No. 19-723

In the Supreme Court of the United States

OLIVER LEE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION (REDACTED FOR PUBLIC FILING)

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QUESTION PRESENTED

Under the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, the federal government may initiate civil-commitment proceedings for certain sexually dangerous individuals, including sexually dangerous individuals who have been found incompetent to stand trial in criminal proceedings. 18 U.S.C. 4248(a). In order to establish that an individual is sexually dangerous for purposes of that provision, the government must prove by clear and convincing evidence that the individual engaged or attempted to engage in past sexual misconduct and that he suffers from a serious mental illness, abnormality, or disorder that would make it difficult for him to refrain from sexually violent conduct or child molestation if released.

The question presented is whether it violates the Due Process Clause of the Fifth Amendment to apply those civil-commitment proceedings to a mentally incompetent individual who denies he engaged in past sexual misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 927 F.3d 257. The orders of the district court concluding that a competency hearing was needed and adhering to that view on reconsideration (Pet. App. 27a-37a, 38a-64a) are reported at 340 F. Supp. 3d 568 and 348 F. Supp. 3d 571. The order of the district court dismissing the case (Pet. App. 65a-67a) is unreported. The memorandum and recommendation of the magistrate judge (Pet. App. 19a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2019. A petition for rehearing was denied on August 16, 2019 (Pet. App. 68a). The petition for a writ of certiorari was filed on November 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2006, in response to "the growing epidemic of sexual violence against children," Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or Act), Pub. L. No. 109-248, 120 Stat. 587, to "address loopholes and deficiencies in existing laws" intended to protect children. H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005).

As one means of addressing those concerns, the Act amended and supplemented the longstanding provisions of federal law that allow for the civil commitment of certain mentally ill persons who would pose a danger to the public if released from federal custody. Tit. III, § 302, 120 Stat. 619. Of particular relevance here, Congress authorized the civil commitment of a person "who is in the custody of the Bureau of Prisons," or who has had federal criminal charges dismissed against him "solely for reasons relating to the mental condition of the person," if the person qualifies as a "sexually dangerous person" within the meaning of the statute. 18 U.S.C. 4248(a). A person so qualifies if he has (1) "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) as a result "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(5) and (6).

When the government seeks civil commitment under Section 4248(a), the Act provides for judicial proceedings in which the government must prove "by clear and convincing evidence that the person is a sexually dangerous person." 18 U.S.C. 4248(d). As part of those proceedings, the court is authorized to order that the person undergo a forensic examination. 18 U.S.C. 4248(b).

The court also is required to hold a hearing, at which the person subject to potential commitment is entitled to the assistance of counsel (at government expense if indigent) in presenting evidence, subpoenaing and cross-examining witnesses, and testifying. See 18 U.S.C. 4247(d) and 4248(b).

If the government carries its burden of proving by clear and convincing evidence that the person is a "sexually dangerous person," that person is committed to federal custody until it is determined, by a preponderance of the evidence, that "he is no longer sexually dangerous to others," or "will not be sexually dangerous to others if released under a prescribed regimen of * * * care or treatment." 18 U.S.C. 4248(e). The government must assess whether those circumstances exist through an annual evaluation of the person, which results in a recommendation to the court "concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). A committed individual may also separately file his own motion for discharge, see 18 U.S.C. 4247(h), or a petition for a writ of habeas corpus, see 18 U.S.C. 4247(g) ("Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.").

2. [redacted] It is undisputed that petitioner has significant intellectual deficits, and he has been diagnosed as having an intellectual disability and as suffering from the effects of fetal alcohol syndrome. Pet. App. 3a.

In 2009, when petitioner was 21, a federal grand jury in the District of Montana returned an indictment

charging him with the sexual abuse of four girls—all under the age of 12—[redacted]. Pet. App. 3a; C.A. Sealed App. 162-165. Soon thereafter, however, the government dismissed the charges as part of a deferred prosecution agreement in which petitioner agreed to have no further contact with minors. Pet. App. 3a.

[redacted] In 2012, therefore, petitioner was indicted in the District of Montana [redacted]. Pet. App. 4a; C.A. Sealed App. 158-160.[1] Petitioner was again found incompetent to stand trial, the charges were dismissed, and petitioner was released in October 2013 [redacted]

In 2016, petitioner was indicted for a third time in the District of Montana. See Pet. App. 4a; C.A. Sealed

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[1] [redacted]

[2] [redacted]

App. 183. Based on the sexual abuse of a girl under the age of 12 [redacted] the federal grand jury charged petitioner with aggravated sexual assault of a child, [redacted]. Pet. App. 4a; C.A. Sealed App. 182-183. Petitioner was once again found mentally incompetent to stand trial, and the charges against him were again dismissed. Pet. App. 4a. Before that dismissal, however, a psychologist concluded that petitioner was sexually dangerous within the meaning of Section 4248. C.A. App. 15-16. Accordingly, the government commenced commitment proceedings under Section 4248 against petitioner in the United States District Court for the Eastern District of North Carolina (the district where petitioner was confined). Pet. App. 4a.

3. a. The district court appointed the Federal Public Defender to represent petitioner, and his counsel then filed a motion to dismiss, contending that petitioner's mental incompetence meant he could not be civilly committed. Pet. App. 4a.

[redacted] The district court, however, concluded that petitioner would be entitled to dismissal if he were incompetent, and ordered a competency hearing. *Id.* at 27a-37a. The government moved for reconsideration, but the court denied that motion, reasoning that, as a statutory matter, Section 4248 does not apply to an incompetent person who denies he engaged in sexual misconduct. *Id.* at 42a. The court further held that if the statute did apply to such a person, that application would violate the Due Process Clause. *Id.* at 49a, 51a-

64a. After holding a competency hearing and finding petitioner incompetent, the court dismissed the Section 4248 proceeding. *Id.* at 65a-67a.

b. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-18a.

The court of appeals first held, as a statutory matter, that Section 4248 applies to incompetent individuals, noting that Congress expressly directed that the provision would cover individuals who had previously been found incompetent. Pet. App. 6a-10a. Petitioner does not challenge that statutory holding before this Court.

The court of appeals then held that applying Section 4248 to petitioner would not violate the Due Process Clause. Pet. App. 10a-18a. In reaching that conclusion, the court balanced the three factors set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976): (1) petitioner's liberty interest; (2) the risk that the statutory procedures would lead to an erroneous intrusion on that liberty interest, and the value of any additional procedures; and (3) the government's interest and the burden on the government of providing any additional procedure that would be required. Pet. App. 12a.

The court of appeals recognized the weight of petitioner's liberty interest, Pet. App. 14a, and also recognized that the government has a significant interest in providing care to, and protecting the public from, dangerous individuals in federal custody, *id.* at 15a.

The court of appeals then concluded that the statute's numerous procedural protections provided sufficient protection against an erroneous deprivation of liberty. The court observed that petitioner had a statutory right to appointed counsel and had additionally received the assistance of an appointed guardian ad litem; that petitioner was entitled to a hearing at which his counsel

could subpoena witnesses, present evidence, and cross-examine the government's witnesses; that the government had to establish all elements of sexual dangerousness by clear and convincing evidence; that the testimony of various professionals and experts was needed before commitment could be ordered; and that even after commitment, there were further opportunities to secure release (such as through the annual review process, and through a motion for an additional hearing under Section 4247(h)). Pet. App. 16a-17a. This panoply of protections, the court held, minimized the risk of an erroneous deprivation even though petitioner might not be able to engage fully in the commitment proceedings in the same way that a competent person would. *Id.* at 15a-16a.

Petitioner sought rehearing and rehearing en banc, which the court of appeals denied without noted dissent or request for a poll. Pet. App. 68a.

ARGUMENT

Petitioner contends that this Court should grant interlocutory review to consider whether the Due Process Clause prohibits use of civil-commitment proceedings, which are designed for individuals whose mental illness poses a serious danger to the public, when an individual who disputes the factual allegations against him has been declared mentally incompetent. The court of appeals correctly decided that the Due Process Clause does not prohibit the use of civil-commitment proceedings in such circumstances, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, although petitioner recognizes that many States have "analogous" civil-commitment

regimes, Pet. 24-25, he also identifies no state-court decisions that conflict with the Fourth Circuit's decision. This Court's review is not warranted.

1. a. Congress has long provided procedures by which the government can commit to federal custody a person who has been found "so mentally incompetent that he could not stand trial" but who, "if released, * * * would probably endanger the safety of [others]." *Greenwood* v. *United States*, 350 U.S. 366, 372 (1956) (discussing an earlier version of Section 4248). And this Court has recognized that such civil commitment is permissible under the Constitution so long as it is preceded by adequate procedural safeguards. See *Kansas* v. *Hendricks*, 521 U.S. 346, 357 (1997) ("We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards."); *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (explaining that once an individual is found incompetent to face a criminal trial, the Due Process Clause requires that the government either release the person or "institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen").

The court of appeals correctly held that Section 4248 provides adequate safeguards in connection with commitment proceedings for sexually dangerous persons. Pet. App. 13a-18a. Applying the three factors set out in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), for assessing the adequacy of procedures under the Due Process Clause, see p. 6, *supra*, the court of appeals appropriately recognized that both the person subject to civil commitment and the government have weighty interests at stake in civil-commitment proceedings under Section 4248. Pet. App. 14a-15a. The individual, of

course, has a "foundational" interest in maintaining his liberty. *Id.* at 15a. But the government's interest is also very substantial: an individual is subject to commitment under Section 4248 only if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(5) and (6). In seeking to detain such individuals and provide them with treatment, therefore, the government is acting to protect the public from people who have been shown particularly likely to commit heinous offenses.[3] See Pet. App. 15a; see also *Hendricks*, 521 U.S. at 357-358. Indeed, in some respects, release of an individual who has been found incompetent to stand trial would pose even greater risks than release of persons who have been previously convicted and who will therefore be subject to tailored conditions of supervision on their release.[4]

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[3] Petitioner contends (Pet. 22) that the government "presupposes" petitioner's dangerousness in articulating its interests. That is incorrect. Petitioner will only be committed if the government proves his danger by clear and convincing evidence, subject to a host of procedural protections. Petitioner's rule, by contrast, would lead to his release without regard to the danger he poses to the public.

[4] Petitioner suggests (Pet. 22) that concerns regarding his release are alleviated by the possible application of Section 4246 (a general civil-commitment provision) or state commitment proceedings. Petitioner never explains, however, why it would be constitutional to impose civil commitment under those provisions but not under Section 4248. Indeed, because Section 4248 requires the government not only to prove by clear and convincing evidence a mental illness and future dangerousness (akin to the showing required under Section 4246), but also to make the additional showing—again by clear and convincing evidence—of past sexual misconduct, Section 4248 is arguably *more* protective of the liberty of individuals who are incompetent to stand trial than the alternatives petitioner suggests.

As to the final *Mathews* factor, the court of appeals described the key question as "whether, when a person is mentally incompetent, the process afforded in [Section] 4248 allows too great a risk of an 'erroneous deprivation of [the private] interest through the procedures used.'" Pet. App. 15a (quoting *Mathews*, 424 U.S. at 335) (second set of brackets in original). In answering that question, the court correctly recognized that Congress has amply protected against the risk of erroneous deprivation of liberty through safeguards that remain effective even when an individual is incompetent to stand trial. *Id.* at 15a-18a. Those statutory safeguards include the right to appointment of counsel, the opportunity to present evidence, and the right to subpoena and cross-examine witnesses. See 18 U.S.C. 4247(d). Moreover, the government bears the burden of proving all elements of sexual dangerousness (including past sexual misconduct) by clear and convincing evidence, at a hearing before a district judge. See 18 U.S.C. 4248(d).

As this Court has recognized in the past, civil-commitment proceedings also reduce the risk of erroneous deprivation of liberty through "layers of professional review * * * and the concern of family and friends," which provide "continuous opportunities for an erroneous commitment to be corrected." *Addington* v. *Texas*, 441 U.S. 418, 428-429 (1979). Here, the court of appeals noted that "the risk that an erroneous factual finding of prior sexual violence or child molestation will result in civil commitment is substantially mitigated by the personal observations and opinions of professionals that are required to prove" that the individual "suffers from a serious mental illness, abnormality, or disorder." Pet. App. 16a. Petitioner's ability to contest his dangerous-

ness is also enhanced by the district court's appointment of a guardian ad litem, who can work with petitioner and his counsel to develop his case. And the possibility of erroneous deprivation of liberty is reduced further still by the numerous opportunities the statute provides to a committed individual to obtain release upon a showing, by a bare preponderance of the evidence, that he is no longer sexually dangerous. *Id.* at 17a (discussing ability of a committed individual to file a discharge motion under 18 U.S.C. 4247(h), as well as the government's obligation to promptly notify court under 18 U.S.C. 4247(e) if it determines individual is no longer sexually dangerous).

Especially given the very serious threat to the public of *releasing* an individual who it turns out is sexually dangerous—[redacted]—those procedural safeguards are more than sufficient to satisfy the requirements of due process.

b. Petitioner contends (Pet. 14-22) that notwithstanding the significant procedural protections Congress has afforded for Section 4248 proceedings, it violates the Due Process Clause to pursue civil commitment under Section 4248 against a person who is not mentally competent and may not be able to assist in disputing the historical facts that the government would have to prove. Petitioner identifies no court (other than the district court here) that has ever embraced that position, and the authority he seeks to rely on by analogy is inapposite.

This Court in *In re Winship*, 397 U.S. 358 (1970), concluded that the juvenile-delinquency proceeding at

issue there was sufficiently criminal in nature that the government had to prove its case beyond a reasonable doubt. See *id.* at 368. The proceedings here, however, are not criminal but rather civil, resembling in all relevant respects (including the need for a showing of prior sexual misconduct) the Kansas commitment scheme upheld in *Hendricks*. See 521 U.S. at 361-362; see also *Addington*, 441 U.S. at 428 ("Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution."). And the fact that a particular individual may be incompetent to stand trial does not convert the Section 4248 proceedings against him into a criminal prosecution for that particular person.

Addington, *supra*, is similarly unhelpful to petitioner. The Court there held that in civil-commitment proceedings, due process requires application of the "clear and convincing evidence" standard. 441 U.S. at 432-433. Congress has accordingly required the use of the clear-and-convincing standard under the Adam Walsh Act. See 18 U.S.C. 4248(d). *Addington* requires nothing more, and certainly does not stand for the proposition that the government must forgo commitment under Section 4248 whenever a sexually dangerous person is incompetent to stand trial in a criminal case.

Petitioner's reliance (Pet. 21) on *Jackson* v. *Indiana*, 406 U.S. 715 (1972), is even further afield. The Court in that case held "that a person charged by a State with a criminal offense who is committed *solely on account of his incapacity to proceed to trial* cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Id.* at 738 (emphasis added). The Court declared that if

such substantial probability does not exist, "then the State must either *institute the customary civil commitment proceeding* that would be required to commit indefinitely any other citizen, or release the defendant." *Ibid.* (emphasis added). Far from rejecting the use of civil-commitment proceedings for individuals who have been found incompetent to stand trial but who pose a serious danger to the public, the Court's directive rested on the premise that institution of such proceedings would be proper.

Finally, petitioner's reliance (Pet. 17-22) on *Mathews*, *supra*, is also misplaced. Under *Mathews*, a court seeks to determine what "'procedural protections [a] particular situation demands'" by considering the private and public interests at stake as well as the risk of error under the current procedures and "the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 334-335 (citation omitted). Petitioner, however, does not ask for "additional or substitute procedural safeguards" that would provide "value" for a person in his condition whom the government seeks to civilly commit. *Ibid.* Instead, he argues that individuals in his position should be categorically *exempt* from commitment under Section 4248. Nothing in *Mathews* supports that result.

2. Petitioner effectively concedes (Pet. 26-27) that the decision below does not conflict with the decision of any other appellate court. He contends (*ibid.*), however, that this is a result of the "effective centralization of Section 4248 proceedings in the Eastern District of North Carolina," and argues that the Court "routinely grants review" in cases presenting this sort of centralization.

Petitioner's attempt to analogize his petition to one requesting "review of patent appeals vested exclusively in the Federal Circuit," Pet. 27, is unavailing. As petitioner acknowledges (Pet. 23-24), Section 4248 proceedings were held in other districts prior to the Bureau of Prisons' decision to designate Federal Correctional Institution Butner as the institution for inmates referred for precertification evaluations or committed as sexually dangerous persons. Yet petitioner does not suggest that any of the courts resolving those proceedings ever embraced a rule akin to the one he advances here. Moreover, while petitioner notes (Pet. 25) that nearly half of the States have enacted civil-commitment provisions applicable to sex offenders, he does not identify a single state-court decision that has adopted the due process rule he advocates. There is accordingly no need for this Court to take up petitioner's novel claim.

3. Finally, review is also unwarranted because this case arises in an interlocutory posture. The court of appeals here remanded for the district court to conduct commitment proceedings. If petitioner prevails in those proceedings, further review will become unnecessary. And if the remand proceedings result in a finding, by clear and convincing evidence, that petitioner is a sexually dangerous person, then the fully developed record at that time would allow a court to better assess whether and how petitioner's incompetency affected his ability to participate in the Section 4248 proceedings with the assistance of counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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