No. 17-10546

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Client,

Defendant-Appellant.

Appeal From The United States District Court
For The District Of Arizona

BRIEF OF AMICI CURIAE FEDERAL PUBLIC AND COMMUNITY DEFENDER ORGANIZATIONS OF THE NINTH CIRCUIT IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

OTHER

INTEREST OF AMICI CURIAE

The Ninth Circuit Federal and Community Defender Organizations provide representation to accused persons who lack financial means to hire private counsel in this Circuit pursuant to 18 U.S.C. § 3006A. The Defenders advocate 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, Defenders regularly represent individuals with intellectual, developmental, and psychiatric disabilities who are charged with crimes but found incompetent to stand trial. The Defenders have a profound interest in assuring that the constitutional rights of clients with illness or disability are protected; that needless and harmful incarceration is avoided; and that the ethical dilemmas for defense attorneys created by the current interpretation of 18 U.S.C. § 4241(d) are ameliorated. This brief is submitted in support of Mr. Nino's position that persons on pretrial conditional release should not be automatically incarcerated for restoration upon a finding of incompetency. No party or party's counsel or any person other than employees of amici curiae authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

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 for due process and equal protection under law should foreclose automatic incarceration for competency restoration without individualized consideration of less restrictive forms of custody. Yet the current implementation of 18 U.S.C. § 4241(d) creates exactly that disrespect of liberty interests for a class of society's most vulnerable members. The Defenders support rehearing en banc for this Court to reexamine and to reject the reasoning and result in *United States v. Strong*, 489 F.3d 1055 (9th Cir. 2007), to the extent it foreclosed constitutional objection to automatic incarceration of persons with mental or intellectual disabilities for competency restoration.

This brief in support of the defendant's petition elaborates on the bases for rehearing en banc and grant of relief. First, the real harm to mentally disabled clients violates the Due Process and Equal Protection Clauses of the Fifth Amendment, especially given the widespread availability of effective out-of-prison competency restoration in state programs. Second, before reaching the constitutional issues, this Court should determine whether 18 U.S.C. § 4241(d) is amenable to the constitutional construction that would require the judge, upon making a finding of incompetence, to

describe the appropriate degree of "custody" for the individual mentally disabled defendant, which would then allow the Attorney General to identify the "suitable facility," including outpatient hospitalization. Third, the Court should grant rehearing to ameliorate the ethical dilemmas faced by defense attorneys representing potentially incompetent clients whose conditional release can automatically end because counsel alerted the court to concerns regarding competency.

ARGUMENT

I. Mandatory Confinement Of Defendants With Mental Disabilities In Federal Prisons For Competency Restoration Unconstitutionally Subjects Them To Needlessly Harsh Conditions In Light Of The Demonstrated Effectiveness Of Out-Of-Custody Competency Restoration Programs.

For pretrial defendants with mental disabilities, the difference between 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. While the Constitution forbids criminal prosecution of an incompetent defendant, this prohibition also means that punitive pretrial detention for competency restoration of presumptively innocent persons is prohibited. In support of Mr. Nino's constitutional arguments, the Court should consider that (1) mandatory

detention subjects defendants to unnecessarily harsh conditions that cause substantial harm; (2) state programs have succeeded with community-based competency restoration, which demonstrates that automatic incarceration does not meet any legitimate governmental need; and (3) mandatory incarceration without individualized consideration is an unwarranted exception to statutory and constitutional protections for a vulnerable population.

A. Mandatory Detention Is Needlessly Harsh And Subjects Defendants To Real Harm.

The mandatory incarceration of defendants with mental disabilities who do not pose a danger to the community and are not a flight risk causes significant harm. First, mandatory detention removes people from community resources and the supports they depend on, such as mental health providers, housing, family, and public benefits. Losing existing support systems 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.

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. In February 2019, the BOP represented that the shortest wait-time for competency restoration placement was approximately nine weeks.[1]

Because the FMCs are located thousands of miles from the Ninth Circuit, transportation often results in significant delay and harm to vulnerable clients. Transportation through the Marshals can result in long bus rides and overnight stays in county jails and other contract facilities. For those permitted voluntary surrender, the challenges are also daunting given the lack of funding for transportation and the difficulties for some mentally disabled persons in navigating public transportation.[2]

Third, under national standards, institutionalization should only be used in the most serious instances where individuals are immediately dangerous to the community or themselves to avoid the trauma and isolation that accompany forced detention. Involuntary hospitalization is inappropriate unless the court determines by clear and convincing evidence that there exists "no less restrictive alternative." American Bar Association, Criminal Justice Mental Health Standards, § 7-4.10(a)(iii)(B) (2016); *see*

[1] Declaration of BOP Chief of the Office of Medical Designations and Transportation, United States v. Weisman, No. 6:18-mj-00237-MK (D. Or. Feb. 19, 2019), ECF No. 25.

[2] The statute on non-custodial transportation, 18 U.S.C. § 4285, only provides for one-way transportation for court hearings.

Susan McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 Georgetown L. J. 601, 604 (2019).

B. Out-Of-Custody Competency Restoration Is Effective, Efficient, And Humane.

Outpatient competency restoration programs, which provide treatment and competency education in the community, are more effective and efficient for defendants who can be conditionally released. Currently, at least 35 states have community-based competency restoration programs. Amanda Wik, *Alternatives to Inpatient Competency Restoration Programs: Community-Based Competency Restoration Programs*, 5 (Nat'l Ass'n of State Mental Health Program Dirs. Research Inst. 2018). These programs are successful at treating defendants in an outpatient setting and restoring competency. *Id.* at 15; *see also Multnomah County, Oregon: Case Study* (Just. Sys. Partners 2018).

In Oregon, the Multnomah County Forensic Diversion Program is a model of how community restoration works. The Program provides outpatient competency restoration that consists of mental health treatment with weekly legal skills psychoeducation. The same educational program used for detained defendants at the Oregon State Hospital is provided one-on-one by case managers for each releasable defendant. Defendants in the Program receive short-term intensive case management and linkage to community resources.

The success of the Oregon state community-based competency restoration program has been matched in other states that reject automatic incarceration for restoration. *See* Wik, *supra* at 15. These programs not only provide humane treatment without removing mentally ill people from their communities, they are cost-effective. *Id.* In Oregon, the availability of outpatient restoration in Multnomah County is estimated to have saved $6 million. Human Servs. Research Inst., Multnomah County Mental Health System Analysis 40 (2018). In contrast, the BOP puts the cost of a Federal Medical Center's daily bed at $200, over twice the normal cost of incarceration. Federal Prison System Per Capita Costs, FY2017, available at www.bop.gov/foia/docs/fy2017_per_capita_costs.pdf. The community-based restoration programs are efficient, cost-effective, and humane.

C. Detention Of Defendants With Mental Disabilities Without An Individualized Determination Of Necessity Violates Due Process, Equal Protection, And Federal Laws Protecting The Rights Of The Disabled.

Based on protective statutes and constitutional guarantees, mentally ill or intellectually disabled defendants should receive greater protections than other defendants. But mandatory incarceration of incompetent defendants flips these protections on their head, turning them into disfavored subjects of discrimination. Competent defendants receive a pretrial custody determination based on risk of flight and safety of the community, whereas defendants with mental disabilities who are

found incompetent face only mandatory detention. In other words, fewer protections and worse treatment for people who need protection the most.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). "Freedom 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 so, 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." *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) ("[M]ental illness, on its own, cannot serve as the sole basis for the government's authority to detain consistent with substantive due process.").

Thus, in *Jackson v. Indiana*, the Supreme Court held that, "indefinite commitment of a criminal defendant solely on account of his incompetency to stand

trial" violates due process. 406 U.S. 715, 731 (1972); *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, 491-92 (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.

The equal protection norms of the Fifth Amendment further protect mentally ill and intellectually disabled defendants against mandatory detention. In *Jackson*, the Court held that, by subjecting a mentally ill defendant "to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses," the state violated the defendant's equal protection rights. 406 U.S. at 730; *see also United States v. Sahhar*, 917 F.2d 1197, 1200 (9th Cir. 1990) (applying equal protection analysis to federal defendants). Mandatory detention violates equal protection because it subjects those found incompetent to stand trial to a less stringent detention standard than that required in 18 U.S.C. § 3142(e) for other pretrial defendants.

Mandating detention for defendants with mental disabilities based merely on a showing of incompetency to stand trial is not narrowly tailored to serve governmental interests. Even accepting that the government has a strong interest in restoring

incompetent defendants, commitment is often not necessary to achieve competency restoration. Absent proof that no less restrictive alternative is likely to achieve substantially the same result, § 4241(d) is not narrowly tailored to serve the government's interest in prosecution. Therefore, disparate standards for detention of pretrial defendants found incompetent to stand trial and all other pretrial defendants does not withstand equal protection scrutiny.

Moreover, the constitutional assessment of governmental and individual interests must occur in the context of norms established in federal disability law protecting defendants with mental illness and intellectual disabilities against mandatory detention. Protections enacted by Congress in the Rehabilitation Act (RA) and the Developmental Disabilities Assistance and Bill of Rights Act (DDA) prohibit the discrimination that mandatory detention inherently creates for incompetent defendants with mental illness or developmental disabilities. First, Section 504 of the RA requires the Department of Justice to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 39.130(d). The language of the "integration mandate" prohibits "[u]njustified isolation." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (addressing the substantially similar "integration mandate" in the Americans with Disabilities Act as it applies to the states). Unjustified isolation of a disabled person was "properly regarded

as discrimination based on disability." *Id.* Under the prevailing interpretation, 18 U.S.C. § 4241(d) mandates confinement for competency restoration without regard to whether it will lead to unjustified isolation and without determining whether there is a more "integrated setting" that could appropriately meet the needs of the defendant and the treatment necessary to return the defendant to competency.

Second, the DDA sets forth the rights of individuals with developmental disabilities. 42 U.S.C. § 15009. Treatment and services for individuals with developmental disabilities "should be provided in the setting that is least restrictive of the individual's personal liberty." § 15009(a)(2). Many defendants found to be incompetent are diagnosed with a developmental disability rather than a mental illness. For these defendants, § 15009 requires that competency restoration be provided in a setting "least restrictive" of their personal liberty. *Id*. The state restoration programs across the country show that community restoration is particularly effective for developmentally disabled individuals.

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 deserve protection the most.

II. The Court Should Construe The Statute To Require That The Judicial Commitment Specify The Degree Of Custody Authorized In The Pretrial Setting, Which Must Be Commensurate With The Constitutional Requirements Of Individualized Determination And The Least Restrictive Alternative.

The serious constitutional issues raised by mandatory imprisonment of presumptively innocent pretrial defendants warrant review and relief. However, the Court only reaches the constitutional issues if the statute cannot be construed to avoid serious constitutional problems. *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (en banc) ("The Supreme Court instructs us that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). "Thus, 'if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," we are obligated to construe the statute to avoid such problems.'" *Id*. at 564 (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

The competency statute has not been carefully construed in light of constitutional issues because the assumption in *Strong* was that the judicial commitment to "custody" meant the same degree of restraint as post-conviction custody under the sentencing statutes. *See* 18 U.S.C. § 3621(a) and (b) (commitment to Bureau of Prisons custody in the designated "penal or correctional facility"). But "custody" has a radically

different meaning in the pretrial context for presumptively innocent pretrial detainees on conditional release.

In *Salerno*, the 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. In the absence of detention, pretrial conditional release still constitutes "custody" as that term is used throughout the habeas corpus statutes addressing restrictions on liberty in the absence of criminal convictions. *Hensley v. Municipal Court*, 411 U.S. 345, 345 (1973) (holding that "a person released on his own recognizance is 'in custody' within the meaning of the federal habeas corpus statute"). Even in the context of a prison sentence, the difference between community corrections and incarceration involves cognizable custody for habeas corpus proceedings. *See Sacora v. Thomas*, 628 F.3d 1059, 1066-68 (9th Cir. 2010) (reviewing the BOP's implementation of increased access to community corrections); *Rodriguez v. Smith*, 541 F.3d 1180, 1187 (9th Cir. 2008) (striking down the BOP's categorical denial of eligibility for community corrections).

Freed from the restrictive view of post-sentencing "custody," the Court should take a fresh look at the statutory language and context, as informed by the assumption that Congress did not intend to write an unconstitutional law. *Nken v. Holder*, 556 U.S.

418, 426 (2009) ("[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.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[The doctrine 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.").

In this context, the words of the statute are amenable to construction to foreclose automatic incarceration of conditionally released pretrial defendants. The statute simply uses the term "custody" without any restriction preventing the trial judge from defining the scope of the custody: "the court shall commit the defendant to the custody of the Attorney General." 18 U.S.C. § 4241(d). Properly construed, 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. The Attorney General, upon such an instruction, "shall hospitalize the defendant for treatment at a suitable facility." *Id.*; *see United States v. Esquibel*, No. CR 08-0837, 2010 WL 11623616, at *4 (D.N.M. Feb. 1, 2010) (in the absence of statutory language to the contrary, the power to commit under § 4241(d)(1) includes the authority to limit the time and conditions of custody).

Under this construction, the trial judge would not order a particular program. Instead, 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. As opposed to categorical incarceration, the broad-custody interpretation is consistent with the requirement of an individualized determination of the least restrictive means of accomplishing legitimate governmental goals. *See United States v. Santos-Flores*, 794 F.3d 1088, 1091-92 (9th Cir. 2015) ("The court may not, however, substitute a categorical denial of bail for the individualized evaluation required by the Bail Reform Act.").

The broad interpretation of custody in § 4241(d) is supported by the contrasting language of the Bail Reform Act. Both § 4241(d) and the bail statute specify commitment to the custody of the Attorney General, but, for pretrial detention under the Bail Reform Act, the level of custody is further defined: "committed to the custody of the Attorney General for confinement *in a corrections facility*." 18 U.S.C. § 3142(i)(2) (emphasis added). In contrast, § 4241(d) simply states "commit the defendant to the custody" with no requirement that it be in a corrections facility at all. The § 3142(i)(2) direction for detention in a corrections facility, and the absence thereof for competency commitment, creates an inference that "custody" under § 4241(d) permits the judge to state the degree of custody appropriate given the

individual circumstances of the case. *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 statute is at least amenable to the broad construction of custody. "[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).

III. The Court Should Grant Rehearing En Banc To Ameliorate The Ethical Conflicts That Arise For Criminal Defense Attorneys Whose Conditionally Released Pretrial Clients Face Automatic Incarceration For Competency Restoration.

The representation of clients with mental disabilities in the criminal justice system involves conflicting duties that can create ethical dilemmas for defense attorneys. By granting rehearing to review the prevailing interpretation of § 4241(a), this Court can ameliorate the conflicts that arise when defense attorneys, faced with automatic incarceration of incompetent clients, must choose between duties to their clients and duties to the courts.

Defense attorneys owe a duty of candor to the court that arguably requires reporting concerns about a client's competency to stand trial, even if the client objects.

American Bar Association, *Criminal Justice Mental Health Standards*, § 7–4.3(c) (2016). At the same time, attorneys owe a duty of zealous representation that permits disclosure of information about mentally ill clients "*only to the extent reasonably necessary to protect the client's interests*." American Bar Association, *Model Rules of Prof'l Conduct* r. 1.14(c) (2018) (emphasis added). The Supreme Court's recent case law regarding protection of clients' personal autonomy to make decisions regarding representation, regardless of mental illness, adds an as-yet unexplored level to the ethical conflicts. *See United States v. Read*, No. 17-10439, 2019 WL 1196654, at *4 (9th Cir. Mar. 14, 2019) (counsel's presentation of insanity defense over the objection of a competent but mentally ill defendant violated the right to personal autonomy recognized in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)).

This Court should ameliorate these difficult problems by making clear that, by raising concerns regarding competency, defense counsel does not automatically condemn the client to termination of conditional release and automatic incarceration for restoration of competency. 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. *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).

Defense attorneys should not have to weigh the duty of candor to report doubts concerning clients' competence against their duty to protect clients against automatic incarceration that 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.").

The best solution for defense attorneys and their mentally ill clients is to reach agreement regarding disclosures within the limits of the mental illness, respecting as far as possible the wishes of the client. *See* Model Rule 1.14 cmt. 8. But the Model Rules fail to offer adequate guidance to defense attorneys faced with the ethical

dilemma created by their conflicting duties of candor to the court and protection of their clients' interests, acknowledging in the commentary that "[t]he lawyer's position in such cases is an unavoidably difficult one."[3]

Ethical solutions are far easier to achieve when, for defendants who have established that conditional release creates neither risk of flight nor danger to the community, agreed disclosure to the court, achieved within attorney-client privileged discussions, does not automatically require indefinite incarceration. Defense attorneys must adopt careful, creative, and caring approaches to the infinite variables in cases involving the ethical dilemmas faced while representing the criminally accused who are mentally disabled. The Court should ameliorate the dilemmas and expand the ethical options by clearly holding that attorneys' questions regarding competence, if grounded, do not automatically require incarceration of their previously released pretrial clients.

[3] *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.").

CONCULSION

The Court should grant rehearing en banc and either construe § 4241(d) to authorize commitment to custody in the community or hold that the commitment statute is unconstitutional to the extent it subjects mentally disabled pretrial defendants to mandatory incarceration without individualized consideration.

Respectfully submitted this 1st day of April, 2019.

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