

No. 19-6361

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY ALAN MCKOWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

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

QUESTION PRESENTED

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.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. McKown, No. 17-cr-502 (July 11, 2018)

United States Court of Appeals (5th Cir.)

United States v. McKown, No. 18-20467 (July 22, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 930 F.3d 721. The order of the district court (Pet. App. 1b-2b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2019. The petition for a writ of certiorari was filed on October 21, 2019 (Monday). 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 Southern District of Texas on two counts of threatening to assault and murder a United States official with the intent to retaliate against the official on account of the performance of official duties, in violation of 18 U.S.C. 115(a) (1) (B) and (b) (4). Pet. App. 2a. Following a hearing, the 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. 1c-4c. The court of appeals affirmed. Id. at 1a-16a.

1. In 2017, petitioner sought to collect retroactive benefits from the Social Security Administration. Pet. App. 2a. When the request was denied, petitioner sent emails and voice messages to two employees of the agency, threatening in graphic terms to kill the employees and their families. Ibid.; Gov't C.A. Br. 5-7.

A federal grand jury indicted petitioner on two counts of threatening to assault and murder a federal official with the intent to retaliate against the official on account of the performance of official duties, in violation of 18 U.S.C. 115(a) (1) (B) and (b) (4). Pet. App. 2a. Petitioner was released on bond. Ibid.

2. Two psychiatrists -- one retained by petitioner, the other appointed by the district court at the government's request -- examined petitioner. Pet. App. 2a. Both psychiatrists found petitioner incompetent to stand trial, but they differed in their recommended courses of treatment and assessments of petitioner's likelihood of regaining competency in the foreseeable future. Ibid. The court-appointed psychiatrist found a "substantial probability" that petitioner would recover in the foreseeable future if he took medication and received psychotherapy. Id. at 3a. Petitioner's psychiatrist, however, opined that petitioner could not be restored to competency in the foreseeable future no matter what treatment he received. Ibid. In the view of petitioner's psychiatrist, only "long-term therapy," which could take up to five years, had the potential to restore petitioner's competency. Ibid.

Petitioner and the government agreed that petitioner was incompetent to stand trial, but disagreed about what steps to take to restore petitioner's competency. Pet. App. 3c-4c; Gov't C.A. Br. 4. The government moved to commit petitioner to the Attorney General's custody under 18 U.S.C. 4241(d)(1). Gov't C.A. Br. 4. 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 opposed commitment, acknowledging that the statute required it, but contending that the statute violated the Due Process Clause of the Fifth Amendment. C.A. ROA 134, 365-393.

The district court found petitioner incompetent to stand trial and that he could likely be restored to competency in the foreseeable future with proper treatment. Pet. App. 2c. The court rejected petitioner's constitutional challenge to Section 4241(d), noting that several courts of appeals had rejected similar challenges. Id. at 4c. The court committed petitioner to the custody of the Attorney General for up to four months to determine

his chances of recovery. Id. at 1b-2b. The court stayed its order pending appeal. Id. at 1d.

3. The court of appeals affirmed, rejecting petitioner's contention that Section 4241(d) violated the Due Process Clause. Pet. App. 1a-16a.

The court of appeals observed that, in Jackson v. Indiana, 406 U.S. 715 (1972), this Court held that a person "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." Pet. App. 6a-7a (quoting Jackson, 406 U.S. at 738). The court explained that Section 4241(d) was crafted in response to, and complied with, the limitations set forth in Jackson. See id. at 8a-13a. The court emphasized that "the duration of commitment under § 4241(d) 'is inherently limited'"; that the statute adopts a "'flexible and case-oriented' approach to determining the length of confinement"; and that "the nature of confinement under § 4241(d) is reasonably related to important governmental purposes justifying such detention." Id. at 8a-10a (citations omitted). The court acknowledged that Section 4241(d) makes detention mandatory, but it observed that the statute at issue in Jackson "also provided for automatic commitment" and that, "[r]ather than condemn the mandatory nature of [that] commitment scheme," this Court had held

only that "indefinite" detention under that scheme "was problematic." Id. at 10a.

The court of appeals found that "Congress's choice to mandate temporary confinement is especially reasonable where, as here, the defendant's initial evaluations were uncertain and conflicting." Pet. App. 12a. The court noted that the two psychiatrists who had examined petitioner had "spent only three hours or less examining him." Ibid. And the court reasoned that, given "the seriousness of [petitioner's] condition and the doctors' divergent prognoses," "commitment was reasonably necessary to provide a more in-depth evaluation in a safe and controlled setting." Id. at 13a.

The court of appeals also determined that Section 4241(d) complied with the procedural component of the Due Process Clause. Pet. App. 13a-16a. Observing that "[t]he government already affords hearings to assess competency," the court found "no need for additional process at this stage of the proceedings." Id. at 14a.

ARGUMENT

Petitioner renews his contention (Pet. 11-35) that his mandatory commitment under 18 U.S.C. 4241(d) would violate the Due Process Clause of the Fifth Amendment. The court of appeals correctly rejected that contention, 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 question presented. Further review is unwarranted.*

1. 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

* Similar issues are raised by the petition for a writ of certiorari in Nino v. United States, No. 19-5487 (filed Aug. 2, 2019).

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.

As the court of appeals observed (Pet. App. 7a), Congress enacted Section 4241(d) in response to, and in an effort to comply with, this Court's decision in Jackson. 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," United States v. Strong, 489 F.3d 1055, 1062 (9th Cir. 2007), cert. denied, 552 U.S. 1188 (2008). 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 reasonable 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).

2. Petitioner's challenges to his temporary evaluative commitment under Section 4241(d) lack merit. As a threshold matter, to the extent that petitioner suggests (Pet. 24-25) that the statute can or should be interpreted not to require his

commitment, and instead to authorize the ordering of treatment as an outpatient, that suggestion is mistaken. Petitioner did not advance that contention in the court of appeals, and the court accordingly did not address it in its opinion. This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and it ordinarily does not review a question that "was not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). In any event, petitioner's statutory argument lacks merit. The statute provides that "the court shall commit the defendant to the custody of the Attorney General," who "shall hospitalize the defendant * * * in a suitable facility." 18 U.S.C. 4241(d) (emphases added). The mandatory word "shall" forecloses petitioner's contention (Pet. 25) that the statute "does not require" commitment or hospitalization.

Petitioner errs in contending (Pet. 18) that if Section 4241(d) provides for "mandatory" commitment, it violates the Due Process Clause. The Due Process Clause 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 also errs in contending (Pet. 18) that mandatory commitment under Section 4241(d) violates "procedural due process." Under the statute, a defendant may be committed only after a grand jury finds probable cause to believe that he has committed one or more federal crimes, and after a court finds, following a hearing in which the defendant is 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's reliance (Pet. 22-23) on Sell v. United States, 539 U.S. 166 (2003), is misplaced. Sell 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's reliance (Pet. 27-28) on Vitek v. Jones, 445 U.S. 480 (1980), is likewise 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.

3. As petitioner appears to acknowledge (Pet. 18), every federal court of appeals to consider the issue has determined that Section 4241(d) is consistent with the Due Process Clause. See Pet. App. 5a-16a; 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. 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) (unpublished).

Petitioner asserts (Pet. 34-35) that the decision below conflicts with Carr v. State, 815 S.E.2d 903 (Ga. 2018), in which the Supreme Court of Georgia concluded 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. As the court of appeals correctly observed, however, Carr "involved a distinguishable state law." Pet. App. 12a. 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 913. 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 Supreme Court of Georgia'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," Pet. App. 12a, and any tension between the decision below and that case does not warrant this Court's review.

4. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle to consider it. Even if the Constitution precluded commitment for some incompetent defendants, petitioner has not shown that it would forbid commitment in his case. The doctors who evaluated petitioner each examined him for no more than three hours. Pet. App. 12a. Although the doctors disagreed about whether petitioner's competency might be restored within a foreseeable period of time, they agreed that petitioner could not be trusted to administer medication to himself outside a hospital setting. Id. at 1a-2a, 12a-13a. As the court of appeals correctly found, "temporary confinement is especially reasonable" here, because "the defendant's initial evaluations were uncertain and conflicting" and because "commitment [i]s reasonably necessary to provide a more in-depth evaluation in a safe and controlled

setting.” Id. at 12a-13a. In those circumstances, “the constant observation and increased control afforded by” 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

JOHN M. PELLETTIERI
Attorney

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