No. 19-5487

In the Supreme Court of the United States

MARTIN ANTHONY NINO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

INTEREST OF AMICUS CURIAE[1]

The members of the National Association of Federal Defenders provide representation to persons accused of federal crimes who lack financial means to hire private counsel pursuant to 18 U.S.C. § 3006A. The NAFD membership advocates on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. Specific to this case, NAFD members regularly represent individuals with intellectual, developmental, and psychiatric disabilities who are charged with crimes but found incompetent to stand trial. The NAFD has a profound interest in assuring that the statutory and constitutional rights of clients with illnesses and disabilities are protected; that needless and harmful incarceration is avoided; and that our Sixth Amendment duties of loyalty to our clients are not compromised by the current interpretation of 18 U.S.C. § 4241(d). This brief is submitted in support of Mr. Nino's position that persons on pretrial conditional release should not be automatically detained for restoration upon a finding of incompetency, both as a matter of statutory construction and constitutional law.

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the NAFD and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the NAFD's intent to file this brief, and all parties have consented to its filing.

SUMMARY OF ARGUMENT

When a judge has found a mentally disabled defendant to be neither a danger nor a flight risk on conditional release under the Bail Reform Act, the federal competency statute and constitutional protections against deprivation of liberty should foreclose mandatory detention for the purposes of competency restoration. Rather, the statute should permit individualized judicial consideration of less restrictive forms of custody. The statute in question provides:

> 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 [for designated lengths of time].

18 U.S.C. § 4241(d) (emphasis added).

This Court should grant certiorari to review the Ninth Circuit's construction of 18 U.S.C. § 4241(d) to require mandatory incarceration for three core reasons:

- The Ninth Circuit's decision directly conflicts with a state court of last resort on an important federal question because, in *Carr v. State*, 303 Ga. 853, 815 S.E.2d 903 (2018), the Georgia Supreme Court held that automatic inpatient confinement for competency restoration violates due process of law.

- The Ninth Circuit's decision conflicts with the reasoning underlying this Court's controlling authority on protection of pretrial defendants' liberty interests in *United States v. Salerno*, 481 U.S. 739 (1987), and *Sell v. United States*, 539 U.S. 166 (2003).

- The Ninth Circuit's decision failed to adhere to this Court's rules of statutory interpretation because the term "custody" is susceptible to a broader construction to include community-based supervision, and because construing "custody" in that manner avoids serious constitutional concerns.

The emphasis of this amicus curiae brief is on the last point. Although we strongly agree with the petitioner that the current implementation of 18 U.S.C. § 4241(d) results in unconstitutional automatic detention, we encourage the Court to determine whether § 4241(d) is amenable to a constitutional construction before reaching the important constitutional issues.

Under this Court's controlling rules of statutory construction, "custody" in § 4241(d) is properly construed as coextensive with "custody" in the context of 28 U.S.C. § 2241, which this Court in *Hensley v. Municipal Court* held includes pretrial supervision conditions in the community set by the judge. 411 U.S. 345 (1973). Only this Court can bring statutory coherence to this area of the law because the Circuits are entrenched in incorrect interpretations of the statute that conflict with the Georgia Supreme Court on the due process implications of automatically incarcerating persons with mental disabilities for competency restoration. The constitutional issue can be avoided by construing "custody" to include varying levels of community-based supervision, as in *Hensley*, such that the district judge, upon making a finding of incompetence, must describe the appropriate degree of "custody" for the individual defendant, which would then allow the Attorney General to identify the "suitable facility," including outpatient hospitalization.

By granting certiorari, moreover, this Court can ameliorate the ethical paradox that defense attorneys face when they must choose between either sacrificing Sixth Amendment client loyalty or compromising the duty of candor to the court regarding potential issues of incompetence. As § 4241(d) is currently construed, defense attorneys who report competency concerns to the court risk triggering automatic revocation of release, resulting in prolonged and harmful incarceration for their pretrial, presumptively innocent clients.

ARGUMENT

A. Mandatory Detention Of Defendants With Mental Disabilities In Federal Prisons For Competency Restoration Subjects Them To Real And Needless Harm.

For pretrial defendants with mental disabilities, the difference between conditional release to community-based restoration treatment versus imprisonment for treatment is profound. In the community, the conditions of pretrial release supervised by the Pretrial Services Office often include outpatient treatment, employment or education, and access to family and religious support networks. In contrast, in overworked prison mental health facilities, our clients are separated from the familiar and placed in the intimidating regimentation of prison. The constitutional prohibition on criminal prosecution of an incompetent defendant should also bar punitive pretrial detention for competency restoration of presumptively innocent persons. *See Medina v. California*, 505 U.S. 437, 448 (1992) ("[D]ue process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him.") (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

Mandatory detention for purposes of competency restoration subjects mentally disabled defendants who do not pose a danger to the community and are not a flight risk to unnecessarily harsh conditions

that cause real and substantial harm. First, mentally disabled defendants are already a vulnerable population whose health and well-being are often dependent on having an established network of community and support resources, including mental health providers, housing, family, and public benefits. Mandatory detention removes those individuals from their support structure, which can be traumatic. Moreover, once lost, it can take many months to reestablish support such as social security benefits, subsidized housing, and treatment relationships with mental health providers. Being removed from the community can destabilize individuals who require substantial resources to stay healthy and safe. *See* Arthur J. Lurigio et al., *The Effects of Serious Mental Illness on Offender Reentry*, FEDERAL PROBATION (Sept. 2004) (discussing the multifaceted social services needs of mentally ill individuals reentering the community and the decompensation of "mentally ill [individuals] who move from one system to the other [and] often fail to receive adequate treatment or services from either").

Second, mandatory detention can lead to significant delays in treatment and competency restoration. Federal Medical Centers lack treatment beds. Although the Bureau of Prisons operates six prison medical centers, only two facilities offer competency restoration programs for men, FMC Butner, North Carolina, and FMC Springfield, Missouri, while a single facility provides such programs for women at FMC Carswell, Texas. In February 2019, the BOP represented that the

shortest wait-time for competency restoration placement for men was approximately nine weeks.[2]

Because the FMCs are often located thousands of miles from the court in which charges are pending, transportation is problematic. In-custody transportation through the United States Marshals can take many weeks, with long bus rides during which defendants are shackled, and overnight stays are often in county jails and other contract facilities ill-equipped to address the needs of our incompetent clients.

> [I]ndividuals living with a mental health condition are particularly unsuited for the jail environment. Such defendants are placed in solitary confinement at higher rates, experience neglect and abuse from fellow prisoners and guards, and descend further into mental illness when confined without treatment.

Susan McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 GEO. L. J. 601, 604 (2019). The entire process is physically uncomfortable and stressful. Those individuals permitted voluntary surrender also face daunting challenges given the lack of funding for transportation and the difficulties for some mentally disabled persons in navigating public transportation.

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[2] *United States v. Weisman*, No. 6:18-mj-00237 (D. Or. Feb. 19, 2019).

In general, involuntary detention in a hospital is inappropriate unless it is "the least restrictive setting appropriate to effect competence to stand trial." CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7-4.10(c) (ABA 2016). The custodial environment is often strict and harsh, which is particularly harmful for inmates with mental illness and can contribute to deterioration. McMahon, *Reforming Competence*, at 613 ("For an individual suffering from mental illness, this setting is 'at best, counter-therapeutic and, at worst, dangerous to [an inmate's] mental and physical well being.'") (quoting Jamie Fellner, *A Conundrum for Corrections, a Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill*, 22 WASH. U. J. L. & POL'Y 135, 139 (2006)). The Court's grant of certiorari would address and remediate the trauma and isolation that accompany mandatory detention of mentally disabled, presumptively innocent defendants.

B. The Court Should Construe 18 U.S.C. § 4241(d) To Require That The Judicial Commitment Specify The Degree Of Custody Authorized Based On An Individualized Determination Of The Least Restrictive Alternative.

This Court only reaches the serious constitutional issues raised by mandatory imprisonment of presumptively innocent pretrial defendants if § 4241(d) cannot be construed to avoid those problems. *Hooper v. California*, 155 U.S. 648, 657 (1895). This Court has construed the term "custody" to include conditional release in the community in the

context of the federal habeas corpus statute. In the context of the pretrial incompetence statute, which includes no specification of detention in a corrections facility, such a construction meets the constitutional minimum by requiring judicial determination of the degree of appropriate custody. To the extent the statute can be construed to require mandatory detention, the Court's rules on constitutional avoidance and the rule of lenity require the interpretation that "custody" includes community-based restoration.

1. The Term "Custody" On Its Face And In Context Includes Conditional Community Placement.

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Starting with the plain language, "custody" includes a broad range of court-determined restrictions short of actual incarceration.

In *Hensley*, this Court addressed the statutory requirement that a person be "in custody" to seek relief under the federal habeas corpus statute. The state contended that, because the petitioner had been released on his own recognizance pending appeal of his sentence, he was not "in custody" and could not avail himself of federal remedies. This Court rejected that position because, due to his conditions of release, he was subject to restraints "not shared by the public

generally." *Hensley*, 411 U.S. at 351 (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)). In *Jones*, the Court held that conditions of parole constituted "custody" for the purposes of the federal habeas corpus statutes. 371 U.S. at 240; *see United States v. Haymond*, 139 S. Ct. 2369, 2380 n.5 (2019) (recognizing that "the sword of Damocles hangs over a defendant 'every time [he] wakes up to serve a day of supervised release.'"). The term "custody," as used by this Court, includes placement in the community on conditions requiring participation in treatment aimed at restoration of competency.

The context of "custody" in § 4241(d) also strongly supports authorization to impose conditions in the community to accomplish competency restoration. "The plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (quoting *Robinson*, 519 U.S. at 341). *Inclusio unius est exclusio alterius* is a specific application of the rules on context. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The Sentencing Reform Act used the term "custody" in two statutes addressing pretrial

detention and pretrial competency restoration. In the first but not the second, Congress added the qualifying phrase "in a corrections facility":

> **Contents of Detention Order.**—In a detention order issued under subsection (e) of this section, the judicial officer shall—
>
> (1) include written findings of fact and a written statement of the reasons for the detention;
>
> (2) direct that the person be *committed to the custody of the Attorney General for confinement in a corrections facility* separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;. . . .

18 U.S.C. § 3142(i) (emphasis added). The competency restoration statutes include no such requirement of confinement in a corrections facility.

As this Court has repeatedly held, when Congress has demonstrated it knows how to express itself, the courts should not draw meaning from legislative silence. For example, in *Dean v. United States*, the Court rejected the government's argument that the mandatory consecutive sentence provision of 18 U.S.C. § 924(c) barred the sentencing judge from considering the mandatory § 924(c) sentence when imposing sentences on counts that did not have mandatory minimum sentences. 137 S. Ct. 1170, 1177 (2017). The Court foreclosed such a reading from statutory silence in § 924(c) by comparing it with the

provision in 18 U.S.C. § 1028A that expressly stated that the mandatory minimum sentence could not be considered in imposing sentence on the non-mandatory minimum counts. *Id*. "Section 1028A says just what the Government reads § 924(c) to say—of course, without *actually* saying it." *Id.* (emphasis in original). The government reads § 4241(d) to say detention in "a corrections facility" without the statute actually saying it, even though a different statute, enacted as part of the same Sentencing Reform Act, does provide the express limitation.

Similarly, in *Lagos v. United States*, the Court addressed the question whether specific grounds stated for restitution could be expanded to include general losses, as provided in other restitution statutes. 138 S. Ct. 1684, 1689-90 (2018). This Court found that the differences between the statutes – one referencing general grounds for restitution, the other specifying the bases for restitution – "tip the balance in favor of our more limited interpretation." *Id*. at 1690. To the same extent, the difference between the statute on pretrial detention, which limits custody to "a corrections facility," and the competency restoration statute, which does not, demonstrates that the correct interpretation of the competency restoration statute includes community-based conditions as "custody." *See also Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017) (judicial approval of collection method omitted from applicable forfeiture statute but present in another "would allow the Government to circumvent Congress' carefully constructed statutory scheme").

The Courts of Appeals have not carefully applied this Court's canons of construction to consider whether the term "custody" in § 4241(d) requires incarceration, instead relying on the unexamined assumption that judicial commitment to "custody" meant imprisonment, either as the statutory meaning or because the court's authority ended after mandatory commitment to the Attorney General. The Courts of Appeals that have addressed the constitutionality of § 4241(d) have focused on two issues: (1) the assumption that the statutory commitment provision calls for "temporary incarceration" and not indefinite commitment; and (2) whether the commitment provision is "reasonably related" to the purpose of the statute even for a defendant who was potentially "not restorable." *See, e.g.*, *United States v. McKown*, 930 F.3d 721, 728-30 (5th Cir. 2019); *United States v. Brennan*, 928 F.3d 210, 218 (2d Cir. 2019); *United States v. Strong*, 489 F.3d 1055, 1060-63 (9th Cir. 2007); *United States v. Ferro*, 321 F.3d 756, 762 (8th Cir. 2003); *United States v. Filippi*, 211 F.3d 649, 652 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990); *United States v. Shawar*, 865 F.2d 856, 864 (7th Cir. 1989). None of these cases have addressed the statutory interpretation issue of whether judges should be required to determine the appropriate level of custody.

Although courts accept automatic detention, "custody" has a radically different meaning in the pretrial context for presumptively innocent, incompetent pretrial detainees who are on conditional release. Section 4241(d) does not equate "custody"

with detention in corrections facilities. In this context, "custody" requires determination by the Judicial Branch of the necessary degree of custody, with the Executive Branch carrying out the least restrictive judicially determined alternative. Liberty deprivation is determined by judges, not prosecuting authorities. *See Setser v. United States*, 566 U.S. 231, 242 (2012) (interpreting concurrency statute consistently with the "desideratum" that "sentencing not be left to employees of the same Department of Justice that conducts the prosecution"). Under basic procedural due process, the question of detention for competency restoration must be determined by a neutral decision-maker – the district court judge – after notice and an opportunity to be heard by adverse parties. *See Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

By the plain language and context of the competency restoration statute, for an individual on pretrial release, the trial judge has full authority to specify that the "custody" must not exceed the restrictions for conditional release beyond community-based restoration programming and treatment. *Hensley*, 411 U.S. at 345 ("a person released on his own recognizance is 'in custody' within the meaning of the federal habeas corpus statute"). Under this construction, the trial judge would not order a particular program, but rather would specify the degree of authorized custody. The Attorney General would adapt "hospitalization" and "suitable facility" in order to match its own or contract treatment programs to the court's specific custody conditions. The judicial power to commit under

§ 4241(d) includes the authority to limit conditions of custody to community-based competency restoration.

Moreover, this Court has directed that statutes should be construed not merely by rote application of canons, but also by "the dictates of common sense." *United States v. Feola*, 420 U.S. 671, 698 (1975). In the context of a presumptively innocent person determined to be mentally incompetent, automatic detention – either by legislative action or executive fiat – makes no logical sense without a judicial determination of individualized necessity. Why should the individual suffer the hardship and society the expense of incarceration when a district court judge, considering all of the individual circumstances, can specify the conditions for an effective treatment regimen in the community?

2. In The Absence Of A Clear Statement Requiring Mandatory Detention, "Custody" Should Be Interpreted Broadly To Include Conditions In The Community Under The Doctrine Of Constitutional Avoidance And The Rule Of Lenity.

If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," the Court construes the statute to avoid such problems. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the canon of constitutional avoidance "is a tool for choosing between competing *plausible*

interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.") (emphasis added). The serious constitutional issues raised by automatic incarceration based on pretrial incompetency trigger the doctrine of constitutional avoidance, requiring the "plausible" and "fairly possible" interpretation of the statute that avoids constitutional issues, which are not only serious but merit a finding of unconstitutionality as held by the Georgia Supreme Court in *Carr*:

> Because the nature of *automatic* commitment for all those defendants does not bear a reasonable relation to the State's purpose of accurately determining the restorability of individual defendants' competence to stand trial, that aspect of [the Georgia restoration statute] violates due process when applied to defendants who have been deprived of their liberty based solely on that statutory provision.

815 S.E.2d at 916 (emphasis in original).

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. In *Salerno*, this Court held that pretrial detention was only permissible as a regulatory—not punitive—measure "when the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or

the community." 481 U.S. at 751. The ultimate decisions regarding pretrial detention and release are purely judicial, after adversary proceedings considering a wide range of factors. *Id.* at 746. For persons conditionally released under the Bail Reform Act, the district court has already determined that there is not sufficient risk of flight nor danger to require detention. Interpreting § 4241(d) to automatically overturn such a district court determination runs counter to the constitutional norm of liberty.

Indeed, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty th[e Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Specifically, "the Fifth Amendment permits detention only where heightened, substantive due process scrutiny finds a sufficiently compelling governmental need." *Demore v. Kim*, 538 U.S. 510, 549 (2003) (quotations omitted). These principles extend to the mentally ill: "[There is] no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *see also Zinermon v. Burch*, 494 U.S. 113, 131 (1990) ("[T]here is a substantial liberty interest in avoiding confinement in a mental hospital."); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (commitment to mental hospital entails "a massive curtailment of liberty"). The current practice of mandatory detention for all defendants who are found incompetent to stand trial,

without further justification, implicates fundamental due process liberty interests, as held by the Georgia Supreme Court in *Carr*.

This Court also recognized the liberty and individual autonomy at stake for pretrial defendants in *Sell*, where the Court found a defendant's interests in being free from involuntary medication to restore competency required individualized determinations by a judicial officer. 539 U.S. at 180-81. The Court set out a number of considerations with direct applications to the present statute:

- "The facts of the individual case [and] the Government's interest in prosecution."

- Whether the intrusion "will *significantly further* [the] state interests [in assuring that the defendant's trial is a fair one]."

- Whether the intrusion "is *necessary* to further those interests" and "any alternative, less intrusive treatments are unlikely to achieve substantially the same results."

- Whether the intrusion "is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition."

Id. (emphases in original). In the context of § 4241(d), as presently implemented, the district court weighs none of these factors before subjecting a conditionally

released but incompetent defendant to mandatory imprisonment, usually thousands of miles from home. In light of *Sell*, § 4241(d) should be construed to require the judge to make an individualized determination based on the *Sell* factors regarding the least restrictive type of community custody.

The Courts of Appeals have only superficially addressed the competency restoration statute, with little concern for the constitutional issues and real harm caused by the present system of automatic incarceration. With minimal statutory analysis, some courts equate Congress's use of the word "custody" with "incarceration." *See, e.g.*, *Strong*, 489 F.3d at 1062 (describing the four-month custody limitation as "temporary incarceration"). Other courts, with equally minimal analysis, suggest that the statute forecloses judicial oversight over the Attorney General's automatic incarceration. *See, e.g.*, *Shawar*, 865 F.2d at 860 ("[O]nce a defendant is found incompetent to stand trial, a district judge has no discretion in whether or not to commit him," because "Congress has given authority over defendants declared incompetent by the district judge to the Attorney General").

As a practical matter, the effect of both interpretations is the same: mandatory incarceration for competency restoration. The government's briefing before the Ninth Circuit demonstrates that it views the statute as *requiring* automatic incarceration: "All circuits that have evaluated this statute have found that § 4241 is unambiguous on its face, and that the inpatient commitment of a

defendant for purposes of competency restoration is mandatory." Brief of Appellee, *United States v. Nino*, No. 17-10546 (9th Cir. Aug. 20, 2019), ECF No. 41 (redacted). These interpretations ignore the fundamental individual constitutional interests endangered by the present system.

Mandatory detention for inpatient hospitalization under § 4241(d) for purposes of competency restoration flips the norms established in our constitutional jurisprudence and federal law by denying individualized protection for those who need protection the most. The statute is at least amenable to the broad construction of the term "custody" that requires individualized judicial consideration and delineation of the scope of allowable custody. If, after applying other rules of construction, ambiguity persists, the Court would construe the statute in favor of the mentally disabled defendant: "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see United States v. Santos*, 553 U.S. 507, 514 (2008) (The rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."). The statute should be construed to meet the minimal constitutional requirements in the absence of a clear congressional statement requiring automatic detention.

C. Mandatory Detention Of Conditionally Released Defendants For Competency Restoration Institutionalizes An Intractable Conflict Between Defense Attorneys' Sixth Amendment Obligations To Their Clients And Ethical Obligations To The Courts.

As construed to require mandatory detention, § 4241(d) inserts unnecessary ethical dilemmas into the representation of clients with mental disabilities by pitting defense attorneys' duty of candor to the court against their Sixth Amendment duties of loyalty and confidentiality to clients. This Court should grant review in order to address and to ameliorate this important constitutional problem.

On one hand, the duty of candor to the court anticipates that defense attorneys will report concerns about a client's competency to stand trial, even if the client objects:

> Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7-4.2(c) (ABA 2016). At the same time, attorneys owe

their clients a duty of zealous representation that restricts disclosure of information about mentally ill clients "*only to the extent reasonably necessary to protect the client's interests*." MODEL RULES OF PROF'L CONDUCT R. 1.14(c) (ABA 2018) (emphasis added). This basic duty of loyalty is intrinsic to the Sixth Amendment. *See Wheat v. United States*, 486 U.S. 153, 161-62 (1988) (Sixth Amendment guarantees conflict-free counsel); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."). This Court's recent case law regarding protection of clients' personal autonomy to make decisions regarding representation, regardless of mental illness, provides an additional focus in addressing ethical conflicts. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (attorney's tactical admissions of guilt over defendant's objection violated client's "protected autonomy right").

Defense attorneys who develop doubts concerning their out-of-custody clients' competence should not have to weigh their duty of candor to the courts against their duty to protect their clients' confidentiality, liberty, and personal autonomy. *See* Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 9-11 (2017) (reporting competency concerns often "runs counter to [a] client's best interest" as increasing incarceration). The difficulties are especially acute in cases involving relatively minor federal offenses, such as disruptive behavior at Veterans Administration hospitals and

other federal facilities, low-level drug trafficking, and unarmed bank robberies involving clearly disordered individuals, where their incarceration for restored competency may outlast the length of any reasonable sentence. *See* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 72 (1988) ("For many defendants, particularly those charged with minor offenses, raising competency subjects the defendant to a far greater deprivation of his liberty than if he were convicted of the crime with which he is charged."); Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and A Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 580-81 (1995) ("[D]efendants who are evaluated may be confined for longer than they would have been had they been permitted to waive their incompetency and either plead guilty or stand trial at the outset.").

While defense attorneys strive to reach agreement with their mentally ill clients regarding disclosures, the Model Rules fail to offer adequate guidance to defense attorneys faced squarely with a conflict between their duty of candor to the court and their duty to protect their clients' best interests, acknowledging in the commentary that "[t]he lawyer's position in such cases is an unavoidably difficult one." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 8 (ABA 2018); *compare* Uphoff at 89 (the duty of candor is "paramount and overrides counsel's obligations to her client") *with* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and*

the Mentally Ill Criminal Defendant, 58 AM. U. L. REV. 207, 240, 257 (2008) ("The duties of zealous representation and protection of client confidences should trump any rule that requires a criminal defense lawyer to raise her doubts about her client's competency."). Under the ABA standards, the assumption that automatic detention will *not* ensue ameliorates the conflict:

> A defendant otherwise entitled to pretrial release should not be involuntarily confined or taken into custody solely because the issue of the defendant's competence to stand trial has been raised and an evaluation has been ordered unless confinement is necessary for any personal examination that may be necessary for the evaluation process.

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, § 7-4.3(a) (ABA 2016). The current automatic detention under § 4241(d) exacerbates the already difficult competing interests in a manner inconsistent with professional standards on representing mentally disabled individuals.

Although defense attorneys are obligated under the Sixth Amendment to act zealously in the interests of the criminally accused and to safeguard their confidential material, representation of mentally disabled clients creates conflicting duties. The types of relatively minor offenses that frequently involve serious mental disabilities include incidents at Veterans Administration and Social Security facilities that implicate relatively low Guidelines

ranges, perhaps probation or limited confinement under Zone A or B of the Sentencing Table. U.S.S.G. Ch. 5, Pt. A. Further, the Sentencing Commission identified diminished mental capacity as an encouraged ground for sentences below the Guidelines range in U.S.S.G. § 5K2.13. *See Koon v. United States*, 518 U.S. 81, 82 (1996) (the Sentencing Commission delineated certain grounds "as 'encouraged' bases for departure"). And following this Court's decision in *Booker v. United States*, sentencing judges consider the characteristics of the defendant and treatment needs, which warrant sentences for disabled defendants below the advisory Guidelines range. 543 U.S. 220 (2005).

But if the defendant is determined to be incompetent, and forced into mandatory detention to receive in-custody restoration treatment, the time of actual custody can expand far beyond what a fast guilty plea would generate. And mental disabilities can negate mens rea, or provide an affirmative defense, which would render every day of incarceration unjustified for the innocent defendant. *See* Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Fed. Jury Prac. & Instr.* § 1903 (6th ed. 2019). For both the individual and society, every extra day of lost freedom counts. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) ("Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.") (citations and alterations omitted).

The government's construction of § 4241(d) should not be allowed to institutionalize conflicts that dilute defense counsel's Sixth Amendment duties to the presumptively innocent criminally accused. The broad construction of "custody" in § 4241(d) urged by the petitioner ameliorates the risk of conflict because, for pretrial defendants who have established that conditional release creates neither risk of flight nor danger to the community, defense attorneys can raise competency concerns without automatically risking their clients' prolonged detention. Defense counsel does not condemn the client to termination of conditional release by seeking restoration of competency. By granting a writ of certiorari and rejecting mandatory incarceration, the Court can protect our clients' due process and Sixth Amendment rights while expanding the ethical options available to defense attorneys in this fraught arena.

CONCLUSION

The Court should grant the petition for a writ of certiorari and either construe § 4241(d) to authorize judicial commitment to custody in the community without incarceration, or hold that the commitment statute is unconstitutional to the extent it subjects mentally disabled pretrial defendants to mandatory

incarceration without individualized consideration of less restrictive forms of custody.

Dated this 25th day of September, 2019.

/s/_____
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