19-10300

(Panel: BADE, BYBEE, TALLMAN, Circuit Judges)
Opinion: April 29, 2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

SONIA QUINTERO
Defendant-Appellant.

On Appeal from the Judgment of the
United States District Court for the District of Arizona, Tucson
D.Ct. No. 4:17-cr-01895-JAS-LAB-1

APPELLANT'S PETITION FOR PANEL REHEARING (FRAP 40) AND REHEARING EN BANC (FRAP 35)

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COUNSEL'S STATEMENT

Appellant Quintero was released under the Bail Reform Act and later found incompetent to stand trial. Despite her compliance with pretrial release conditions, the district court—applying *United States v. Strong*, 489 F.3d 1055 (9th Cir. 2007)—ordered her detention for competency-restoration treatment under 18 U.S.C. § 4241(d), without an individualized consideration of whether confinement is necessary to achieve the government's interests. The panel held that it was "bound by" *Strong* to reject Quintero's argument that such automatic detention violates due process. *United States v. Quintero*, 995 F.3d 1044, 1053 (9th Cir. 2021) ("*Quintero* Op."). The en banc Court should grant rehearing and overrule *Strong*, or grant relief on another basis:

- *Strong* conflicts with the reasoning of *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc) and *Sell v. United States*, 539 U.S. 166 (2003)—not considered by *Strong*—which each held that due process requires an individualized showing of necessity to justify a significant deprivation of liberty.

- *Strong* did not (and, in 2007, could not) address the effectiveness of contemporary outpatient restoration programs, but the panel held that it nevertheless remained bound by *Strong*.

- The Georgia Supreme Court recently rejected *Strong* and—relying, *inter alia*, on *Sell*—held that automatic confinement for competency restoration violates due process. *Carr v. State*, 815 S.E.2d 903 (Ga. 2018).

- *Strong* contravenes American Bar Association (ABA) standards and the Rehabilitation Act, a federal law protecting individuals with disabilities.

- Because of *Strong*, nondangerous intellectually disabled or mentally ill defendants released under the Bail Reform Act are routinely and unnecessarily incarcerated before trial because of competency issues, while otherwise similarly situated defendants are allowed to remain at liberty.

The panel held that it remained "bound by" *Strong* "[e]ven if there is recent empirical evidence confirming the effectiveness of outpatient treatment," and "even if [it] thought [*Carr*] persuasive," and it suggested that Quintero seek higher review. *Quintero* Op., 1053-54.

Contrary to *Strong*'s holding, automatic detention for competency restoration violates due process. It also violates equal protection, a hybrid of the due process and equal protection guarantees, the Sixth Amendment, the Eighth Amendment, and the Rehabilitation Act. *See* Opening Brief (OB), 26-65. Accordingly, this Court should vacate the district court's order and invalidate any portion of 18 U.S.C. § 4241(d) that cannot be construed to allow the individualized showing of necessity required by the Constitution before a defendant may be incarcerated for competency restoration. *See* OB, 16-25.

The panel should rehear this case because it overlooked *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008), which is highly relevant to the significance of *Sell* and to the proper application of *Lopez-Valenzuela* under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

The en banc Court should grant rehearing and overrule *Strong* to ensure that federal competency restoration complies with the Constitution, ABA

standards, and the Rehabilitation Act, which all require outpatient competency-restoration treatment if it is adequate to achieve the government's interests.

THE STATUTE AND DISTRICT COURT RULING

Under 18 U.S.C. § 4241(d), if a district court finds that a defendant is incompetent, "the court shall commit the defendant to the custody of the Attorney General," and "[t]he Attorney General shall hospitalize the defendant for treatment in a suitable facility" for a "reasonable period of time, not to exceed four months, as is necessary" to determine whether there is a substantial probability that she can attain competency in the foreseeable future. The court may later extend the commitment period for "an additional reasonable period of time." *Id*.

"Suitable facility" is defined as "a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant," and includes state and private treatment providers. §§ 4247(a)(2) and (i)(A)&(C).

Here, the district court found Quintero incompetent based on a neurocognitive disorder caused by a traumatic brain injury that left her with problem-solving deficits. The court later affirmed the magistrate judge's commitment order, which requires Quintero's detention in a Bureau of Prisons (BOP) facility for competency restoration. 1-ER-08-25.

Following *Strong*, the district court ordered Quintero's incarceration without finding that this deprivation of her pretrial liberty is necessary to achieve the

government's interests (1-ER-22), even though suitable local outpatient competency-restoration programs are available, Quintero is willing to participate in such a program as a condition of release (2-ER-51, 3-ER-221-34), and the doctor who evaluated her opined that—because Quintero's deficits would make her particularly vulnerable in an correctional setting—she should remain out of custody should the district court decide to attempt restoration. 3-ER-186. Nevertheless, the district judge, a former state judge familiar with Arizona's outpatient restoration programs, was "sympathetic" to Quintero's position because "out-of-custody restoration is more economically efficient" and has "proven effective at the state level." 1-ER-17; 2-ER-129.

The district court stayed its order, 2-ER-158, and Quintero remains on pretrial release, pending this appeal's resolution.

ARGUMENTS

I. Automatic detention for competency restoration, as endorsed by *Strong* and affirmed in *Quintero*, violates due process and conflicts with the reasoning of Supreme Court and en banc Ninth Circuit precedent.

A. Automatic detention violates substantive due process.

As this Court—sitting en banc and relying on Supreme Court precedent—has confirmed, freedom from confinement before or without trial is a "fundamental right." *Lopez-Valenzuela*, 770 F.3d at 780-81 (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987) and *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992)). "[H]eightened scrutiny" must be applied when evaluating whether a statute or

court order that "infringe[s] a 'fundamental' right" violates "substantive due process." *Lopez-Valenzuela*, 770 F.3d at 780 (citation omitted) (holding that a law forbidding bail for undocumented immigrants violated due process).

Because pretrial liberty is a fundamental right, substantive due process requires "case-by-case determinations of the need for pretrial detention," and the government must prove by "clear and convincing evidence" that "no conditions of release c[ould] reasonably" address the government's interest in detention. *Id.*, 784-85 (citation omitted). In other words, pretrial detention cannot be based on "an overbroad, irrebuttable presumption rather than an individualized hearing" to determine whether less restrictive means are sufficient to meet the government's objectives. *Id.*, 784.

The Bail Reform Act, 18 U.S.C. § 3142, satisfies these requirements. *Salerno*, 481 U.S. 739. Section 4241(d) does not, however, specify that these conditions must be met before a defendant found incompetent to stand trial may be incarcerated for competency-restoration treatment. And this Court held in *Strong*, 489 F.3d at 1060-61, and reaffirmed in *Quintero*, that no individualized determination of necessity is required before a district court may order a defendant's pretrial detention for this purpose.

Due process, however, requires that, before a defendant released under the Bail Reform Act may be detained for competency restoration, the government must prove that any less restrictive alternative is substantially unlikely to achieve

the same result. The Supreme Court last addressed the requirements of due process in the competency-restoration context in *Sell*, 539 U.S. 166, in which the Court characterized the defendant's liberty interest in refusing antipsychotic medication as "significant." *Id.*, 178. (Mr. Sell was detained under the Bail Reform Act before his competency-restoration proceedings commenced. *Id.*, 170.) It held that the government may forcibly medicate a defendant facing serious criminal charges in order to attain competency, but only if treatment is "medically appropriate," is "substantially likely to render the defendant competent to stand trial," and, "taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.*, 179-81.

Under the rationale of *Sell* and *Lopez-Valenzuela*, pretrial detention for competency restoration requires proof that no less restrictive alternative than confinement could reasonably address the government's interest in competency restoration. Indeed, freedom from pretrial confinement is a "fundamental right," not just a "significant" liberty interest. Without such a showing, detention for competency restoration is excessive in relation to the government's interests and, thus, also violates due process because it impermissibly imposes punishment without an adjudication of guilt. *Lopez-Valenzuela*, 770 F.3d at 789-91.

In holding that *Strong* remains binding precedent, the panel noted that *Salerno*, *Sell*, and *Lopez-Valenzuela* dealt with different circumstances. *Quintero* Op., 1053-54. But the reasoning of these cases applies in the restoration-to-

competency context. Like the class of defendants at issue in *Lopez-Valenzuela*, defendants on pretrial release who are found incompetent to stand trial are then "categorically denied bail, that but for their … status, would have been routinely afforded to them." *Id.* In fact, as to these incompetent defendants, bail that had already been granted is stripped from them without any determination that pretrial detention is a necessary means of achieving the government's competency-restoration interests. Thus, the panel erred in concluding that *Strong* is not "clearly irreconcilable" with the reasoning of *Lopez-Valenzuela*. *See Miller*, 335 F.3d 889; *Witt*, 527 F.3d at 815-819 (holding that, although *Sell* concerned different context, prior cases addressing "Don't Ask Don't Tell Policy" were clearly irreconcilable with *Sell* under *Miller* standard).

Moreover, this Court has applied *Sell*'s rationale in contexts very different than forced medication for competency restoration. In *Witt*, *id.* (emphasis added), which the panel overlooked, this Court concluded that—because the "Don't Ask Don't Tell" policy implicated the "significant liberty interest" in private homosexual sodomy—it must be evaluated under the level of scrutiny established in *Sell* for the "significant liberty interest" in refusing forced medication, i.e., the "intrusion must be *necessary* to further [the government's] interest." As freedom from pretrial detention is undisputedly a "significant liberty interest," *Sell*'s rationale likewise requires a showing of necessity to justify carceral rather than outpatient competency restoration.

This Court made the contrary ruling in *Strong*, 489 F.3d 1055—which predates *Lopez-Valenzuela* and did not address *Sell*—in 2007, before the recent proliferation of successful outpatient restoration programs. The *Strong* Court relied on federal cases dating from the 1970s. *See Strong*, 489 F.3d at 1061-62 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *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)).

The Supreme Court did not address whether automatic confinement for competency restoration violates due process in *Jackson*, 406 U.S. 715. *Jackson* merely held that the indefinite detention of incompetent defendants violates due process; the defendant challenged only his prolonged detention, not the initial decision to detain him. *Id.*, 719, 737-38. *See also* Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 24-26 (2017).

Recent empirical evidence demonstrating the efficacy of outpatient restoration for appropriate defendants belies the reasoning of *Strong* and the earlier federal circuit cases. Today, a substantial majority of states allow for or provide outpatient competency restoration, with positive results, including high rates of restoration and low rates of negative incidents. W. Neil Gowensmith, *Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration As A Promising*

Approach to Modern Challenges, 22 PSYCHOL. PUB. POL'Y & L. 293, 296-301 (2016) ("Gowensmith"); Amicus Brief of the Arizona Center for Disability Law in *United States v. Nino*, No. 17-10546, 2018 WL 2193706 (9th Cir), *16-22 ("ACDL Amicus Brief").

In Arizona, for example, outpatient competency restoration is commonplace. The governing state statute requires the court to select the "least restrictive treatment alternative" after considering individualized circumstances. ARIZ. REV. STAT. § 13-4512. As the district court found in this case, Arizona's outpatient restoration programs have "proven effective." 1-ER-17.

The *Strong* Court simply did not have the benefit of now-available evidence that outpatient competency-restoration programs are, in many circumstances, at least as effective as in-custody programs and are typically much less expensive. *See* Gowensmith and ACDL Amicus Brief, *supra*. Instead, the *Strong* Court looked "first and foremost" to the Supreme Court's 1972 opinion in *Jackson*, despite its historical context and its consideration of a different issue. 489 F.3d at 1060. And *United States v. McKown*, 930 F.3d 721 (5th Cir. 2019), *cert. denied*, the only recent federal opinion on this specific issue, did not meaningfully address the possibility that outpatient services could, in some cases, meet the government's competency-restoration interests.

As the Georgia Supreme Court recently observed, confinement may actually impede the government's purpose of achieving competency restoration in some

circumstances. *Carr*, 815 S.E.2d at 915. The stress of detention, especially at a BOP facility far from the defendant's support network, can exacerbate mental health issues or make it more difficult for intellectually disabled individuals to learn. Moreover, ongoing medical staffing shortages hinder BOP's ability to provide timely, adequate treatment. *See* Office of the Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges* (March 2016);[1] C. Woehr, *Justice Delayed: The Plight of Incompetent Federal Pretrial Detainees*, 11 ALA. C.R. & C.L. L. REV. 208 (2019-2020).[2]

Thus, today, outpatient restoration programs are just as effective as inpatient programs for many defendants, and outpatient programs are sometimes in a better position to accurately assess the defendant's likelihood of attaining competence and to provide restorative treatment. Due process analysis requires consideration of *today's* standards. *Obergefell v. Hodges*, 576 U.S 644, 673, 670-81 (2015) (intersection of due process and equal protection concerns required invalidation of legislative same-sex marriage prohibitions).

ABA standards mirror the requirements of due process. Under these standards, a "defendant should not be involuntarily hospitalized to restore or sustain competence unless the court determines by clear and convincing evidence

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[1]https://oig.justice.gov/reports/2016/e1602.pdf (last visited 5/20/21).
[2]https://heinonline.org/HOL/LandingPage?handle=hein.journals/alabcrcl11&div=12&id=&page= (last visited 5/25/21).

that: (A) treatment appropriate for the defendant to attain or maintain competence is available in the facility; and (B) no appropriate treatment alternative is available that is less restrictive than placement in the facility." ABA, *Criminal Justice Mental Health Standards*, std. 7-4.10(a)(iii) (2016).[3] "A defendant has a right to treatment in the least restrictive setting appropriate to restore competence to proceed." *Id.*, 7-4.11(c).

Federal disability laws likewise require that services for intellectually disabled individuals be provided in the most integrated setting appropriate to the needs of those individuals. *See* 29 U.S.C. § 794(a) (Rehabilitation Act); 28 C.F.R. § 39.130(d); ACDL Amicus Brief, *9-25.

As explained above, because pretrial liberty is undisputedly a fundamental right, heightened scrutiny must apply. But, as the Georgia Supreme Court recently held—relying, *inter alia*, on *Sell* and the current availability of outpatient competency-restoration services—automatic confinement for competency restoration violates due process even under mere "reasonable relation" scrutiny. *Carr*, 815 S.E.2d at 914-16. After considering the reasoning of *Strong* and other federal cases approving automatic confinement under 18 U.S.C. § 4241(d), the Georgia court determined that such detention did not even bear a reasonable

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[3]available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (last visited 5/20/21).

relation to governmental competency-restoration interests for individuals charged with even violent crimes. *Id.*, 914-16. It emphasized that other states had concluded that detention is not always necessary to determine whether there is a substantial probability that the accused will attain competency. *Id.*, 914, n.16. Although the *Carr* court agreed with federal appellate courts that determination of a defendant's likelihood to regain competency requires a "careful and accurate diagnosis," it observed that "these courts have [not] explained why commitment is reasonable in every case to achieve this," because a defendant may be carefully evaluated by qualified professionals as an outpatient. *Id.*, 914. It concluded that a court must consider each defendant's individualized circumstances in determining whether custodial confinement is necessary and appropriate to further the government's competency-restoration interests. *Id.*, 906, 916-17.

Because of *Strong*, federal defendants in this circuit are routinely deprived of pretrial liberty in violation of due process, and district judges who follow *Strong* and order such confinement also routinely violate ABA standards and facilitate unjustified discrimination against individuals with disabilities. Defendants are often found incompetent solely based on an intellectual or cognitive disability, with no circumstances that would justify custodial treatment. Thus, defendants—initially released under the Bail Reform Act—are routinely deprived of liberty merely because they have such a disability, while otherwise similarly situated defendants with higher intellectual functioning are able to remain at liberty. The en

banc Court should put an end to this offensive and unconscionable practice, endorsed—and ostensibly required—by *Strong*. *See* 489 F.3d at 1062 ("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.'") (citation omitted).

B. Automatic detention violates procedural due process.

In addition—independent of substantive due process—procedural due process requires an adversarial hearing with a neutral decisionmaker before a defendant released under the Bail Reform Act may be committed to a custodial, inpatient institution for competency restoration. In *Vitek v. Jones*, the Supreme Court held that due process requires this procedure before a convicted state inmate may be transferred to a mental hospital based on a prison doctor's determination that he cannot be given proper treatment in the prison. 445 U.S. 480, 489-95 (1980) (explaining that procedural due process protections were grounded both in the requirements of the applicable state statute and due process). In the federal competency-restoration context, these procedural protections are grounded both in the "necessity" and "suitability" requirements of 18 U.S.C. § 4241(d), §§ 4247(a)(2), (i)(A) and (C), as well as the Due Process Clause itself, which protects against unnecessary confinement in a mental hospital because such confinement produces "a massive curtailment of liberty." *Vitek*, 445 U.S. at 491

(citation omitted).

Vitek's holding applies with even greater force here because pretrial defendants released under the Bail Reform Act have a stronger liberty interest than convicted inmates. Under *Vitek*'s rule, a neutral decisionmaker—here, the district court—must determine that outpatient programs in the defendant's community are inadequate before the defendant may be institutionalized for competency restoration. *Cf. Sell*, 539 U.S. at 180-81 (district court must make findings necessary to order forced medication for competency restoration).

The panel held that 18 U.S.C. § 4241(d)'s procedures for determining that a defendant is incompetent, along with the statute's durational limitation on confinement to a "reasonable period of time," afford sufficient procedural protections. *Quintero* Op., 1055-56. The panel, however, missed the point. The salient issue here is not whether someone is incompetent and in need of restorative treatment, but whether—given the nature of the defendant's underlying mental illness or disability—it is necessary to deprive her of pretrial liberty *at all* in order to provide effective treatment. For defendants who are ultimately acquitted or receive probation, or whose charges are ultimately dismissed, even one day of pretrial incarceration is unjustified, if that incarceration is unnecessary to further the government's competency-related interests. *See Sandin v. Conner*, 515 U.S. 472, 487 (1995) (state action that affects duration of inmate's sentence implicates due process liberty interest); *Teague v. Quarterman*, 482 F.3d 769, 771 (5th Cir.

2007) (state must afford due process before depriving inmate of any previously earned good-time credits, however slight).

In any event, because of BOP's ongoing staffing shortages, requests for extensions of the initial four-month period under § 4241(d)(2) are the norm, and defendants typically spend at least eight months in treatment. *See* OB, 34-35; p. 10, *supra.* Incompetent defendants charged with misdemeanors or relatively minor non-violent felonies, like Quintero, thus can easily spend more time incarcerated for competency restoration than they would ever face if ultimately convicted.

II. Automatic detention for competency restoration violates equal protection.

Because freedom from pretrial detention is a fundamental right, any classification requiring such detention based on incompetence to stand trial is subject to strict scrutiny, i.e., it must be narrowly tailored to serve a compelling government interest. *See Dunn v. Blumstein*, 405 U.S. 330, 338-39, 342 (1972) (classifications that burden fundamental rights must be "necessary to promote a compelling governmental interest"); *Liberian Cmty. Ass'n of Connecticut v. Lamont*, 970 F.3d 174, 187 (2d Cir. 2020) (recognizing that "least-restrictive means" test applies to physical confinement of mentally ill). Automatic detention for competency restoration violates equal protection because, *inter alia*, it subjects those found incompetent to stand trial to a less stringent detention standard than that required in the Bail Reform Act for other pretrial defendants, who cannot be

detained absent a showing of dangerousness or flight risk. *See* OB, 45-53. The panel concluded that "the two situations are not comparable for equal protection purposes." *Quintero* Op., 1057.

The panel, however, did not engage in the necessary inquiry into whether the difference justifies the differential treatment. For example, in *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), the Court considered the validity of a zoning ordinance that required a special use permit for group homes for the mentally disabled but did not require such a permit for group homes housing other individuals, such as boarding houses and fraternities. Although the Court noted that "the mentally [disabled] as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit," *id.*, 448, the Court nevertheless found an equal protection violation because the reasons put forward by the city were constitutionally insufficient to justify the differential treatment. *Id.*, 448-49. Equal protection of the laws demands that "the difference [between the relevant groups] warrants" a burden that "others need not" bear. *Id.*, 450.

Likewise, here, there is no need to subject nondangerous, incompetent defendants to pretrial detention for competency restoration while allowing competent, nondangerous defendants to remain free *unless* detention is necessary to achieve competency-restoration goals. As explained above, inpatient

confinement is *not* always necessary to achieve those goals; in fact, sometimes such detention can be counterproductive.

III. Automatic detention for competency restoration violates a hybrid of due process and equal protection guarantees.

The right of intellectually disabled or mentally ill individuals to pretrial liberty absent a showing of necessity is analogous to the convergence of equal protection and due process principles in the context of revoking a defendant's probation for failure to pay a fine. In *Bearden v. Georgia*, 461 U.S. 660, 665-666, 672 (1983), the Supreme Court held, based on this convergence, that if a probationer cannot pay a fine despite bona fide efforts, the sentencing court must consider alternate measures of punishment and may impose prison time only if alternate measures are inadequate to meet state interests. As the Court explained, this analysis requires "careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose … .'" *Id.*, 666-67 (citation omitted).

Under *Bearden*'s reasoning, before pretrial defendants may be incarcerated for competency-restoration treatment, the district court must consider whether less restrictive, alternative means of treatment are adequate to meet the government's interests. "To do otherwise would deprive" defendants of pretrial freedom "simply because, through no fault of [their] own," *id.* at 672-673, they have a disability that

renders incompetent them to stand trial. "Such a deprivation would be contrary to … fundamental fairness," *id.* at 673, which is the "touchstone of due process." *Id.*, 666 n.7 (citation omitted). Indeed, *Bearden*'s reasoning applies with greater force in this context, because defendants have even less control over whether they have an intellectual disability or mental illness rendering them incompetent than they do over whether they can pay a fine.

This hybrid due process and equal protection analysis is particularly appropriate here because, in this context, "[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other." *Obergefell*, 576 U.S. at 673 (discussing intersection of due process and equal protection in the same-sex marriage context). As explained above, precedent firmly establishes the fundamental right to pretrial liberty. It also establishes that involuntary confinement for treatment of intellectual disability or mental illness imposes "more than a loss of freedom from confinement," *Vitek*, 445 U.S. at 492, because of its "stigmatizing consequences." *Id.*, 494; ACDL Amicus Brief, *5-9. In short, automatic detention for competency restoration without proof of necessity not only deprives disabled individuals of liberty but also "serves to disrespect and subordinate them." *Obergefell*, 576 U.S. at 675.

The panel declined to find a "synergy in [the due process and equal protection] clauses that is greater than either of the clauses individually." *Quintero* Op., *1058. But the Supreme Court, by its own terms, has relied on the

intersection of those guarantees to find constitutional violations in various contexts, because the circumstances implicated both discrimination and essential fairness. *Obergefell*, 576 U.S. at 672; *M.L.B. v. S.L.J.*, 519 U.S. 102, 110, 116, 120-21, 125-26 (1996) (holding that state may not dismiss an appeal of parental rights' termination based on parent's inability to pay for record preparation and noting that neither due process nor equal protection alone would require this result); *Bearden*, 461 U.S. at 665-67. *See also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name,* 129 HARV. L. REV. F. 16, 26-27 (2015) (noting that *Obergefell* "relies on no single clause" but "intertwin[es] … the Equal Protection and Due Process Clauses into a principle of equal dignity").

CONCLUSION

The panel or en banc Court should grant rehearing.

Respectfully submitted this 27th day of May 2021.

JON M. SANDS
FEDERAL PUBLIC DEFENDER

s/ ***M. Edith Cunningham***
M. EDITH CUNNINGHAM
Assistant Federal Public Defender
Attorneys for Appellant Mr. Nino

CERTIFICATE OF COMPLIANCE

Form 11. Certificate of Compliance for Petition for Rehearing or Answers

9th Cir. Case Number 19-

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

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Dated: May 27, 2021

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Signature: ***s/ M. Edith Cunningham***
M. EDITH CUNNINGHAM
Assistant Federal Public Defender

995 F.3d 1044
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Sonia QUINTERO, Defendant-Appellant.

No. 19-10300
|
Argued and Submitted November 17, 2020 Phoenix, Arizona
|
Filed April 29, 2021

Synopsis

Background: In prosecution for conspiracy to possess with intent to distribute and possession with intent to distribute marijuana, the United States District Court for the District of Arizona, James A. Soto, J., 2019 WL 3973706, denied defendant's objection to the order of Leslie A. Bowman, United States Magistrate Judge, finding that defendant was incompetent to stand trial and ordering commitment for inpatient competency restoration treatment. Defendant appealed.

Holdings: The Court of Appeals, Bybee, Senior Circuit Judge, held that:

inpatient commitment is required under Insanity Defense Reform Act (IDRA);

mandatory commitment for competency restoration assessment and treatment does not violate substantive due process;

IDRA does not violate procedural due process; and

defendant was not similarly situated to pretrial detainees who were denied bail, for equal protection purposes.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

Appeal from the United States District Court for the District of Arizona, James Alan Soto, District Judge, Presiding, D.C. No. 4:17-cr-01895-JAS-LAB-1

Attorneys and Law Firms

M. Edith Cunningham (argued) and James D. Smith, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Defendant-Appellant.

Shelly K.G. Clemens (argued), Assistant United States Attorney; Christina M. Cabanillas, Deputy Appellate Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

Before: Richard C. Tallman, Jay S. Bybee, and Bridget S. Bade, Circuit Judges.

OPINION

BYBEE, Circuit Judge:

Sonia Quintero was found incompetent to stand trial and was committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d) for assessment of her potential for restoration to competency. Under Department of Justice policy, Quintero was to be hospitalized in an inpatient facility for evaluation and treatment. Quintero argues that the district court should have ordered evaluation and treatment in an outpatient facility and that her commitment violates her statutory and constitutional rights.

We affirm the district court's commitment order.

I. PROCEDURAL HISTORY

In December 2017, Quintero was charged in the District of Arizona with conspiracy to possess with intent to distribute and possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B)(vii). During pretrial proceedings, Quintero filed a motion to determine competency, along with a neuropsychological evaluation concluding that Quintero was incompetent to stand trial due to cognitive impairment resulting from severe traumatic brain injury and that she was not restorable to competency. The magistrate judge ordered a second psychiatric evaluation,

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which concluded that Quintero was incompetent to stand trial but was restorable to competence.

After an evidentiary hearing with testimony from both evaluators, the magistrate judge agreed that Quintero was not competent to stand trial, but determined that she was likely restorable to competence.[1] ***1049** Quintero objected to mandatory commitment for competency restoration and instead requested outpatient treatment. However, the magistrate judge found that commitment was mandated by 18 U.S.C. § 4241(d) and ordered her committed to the custody of the Attorney General.

1 We note that the second half of the magistrate judge's finding exceeded the scope of § 4241(d), which only authorizes the court to determine whether the defendant is suffering from a mental disease or defect that renders him incompetent to stand trial, not whether the defendant is restorable to competency at that point in the proceedings. This extraneous finding does not affect our analysis here.

Quintero objected to the magistrate judge's order, but the district court overruled the objection. Quintero timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291 and pursuant to the collateral order doctrine. *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004). We review challenges to the constitutionality of a statute and questions of statutory construction de novo. *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Kowalczyk*, 805 F.3d 847, 856 (9th Cir. 2015).

III. DISCUSSION

The Insanity Defense Reform Act (IDRA), 18 U.S.C. §§ 17, 4241–47, governs pretrial competency evaluation and restoration. Section 4241 provides in relevant part:

> If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility–
>
> (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and
>
> (2) for an additional reasonable period of time until–
>
> (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or
>
> (B) the pending charges against him are disposed of according to law;
>
> whichever is earlier.

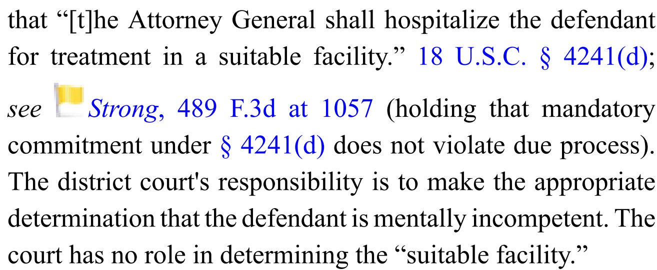
18 U.S.C. § 4241(d).

Quintero raises seven distinct challenges to her mandatory inpatient commitment under § 4241(d). She argues: (1) § 4241(d) grants the district court discretion to order a specific form of treatment, and the policies of the Attorney General and Bureau of Prisons (BOP) violate the Constitution; mandatory commitment violates (2) due process, (3) equal protection, (4) fundamental fairness, (5) the Sixth Amendment, and (6) the Eighth Amendment; and (7) mandatory commitment discriminates on the basis of disability in violation of the Rehabilitation Act and the Americans with Disabilities Act. None of these arguments is persuasive.

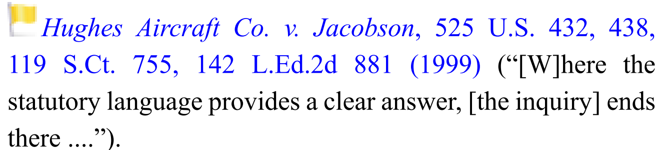
***1050** A. *Statutory Construction*

1. District Court Discretion under 18 U.S.C. § 4241

Quintero argues that § 4241(d) grants the district court discretion to order outpatient competency restoration assessment and treatment. This contention is meritless. The statute is clear that upon finding a defendant mentally incompetent to stand trial, "the court shall commit the defendant to the custody of the Attorney General" and

that "[t]he Attorney General shall hospitalize the defendant for treatment in a suitable facility." 18 U.S.C. § 4241(d); *see*  *Strong*, 489 F.3d at 1057 (holding that mandatory commitment under § 4241(d) does not violate due process). The district court's responsibility is to make the appropriate determination that the defendant is mentally incompetent. The court has no role in determining the "suitable facility."

Other provisions of the IDRA support this construction of § 4241(d). For an initial psychological evaluation of a pretrial defendant—the step before commitment for competency restoration evaluation—Congress employed almost identical language to § 4241(d), except that it used the permissive verb "may" in § 4247(b). *See* 18 U.S.C. § 4247(b) ("[T]he court *may* commit the person to be examined for a reasonable period ... to the custody of the Attorney General for placement in a suitable facility.") (emphasis added)). And the IDRA provides that upon restoration of competency, "the court *shall* order his immediate discharge from the facility in which he is hospitalized." *Id.* § 4241(e) (emphasis added). In order for Quintero's proposed reading of § 4241(d)—that "shall" means "may"—to be consistent, we would have to read § 4241(e) to be permissive as well, a reading we are confident Quintero would not support. If there is discretion here, it rests with the Attorney General, as elsewhere the IDRA provides that the Attorney General "shall ... consider the suitability of the facility's rehabilitation programs in meeting the needs of the person" and "may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody." *Id.* § 4247(i)(A), (C).

Quintero attempts to draw inferences from definitions of "custody" and "hospitalize" in other statutes. We need not consider these, because any such inferences are irrelevant where, as here, the language of the statute is unambiguous.  *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) ("[W]here the statutory language provides a clear answer, [the inquiry] ends there ....").

We hold that § 4241(d) mandates that district courts commit mentally incompetent defendants to the custody of the Attorney General for treatment, without discretion for the court to order a particular treatment setting.

2. Attorney General and Bureau of Prison Policies

Quintero next asserts that under Attorney General and Bureau of Prison (BOP) policies,[2] defendants are automatically hospitalized and that this contravenes her construction of the statute in violation of the Take Care Clause of Article II and general separation of powers principles. ***1051** *See* U.S. Const. art. II, § 3. Quintero offers no particular assessment of the Take Care Clause or the separation of powers. Rather, she asserts that the phrase "as is necessary" in § 4241(d)(1) requires the Attorney General to consider the need for hospitalization to achieve competency restoration. Because, in her view, the policies are inconsistent with the statute, Quintero argues that the Attorney General and BOP have failed to take care that the statute be faithfully executed. We find no merit in these arguments.

2 The BOP policies referenced by Quintero are quite general. " '[H]ospitalization in a suitable facility' includes the [BOP's] designation of inmates to medical referral centers or correctional institutions that provide the required care or treatment." 28 C.F.R. § 549.41; *see also* BOP Program Statement P5070.12, at 6–7 (Apr. 16, 2008) ("[I]nmates requiring hospitalization by statute ... will be designated to a Medical Referral Center.").

Section 4241(d) grants the Attorney General the discretion to "hospitalize" the defendant for treatment in a "suitable facility." The IDRA defines "suitable facility" as treatment in a "facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant." *Id.* § 4247(a)(2). The statute does not enjoin the Attorney General to choose the least restrictive treatment, a judgment that would constrain the Attorney General's options and potentially open this process to endless litigation over the range of appropriate restorative medical treatments.

Quintero also points to the phrase "as is necessary" in § 4241(d)(1) as constraining the Attorney General's choice of treatment. This misreads the statute. Section 4241(d)(1) instructs the Attorney General to hospitalize a mentally incompetent defendant "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) (emphasis added). The phrase "as is necessary" modifies "reasonable period of time," not "suitable facility." It is a temporal limitation, not a mandate to consider the necessity of inpatient treatment.

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The history of the IDRA supports this conclusion. Congress enacted § 4241(d) in response to the Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Indiana's incompetency statute authorized indefinite commitment for mentally incompetent defendants. The Supreme Court held that a defendant "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [ ] capacity in the foreseeable future." *Id.* at 738, 92 S.Ct. 1845. The temporal limitation Congress added to § 4241(d) remedied this defect in the federal statute. *See* *Strong*, 489 F.3d at 1061 ("[Section] 4241(d) was enacted in response to the *Jackson* decision and echoed *Jackson*'s language."). The "as is necessary" language instructs the Attorney General to give individualized consideration of the period of time—with an outer limit—necessary to assess and restore competency. Nothing in the Attorney General's and BOP's policies contravenes § 4241(d).

B. *Due Process*

Quintero argues that mandatory commitment under 18 U.S.C. § 4241(d) raises both substantive and procedural due process concerns. The Due Process Clause of the Fifth Amendment mandates that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause "protects individuals against two types of government action": violations of substantive due process and procedural due process. *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). "[S]ubstantive due process prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *Id.* (internal quotation marks and citations omitted). Procedural due process requires that, even where a ***1052** deprivation of liberty survives substantive due process scrutiny, the action "be implemented in a fair manner." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Neither of Quintero's due process challenges has merit.

1. Substantive Due Process

Quintero first argues that mandatory commitment under § 4241(d) violates her substantive due process rights. She claims freedom from confinement before trial is a "fundamental right" and that we must apply heightened scrutiny to the custodial provisions of § 4241(d). *See* *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc).

Pretrial commitment is "a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). In *Jackson v. Indiana*, the Supreme Court addressed the due process requirements for pretrial commitment for competency restoration. 406 U.S. at 738, 92 S.Ct. 1845. Indiana—as did the United States and other states—provided that mentally incompetent defendants could be confined indefinitely. *Id.* at 731–36, 92 S.Ct. 1845. The Supreme Court held the Indiana statute was unconstitutional insofar as it provided for indefinite commitment without "the customary civil commitment proceeding that would be required to commit indefinitely any other citizen." *Id.* at 738, 92 S.Ct. 1845. The Court held that a person hospitalized for competency restoration "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" and that "continued commitment must be justified by progress toward" the goal of competency restoration. *Id.* at 738, 92 S.Ct. 1845.

As we previously noted, 18 U.S.C. § 4241(d) was added to conform to the Court's holding in *Jackson*. *Strong*, 489 F.3d at 1061. In *Strong*, we held that § 4241(d) complies with the requirements of due process under the framework set out in *Jackson*. We began from the premise that "the right to be free from Government confinement ... is the very essence of the liberty protected by the Due Process Clause" and that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 1060 (quoting *Reno v. Flores*, 507 U.S. 292, 346, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993), and *Salerno*, 481 U.S. at 755, 107 S.Ct. 2095). First, we found that "the duration of the defendant's commitment" under § 4241 is "inherently limited" to "such a reasonable period of time, not to exceed four months, as is necessary' " to determine the likelihood of competency restoration. *Id.* at 1061–62 (quoting § 4241(d)). Second, we held that in determining

whether a "defendant is susceptible to timely restoration," there was a "close[ ] ... fit between the commitment and the purpose for which such commitment is designed." *Id.* at 1061. We noted that "[s]uch a determination requires a more careful and accurate diagnosis than the brief interviews and review of medical records that tend to characterize the initial competency proceeding." *Id.* at 1062 (internal quotation marks and citation omitted). We thus rejected Strong's argument that § 4241(d) violated his substantive due process rights. [3]

3 We also noted that at least three circuits had rejected similar challenges. *Strong*, 489 F.3d at 1063 (citing *United States v. Filippi*, 211 F.3d 649, 651–52 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301,1303 (11th Cir. 1990); *United States v. Shawar*, 865 F.2d 856, 864 (7th Cir. 1989)). Since *Strong*, several other circuits have upheld § 4241 against various challenges. *See United States v. McKown*, 930 F.3d 721, 728–30 (5th Cir. 2019); *United States v. Dalasta*, 856 F.3d 549, 554–55 (8th Cir. 2017); United States v. *Magassouba*, 544 F.3d 387, 406–08 (2d Cir. 2008); *United States v. Ferro*, 321 F.3d 756, 761–62 (8th Cir. 2003).

***1053** Quintero acknowledges our decision in *Strong* but argues that, after our en banc decision in *Lopez-Valenzuela*, 770 F.3d 772, "automatic detention for competency restoration under § 4241(d) violates due process" because "the statute employs an irrebuttable presumption that detention is necessary." According to Quintero, *Strong* is thus no longer binding authority. We are not persuaded. In *Lopez-Valenzuela* we addressed an Arizona statute that categorically denied bail for aliens present in the United States illegally who were charged with a felony offense. 770 F.3d at 775. Applying heightened scrutiny, we held the statute unconstitutional. *Id.* at 780–81 & n.3. *Lopez-Valenzuela* concerned the liberty interests of a class of defendants who were categorically denied bail that, but for their alien status, would have been routinely afforded to them. We fail to see how *Lopez-Valenzuela* has undermined our decision in *Strong*. Section 4241(d) only authorizes "hospitaliz[ation] ... in a suitable facility" for a limited purpose and for "a reasonable period of time." 18 U.S.C. § 4241(d)(1). Unlike the statute at issue in *Lopez-Valenzuela*, persons thought to be mentally incompetent are entitled to a hearing and an individualized determination of their competence. Their custody is only temporary and, if treatment is not successful, may lead to their civil commitment or even to their release. *See Jackson*, 406 U.S. at 738, 92 S.Ct. 1845.

Quintero also argues that *Strong* is inconsistent with the Supreme Court's decisions in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, and *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). [4] Both of those decisions were issued well before our opinion in *Strong*, and *Strong* quoted *Salerno*. *See Strong*, 489 F.3d at 1060. Accordingly, they are not *intervening* Supreme Court authority on which we may rely to overturn the judgment of a prior panel of this court. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) ("[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority ...."). Quintero's argument is simply an effort to re-argue *Strong*, but we are bound by it. If Quintero believes *Strong* is wrongly decided, her remedy lies in rehearing en banc or certiorari.

4 Quintero appears to argue that these cases, together with *Lopez-Valenzuela*, require "proof by clear and convincing evidence that no less restrictive alternatives than confinement could reasonably address the government's interest." The statement comes without citation, so we are unsure of its origin. To be sure, the phrase "clear and convincing evidence" appears in *Salerno*, but that is the level of proof required by the Bail Reform Act, 18 U.S.C. § 3142(f), which was at issue in *Salerno*. *See, e.g.*, *Salerno*, 481 U.S. at 742, 750–52, 107 S.Ct. 2095; *see also Lopez-Valenzuela*, 770 F.3d at 779–80, 782,

785 (referring, in each instance, to *Salerno*). We cannot locate the phrase "no less restrictive alternative" (or some variant) in any of these cases.

In any event, in *Strong* we did not set forth a formal standard of scrutiny. We did use the phrase "reasonable relation" because that was the standard the Court used in *Jackson*. *See* *Strong*, 489 F.3d at 1061 (quoting *Jackson*, 406 U.S. at 738, 92 S.Ct. 1845). Elsewhere we commented on the "the closeness of the fit" in § 4241(d) "between the commitment and the purpose for which such commitment is designed." *Id.*

We take very seriously our obligation to examine our prior decisions in light of subsequent developments; we do not lightly overturn one of our prior decisions. Quintero falls well short of persuading us that there are grounds to do so in this case.

In any event, both of those cases dealt with very different circumstances. *Salerno* ***1054** rejected a substantive due process challenge to a Bail Reform Act provision allowing for case-by-case pretrial detention on the basis of future dangerousness. 481 U.S. at 746–52, 107 S.Ct. 2095. In the same vein, *Sell* concerned forcible medication to restore competence for trial, which the Supreme Court subjects to a higher standard of review due to defendants' distinct liberty interest in rejecting invasive medical treatment. 539 U.S. at 177–78, 180–81, 123 S.Ct. 2174; *see United States v. Loughner*, 672 F.3d 731, 747–52, 765 (9th Cir. 2012) (discussing *Sell* and distinguishing between commitment for competency restoration under § 4241(d) and involuntary medication orders).

Quintero also argues that we should overturn *Strong* because it was based on the "faulty premise ... that inpatient confinement is always necessary to achieve the government's interests" and "[r]ecent empirical evidence refutes the premise underlying *Strong*." We see no such "premise" in our decision. If there is a premise to be had here, it is Congress's. Nevertheless, we see no impediment in the statute to the Attorney General—in his discretion, not ours—choosing outpatient treatment as the "suitable facility." 18 U.S.C. § 4241(d); *see id.* § 4247(a)(2) (defining "suitable facility" as "a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant"). Even if there is recent empirical evidence confirming the effectiveness of outpatient treatment, we cannot revisit *Strong.*

Finally, Quintero points us to a recent decision of the Georgia Supreme Court. *See* *Carr v. State*, 303 Ga. 853, 815 S.E.2d 903, 914–16 (2018). Even if we thought that decision persuasive, we are not bound by state court decisions. We are bound by our decision in *Strong*, and reaffirm that § 4241(d) does not violate Quintero's substantive due process rights.

2. Procedural Due Process

Quintero argues that mandatory commitment under § 4241(d) violates procedural due process because the statute does not provide a sufficient adversarial hearing prior to commitment. Relying on *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), she asserts that a pre-deprivation adversarial hearing specifically addressing the necessity of confinement is warranted and that the court must make a finding that outpatient programs are inadequate because § 4241(d) creates an expectation that a defendant will not be committed to an inpatient facility unless it is both "suitable and necessary." We hold that § 4241(d) provides sufficient procedural safeguards prior to commitment, and thus her commitment does not violate procedural due process.

A "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425, 99 S.Ct. 1804. "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner." *Salerno*, 481 U.S. at 746, 107 S.Ct. 2095. The constitutional process due depends upon "the extent to which [the individual] may be condemned to suffer grievous loss, and depends upon whether the [individual's] interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Goldberg v. Kelly*, 397 U.S. 254, 262–63, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (internal quotation marks and citation omitted); *see* *Mathews*, 424 U.S. at 332, 96 S.Ct. 893.

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To determine whether a pre-deprivation procedure comports with due process, we consider: "(1) the private interest affected; (2) the risk of an erroneous deprivation of that interest and the probable ***1055** value of additional procedural safeguards; and (3) the government's interest including the function involved and the burdens that additional procedural requirements would place on the state." *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir. 1983) (citing *Mathews*, 424 U.S. at 335, 96 S.Ct. 893).

We hold that § 4241(d) appropriately balances those interests. First, we recognize that a pretrial defendant has a significant liberty interest in avoiding pretrial confinement, including civil commitment. *See* *Addington*, 441 U.S. at 425–26, 99 S.Ct. 1804; *see also* *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972). Even if not a punitive measure, commitment for evaluation and treatment of mental conditions is a physical restraint on liberty and may come with its own social stigma. Indeed, the Court has held that even a convicted inmate is entitled to some process before he may be transferred to a mental facility, because such hospitalization is "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Vitek*, 445 U.S. at 493, 100 S.Ct. 1254.

Second, the government has a strong interest in these proceedings. It has charged a defendant such as Quintero with violation of federal law. It has an obligation to try a defendant expeditiously, *see* U.S. Const. amend. VI; 18 U.S.C. §§ 3161–3174 (Speedy Trial Act), or release the defendant. It may not try a defendant who cannot aid in his own defense, *see* *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (citing *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956)), and the diagnosis may even have a bearing on any affirmative defense of mental impairment at the time of the crime. If the defendant cannot be tried because he is unable to aid counsel in his defense and he cannot be restored to health, the government may have to release the defendant. *See* *Jackson*, 406 U.S. at 738, 92 S.Ct. 1845. But before the government so concludes, it has an additional obligation to ensure that the defendant is not a danger to himself or the public and may seek civil commitment to protect the public. *See* *id.* at 733, 92 S.Ct. 1845.

Given the strong interests of both the defendant and the government, "[t]he final, and perhaps most important, *Mathews* factor is the risk of erroneous deprivation and the probable value of additional procedural safeguards." *Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1194 (9th Cir. 2009), *rev'd in part on other grounds*, 562 U.S. 29, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010). This prong requires that we examine the procedures provided in the IDRA and "ask 'considering the current process, what is the chance the [government] will make a mistake?' " *Id.* We think the risk of error is low. Section 4241 provides extensive safeguards to ensure that commitment is justified. When questions first arise regarding competency, the court must order a hearing "if there is reasonable cause to believe that the defendant may presently be" incompetent to stand trial. 18 U.S.C. § 4241(a). Prior to the hearing, the court has discretion to order psychiatric or psychological examinations of the defendant and that such reports be filed with the court. *Id.* § 4241(b). These exams must be conducted, and a report prepared, by a licensed or certified psychiatrist or psychologist, and defendants may request examiners in addition to those selected by the court. *Id.* § 4247(b). The content of the report is specified by the statute and must include a patient history and present symptoms; a description of the tests that were employed; the examining psychiatrist's or psychologist's diagnosis and prognosis; and a conclusion as to whether the person is suffering from mental impairment that renders him incompetent ***1056** to assist in his defense. *Id.* § 4247(c). The report must be followed by a hearing at which the defendant is required to be represented by counsel, and for which counsel will be appointed for him "if he is financially unable to obtain adequate representation." *Id.* § 4247(d). At the hearing, the defendant must be afforded the "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.* § 4241(c), 4727(d). After the hearing, the court must find by a preponderance of the evidence that the defendant is mentally incompetent to stand trial before committing the defendant to the custody of the Attorney General. *Id.* § 4241(d).

As we have previously stated, commitment to the Attorney General for competency evaluation is durationally limited to 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." *Id.* § 4241(d)(1). Hospitalization may be extended

for competency restoration "for an additional reasonable period of time" "if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward" or until the charges are dropped. *Id.* § 4241(d)(2). The defendant may "at any time during [his] commitment" request a further hearing to determine if he should be discharged. *Id.* § 4247(h). Finally, 18 U.S.C. § 4241(e) provides additional safeguards for release upon a restoration of competency.

As we consider these procedural safeguards Congress has put in place, we are hard pressed to understand what further procedures are required to reduce the risk of error. A hearing, attended by counsel, with an opportunity to testify, to present evidence, to subpoena witnesses, to confront and cross-examine witnesses, and to seek reconsideration of an adverse decision is the core of American due process. *See* *Vitek*, 445 U.S. at 494–95, 100 S.Ct. 1254. Nevertheless, Quintero argues that she is entitled to a "predeprivation process" to decide if outpatient treatment is suitable. This is not properly a procedural due process argument, but a variation on her substantive due process argument, which we have rejected. Congress has provided ample process for determining whether a defendant is mentally incompetent and likely to respond to treatment. The choice of a facility is within Congress's prerogative.

We have little difficulty holding that mandatory commitment under § 4241(d) comports with the requirements of procedural due process.

C. *Equal Protection*

Quintero raises three arguments under the equal protection component of the Due Process Clause of the Fifth Amendment. We examine equal protection claims under a two-step inquiry, first inquiring whether the petitioner's class is similarly situated to the claimed disparate group and, if so, whether the classification is justified. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1106 (9th Cir. 2012) (per curiam). We will consider each argument in turn.

Quintero first argues that § 4241(d) denies her equal protection of the laws because it imposes a less stringent standard for confinement than the Bail Reform Act, 18 U.S.C. § 3142(e), which governs release or detention of pretrial defendants. The Bail Reform Act provides in relevant part:

> If, after a hearing ..., the judicial officer finds that no condition or combination of conditions will reasonably assure ***1057** the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

18 U.S.C. § 3142(e)(1). Quintero argues that, like defendants denied bail, she has been confined but, unlike defendants denied bail, she has not been found to be dangerous. We think it obvious that the two situations are not comparable for equal protection purposes. The purposes of confinement under each statute are not the same: Section 3142(e) ensures that the defendant appears at trial and does not endanger the community, while § 4241(d) aims to assess the potential to restore a defendant to competency to stand trial. The government has different interests for confinement of each group, and thus these two classes of defendants may be subject to different standards related to those interests.

Quintero also argues that mentally incompetent pretrial defendants are subject to less stringent standards for commitment than convicted persons who, having served their sentence, are going to be committed civilly. *See* 18 U.S.C. § 4246. Section 4246 governs hospitalization of three classes of mentally impaired persons: (1) convicted persons whose sentence is about to expire, (2) pretrial defendants committed to the custody of the Attorney General under § 4241(d), and (3) pretrial defendants committed under § 4241(d) whose charges have been dismissed because of their mental condition. *Id.* § 4246(a). Section 4246(d) provides:

> If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall

commit the person to the custody of the Attorney General.

Again here, the purposes of commitment for persons subject to each statute differ: Section 4246 is about protecting the community from a dangerous and mentally ill defendant who is about to be released, while § 4241(d) aims to ensure an accurate assessment of competency before trial. Including an assessment of danger in § 4246 directly addresses the statute's purpose of protecting the community, but it serves no purpose in the context of a competency assessment. Section 4246 itself recognizes that persons subject to these statutes are not similarly situated. Defendants committed pursuant to § 4241(d) may be subject to § 4246 in some instances because, although not all defendants committed pursuant to § 4241(d) are dangerous, those found dangerous—and who could be released after the durational limit or through the other safety valves—are subject to further hospitalization under § 4246. The consequences also differ: Section 4246 allows for potentially indefinite confinement of a defendant who has already served her sentence, while § 4241(d) allows for confinement before trial for only a "reasonable period of time." The stricter standard in § 4246 makes sense where the period of confinement is not so limited and discharge is conditioned on a finding that the person is no longer a danger. *Id.* § 4246(e).

The Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, reinforces our conclusion. In that case Jackson, who was deaf, mute, and mentally handicapped, was accused of robbery. Before he could be tried, the court found him mentally incompetent to aid in his defense and committed him to the custody of the Indiana Department of Mental Health until he could be certified as sane. 406 U.S. at 717–18, 92 S.Ct. 1845. Because Jackson likely could not be rehabilitated, it was effectively a life sentence. *See id.* at 716, 92 S.Ct. 1845. Although Jackson had ***1058** not been convicted of any crime, the standards for his commitment and the conditions for his release were stricter than for similarly situated persons in the general population. The Court concluded that Indiana's scheme violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 729–30, 92 S.Ct. 1845.

Section 4241(d) does not present the same concerns as the Indiana statute at issue in *Jackson*. Section 4241(d) does not automatically condemn a mentally incompetent defendant to potentially permanent commitment. Instead, the period of hospitalization under § 4241(d) is statutorily limited to four months for assessment and an additional reasonable period of time if there is a substantial probability that the defendant can be restored to competence. Release is also mandated where, at the end of the time period, a "defendant's mental condition has not so improved as to permit the proceedings to go forward." 18 U.S.C. § 4241(d). Any further restraint on Quintero's liberty, such as civil commitment, would be subject to other statutory and constitutional constraints. Section 4241(d) thus avoids *Jackson*'s concerns with time limits and release mechanisms.

Finally, Quintero argues that mandatory confinement under § 4241(d) violates her right to equal protection because federal pretrial defendants are subject to a less stringent commitment standard than Arizona state defendants. *See* Ariz. Rev. Stat. § 13-4512(D) (requiring courts to consider a variety of factors and select the "least restrictive treatment alternative" for competency restoration). Quintero acknowledges that there is no equal protection violation where the federal government treats defendants charged with federal crimes differently than a state treats defendants charged with state crimes. *United States v. Antelope*, 430 U.S. 641, 649, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) ("Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." (footnotes omitted)). Nothing else needs be said regarding our dual sovereignty. *Antelope* supplies a complete answer to Quintero's argument.

D. *Fundamental Fairness*

Quintero next raises a novel claim that mandatory commitment violates fundamental fairness and a hybrid due process/equal protection right recognized by the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), and *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In *Obergefell* the Court observed that "[t]he Due Process Clause and the Equal Protection Clause" "set forth independent principles," although they "are connected in a profound way." 576 U.S. at 672, 135 S.Ct. 2584. The Court in *Bearden* noted that in cases concerning indigent

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defendants, "[d]ue process and equal protection principles converge," but that most decisions "have rested on an equal protection framework." 461 U.S. at 665, 103 S.Ct. 2064.

We need not parse these cases further. In both *Obergefell* and *Bearden*, the Court considered the convergence of due process and equal protection rights the Court had previously recognized. Here, Quintero argues that we should find a synergy in these clauses that is greater than either of the clauses individually. But in this case, we have *rejected* Quintero's due process and equal protection clause arguments. We decline to create a new right here that is unsupported by either the Due Process Clause or the equal protection component of the Due Process Clause.

E. *The Sixth Amendment*

Quintero raises a Sixth Amendment challenge to § 4241(d) for the first ***1059** time on appeal. She argues only that § 4241(d) *could* create a conflict of interest for counsel in some cases, which would be inconsistent with the Sixth Amendment. She does not argue that her own counsel was faced with any conflict here. At base, her argument is that mandatory commitment under § 4241(d) "makes effective, conflict-free representation impossible in *some* circumstances" because defense counsel will face the tension between "[d]ooming" a client to lengthy hospitalization and allowing an incompetent client to stand trial. Because Quintero did not raise a Sixth Amendment claim before the district court, we review her claim for plain error. *United States v. Olano*, 507 U.S. 725, 730–36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *see* Fed. R. Crim. P. 52(b). To succeed, she must demonstrate that

> (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [her] substantial rights, which in the ordinary case means it affected the outcome of the district-court proceedings; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

United States v. Walter-Eze, 869 F.3d 891, 911 (9th Cir. 2017) (citation omitted).

The Sixth Amendment guarantees defendants the right to "effective assistance of counsel," which includes "a duty of loyalty" and "a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 686, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The Sixth Amendment protects defendants only from *actual* conflicts of interest—not every potential conflict that could arise. *Wheat v. United States*, 486 U.S. 153, 159–60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Thus, mere allegations of a potential conflict of interest are insufficient to demonstrate a violation of the Sixth Amendment. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980).

At the outset, Quintero's failure to allege or demonstrate any actual conflict of interest for her counsel dooms her argument. Quintero has not shown—or even alleged—an actual conflict of interest in her counsel's representation. Quintero initiated the competency proceedings here, and she does not argue that her counsel filed the motion for competency determination against her wishes. Mandatory commitment does not violate her Sixth Amendment right to conflict-free representation.

In any event, § 4241(d) does not violate the Sixth Amendment. Defense counsel has "a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). A failure to raise competency with the court may deprive a defendant of effective assistance of counsel. *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011). But the possibility that counsel's client may have to be hospitalized to verify her mental competence does not present a real conflict of duties: temporary confinement is a consequence of counsel's duty to raise the mental stability of his client. Moreover, not every dilemma presents a conflict of constitutional dimensions. Counsel often faces difficult and consequential choices in determining trial strategy: whether to cross-examine certain witnesses; whether to raise objections in front of the jury; whether to raise certain affirmative defenses, including an insanity defense; and whether to mount a defense at all, or rest on the government's burden

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of proof. The fact that counsel has to make ***1060** hard choices, and may be subject to second-guessing by post-conviction counsel, is not evidence of a conflict created by the law. Although an increased sentence resulting from deficient performance by counsel prejudices a defendant and violates the Sixth Amendment, *Glover v. United States*, 531 U.S. 198, 200, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), temporary pretrial hospitalization to assess competency is not a sentence. Pretrial detention provisions are regulatory, not punitive. *Salerno*, 481 U.S. at 747, 107 S.Ct. 2095 (finding that pretrial detention under the Bail Reform Act was regulatory, not punitive).

We hold that mandatory commitment under § 4241(d) does not violate the Sixth Amendment.

F. *The Eighth Amendment*

Quintero next argues that mandatory confinement of incompetent defendants pursuant to § 4241(d) violates the Eighth Amendment's prohibition of "[e]xcessive bail." U.S. Const. amend. VIII. We are unsure why the Excessive Bail Clause is even relevant here. Quintero does not seek bail in this proceeding. We think that Quintero has attempted to draw a principle from that Clause that there must be a "weighing of individual factors" and a "constitutional presumption in favor of release." Like her other constitutional claims, Quintero's excessive bail argument falls short.

The Bail Reform Act "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). So "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, ... the Eighth Amendment does not require release on bail." *Salerno*, 481 U.S. at 754–55, 107 S.Ct. 2095.

The government has a compelling interest in ensuring competence for trial. It has both a "substantial interest in timely prosecution" and a "concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Sell*, 539 U.S. at 180, 123 S.Ct. 2174. The government may not convict a mentally incompetent defendant, *Robinson*, 383 U.S. at 378, 86 S.Ct. 836, and it bears the burden of demonstrating the defendant's competency, *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991). Even if we thought the Excessive Bail Clause had some bearing on our decision, these are not sufficient reasons for disapproving the scheme laid out in the IDRA.

G. *Disability Law*

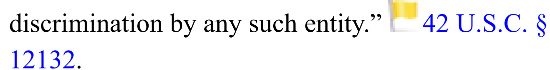
In her final challenge, Quintero argues that mandatory commitment pursuant to § 4241(d) violates the Rehabilitation Act, 29 U.S.C. § 794(a), and the Americans with Disabilities Act, 42 U.S.C. § 12132, both of which prohibit discrimination on the basis of disability.[5] She further claims that mandatory ***1061** commitment violates the proscription against unjustified isolation of the disabled set out by the Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). Quintero cites no authority which permits her to assert these civil claims within the context of her interlocutory criminal appeal. If Quintero wishes to assert and develop these legal theories, she must do so in the context of a civil cause of action. We therefore decline to reach the merits of these arguments here.

5 The Rehabilitation Act provides in relevant part:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency ....

29 U.S.C. § 794(a). The Department of Justice's (DOJ) Rehabilitation Act implementing regulations provide that DOJ "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 39.130(d). These implementing regulations apply "to all programs or activities conducted by" DOJ. 28 C.F.R. § 39.102.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to



> discrimination by any such entity.” 42 U.S.C. § 12132.

IV. CONCLUSION

The district court here properly found Quintero incompetent to stand trial and ordered her committed to the custody of the Attorney General for inpatient assessment and treatment. The district court did not have discretion to order alternative outpatient evaluation. We affirm the district court's commitment order.

ORDER AFFIRMED.

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