No. ____

IN THE

Supreme Court of the United States

OLIVER LEE WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT PENDING PREPARATION, FILING, AND CONSIDERATION OF MR. WHITE'S PETITION FOR WRIT OF CERTIORARI

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Under 28 U.S.C. § 2101(f) and Rule 23 of this Court, petitioner Oliver Lee White respectfully applies to stay the Fourth Circuit's mandate pending preparation, filing, and consideration of a petition for writ of certiorari in this case, which is due on November 14, 2019. Absent this Court's intervention, the Fourth Circuit's mandate will issue on September 11, 2019. *See* Fed. R. App. P. 41(b).

Oliver White is a 31-year-old intellectually disabled man who has never been convicted of any crime, but was certified under the Adam Walsh Act's civil-commitment provision, 18 U.S.C. § 4248(a), in August 2017. Because Mr. White is incompetent and cannot understand the proceedings against him or assist counsel in his defense, he moved to dismiss the certificate filed against him, arguing that proceeding to a trial would violate procedural due process. The District Court in the Eastern District of North Carolina agreed and dismissed the certificate, explaining its reasoning over the course of three written opinions and an oral ruling. Exhibits 1-4.

The Government appealed and the Fourth Circuit reversed. Exhibit 5. The Fourth Circuit denied Mr. White's petition for rehearing or rehearing en banc, Exhibit 6, and his unopposed motion to stay the mandate, Exhibit 7. Mr. White now seeks relief from this Court because if his case were to proceed to trial, he would be subject to precisely the due process violation from which he seeks relief in

this Court. A stay is warranted to allow the Court the opportunity to consider his petition and grant meaningful relief.

BACKGROUND

Oliver White is incompetent to stand trial, incompetent to testify, and intellectually disabled; his IQ is 55 or 56. Ex. 3 at 2; Ex. 1 at 9; Ex. 4 at 21. His native language is Crow. He was born prematurely to a teenage mother who was intellectually disabled and used drugs. Ex. 5 at 3. Mr. White was in special education classes; he had no disciplinary problems. Ex. 4 at 11. He has never been convicted of any crime. Ex. 4 at 2.

In 2009, Mr. White was indicted in the District of Montana, alleging four counts of aggravated sexual abuse, but the Government dismissed the charges as part of a deferred prosecution agreement. Ex. 4 at 3.

In 2012, he was indicted in the District of Montana, alleging four counts of abusive sexual contact (arising from the same allegations set forth in the 2009 indictment) and two counts of attempted abusive sexual contact. *Id.* Mr. White was deemed incompetent to stand trial. Evaluators explained he

> was often presenting accounts that had been told to him. Such a tendency places him at risk for providing answers he does not understand or know to be true. His poor verbal comprehension limits his ability to comprehend courtroom proceedings in order to assist counsel, and this is exacerbated by his failure to notify others when he does not understand.

SA181; A36[1]. The charges were dismissed. Ex. 4 at 4.

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[1] SA__ and A__ references correspond to the sealed and unsealed appendices filed in the Court of Appeals for the Fourth Circuit.

In 2016, Mr. White was indicted in the District of Montana, alleging one count of aggravated sexual abuse and one count of abusive sexual contact. *Id.* Again, Mr. White was deemed incompetent to stand trial and the charges were dismissed. Ex. 4 at 4-7.

In August 2017, the Government certified Mr. White for civil commitment under the Adam Walsh Act, codified in relevant part at 18 U.S.C. §§ 4247-4248, alleging that he is a sexually dangerous person. Ex. 4 at 5. In cases under that statute, a bench trial is held and the Government must prove, by clear and convincing evidence, that the person is "sexually dangerous." 18 U.S.C. § 4248(a), (d). By statute, that inquiry has three elements: ***First***, has the person "engaged or attempted to engage in sexually violent conduct or child molestation" (the "prior conduct" element)? ***Second***, does he presently "suffer[] from a serious mental illness, abnormality, or disorder" (the "serious illness" element)? ***And third***, as a result of that serious mental illness, would he "have serious difficulty refraining from sexually violent conduct or child molestation if released" (the "volitional impairment" element)? 18 U.S.C. §§ 4247(a)(5), (a)(6).

At a trial under that statute, a person "shall be represented by counsel" and if he cannot afford to retain adequate counsel, "counsel shall be appointed for him pursuant to section 3006A." 18 U.S.C. § 4247(d). He "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." *Id.*

All of the experts to evaluate Mr. White under section 4248 noted his marked impairments and two explicitly questioned his ability to understand and meaningfully participate in his civil-commitment case. For example, Luis Rosell, Psy.D., opined that Mr. White "has difficulty understanding the current proceedings and the nature of the 4248 statute." SA104; A23; A122.

Mr. White moved for appointment of a guardian ad litem, which was granted. Ex. 1 at 5, 6. And he moved to dismiss the certificate against him or, in the alternative, to hold a competency hearing, because he was incompetent and contested all three elements of the section 4248 statute. Ex. 1 at 6. Because he could not understand the proceedings against him or assist in his defense, he explained that a civil-commitment trial at which the Government tried to prove past conduct against him would violate procedural due process.

The District Court held a competency hearing and concluded that Mr. White's moderate to severe intellectual disability "renders [him] unable to understand the nature and consequences of the Section 4248 proceeding against him and to assist properly in his defense in the Section 4248 proceeding." Ex. 4 at 26-27. The court summarized the findings of Hans Stelmach, M.D., which it credited, explaining:

> White has poor recollection of chronological events, he has very poor recall overall and is easily confused. He repeats statements that were told to him in the past which are no longer factual, for example, his belief that he is presently at FMC Butner for four months of competency restoration. White's ability to differentiate between factual recall and statements that he has heard in a competency restoration class or when receiving discovery, for example, is impaired.
>
> White lacks the ability to recall personal knowledge of events that he would need to convey to a Guardian Ad Litem for that Guardian Ad

> Litem to assist him in any way, particularly in defending against the first element in an Adam Walsh Act case under 18 U.S.C. Section 4248. White does not understand the role of a Guardian Ad Litem.
>
> White lacks the capacity to testify as a witness in a 4248 proceeding. The truthfulness of his testimony would be unreliable. This impairment is not volitional, it is due to White's intellectual disability.
>
> Dr. Stelmach persuasively opined that in his professional opinion, White is not able to understand the nature of the Section 4248 civil commitment proceedings against him, and is not able to assist counsel in defending these proceedings.

Ex. 4 at 21-22.

The court dismissed the certificate, concluding that neither the section 4248 statute nor procedural due process could tolerate a civil-commitment trial against a presently incompetent respondent: In such a trial, Mr. White would "face[] the prospect of indefinite commitment arising from a trial focused on both his past conduct and present mental condition even though he lacks the capacity to understand the section 4248 trial or participate rationally in his defense." Ex. 2 at 9.

The Government appealed, and the Fourth Circuit reversed and remanded the case with instructions for the District Court to conduct a civil-commitment hearing. *United States* v. *White*, 927 F.3d 257, 259 (4th Cir. 2019). It argued that dismissal was not authorized as a statutory matter because section 4248 allows for certification of incompetent persons and "makes no provision for the release of a [certified] person" due to incompetency. *Id.* at 261.

The court concluded that procedural due process also would not preclude a civil-commitment trial against an incompetent person who challenged all three

statutory elements. Applying the *Mathews* v. *Eldridge* balancing test, the Fourth Circuit evaluated "the private interest that will be affected," the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. 319, 335 (1976). The court acknowledged that Mr. White's liberty interest is "extraordinarily weighty" and found that the Government's interest in "delivering mental health care to sexually dangerous persons" and "protecting the public from such individuals" also is "weighty." *White*, 927 F.3d at 264.

Although the court conceded that Mr. White is incompetent and "unable to assist in his defense," it found that he was adequately protected by statutory protections, including the right to counsel, the right to present evidence, and the right to subpoena and cross-examine witnesses. *Id.* at 265. It also found appointment of a guardian ad litem to be protective, as well as the "clear and convincing" burden of proof and the "personal observations and opinions of professionals" opining on the second and third statutory elements. *Id.* It pointed to post-commitment avenues for relief, including the Government's obligation to file annual reports and Mr. White's ability to seek a hearing. *Id.* Despite conceding Mr. White's incompetence and inability to understand or assist in any civil-commitment trial, the Fourth Circuit opined: "[I]t is difficult to conceive of circumstances where a person such as White could be wrongfully committed." *Id.* at 265-266.

Mr. White petitioned for rehearing or rehearing en banc, which was denied on August 16, 2019. Ex. 6. He also moved, without opposition, to stay the mandate

pending the filing of a petition for writ of certiorari, which was denied on September 4, 2019. Ex. 7.

ARGUMENT

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. § 2101(f). This Court grants a stay of the mandate pending its disposition of a petition for a writ of certiorari where an applicant can demonstrate (1) a "reasonable probability" that this Court will grant certiorari, (2) a "fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland* v. *King*, 567 U.S. 1301, at *2 (2012) (Roberts, C.J., in chambers) (quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)) (internal quotation marks omitted).

That standard is satisfied here. First, there is a reasonable probability this Court will grant certiorari. The Fourth Circuit's decision creates an issue of exceptional importance and a conflict with this Court's precedent. The Fourth Circuit's decision directs the District Court to hold a bench trial adjudicating past conduct against a person who does not understand what is going on and cannot help his counsel or participate in his defense; the consequence of an adverse decision is indefinite (and likely lifelong) detention in a federal prison.

That decision conflicts with *Cooper* v. *Oklahoma*, which explains that "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." 517 U.S. 348, 354 (1996). In conflict with that precedent, the Fourth Circuit found that Mr. White is adequately protected against an erroneous commitment by *the very rights he cannot exercise because of his incompetence.*

Mr. White's intellectual disability prevents him even from *understanding* the trial against him. He cannot testify, cannot suggest helpful witnesses, and cannot provide potentially fruitful lines of investigation or cross-examination. He cannot even assist counsel by providing his own recollection of events.

The same is true of the "protection" provided by a guardian ad litem. As the District Court explained, Mr. White "was unaware" he had one, despite the guardian's credible testimony they had met on two occasions for an hour each. Ex. 4 at 17. Mr. White "was unable to repeat or retain" the role of a guardian ad litem. *Id.* And, in any event, a guardian ad litem cannot assist Mr. White in defending against the prior conduct element: "Mr. Tarlton wasn't in Montana or Arizona or New Mexico or wherever the alleged event—right? He has no—he has no ability to sort of say, 'I was with him. I can give you historical information.' " A106.

Likewise the Fourth Circuit's reliance on post-commitment avenues for relief. *White*, 927 F.3d at 267. Committed men have no "release date" as do federal

prisoners; commitment thus is presumptively indefinite or lifelong. Even to obtain a discharge hearing seeking relief from civil commitment, a person must first show "sufficient factual matter, accepted as true, to state a claim for discharge that is plausible on its face," to say nothing of prevailing in the hearing. *United States* v. *Maclaren*, 866 F.3d 212, 219 (4th Cir. 2017). In a case like Mr. White's where a person is incompetent and intellectually disabled, the District Court explained:

> [He] could not participate meaningfully in sex offender treatment, much less learn from it. Moreover if the person were incompetent due to an intellectual disability, the person essentially would face lifetime commitment unless and until he became competent.

Ex. 2 at 17. No evaluator has ever concluded that Mr. White is competent or restorable, so if he were committed, it would likely be for life.

For this reason, the Fourth Circuit's decision also conflicts with *Jackson* v. *Indiana*, which explains there is "substantial doubt that [federal civil-commitment statutes] could survive constitutional scrutiny if interpreted to authorize indefinite commitment." 406 U.S. 715, 733 (1972). Where, as here, a person facing commitment is incompetent and unable to participate in the commitment program's treatment plan or assist his counsel in attempting to prove that he is no longer dangerous, civil commitment under section 4248 could do just that.

Although there is not a circuit split on this precise issue, the nature of section 4248 proceedings prevents one from emerging. The Executive Branch has elected to handle all Adam Walsh Act civil-commitment proceedings through one federal correctional institution in North Carolina. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5394.01, Certification and Civil Commitment of Sexually

Dangerous Persons 15 (2016), *available at* https://bit.ly/2qCIV2I. So civil commitment trials are handled in the Eastern District of North Carolina, with review in the Court of Appeals for the Fourth Circuit.

This Court regularly grants certiorari to review the decisions of courts that bear sole responsibility for specific areas of law. *See, e.g.*, *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018) (specialized military proceedings in the Court of Appeals for the Armed Forces); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) (patent appeals in the Federal Circuit); *Boumediene* v. *Bush*, 553 U.S. 723 (2008) (review of Combatant Status Review Tribunals vested exclusively in the D.C. Circuit); *Hinck* v. *United States*, 550 U.S. 501 (2007) (interest-abatement claims vested exclusively in the Tax Court); *Shaw* v. *Reno*, 509 U.S. 630 (1993) (injunctions under the Voting Rights Act vested exclusively in the District Court for the District of Columbia).

These conflicts with Supreme Court authority on a question as fundamental as competence to stand trial provide at least a "reasonable probability" this Court will grant certiorari in these critical cases heard only by the Fourth Circuit. And for the reasons expressed persuasively by the District Court and in this Court's decisions in *Cooper* v. *Oklahoma* and *Jackson* v. *Indiana*, an incompetent person may not be put to a civil commitment trial he does not understand without the ability to exercise the rights deemed adequate for his protection, risking indefinite commitment in a federal prison: There is a "fair prospect" that this Court will reverse the decision below.

What is more, the decision below subjects Mr. White to irreparable harm. Absent a stay, the District Court could proceed to a trial on the merits of civil commitment, the very harm Mr. White's petition for certiorari will argue he may not be subjected to. Therefore, issuance of the mandate would deprive Mr. White of the benefit of a successful petition for certiorari. The equities here support maintaining the status quo for the few months necessary for this Court to review and address Mr. White's petition for certiorari. During that time, Mr. White will remain in the Bureau of Prisons, so the Government can assert no prejudice. Indeed, it did not oppose Mr. White's motion to stay the mandate in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, Mr. White respectfully requests the Court stay issuance of the Fourth Circuit's mandate pending this Court's disposition of his petition for a writ of certiorari.

Respectfully submitted this 6th day of September, 2019.

Respectfully submitted,

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