] 539 U.S. at 180–81.

2. The Fifth Circuit's conclusion that involuntary commitment requires no individualized procedures related to necessity or reasonableness misapplied the *Mathews v. Eldridge* balancing test.

Both *Jackson* and the competency restoration statute itself limit initial involuntary commitment to a (1) "reasonable period" that is (2) "necessary to determine whether there is a substantial probability that in the foreseeable future" the defendant will attain capacity.[65]

Unfortunately, the courts of appeals have construed the statute—and this Court's opinion in *Jackson*—in a manner that eliminates the "necessary-to-determine" requirement entirely. Despite the statute's plain language requiring that commitment be "necessary," courts have read the statute to *require* commitment automatically upon a mere finding of incapacity whether or not such commitment is "necessary" (as the statute and *Jackson* require) or even helpful.[66]

a. As an initial matter, the capacity-restoration statute does not mandate unnecessary involuntary commitment, as the Fifth Circuit held, rather the statute implicitly prohibits unnecessary commitment.

The courts of appeals have misread the competency-restoration statute to require commitment in all circumstances, when in reality, the statute merely delegates authority regarding the means for competence restoration to the Bureau of Prisons.[67]

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[65] 18 U.S.C. § 4241(d)(1); *see Jackson*, 406 U.S. at 738.

[66] *See* Pet. App. A, at 14a (calling claim that a defendant cannot be committed upon a mere finding of incapacity without some showing that commitment will aid government interests "false"); *see also United States v. Dalasta*, 856 F.3d at 549 (8th Circuit); *Strong*, 489 F.3d at 1055; *Filippi*, 211 F.3d at 649; *Donofrio*, 896 F.2d at 1303; *Shawar*, 865 F.2d at 856.

[67] As discussed above, Congress delegated these decisions to the Attorney General, who in turn delegated them to the Bureau. *See* 28 C.F.R. § 0.96(j).

Indeed, the statute does not require unnecessary involuntary commitment or hospitalization. To the contrary, the "necessary-to-determine" requirement's plain implication is that, if hospitalization is *not* necessary, the Bureau cannot hospitalize the defendant. Related provisions support this reading by requiring the Bureau to:

- place incompetent defendants in facilities "suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant," 18 U.S.C. § 4247(a)(2);

- "consider the suitability of the facility's rehabilitation program in meeting the needs of the person," (*i.e.*, make an *individualized* treatment determination), *id.* § 4247(i)(A);

- "consult with . . . the Department of Health and Human Services . . . in the establishment of standards for facilities used in the implementation of this chapter," *id.* § 4247(i)(D); and;

- perhaps most importantly, *empowering the Bureau* to "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 [its] custody pursuant to this chapter," *id.* § 4247(i)(A) (emphasis added).

When read in combination with the competency-restoration statute's "necessary-to-determine" requirement, these "[a]uthorities and responsibilit[ies]" of the Bureau,[68] plainly contemplate a broad range of individualized treatment plans for incompetent defendants that need not necessarily be inpatient.

In this respect, the deference shown by the courts of appeals to a Congressional

[68] *See* 18 U.S.C. § 4247(i).

determination that "in almost all cases" incarceration somehow permits a superior diagnosis rest on a very slender reed.[69] Congress made no such determination. Instead, it not only authorized, but required, the Bureau to make individualized determinations of the nature, duration, and type of treatment that incompetent defendants would receive.

The question then, is what substantive constitutional considerations constrain the Bureau's discretion (as discussed above) and what procedures does the Constitution require that the Bureau provide (as discussed below).

b. To the extent Congress did determine that involuntary commitment was necessary for every incompetent defendant, a sweeping legislative determination of this highly individualized medical issue is inadequate process when considering the *Mathews v. Eldridge* factors.

Even if Congress had made some legislative determination that involuntary commitment was necessary to evaluate every incompetent defendant (which it didn't), permitting the government to make this determination through sweeping legislation rather than individual adjudication violates procedural due process.

Simply put, both the paramount liberty interest at stake and the nature of individualized medical determination at issue require—at the very least—an individualized determination that involuntary commitment will actually assist in bringing a particular defendant to trial. Because the government has never contended that such a hearing would be infeasible before committing the defendant—and there is no obvious reason why it would be—due process requires a pre-commitment hearing.[70]

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[69] Pet. App. A, at 16a (citing *Filippi*, 211 F.3d at 651; *United States v. Ferro*, 321 F.3d 756, 762 (8th Cir. 2003).

[70] *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

In deferring to what it viewed as a contrary legislative determination, the Fifth Circuit misapplied the *Mathews v. Eldridge* factors: (1) the private interest at stake, (2) the risk of erroneous deprivation under existing procedures (including the value of additional safeguards), and (3) the government interest at stake, including the burdens of additional or different processes.[71]

This Court's opinion in *Vitek v. Jones* makes this point clear.[72] In *Vitek*, this Court overturned the transfer of a convicted inmate from a prison to a mental hospital on procedural due process grounds.[73] The transfer relied upon a state statute that permitted such hospitalization when a designated physician found that the prisoner suffered from a "mental disease or defect" that "[could not] be given proper treatment" in prison.[74]

In holding that this process was inadequate under the Fifth Amendment, the Court expressly rejected the argument that a qualified person's certification of a mental disease or defect could—on its own—support a prisoner's involuntary hospitalization.[75] Instead, because the statute created the expectation that the availability of proper treatment in prison would be considered before hospitalizing a prisoner, prisoners were entitled to process related to this element of the statute as well as process related to the existence of mental

[71] *See Mathews*, 424 U.S. at 334–35.

[72] 445 U.S. 480, 491–492.

[73] *See id.* at 496–97.

[74] *Id.* at 489.

[75] *Id.* at 493–94.

illness.[76]

In other words, even for those *already incarcerated*, the government cannot impose involuntary hospitalization without first providing process related to the availability of "proper treatment" without hospitalization, *i.e.*, process related to the *necessity* of such hospitalization.[77] This Court later emphasized that the substantive rights identified in *Vitek* arose not only from the state statute at issue, but also that "the Due Process Clause itself confers a liberty interest" in avoiding involuntary hospitalization.[78]

The Constitutional case for such additional process is even stronger here because Mr. McKown is free (not incarcerated as in *Vitek*) and presumed innocent (not convicted as in *Vitek*).

i. The Fifth Circuit significantly understated Mr. McKown's interest in his personal liberty and bodily autonomy.

Involuntary mental health commitment is "a massive curtailment of liberty."[79] In balancing the *Mathews* factors the Fifth Circuit failed to even acknowledge the fact that involuntarily committing Mr. McKown places a free and presumptively innocent man in a Bureau of Prison's facility.

Instead of acknowledging the magnitude of the deprivation at issue, the Fifth Circuit treated involuntary commitment as a petty indignity "to which an incompetent defendant

[76] *Id.* at 490–91.

[77] *See id.*

[78] *See Sandin v. Conner*, 515 U.S. 472, 479 n.4 (1995).

[79] *Vitek*, 445 U.S. at 491–492.

might reasonably be subject."[80] In other words, the Fifth Circuit seemed to suggest, if Mr. McKown wished to avoid involuntary commitment, he should not have been charged with a crime while incompetent.

There are at least two problems with this. First, Mr. McKown is presumed innocent. He has repeatedly asserted his innocence by pleading not guilty, but his incapacity prevents him from exercising his right to a trial. It hardly seems "reasonable"—as the Fifth Circuit suggested—to subject a presumptively innocent person to involuntary commitment to a Bureau of Prisons facility without some individualized showing that the commitment will advance a government purpose.

Second, Mr. McKown did not ask to be mentally ill, nor—contrary to the Fifth Circuit's opinion—did Mr. McKown himself raise the issue of his mental illness. Instead, Mr. McKown's *court-appointed lawyer* (the undersigned) conceded Mr. McKown's incapacity because his duty of candor to the court required that he do so.[81] The nature of Mr. McKown's delusion is that he believes himself to be sane. If anything, Mr. McKown is doubly stigmatized because these proceedings have created the impression that he is so mentally ill that even his own lawyer had to concede the matters that resulted in his commitment. [82]

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[80] Pet App. A, at 15a.

[81] *See, e.g.*, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7- 4.2(c) (ABA 2016) (requiring counsel to disclose concerns about client competence).

[82] Indeed, the divergence of interests that mandatory commitment creates between lawyer and client undermines the Sixth Amendment's right to counsel and, by extension, all of the rights that our Constitution entrusts counsel to safeguard. This underscores the importance of the issue in this case. *See* BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OR PETITION FOR A WRIT OF CERTIORARI, *Martin Anthony Nino v. United States*, No. 19-5487 (filed Sept. 25, 2019), at 21–26.

But more to the point, merely being mentally ill generally does not lead to involuntary commitment because, generally speaking, "there is . . . no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom."[83] And, in a majority of states, being unable to consult with one's lawyer or understand criminal proceedings would not result in incarceration—as the current federal system inexorably requires.[84]

For all of these reasons, the Fifth Circuit's conclusion that involuntary commitment to the Bureau of Prisons was "within the range of conditions" to which Mr. McKown might reasonably be subject is dubious and significantly understates his fundamental interest in his own liberty. This combined with the Fifth Circuit's failure to even acknowledge the deprivation that Mr. McKown would suffer by being sent to a Bureau of Prisons facility caused the Fifth Circuit to inadequately weigh the interest at stake.

ii. The Fifth Circuit's analysis understated the risk of erroneous deprivation by relying upon unsupported assumptions that contradict all empirical evidence presented and all of the evidence in this particular case.

The Fifth Circuit concluded that the risk of erroneous deprivation was low because it assumed—as have a number of courts—that inpatient commitment necessarily provides a superior means of evaluating incompetent defendants.[85] To be clear, neither the Fifth

[83] *See O'Connor*, 422 U.S. at 575.

[84] *See* W. Neil Gowensmith et. al., *supra*, at 296.

[85] *See* Pet App. A, at 9a–10a.

Circuit's opinion nor any opinion upon which it relies cites any clinical or empirical support for this conclusion. And, in this case, the undisputed record evidence established that involuntary commitment was unnecessary to perform the evaluation that the government sought—two different doctors testified to this effect. In addition, throughout this appeal, Mr. McKown has cited empirical data establishing that involuntary commitments does not—in fact—improve outcomes.[86]

To overcome the complete lack of clinic, empirical, or expert evidence supporting a fundamental assumption of its opinion (and the significant evidence on the other side), the Fifth Circuit relied upon a rational-basis review of the competence-restoration statute. Specifically, the Fifth Circuit, like others before it, embraced the conclusion that "Congress could reasonably think that, in almost all cases, temporary incarceration would permit a more careful and accurate diagnosis."[87]

Even assuming that Congress had this belief, [88] both the fundamental right at stake and the individualized nature of mental health treatment counsel against blindly accepting this assumption without at any empirical support or individualized analysis.[89] What's more, treatment options evolve and change constantly. What seemed "necessary" or "reasonably

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[86] *See* Hogg Foundation for Mental Health, *Evaluation Report: Texas Outpatient Competency Restoration Programs* (2015), http://hogg.utexas.edu/project/evaluation-outpatient-competency-restoration.

[87] *See, e.g.*, *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000) (emphasis added) *cited by* Pet. App. A, at 16a.

[88] As discussed above, the statute need not be read to require mandatory commitment when such commitment would be unnecessary. *See* Section I.B.2.a., above.

[89] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.")

related" to a competency evaluation 25 years ago, when Congress passed the current competency-restoration statute, might not be now.[90] All of these considerations counsel in favor of individual determination over deference to a sweeping legislative rule.

In addition, when analyzing the risk of erroneous deprivation, the Fifth Circuit's hedge that "almost all" evaluations might benefit from involuntary commitment should cause great concern. Baked into the notion that "almost all" might benefit is the corollary that "at least some" will not. The Fifth Circuit's opinion treats the unfortunate "some" as a kind of rounding error that can be disregarded. But these are people. And—like every other person in this country—committing them to a Bureau of Prisons facility profoundly disrupts their lives and completely destroys their Liberty. Given the significance of the interest at stake, the risk of erroneously deprivation—even if relatively small, as the Fifth Circuit suggested—would warrant individual process.

That said, the risk of erroneous deprivation is significant. As noted above, a Texas study showed that 75% of incompetent participant defendants were restored to competence without committing them.[91] If the federal government had brought these cases, each of the defendants would have been erroneously deprived of their liberty in violation of the competence-restoration statute and *Jackson*'s "necessary-to-determine" requirements. For all

[90] *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 104 (2009) (Souter, J., dissenting) ("T]he accumulation of new empirical knowledge can turn yesterday's reasonable range of the government's options into a due process anomaly over time.").

[91] *See* Hogg Foundation for Mental Health, *Evaluation Report: Texas Outpatient Competency Restoration Programs* (2015), *available at*, http://hogg.utexas.edu/project/evaluation-outpatient-competency-restoration.

of these reasons, the risk of erroneous deprivation factor weighs in favor of individual process.

iii. Additional procedures would not unduly burden the government.

If the assumption that involuntary commitment results in more efficient and accurate evaluation has any support, the executive branch should have no trouble establishing this at an administrative hearing subject to judicial review. Two doctors testified in this case that commitment would be unnecessary to evaluate Mr. McKown, with one saying that commitment would, in fact, exacerbate his condition.

The government has presented no evidence as to why it would be particularly burdensome for it to present evidence to its own hearing officer that commitment would materially aid its evaluation of Mr. McKown when considering outpatient alternatives. Indeed, parallel procedures already exist to involuntarily medicate incompetent defendants and do not seem particularly burdensome.[92]

The Fifth Circuit concluded that any additional procedure would not adequately account for the government's "substantial interest in pursuing a correct diagnosis and in prosecuting trials in a fair and timely manner."[93] Again, however, neither the Fifth Circuit nor the government identified any empirical, clinical, or evidentiary support whatsoever for the conclusion that committing Mr. McKown would assist the government in accomplishing these goals.

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[92] *See* 28 C.F.R. § 549.46.

[93] Pet. App. A, at 16a.

All three of the *Mathews v. Eldridge* factors require that the Bureau provide some individualized process addressed to whether commitment would be necessary—or even helpful—to restore an incompetent defendant before imposing this massive deprivation of liberty.

II. The Fifth Circuit's opinion conflicts with an opinion of the court of last resort in Georgia.

Finally, this Court should also grant certiorari because the Fifth Circuit's opinion conflicts with that of Georgia's court of last resort in *Carr v. State*.[94] In that case, the Georgia Supreme Court relied upon *Jackson* to conclude that "[n]o matter how short the duration of the detention, if the *nature* of the confinement is not reasonably related to the government's purpose of accurately evaluating the individual defendant's potential to attain competency, the detention is unconstitutional."[95] Because the Georgia statute at issue (like the federal statute) lacked any requirement of this nexus between the defendant's individual needs and mandatory pretrial commitment, the statute was unconstitutional.[96]

The Fifth Circuit dismissed *Carr* because, unlike the federal statute, the Georgia statute did allow certain incompetent defendants to be restored without involuntary commitment. The Fifth Circuit concluded that, because federal lawmakers had determined that commitment would aid evaluation in all cases, *Carr* was distinguishable. This analysis is

[94] 815 S.E.2d 903, 912 (Ga. 2018).

[95] *Id.*

[96] *Id.*

wrong, however, because (1) Congress arguably did not require commitment in all cases,[97] and (2) to the extent that it did, the fundamental liberty interest at stake and the individualized medical considerations involved require individual process.[98]

For these reasons, this Court should grant the petition to resolve the split of authority that has now emerged between the federal courts of appeals and at least one state court of last resort.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, should the Court not grant this petition, Mr. McKown respectfully requests that the Court retain jurisdiction over the case until the resolution of the petition in *Martin Anthony Nino v. United States of America*, No. 19-5487, and enter any appropriate orders in this case that the resolution of *Nino* may require.

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Respectfully submitted,

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[97] *See* Section I.B.2.a., above

[98] *See* Section I.B.2.b., above